THE

CHICAGO LEGAL NEWS

A Journal of Legal Intelligence.

CONTAINING

CASES DECIDED IN THE VARIOUS UNITED STATES COURTS; THE SUPREME COURT OF ILLINOIS, AND OTHER STATES; HEAD NOTES TO IMPORTANT CASES IN ADVANCE OF THEIR PUBLICATION IN THE REPORTS OF THE STATE COURTS; RECENT ENGLISH CASES; LEGAL INFORMATION AND GENERAL NEWS.

MYRA BRADWELL, EDITOR.

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CHICAGO LEGAL NEWS.

SATURDAY, SEPTEMBER 25, 1875.

The Courts.

[From JOSIAH H. BISSELL, official reporter.]

U. S. DIST. COURT, E. D. OF WIS.

OPINION FILED MARCH 18, 1875.

UNITED STATES v. LD SOUTHMAYD.

1. LIST OF WITNESSES FOR ACCUSED.—In all criminal cases in which there has been no preliminary examination, it is within the discretion of the court to order a list of the witnesses sworn before the grand jury, to be furnished to the accused.

2. MINUTES OF GRAND JURY.—He is not, however, entitled to the minutes of the proceedings before the grand jury, nor, in the absence of strong reasons to the contrary, should they be furnished him.

The defendant stands indicted for the alleged forgery of a postal money order, and for passing such order. There was no preliminary examination previous to the finding of the indictment. The defendant's counsel moves for an order requiring the district attorney to furnish him with a list of the witnesses sworn before the Grand Jury and with the minutes of their testimony, basing his application upon the fact that there was no preliminary examination, and claiming that he is entitled to know who the witnesses were who appeared before the Grand Jury and what their testimony was, in order to prepare for trial. The application, so far as it relates to the production of a list of the witnesses, is not resisted, but opposition is made to disclosure of their testimony.

DYER, J. There are cases reported in the books in which the courts, in the exercise of a proper discretion, have ordered a list of the witnesses to be furnished to the accused where he has had no preliminary examination before a magistrate. The statutes of the United States provide that when any person is indicted of *treason*, or of any other *capital offense*, he shall be furnished with a copy of the indictment and a list of the witnesses to be produced at the trial. Rev. Stat. of U. S., 1874., Title 13, Ch. 18, § 1033. I find no similar provision in relation to other offenses. I have no doubt, however, that in all cases in which there has been no preliminary examination, it is within the discretion of the court to order a list of the witnesses sworn before the Grand Jury to be furnished to the accused. The People *v.* Naughton, 7 Abbott's Practice, R. N. S. § 421, is relied upon by counsel for defendant as an authority in support of his motion, not only as to furnishing a list of witnesses, but as bearing upon his right to the minutes of their testimony. In that case the defendants were indicted for alleged frauds in the conduct of certain elections. The motion papers set forth that the accused were indicted without preliminary examination; that they nad no means of knowing the particular time, place or circumstances relied on by the people; that, at different times during the day on which the charges were laid, a large number of persons were present at the voting place, and, unless the accused could ascertain the precise time at which they were charged to have committed the offenses, it was impossible for them to determine what witnesses to summon, or in any manner to prepare for trial; and that important irregularities occurred in the proceedings of the Grand Jury, fatal to the validity of the indictment, which the minutes of testimony would disclose. Most of the discussion, in the opinion of the court in that case, is addressed to the question of the right of the accused to a list of the witnesses. The case discloses that it had been customary in many of the counties of the State of New York, before the passage of any statute on the subject, for the Distaict Attorney to indorse the names of witnesses on an indictment, and then send the same to the Grand Jury to be investigated. The names of the witnesses came, therefore, to be regarded as much an indorsement as the words, "True bill," and, consequently, the statute subsequently passed provided that the accused shall be entitled "to a copy of the indictment and of all indorsements thereon." We have the same provision in the statutes of this State. Upon the practice as it had grown up in New York, and upon the statutes, there can be no doubt of the correctness of the decision of the court in The People *v.* Naughton, *supra*, requiring a list of witnesses to be furnished.

The case of Commonwealth *v.* Knapp, 9 Pickering, 496, so far as it is applicable here, presented only the question of the right of the accused in a capital case to a list of the witnesses for the State. Although it was urged that this was not a matter of right, except under the statute of treason, Wilde, J., says, "a list of the witnesses has never been refused, in a case of this kind."

If the determination of the question, now presented, depended upon authority, I do not regard the case of The People *v.* Naughton, *supra*, as settling the point. It is not asserted here, that any irregularities occurred in the proceedings before the grand jury, involving the validity of the indictment. In that case, the application for the minutes of testimony was based principally upon such alleged irregularities, claimed to be fatal to the indictment, and which the minutes would disclose, and this branch of the motion was denied, for the reasons that the motion papers did not state wherein the proceedings of the grand jury were irregular, or wherein an inspection was essential to protect the right of the defendant, or that he could not more properly derive the information sought from other sources. The strictness of the rule on the subject was rigidly enforced, and the court say, that "it is only within certain restrictions that any inspection of the minutes can be allowed."

In Earl of Shaftesbury's case, 3 Howell's State Trials, the court, on application, ordered the witnesses before the grand jury examined in open court. But that was a case where an attempt was made to procure an indictment for high treason against the Earl.

It is the general rule that proceedings before a grand jury are privileged from disclosure. The cases are exceptional in which the rule is not adhered to. In an action for maliciously indicting the plaintiff, Lord Kenyon allowed a grand juryman to be asked, whether the defendant was the prosecutor of the indictment; and thought the disclosure did not infringe upon the juryman's oath. (Sykes *v.* Dunbar, 2 Selwyn Nisi Prius, 1091. Roscoe's Criminal Evidence, 150.) In that case the alleged cause of action, itself, sprung from the act of the party in procuring the indictment.

Following the general rule, it is held that the clerk of the grand jury cannot be compelled to disclose the proceedings before them, (Viner's Abridgement, Evidence (B. a.), pl. 5), nor can the county attorney (McClellan *v.* Richardson, 13 Maine R., 82). In Massachusetts it has been held, that the attorney for the commonwealth cannot be called to disclose what passed in the grand jury room. (Commonwealth *v.* Tilden 2 Starkie on Evidence, 324, note).

In the absence of strong reasons to the contrary, the rule ought not to be departed from. I think it should be adhered to in this case, to the extent of denying the application for the minutes of testimony. A list of the witnesses sworn before the grand jury should be furnished to the defendant.

THROUGH the kindness of the law firm of HARRISON & WHITEHEAD, we have received the following opinion:

SUPREME COURT OF ILLINOIS.

OPINION FILED JUNE 16, 1875.

THE PEORIA, PEKIN & JACKSONVILLE R. R. CO. *v.* JOHN R. CAMP.

Appeal from Peoria.

This was an action brought by appellee to recover of appellants for killing his horse by a train of cars. At the time appellee's horse was killed, it was unlawful for domestic animals to run at large in Peoria county, and notwithstanding this fact, he turned his horse out upon the commons adjoining his premises, and from thence the horse escaped over uninclosed lands to the track where it was killed. The court discuss the principles that should control the liability of the appellants in such cases, and make a distinction between a case where the owner turns his horse out voluntarily, and where he escapes from the enclosure of the owner against his will—[ED. LEGAL NEWS]

Opinion by SCOTT, J.

At the date plaintiff's horse was killed it was unlawful for domestic animals to run at large in Peoria county, when the accident occurred. Session Laws 1872, p. 116. Notwithstanding this fact, he turned his horse out upon the commons adjoining his premises, and from thence it escaped over uninclosed lands of other persons to the track of the railroad, where it was struck by a train and killed. No fence had been erected on either side of the track, although it was the statutory duty of the company to have erected suitable fences, unless it had been relieved by the agreement of the adjoining proprietors, of which there is no evidence in the record. On this state of facts the question arises whether the company is responsible for the value of the animal killed if it is shown its servants observed every reasonable precaution to avoid the accident.

It was contrary to the provision of the statute for plaintiff to turn his horse upon the commons, and therefore unlawful. There was nothing to prevent it from getting from thence upon the railroad. Of this fact he was well aware, for it occurred near plaintiff's residence, and he was, of course, familiar with the locality. By the voluntary unlawful act of the plaintiff, his horse was trespassing on the right of way of the company, and this fact must be imputed to him as negligent care for the safety of his property. Had the horse escaped from his enclosure against his will, and he had used all reasonable diligence to recapture it, the case would have been within the rule in C. and N. W. R. R. Co. *v.* Hains, 54 Ill., 528.

In that case it was unlawful by a local ordinance for plaintiff to permit his horse to run at large, but the decision is placed on the distinct ground, the escape from his private enclosure was involuntary on his part, and that he made reasonable efforts to reclaim them soon after their escape, but was unsuccessful. Although plaintiff in this case was guilty of contributory negligence by his unlawful act in turning his horse upon the commons, where he knew it could escape over lands not his own, upon the railroad, this fact does not relieve the company from the duty to exercise proper care, and observe all reasonable precautions to avoid the accident. Assuming the burden of proof was upon the railroad company, we think it is proven its employees did everything in their power after the danger was discovered, to prevent injury to plaintiff's property? The train was within a few hundred yards of the station and was moving at a low rate of speed. All the witnesses agree, the horse was grazing quietly near the railroad until the train was nearly opposite, when it suddenly came upon the track in front of the engine. As soon as it was discovered the horse was coming upon the track, the engine-driver did everything he could to stop the train in time to avoid a collision, but was unsuccessful. The horse was partially blind, and, as the witnesses describe it, seemed to become bewildered and ran directly towards the train. The whole thing occurred in an instant. The engine driver may have seen the horse grazing near the railroad, not many yards distant, but it was not his duty to stop his train by reason of that fact. He could not anticipate the horse would suddenly come upon the track. Under such circumstances it would be an unreasonable regulation to require him to stop his train, and the law has imposed no such obligation. It is proven the company's employees did everything in their power, after it was discovered the horse was in danger, to avoid the injury. The finding of the court was therefore contrary to the law and the evidence. The judgment will be reversed and the cause remanded.

Judgment reversed.

COURT OF COMMON PLEAS, CHESTER COUNTY, PA.

[Reported by Special Correspondent.]

REED *v.* WOODWARD.

SLATE WILL.—A writing on a slate, intended by the decedent to be her last will and testament, is not admissible as such under the Pennsylvania statute of wills.

This was an action of ejectment. The plaintiff claimed under a will written upon a slate, by which the premises in suit were devised to her by one Phebe Ann Woodward, late of the borough of Kennet Square, deceased; the defendant claimed as the heir of said decedent under the Intestate Laws of the Commonwealth. The case was submitted to the jury, subject to the opinion of the court on the point reserved, which will be found in the opinion of the court below, the verdict was for plaintiff. The legal question here determined was attempted to be brought before the Supreme Court in last January, for their decision, on an appeal from the decree of the Register's Court refusing to admit the writing on a slate for probate. The Supreme Court then affirmed the decree of the court below, delivering the following opinion:—*Per Curiam.*—The principal question in this case, whether a slate will can be proved as a written will under the Act of Assembly, is one of difficulty. However, we find it unnecessary to decide it, as the evidence of the creation of the alleged will as a final testamentary act, and by the requisite number of witnesses, according to the Act of 1833, is too meagre and too doubtful to requ.re a reversal of the decree of the Register's Court, which is presumptively right until the contrary is shown. Decree affirmed and appeal discharged at the costs of the appellant.

At the argument of the point reserved on the trial of the cause,

JOHN J. PINKERTON and JOSEPH J. LEWIS, Esqs., for plaintiff cited:—Justinian's Code, lib. 6, tit. 21, sec. 3 and sec. 15; Swinburn on Wills, p. 351, (7th Ed. 1793) 10 Bac. Abr. tit. "Wills;" Statute of Wills of 32 H. 8, ch. 1; Stat. of Frauds and Perjuries of 29 Car. 2, c 3, sec. 5; Penna. Stat. of Wills of 8th April, 1833, (P. L. 249); Redfield on Wills, I, sec. 17, pp. 165, 166; Masters v. Masters, 1 P. Wms. 425; In re the Goods of Anne Dyer, 1 Hagg. 219, (3 Ecc. Rep. 92); Dickerson v. Dickerson, 2 Phillmore, 173, (1 Ecc. Rep. 222;) Rymes v. Clarkson, 1 Phillmore 22; Haines v. Haines, 2 Vernon, 441; Geary v. Physic, 5 B. & C. 234; McDowell and Wife v. Chambers, 1 Shabhart's Eq. Rep. 347; Clason v. Bailey, 14 Johns. Rep. 491; Henshaw v, Foster, 9 Pick. 312: Walker's, Johnson's and Webster's Dictionaries; Livingstone's Louisiana Penal Code, Book of Definitions, chap. 1; Havard v. Davis, 2 Binn. 406; Schraeider v. Norris, 2 M. & S. 286; Legare v. Ashe, 1 Bay, 464; Matthews v. Warner, 4 Vesey, Jr., 210.

WM. M. HAYES, Esq., for defendant, cited:—Aurand v. Wilt, 9 Barr, 54; Plumstead'e Appeal, 4 S. & R. 545; Stein v. North, 3 Yeates, 324; Toner v. Taggert, 5 Binn. 490; Murry v. Murry, 6 Watts, 356; Patterson v. English et al., 21 P. F. Smith, 454; 3 Vin. Abr. 125, pl. 13; Barnet's Appeal, 3 R. 15; Bouvier Law Dict., tit. Wills: Tomlin's Law Dict.; 2 Bl. Com. 295-297; Co. Litt. 229, a.

Opinion by BUTLER, P. J. April 26th, 1875.

On the trial the defendant requested instruction that "the writing on the slate is not admissible as a will, and the jury, therefore, must find for the defendant." The cause was submitted on the facts, and the point reserved. A verdict having been found for the plaintiff the point must now be disposed of. When the parties were before the Register's Court the case went off upon the facts, which alone were considered.

The question is new, and presents a fair field for discussion. We will content ourselves, however, with the statement of our conclusions without entering elaborately into the agreement.

The writing is within the *terms* of the statute—for they are general, requiring simply that "every will shall be in writing." But is it within the *spirit?* For this inquiry also, is involved in the interpretation; and when considered, we see plainly that *all* writing is not embraced. The purpose of the statute is obvious. It was to avoid the uncertainty and danger attending proof of nuncupative wills. Ordinary writing—as with the material in common use—serves to accomplish this purpose. Such other writing as does not, was not contemplated, and is not embraced. One may write in the dust, or the sand, or with charcoal or chalk, leaving the impression so evanescent that a breath will efface them. Such writing, though embraced by the terms of the statute, is excluded by its spirit. Then again, one may write on a rock or a wall, or a tree; and this also is excluded, for it is incapable of the use and treatment prescribed. We think it may be said with safety, that no writing effected with material not designed for or suited to the purpose, is within the statute. It could not have been contemplated that men would so write;—but does the statute embrace *all* writing effected with material designed for the purpose? This proposition includes lead pencil and slate, for they are designed and prepared for writing. Here the inquiry is narrower and the question more difficult. Still, the true test—the adaptability of the

writing to the end in view—is the same. If all such writing answers this end, then all is included. If a part does not, it is excluded. But the results of the test here, are not so marked as in the instances before stated. It may be said that the difference consists merely in the *degree* of appropriateness. The common judgment of men, however, as shown by almost universal experience, is against the fitness of lead pencil and slate for writing of a permanent character. Deeds, leases, and all similar instruments are uniformly written in ink; and the judicial records of this country show no will in other material; while those of England show but two. Granting therefore, that a will in lead pencil may, in some degree, answer the purposes of the statute, it may well be doubted whether the use of this material was contemplated. Under a statute similar to ours, the English Ecclesiastical Court have, however, admitted wills in pencil to probate: Dyer's Estate, 3 Ecc. Rep. 92; Dickson v. Dickson, 1 Ecc. Rep. 222. Whether we will follow this lead is yet to be shown. In Patterson v. English et al., 21 P. F. S. 454, it is said that "no will should be written or signed with lead pencil, on account of the facility with which the writing may be altered or effaced." It may be remarked that the danger *here* from admitting such wills would be greater than in England, where the statute requires *subscribing* witnesses, and thus avoids the uncertainty attending proof of handwriting in pencil.

But we think writing on *slate* presents even more serious objections. While it is true that this material is prepared and used for writing, it is true only in a limited sense. It is especially designed for figures, and is neither intended for, nor adapted to, writing of a permanent character. It would hardly be thought of in this connection; and the reports here and elsewhere, show not a single instance in which it has been so used. Impressions upon it are easily removed, and replaced, without leaving any trace of the change. Writing upon such material does not in our judgment even reasonably accomplish the purpose had in view by the Legislature, was not contemplated, and is not embraced in the statute.

Judgment must, therefore, be entered for the defendant on the point reserved, notwithstanding the verdict.

For the opinion of Butler, J., in this cause, when in the Register's Court, see 30 Legal Intelligencer, 250.

Judge Hanna, in In re Will of William H. Fuguet, 32 Legal Intilligencer, 179, allowed a will as corrected in lead pencil to be admitted to probate.

SUPREME COURT OF TENNESSEE.

OPINION FILED JUNE, 1875.

SIDNA A. P. HODGES *v.* W. B. WILLIAMS et al.

POWERS OF MARRIED WOMEN.

A married woman, having a separate estate, where the power of disposition is not expressly withheld in the deed or will creating the estate, may convey the same as a *feme sole*, without the concurrence or consent of her husband, provided her privy examination be taken by a chancellor, circuit judge, or clerk of the county court. And if she could convey without the consent of her husband, she could do so with his consent, provided her privy examination be had. The husband's joining could not vitiate the deed.

MCFARLAND, J., delivered the opinion of the court.

The complainant, in her bill, alleges that on the 11th of May, 1860, E. A. Clay conveyed to her, to her sole and separate use, 4½ acres of land in or near Chattanooga; that afterwards she joined her husband, John P. Hodges, in a conveyance of this land to W. P. Williams, the proceeds going to pay debts due from the firm of Womicut & Hodges, of which her husband was a member; that her husband, to reimburse her, conveyed to her, to her sole and separate use, a certain lot in Chattanooga, called in the record the Walnut street property. Afterwards she joined her husband in the conveyance of this latter property to Cohen and wife for $2,000, part of which was paid in cash on debts of her husband. Three notes were executed payable to herself and husband, one for $710, was turned over to her, and she has disposed of it as a matter of necessity to raise money for herself and family. The two $500 notes were placed in the hands of S. A. Key, as collateral security to secure D. B. Ragsdale and P. A. McKinney as securities of said John P. Hodges, for money due for the purchase of certain mountain land described. John P. Hodges afterwards died.

The bill prays, first, to recover the 4½ acre tract of land conveyed to Williams, and to have her deed declared void; or, if this relief cannot be granted, that she recover the Walnut street property from Cohen and wife, or the consideration agreed to be paid therefor with interest, and, lastly, if not entitled to relief upon either of the foregoing grounds, that the mountain land be decreed to her, and the difference in value between it and the 4½ acres be paid to her out of the estate of John P. Hodges, or out of the assets of the firm of Womicut & Hodges. The cause was heard upon the demurrer of Cohen and wife, Ragsdale, McKinney and Key. The demurrer was overruled and the defendants allowed to appeal. Williams answered the bill, but no appearance was made by the administrator or minor heirs of John P. Hodges, nor were any steps taken to bring the cause to a hearing as to them.

The case, therefore, as to Williams and the heirs and administrator of Hodges, is not before us. We will consider only the questions raised by the demurrer of the other defendants. The objection upon the ground of mulitifariousness was withdrawn.

First, as to the right of the complainant to recover the Walnut street property from Cohen and wife. The complainant held this property under a deed from her husband, conveying it to her sole and separate use. The deed contains no provision in regard to her power of sale or disposition. No such power is in terms conferred, nor is there any restriction upon the power.

In Gray *v.* Robb, 4 Heiskell, 74, this court held, that if the deed creating the separate estate of a married woman contains no power of disposition, no such power can be exercised, and the deed of the husband and wife in such case was a nullity. This was in regard to a deed executed in 1862. The Act of 1869-70, ch. 99, however, is to be considered. The 3d section is as follows: "*Femes covert* or married women owning a separate estate settled upon them and for their separate use, shall have and possess the same power of disposition by deed, will or otherwise, as are given by the first and second sections of this act—provided the power of disposition is not expressly withheld in the deed or will under which they hold the property."

The first section enacts: "Married women over the age of twenty-one years, owning the fee or other legal or equitable interest or estate in real estate, shall have the same power of disposition by will, deed or otherwise as *femes sole*." The second enacts that the powers of married women to sell, convey, devise, charge or mortgage their real estate shall not depend upon the concurrence of the husband, provided her privy examination shall take place before a Chancellor, Circuit Judge or Clerk of a County Court. A subsequent section limits the provisions of the act, *except the third section*, to *femes covert* whose husbands have abandoned or refused to live with them, or are *non compos mentis*, with a proviso that married women may devise their real estate as *femes sole*, but not to defeat tenancy by the courtesy.

The third section is to be taken with the first and second sections, except that the third section is not limited, as is the first and second sections, to that class of married women above mentioned. From this it would seem to result that a married woman having a "separate estate" where the power of disposition is not expressly withheld in the deed or will, may convey the same as a *femes sole*, without the concurrence or consent of her husband, provided her privy examination be taken by a Chancellor, Circuit Judge or Clerk of the County Court. We take it that if she could convey without the concurrence or consent of her husband, she could certainly do so with his consent *provided the privy examination be had* as required. The joining of the husband could not vitiate the deed.

The bill does not deny that there was a privy examination in this case, and the power of disposition was not expressly withheld in the deed of Mrs. Hodges. So we hold that, under this statute, the deed to Cohen and wife was not void for want of power to make it. We think there is no sufficient allegation of fraud or undue advantage to avoid the deed. The result is, that the decree of the Chancellor overruling the demurrer as to Cohen and wife, is erroneous—it should have been sustained, but the decree was correct in overruling the demurrer as to Key, Ragsdale and McKinney. Whether the complainant's equities are superior to those of McKinney and Ragsdale, it is not proper now to determine. The question as to complainant's rights against Williams, or the heirs and administrator of her husband, are not before us.

The decree will be reversed and the demurrer sustained as to Cohen and wife, and affirmed and remanded as to the other defendants. The costs of this court will be paid one-half by complainant, and one-half by Ragsdale and McKinney.—*The Commercial and Legal Reporter.*

SUPREME COURT OF THE DISTRICT OF COLUMBIA.

APRIL, 1875.—IN EQUITY.—No. 3721.

WM. E. CHANDLER *v.* WM. A. COOK, Trustee.

Where the advertisement of sale of trust property states the day of the month correctly, but names a wrong day of the week, and the mistake is corrected in the published notice, the day before the sale, a bill in equity to set aside such sale for that irregularity will be dismissed, when it is evident that there was no intention to mislead either the parties or the public, and when neither in fact were misled.

STATEMENT OF THE CASE.

The complainant filed his bill to have a sale of certain real estate which had been sold under a power of sale, in a trust deed, set aside and declared null and void.

The deed of trust was executed by one Sidney McFarland to the defendant, Wm. A. Cook, as trustee, to secure the payment of fifty-six promissory notes, each for the sum of twenty-five dollars, with interest, which notes, at the time of the sale of the trust property, belonged to the estate of one Plowman, deceased. The said deed and notes were all dated on or about the 12th day of October, 1869; said deed empowered the trustee, upon default made in the payment of any one of said notes, etc., to sell the premises "at public auction, upon such terms and conditions, and at such time and place, and after such public advertisement," as the trustee in the execution of the trust should "deem advantageous and proper."

The premises were advertised November 27, 1873, to be sold on the 8th of December following. For reasons not shown no sale was made on the 8th of December, but on the 9th of December the original advertisement, with the following notice attached, appeared in the *Republican*, a daily newspaper:

The above sale is hereby postponed until Thursday, December 19, 1873, same hour and place. LATIMER & CLEARY,
de9-TuThS&ds. Auctioneers.

The sale actually took place on Friday, December 19, 1873. On Thursday, the 18th of December, the above error in the day of the week was corrected. On that day, as well as on the morning of the sale, the notice of postponement was printed correctly, viz: "Friday, December 19th, 1873."

Evidence as to attendance, and number of bidders and adequacy of price is conflicting. The defendant, Cook, trustee, in his deed to the purchaser, recites that he advertised the premises "for more than ten days, and on the day of the sale."

The special term in equity made a decree dismissing the bill, and the plaintiff prayed an appeal.

FRANK W. HACKETT, for plaintiff, argued in his brief as follows:

The authority of the trustee in this suit to sell, after such public advertisement as he should deem advantageous and proper, extended only to publication of such an advertisement as in itself contained the essential characteristics of a valid and legal notice.

The *medium* of publication was left to his sound discretion; whether by posters or newspaper advertisement, daily, weekly, morning or evening, and for such a length of time, as his judgment should approve. But he could not neglect the salutary requirements of the law as to what the notice itself should contain. No particular form of advertisement is necessary when not prescribed by the deed. Newman *v.* Johnson, 12 Wheat., 570; but it should reasonably inform the public as to the time, place and description of the property. Besides, the notice must be truthful in all material particulars. Burnet *v.* Dennison, 5 Johns. Ch., 35. In Fitzpatrick *v.* Fitzpatrick *ut., sup.*, the court observed in setting aside a sale where the notice gave the day, but omitted the time of day, that "such a defect defeats the whole purpose of the notice."

The adjournment should have been made on the *day* and at the *place of sale*. 11 Am. Law Reg., 721, Sect. 29. The question of the best time to which postponement should be made was for the trustee himself. Its decision could not be delegated to an agent. Bates *v.* Perry, 51 Mo., 449.

But it appears that the sale was postponed by the advertisement of December 9th, which reads:

"The above sale is *hereby* postponed," etc.

There is no evidence that the trustee was in attendance December 8th. In fact, if he had been, he would have said so in his answer. Besides, the postponement does not purport to be the act of the trustee at all but of the auctioneers. If the postponement was in fact made by the trustee, *before* the publication of the advertisement, then the advertisement was incorrect in stating that the sale "is *hereby* postponed." Such a statement might have induced a would-be purchaser to stay away from the sale, for the reason that he would not venture to risk a title upon a trustee's sale fixed by the auctioneer, and not by the trustee himself. On the other hand, if the postponement was actually made by the advertisement, it was either void, as not being the act of the trustee himself, or the advertisement was fatally defective in not setting forth a postponement, determined upon by the trustee, or by his authority.

If there was a postponement by the trustee on the ground, it must have been till Friday, Dec. 19th; otherwise the day of actual sale and the day of postponement would have differed.

But a published notice of postponement must conform to the actual postponement made on the ground. Richards *v.* Holmes, 10 How., 143; Miller *v.* Hull, 4 Denio, 104. The *onus* of proving that the advertisement, and the day of sale itself conformed to the day established by actual postponement, rests upon defendants. Gibson *v.* Jones, 5 Leigh, 370.

WILLIAM A. COOK, for defendant.

Mr. Justice OLIN announced the decision of the court to the effect following:

The only question raised by the bill in this case is as to the regularity of the notice of sale. No fault is found with the original advertisement, but the notice postponing the sale to the 19th of December, 1873, stated the day of the week to be Thursday instead of Friday.

The day of the month was correct, and that was the day of the sale. There is no doubt but the wrong day of the week was inserted by mistake, and without any intention of misleading, and it was discovered and corrected the day before the sale, which actually transpired at the place and on the day of the month advertised.

The correction of the notice gave a time certain, so that the public could not be misled.

We are aware of the rule which requires a trustee for sale to act in good faith and with diligent attention in conducting the sale of the property. But the postponement in this case was proper and necessary to bring the property to sale under the most favorable circumstances for realizing its full value. And in point of fact there is nothing in the case to show that the sale was not conducted so as to secure this result.

We think the decree of the special term should be affirmed and the bill dismissed with costs.

MACARTHUR, J., dissented, and expressed his opinion to be that there was no proof as to the sale having been postponed by the trustee or by his direction. The notice is in the name of the auctioneers alone, and not by the trustee.

Whether the sale shall take place, or be advertised again, is a matter confided to the discretion of the trustee, and he cannot delegate that power to auctioneers or agents under the special trust and confidence with which he alone is invested. The fact may be that the postponement was authorized and the new advertisement directed by the trustee; but there is nothing in the pleadings or proofs to explain the advertisement of the auctioneers. For this reason, I

think, there was no valid execution of the power to sell, and that the sale was null and void.—*Wash. Law Rep.*

SUPREME COURT OF ILLINOIS.

ABSTRACTS OF OPINIONS FILED AT SPRINGFIELD, IN JUNE, 1875.

[Continued from page 422.]

147.—John Alsop *v.* Eliza Armstrong et al.—Appeal from De Witt,—Opinion by BREESE, J.

PROPERTY TO PROMISSORY NOTE EXECUTED TO A WIFE UNDER AN AGREEMENT THAT SHE SHALL HAVE THE INTEREST THEREOF FOR LIFE.

STATEMENT.

The appellant sold his land; to which his wife agreed, until the writings were prepared, when she refused to sign, alleging her fear that her husband would abandon her when he got rid of all his lands, and demanding one thousand dollars as a security, which he refused. Finally, it was compromised, by executing one of the notes to her for $1,000, on the distinct understanding that she should have the interest during life, and the whole if appellant should abandon her. Afterwards, the purchaser paid this note to her; she took the money and loaned it out, taking a note and mortgage. This note she devised to appellee, her daughter, on her death. Appellant filed a bill for injunction, and to obtain a decree of the property of this note and mortgage in him.

Held, That the property of the note and mortgage was in him.

David Blalock *v.* Stephen A. Randall.—Appeal from Sangamon.—Opinion by SHELDON, J.

TRESPASS AND CASE UNDER THE LATE STATUTE ABOLISHING THE DISTINCTION—WHEN ACTION FOR MALICIOUS PROSECUTION BROUGHT—EVIDENCE.

STATEMENT.—Action of trespass for false imprisonment, and action for malicious prosecution together. *Held*,

1. That trespass will not lie for imprisonment on regular process, but only case; and that only on the grounds of malice and want of probable cause. The statute abolishing the distinction between the actions of trespass and case does not change the rule. The statute only does away with the technical distinction between the two forms of action; but does not affect the substantial rights and liabilities of parties so as to give any other remedy for acts done under regular legal process than before existed; an action on the ground of malice and want of probable cause.

2. An action for malicious prosecution can only be brought after the final determination of the prosecution, and not where the cause has merely been stricken from the docket with leave to reinstate.

3. Where it is charged that a note was given through circumvention and fraud, by means of a devise, proof of the same device being used on others in the same course of employment, is admissible, to show a fraudulent intention.

154.—Tilman Lane et al. *v.* The People, etc.—Error to DeWitt.—Opinion by WALKER, C. J.

ISSUE OF SCIRE FACIAS ON RECOGNIZANCE-FORFEITED—STATUTE RETROACTIVE—VARIANCE BETWEEN THE WRIT AND THE RECORD—OBJECTION MUST BE MADE BELOW—FINDING AGAINST EVIDENCE.

STATEMENT.—In this case. it was objected that, after the forfeiture of the recognizance, there was no order of court for the *scire facias* issued by the clerk. *Held*,

1. That, under the statute, the judgment of forfeiture is a sufficient order to the clerk to issue the writ. Nor does it make any difference that the forfeiture was declared before the passage of this statute, inasmuch as the statute was intended to regulate the practice, and apply to all cases in which writs were to be issued after its passage. Nor, indeed, was such an order necessary, in the absence of the statute, under the common law.

2. The question of a variance between the writ and the record cannot be made for the first time in the Supreme court.

3 It is only where the verdict is clearly against the weight of evidence that the Supreme court will interfere with it.

155.—William L. Kenner *v.* Charles N. Harding.—Appeal from McDonough—Opinion by BREESE, J. WALKER, C. J., dissenting.

WARRANTY—WHAT IT INCLUDES—FALSE REPRESENTATIONS IN THE SALE OF LANDS—MOTION IN ARREST OF JUDGMENT.

STATEMENT.—False representation of soundness as to a mule which was visibly unsound; and false representations alleged as to the value of land, and the excellence of its timber, the land being in the neighborhood where the parties lived, and the vendee choosing to rely upon the representations of the vendor without going to view the land. *Held*,

1. That a warranty does not extend to the visible defects of an animal sold, but only to those which are latent.

2. Where there are no relations of trust or confidence between the parties, it is merely the folly of a vendee to rely upon the representations of the vendor, and he cannot be relieved against false representations as to the value or quality of the land.

3. A motion in arrest of judgment has the same effect in law as a general demurrer to the declaration, and the office of such pleading is to admit all facts well pleaded.

[This case is distinguished from White *v.* Sutherland, 64 Ill., 181, in which the party complaining was bed-ridden—a cripple, incapable of motion—the land was 30 miles away, and the seller was a minister of the gospel, and had been an officer in the army; and the vendee told him he should rely upon his statements, and invoked him as a gentleman, a soldier, and a minister, to tell him the exact truth. On these circumstances, it was held there was such a relation of trust as entitled the vendee to relief in equity.]

158.—J. W. Jefferson, *v.* George W. Kennard.—Appeal from Champaign.—Opinion by SHELDON, J.

STATEMENT.—Amendment in prayer of a bill for specific performance, changing it to a prayer for a rescission of the contract for fraudulent representations in the sale of a large quantity of wool.

Held, That where, in a contract for the sale of personal property, the buyer files a bill for specific performance, and while it is pending the complainant discoveres that there was fraud in the sale, he may have leave, by application to the court, to amend the prayer of his bill, so as to pray for a rescission of the contract on the ground of the fraud, and thus obtain relief; and the right of rescission would not be concluded by the original bill.

159.—City of Champaign *v.* Robert M. McLaurie.—Appeal from Champaign.—Opinion by SCHOLFIELD, J.

CASE FOR INJURY TO POSSESSION OF LAND—CHARACTER OF THE POSSESSION NECESSARY—WHAT PUT IN ISSUE BY THE PLEA OF "NOT GUILTY"—PROOF.

STATEMENT.—Action on the case for injury to real estate in the possession of appellee.

Held, 1. That where possession of land alone is relied upon for any legal purpose in the absence of legal title, it must be an actual, and not a constructive possession.

2. The rule of common law is that, under the plea not guilty, in an action on the case, the defendant may not only put the plaintiff on proof of the whole charge contained in the declaration, but may also give in evidence any justification, or excuse. The English rule that, in actions on the case, the plea of not guilty shall operate as a denial only of the breach of duty, or wrongful act alleged to have been committed by the defendant, and not of the fact stated in the inducement, etc., was adopted by the judges at Hilary, Term., 4 William 4, pursuant to the statute 3 and 4, William 4, and has never been adopted by statute in this State.

3. It was incumbent on the plaintiff to make proof, under his declaration, either of the legal title to, or the actual possession of, the property claimed to have been injured.

162.—Oliver P Canterbury *v.* Charles Miller.—Appeal from Sangamon.—Opinion by CRAIG, J.

WRITTEN AGREEMENTS VOID FOR UNCERTAINTY—CONSTRUCTION OF CONTRACTS IN WRITING.

STATEMENT.—Suit for not receiving and paying for a lot of hogs sold by appellant to appellee. On the trial, two instruments were offered in evidence, but rejected by the court and judgment for defendant.

The instruments were: "I have this day bought of O. P. Canterbury, 100 head of hogs, to average 225 pounds and over; to be delivered at Sherman between the 1st and 20th of July, at my option. The hogs to be weighed on his scales, and delivered at his expense, for which I agree to pay $4.50 per hundred lbs. on delivery, this 30th day of April, 1873.

O. P. Canterbury."

And, "I have this day sold to Charles Miller, 100 head of hogs, to average 225 lbs. and over. The hogs to be weighed at my scales and delivered at Sherman at my expense, between the 1st and 20th of July, at his option, for which he agrees to pay $4.50 per hundred lbs. on delivery, this 30th day of April, 1873.

Charles Miller."

Held, 1. That these two instruments, simultaneously executed, are to be regarded as one and the same instrument.

2. They constitute no contract. The one signed by Canterbury recites that he has bought of himself one hundred head of hogs, for which he agrees to pay himself $4.50 per hundred. The other that Miller has sold to himself, etc.

3. It is no part of the duty of courts to make contracts for parties. In the construction of a contract, where the language employed is ambiguous, courts uniformly endeavor to ascertain the intention of parties; and give effect to that intention. But where the language is unequivocal, although the parties may have failed to express their real intention, there is no room for construction; and the legal effect of the agreement must be enforced.

165.—Toledo, Wabash and Western R. R. Co. *v.* John Jones—Appeal from Macon.—Opinion by BREESE, J.

CONTRIBUTORY NEGLIGENCE, ETC.—INADMISSIBLE EVIDENCE—TRAIN BEHIND TIME—SIGNALS—INSTRUCTIONS.

STATEMENT.—Action for damages in a train running upon the wagon of appellee in trying to cross the track before it; which collision severely injured him and killed a little boy riding in the wagon with him. *Held*,

1. That where a declaration does not aver that the condition of a culvert at a railroad crossing contributed to produce an injury, evidence is not admissible to show the condition of the culvert, and such evidence tends to draw the attention of the jury from the true issue.

2. That in regard to ringing the bell or sounding the whistle, a railroad company are not liable under the statute for non-performance, but only for the injury resulting from the non-performance; and it must appear that the non-performance contributed to the injury.

3. It is erroneous to instruct a jury that a train not running on its schedule time requires more vigilance on the part of those managing it, and makes less vigilance necessary on the part of others in crossing the track. Due care and diligence are alike requisite at all times, on both the part of the company and of all persons exposed to danger at a railroad crossing.

4. It is proper to instruct the jury that it was not the duty of the engineer in charge of the locomotive on nearing the road crossing to stop the train for the purpose of avoiding a collision with a wagon and team approaching the crossing, although by applying the brakes he could do so in time to avoid the collision, but it was the duty of the person in charge of the team, in obedience to the known custom of the country, to stop his team, and not attempt to cross in front of the train.

166.—Toledo, Wabash and Western R. R. Co. *v.* Andrew J. Miller, Admr., etc.—Appeal from Macon.—Opinion by SCOTT, J.

DEATH OF CHILD UNDER CHARGE OF ONE WHOSE NEGLIGENCE CAUSED THE ACCIDENT BY COLLISION WITH A TRAIN.

STATEMENT.—This action was for the death of the son of appellee, as set forth in the above case, being in connection with the same occurrence. The boy was nine years of age. *Held*,

That although the same degree of care could not be required of a child of tender years as of an adult, yet as the parents entrusted him to the care of the owner of the team, by whose negligence he was brought into the fatal danger, the railroad cannot be held liable.

168.—John W. White *v.* Charles W. Smith.—Error to Piatt.—Opinion by SHELDON, J.

WHAT IS A VALID PROMISSORY NOTE—CONTINGENCY.

STATEMENT.—Suit was brought by the assignee of this instrument in writing:

"MONTICELLO, ILLS., }
"$50.00. *April 17th*, 1866. }

"For value received, I promise to pay to the Monticello Railroad Company, or order, the sum of fifty dollars, to be paid in such installments, and at such times, as the directors of said company may, from time to time, assess, or require. J. W. WHITE."

On this some assessments were paid, and the whole of the remainder assessed but not paid; and afterwards it was indorsed to the plaintiff. The question arose whether it was a negotiable promissory note. *Held*,

1. That, although a valid promissory note must be for the payment of money which will certainly become due and payable one time or other, though it may be uncertain when that time will come; and when the payment depends on a contingency, it will make no difference that the contingency does in fact happen afterwards, on which the payment is to become absolute, since its character as a promissory note cannot depend upon future events, but solely upon its character when executed; and although this instrument seems to depend upon a contingency, yet, there is a class of cases which, at first view, seem to import that payment is to be made only upon the occurrence of events which may never happen, and yet which are uniformly held to be absolutely payable at all events; as, for example, a note payable after sight, or after notice, or on demand, which note will be held valid and payable at all events, although, in point of fact, the payee may die without ever having presented the note for sight, or without giving notice, or making demand. The law, in all cases of this sort, deems the note to admit a present debt to be due the payee, and payable absolutely and at all events, whenever, or by whomsoever, the note is presented for payment, according to its import.

2. That the instrument sued on in this case is to be construed as a note payable on demand.

No. 169.—Toledo, Wabash and Western R. R. Co. *v.* Lydia F. Moore.—Appeal from Piatt.—Opinion by CRAIG, J.

STATEMENT.—Action for the death of the appellee's husband by the explosion of a boiler, he being engine-driver on the train. *Held*,

1. That where there is evidence from which a jury could find a verdict, it will not be disturbed, although the evidence might, in the opinion of the appellate court, justify a different result. The verdict must be manifestly against the weight of the evidence, in order that the court should interfere with it.

2. But where there is a balance of evidence, the instructions below must accurately state the law, or the cause will be reversed therefor.

3. While it is the settled rule that a servant cannot recover of the company for an injury resulting from the negligence of another servant in the same line of employment, provided the company has taken due care to select skillful and careful servants, yet an engine-driver will not be held to be in the same line of employment with the master mechanic whose business it is to keep the engines in repair, any more than a brakeman would be held to be in the same line of employment with construction hands.

4. A company is liable for any negligence resulting in injury to its employees in not providing safe machinery or track for them to operate with in the performance of their duty.

170.—Thomas O. Smith *v.* Job A. Race et al.—Appeal from Moultrie.—Opinion by CRAIG, J.

CONSTRUCTION OF THE WORDS "OWN" AND "POSSESS" IN THE TEXAS CATTLE STATUTE.

STATEMENT.—Action of damages to cattle of appellee by Texas cattle of appellant. Verdict for plaintiff of $4.900. *Held*,

1. That the word "own" in the prohibitory statute relating to Texas cattle,

is to be understood in its natural and ordinary sense, and not as relating to a conditional ownership; and the term "possess," also, to be the usual and well-known possession which men generally name of personal property, and not as relating to a mere lien, without the control of the property. [The case mainly turns on evidence of ownership.]

171.—City of Decatur *v.* William Vermillion.—Appeal from Macon.—Opinion by WALKER, Ch. J.

EXTRA COMPENSATION NOT ALLOWED TO PUBLIC OFFICERS—EVEN PROMISE THEREON NOT BINDING.

STATEMENT. — Appellee being pound-master, was appointed special policeman in order to enable him to more efficiently discharge his duties in that office on the express understanding that he was not to be paid as policeman, yet he brought suit and recovered for extra services as such special policeman. In reversing, the court *held*,

1. That a person accepting a public office, with a fixed salary, is bound to perform the duties of the office for the salary. He cannot legally charge additional compensation for the discharge of those duties, even though the salary may be a very inadequate remuneration for his services, and even though, by subsequent statutes or ordinances, his duties are increased, and not his salary. Even a promise to pay him an extra fee is not binding, though he may render service and exercise a degree of diligence greater than could legally have been required of him.

2. The office of special policeman, in this case, was but auxiliary to that of pound-master, and even a promise for extra pay would not have been binding.

172.—Wesley Best *v.* Nokomis National Bank. — Appeal from Sangamon. — Opinion by BREESE, J.

RULES GOVERNING DRAFTS OR BILLS OF EXCHANGE—ACTION THEREON BY PAYEE—INDORSEMENTS MERELY FOR COLLECTION—CONSIDERATION.

STATEMENT.—Bill of exchange drawn by defendant (appellant) for the accommodation of Cooley & Co. in favor of B. F. Culp, Cashier of appellee, on Whitaker & Gray, of St. Louis.

Suit thereon— pleas *non assumpsit*, and want of consideration, the drawer being insolvent.

Held, 1. That it was a bank transaction, and the draft belonged to the bank, although made payable to the cashier.

2. A payee of a note, although he may have written an assignment thereon, can maintain an action in his own name. The indorsement is in the power and control of the payee; and he may strike it out or not, as he thinks proper, and the possession of the note by the payee is, unless the contrary appears, evidence that he is the *bona fide* holder of it.

3. Where indorsements are made for the purpose of collection merely, they do not transfer the title. The indorsee in such case, is a mere agent, and, at any time, his ageney may be annulled, and he deprived of all authority to receive the money.

5. An objection that bills drawn for the accommodation of another are without consideration, is not tenable any more than would be the objection of a surety that he had received no consideration. It is sufficient if the principal has received a consideration.

174.—Mary Ann Sontag etc. *v.* Rosina Schmisseur.—Error to St. Clair.—Opinion by WALKER, C. J.

HOMESTEAD RIGHT OF A WIDOW AS TO THE HEIRS—CONSTRUCTION.

STATEMENT.—The question in this case was, whether the widow of a person dying seized of real estate, having children as heirs, but no debts, can claim in addition to her dower in the premises a homestead worth one thousand dollars, as against the heirs of her husband, in a proceeding for partition and assignment of dower.

Held, That the acts of 1851 and 1857 only create an exemption from forced sales, or alienations by the husband, and do not extend the right to the widow as against the heirs.

175.—Henry Cease *v.* Washington Cockle. —Appeal from Mason.—Opinion by SHELDON, J.

STATEMENT.—Action to recover excess of a payment, with interest, made on a written agreement to deliver 20,000 bushels of corn, of which only a part was delivered. The agreement was signed by Tambly & Co. and Cease, as sellers, parties of the first part, jointly and severally to deliver. It was contended that Cease was only surety as to one-half (10,000 bushels).

Held, That while, where two or more have signed an instrument for the payment of money, jointly and severally, it may be shown that one was only a surety; yet this cannot be done on a contract for sale and delivery of property, by the parties respectively, as this would vary the contract; nor can it be shown that one was to deliver one-half the corn, (or other property), and the other the remainder, as this likewise would vary the instrument by parol; nor as to part one was surety. The express terms of such a contract must govern.

176.—Dennis Cullinam *v.* John H. Nash. —Appeal from Macon.— Opinion by SCHOLFIELD, J.

BILLS OF EXCEPTION—CANNOT BE CERTIFIED BY A REPORTER, BUT ONLY BY THE JUDGE —ALL THE EVIDENCE.

Held, 1. That where a bill of exceptions does not state that it contains all the evidence, the appellate court will not look to see whether the evidence not in the record, will sustain the verdict.

2. A reporter cannot sign, or certify, a bill of exceptions as to the evidence, for this is a judicial act, and so must be done by the judge.

177.—William H. Coggeshall *v.* John M. Beesley, guardian, etc.—Appeal from Mason.—Opinion by SCHOLFIELD, J.

AMENDMENT UNDER PRACTICE ACT OF 1874 —WHEN MAY BE MADE.

[The same points as above, in regard to bills of exceptions, were reiterated in this case.]

Held, That under the practice act of 1874, it is proper where there has been a verdict for plaintiff, and there is a motion for a new trial, to allow the plaintiff to amend his declaration, and dismiss as to one of the parties.

180.—George McDaniel v. Benjamin F. Fox.—Appeal from Sangamon.—Opinion by WALKER, C. J.

BALANCE OF EVIDENCE—ILLEGAL LEVY, AND REPLEVIN—BINDING EFFECT OF ERRONEOUS JUDGMENT OF A CIRCUIT COURT THEREIN.

STATEMENT.—Bill filed to set aside a judgment alleged to have been obtained before a justice of the peace, by fraud of the plaintiff. The case chiefly turns on the evidence, there being, as to most particulars, the oath of the plaintiff against the oath of the defendant, merely. *Held*,

1. That, in such a condition of the evidence, the appellate court will not undertake to determine the weight or preponderance thereof.

2. The illegal levy of an execution [as where it was without authority of law] is no ground for setting aside a judgment of replevin, but only for an action of trespass against the officer, and against the plaintiff in execution, if he directed or advised the illegal levy, not even if the execution had lost its life or vigor before the levy was made.

3. If a circuit court holds, in a replevin suit, that a levy could be made under a dead execution, that judgment is binding in all collateral proceedings until reversed, vacated or satisfied.

182.—George Milmine et al. v. Albert C. Burnham et al.—Appeal from Champaign.—Opinion by SCOTT, J.

EQUITIES AS BETWEEN MORTGAGEE AND JUDGMENT CREDITOR—NOTICE.

STATEMENT.—This is a contest between judgment and mortgage creditors. Surplis bought of Conkey a tract of land, and took a deed, which, by mistake, misdescribed the land. Under this he took possession of the land, and afterwards gave a mortgage containing the same description, to the appellants. This mortgage was foreclosed. Soon after this decree of foreclosure, the mistake was discovered, and Conkey re-conveyed to correct the error, December 19, 1869. At the October term of the circuit court, closing Nov. 17, 1869, appellees obtained a judgment against Surplis, not having at that time any notice of the mistake in the deed and mortgage; although they had such notice prior to the date of the second deed. January 5, 1870, levy was made on the land under the judgment of appellees, who bought it in at the sale, and afterwards obtained the sheriff's deed. They contended that as they had no notice of the interest of the mortgagees, Nov. 17, 1869, when their lien attached, their lien having once attached must prevail over the rights of the mortgagees (appellants) acquired under the instrument containing an erroneous description. But, *Held*,

1. That, at that date, the legal title was not in Surplis, he having only an equitable title, which he had conveyed by the mortgage, retaining, however, an equity of redemption, and being in possession. The judgment in the case could be only a lien on the equity of redemption. Whatever interest he had might have been learned, by inquiry of him on the premises. And before the legal title became vested, the judgment creditors had full notice and caused the levy and sale to be made after this notice. And the judgment creditors, under such circumstances, cannot obtain superior equities to prior mortgagees.

2. A judgment creditor has no equities superior to a *bona fide* purchaser; and whatever notice would affect the latter would affect the former.

SUPREME COURT OF ILLINOIS.

PETITIONS FOR RE-HEARING.

1. Asa Scott v. Henry Bryson. Pet. for re-hearing denied and opinion modified.
2. The Erie R. W. Co. v. Adalbert J. Wilcox. Pet. for re-hearing allowed.
3. Samuel Glickauf v. Louis Hirschhorn and Edwin Einstein. Petition for re-hearing denied. Story & King, atty's for petitioner.
4. Bridget Connelly et al. v. Robert Dunn. Petition for re-hearing, denied.
5. The C. & N. W. R. W. Co. v. Robt. B. Chisholm, Jr. Pet. for re-hearing allowed.
6. Oramel S. Hough v. Asahel Gage. Pet. for re-hearing stricken from docket.
7. The David M. Ford Man'f'g Co. v. Oliver H. Horton, assignee, etc. Pet. for re-hearing stricken from docket.
8. A. C. Warriner v. The People, etc. Pet. for re-hearing denied.
9. Abner R. Scranton v. The People, etc. Pet. for re-hearing denied.
10. Robert Stewart v. Solomon McKichan. Pet. for re-hearing denied.
11. Robt. Doyle v. The Frank Douglas M. Co. Pet. for re-hearing denied.
12. Peter L. Yoe v. Andrew McCord. Pet. for re-hearing overruled but cause remanded.
13. Geo. W. Reed v. Richard S. Thompson. Pet. for re-hearing denied.
15. Charles Bradley, imp'd with Lot Frost v. John E. Barber. Pet. for re-hearing denied.
16. Joseph B. Austin et al. v. Joseph Rust. Pet. for re-hearing denied.
17. The H. F. Ins. Co. v. Frank Farrish. Pet. for re-hearing denied.
18. Jonas P. Magnusson v. Swan P. Johnson et al. Pet. for re-hearing denied.
19. Frank Hulett v. Eugene E. Ames. Pet. for re-hearing denied.
20. John Hatch et al. v. Wm. A. Jordan. Pet. for re-hearing denied.
21. The S. & I. S. R. W. Co. v. The Supervisor of Barnhill Township and County Clerk of Wayne county. Pet. for rehearing denied and opinion modified.
22. The Pittsburg, Fort Wayne & Chicago Railway Co. v. Chester Hazen. Pet. for rehearing allowed.
23. Henry L. Gunnell et al. v. Richard H. Cockerell. Pet. for rehearing denied.
25. Henry F. Eames et al v. Der Germania Turn Verein. Pet. for rehearing denied.
26. Charles B. Knox, Adm'r, v. The City of Sterling. Pet. for rehearing denied.
27. Isaac K. Hall v. James Hamilton. Pet. for rebearing denied.
29. The Michigan Central R. R. Co. v. W. J. Carrow, for use, etc. Pet. for rehearing denied but cause remanded.
30. Jacob Kelley, imp'd with Wm. H. H. Miller, v. Harland P. Kellogg. Pet. for rehearing allowed.
32. John Hayward v. John W. Ramsey. Pet. for rehearing denied.
33. Wm. E. Stone et al. v. Alfred Daggett et al. Pet. for rehearing denied.
34. Samuel Ditto v. Geo. F. Harding. Pet. for rehearing denied.
35. Charles H. Thompson et al. v. Joseph H. Reynolds. Pet. for rehearing denied.
39. Joseph Dinet v. The People ex rel. Pet. for rehearing stricken from docket.

CEREMONY IN THE ADMINISTRATION OF JUSTICE.—At the recent assizes of Northampton, England, Mr. Justice Mellor is reported to have said, addressing the gentry of the county, who had assembled to serve as grand-jurymen: "It was also important in this respect—he regretted to see in many counties—and he was not sure he might not say the same of this—the decay of those matters of importance which ought to attend the reception of the representatives of her Majesty's commissioners, those circumstances of state, which in his judgment entered very largely into the spirit of that which was known as allegiance to law, and of which they were but imperfect judges. This was a matter not to be lost sight of; and he doubted whether allegiance to the law would remain in tact as it was at present, if the circumstance of solemnity and state should unfortunately throughout the country disappear. It was of the utmost importance that those who had a stake in the country, as it was called, or who possessed the property of the country in great measure, should do nothing calculated to diminish the allegiance to the law. This was not his opinion only; he had heard it stated by others who took a more philosophical view of the matter than a judge could do; it was their opinion that it was of essential importance to keep up those circumstances of solemnity and state attending the administration of criminal law. He was convinced that they owed the greatest advantage to the solemn administration of justice, particularly by the judges, who were commissioned by her Majesty to represent her, and, therefore, it was that he regretted when he saw anything that was calculated to lessen that respect. He did not say this in any narrow spirit. There were a number of counties in which the same thing was manifested."

LAW SCHOOLS.—The *Albany Law Journal* of last Saturday has the following in favor of law schools:

One of the most hopeful indications of the times in regard to legal education is the increasing prosperity of the principal law schools of the country, and the tendency exhibited by some of them to a more thorough system of education. Although many excellent lawyers are unfriendly to the law schools, the general professional sentiment is that it is a very valuable, if not essential, aid in legal training. One source of objecton has been that some of the schools have professed to make lawyers and have indirectly, if not directly, inculcated the belief among young men that all that was necessary to be fully prepared for the demands of an active practice was to spend the requisite time at the school and to receive the diploma. The law-school cannot make a lawyer, but it can do a great deal toward it. There is much that cannot be learned in the schools, but there is vastly more that the office does not teach. In the technicalities of practice, in the rules of pleading and evidence, and the application of law to the affairs of men, the office furnishes the only instruction. But here its benefit ends. Under ordinary circumstances it makes an attorney, not a lawyer. The larger culture which fits one for the higher walks of the profession, that comprehensive knowledge of the principles of legal science, which lifts one above a mere dependence on cases, can be nowhere so well acquired as in the school of law. The young man who shall pursue with diligence a course at a law school and shall supplement it with an apprenticeship in an office will, nine times in ten, outstrip the mere office student in the professional race. While there may be, and doubtless are, defects in the organization and methods of many of the schools, they are such as time and experience will mend.

The old Vanderbilt homestead at Stapleton, Staten Island, built probably over 100 years ago, is still in a good state of preservation, but the barn is in a tumble-down condition, though the commodore says it is good enough for him, and won't have it repaired.

CHICAGO LEGAL NEWS.

Lex vincit.

MYRA BRADWELL, Editor.

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With this number we commence the eighth year of the Legal News. In looking over the work of the past seven years, we have much to feel thankful for and very little to regret. It shall be our aim in the future, as it has been in the past, whenever possible, to publish the recent opinions of the Federal and State courts upon questions of interest to the profession, in advance of our cotemporaries. We have published more of the opinions of the Supreme Court of the United States and of the Federal District and Circuit Courts than any other legal periodical. Although our advertising patronage has increased during the past year, we have devoted more space to reading matter than in any previous volume, and the volume just closed contains more cases and more reading matter than any other. Upon a calculation, we find that it contains as mnch reading matter, exclusive of advertisements, as five volumes of Illinois Reports. The Chicago Legal News is furnished for less than any other regular weekly or monthly legal publication We are truly grateful to the members of the profession and others for the liberal patronage we have received for the past seven years, and would solicit its continuance in the way of legal notices, advertisements, job printing and stereotyping.

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We call attention to the following opinions, reported at length in this issue:

List of Witnesses for Accused—Minutes of Grand Jury.—The opinion of the United States District Court for the Eastern District of Wisconsin, by Dyer, J., holding that in all criminal cases in which there has been no preliminary examination, it is within the discretion of the court to order a list of the witnesses sworn before the grand jury to be furnished to the accused; that he is not, however entitled to the minutes of the proceedings before the grand jury, nor, in the absence of strong reasons to the contrary, should they be furnished him.

Slate Will.—The opinion of the Court of Common Pleas of Chester County, Pa., holding that a writing on a slate, intended by the decedent to be her last will and testament, is not admissible to probate as such. We cannot endorse this opinion. While no prudent lawyer would advise a will to be drawn on a slate if paper could be obtained; still we can name cases where the best of lawyers would draw a will on a slate and the wisest of judges would admit it to probate. Suppose three men were traveling miles away from any house, and where no paper could be obtained, and one of them was taken suddenly sick, unto death, and desiring to make his will, one of his companions should take from his carpet bag a slate, and the will of the sick man should be drawn upon it signed and witnessed, with all the formalities of law, would any one seriously contend, upon the death of the testator, that the will on the slate, upon proper proof, should not be admitted to probate?

Negligence--Killing Stock.--The opinion of the Supreme Court of Illinois, by Scott, J., in a case brought against a railroad company to recover damages for killing a horse by its cars.

Powers of Married Women.—The opinion of the Supreme Court of Tennessee, by McFarland, J., holding that a married women having a separate estate, where the power of disposition is not expressly withheld in the deed or will creating the estate, may convey the same as a *feme sole*, without the consent or concurrence of her husband, provided her privy examination be taken by the proper officer, and that if she could convey without the consent of her husband, she could do so with his consent, provided her privy examination be had.

Trustee's Sale—Mistake in Advertisement of Sale.—The opinion of the Supreme Court of the District of Columbia, by Olin, J., where, in the advertisement of a sale under a trust deed, the day of the month was correctly stated, but, by mistake, a wrong day of the week was named.

NOTES TO RECENT CASES.

INJUNCTION—GOOD WILL—CONTRACT IN RESTRAINT OF TRADE.

In the case of Harkinson's appeal, where the appellant had sold her confectionery and its good will, and covenanted not to engage directly or indirectly in the same business within the 22nd ward, for ten years, but to endeavor to promote the business interests of her vendee, and she within the time erected another confectionery within the ward, placed the name Harkinson over the door, and put her son in possession to prosecute the business in his own behalf. The Supreme Court of Pa. held that the breach of the covenant being doubtful, and no substantial injury being shown by the covenantee, an injunction would not lie against Mrs. Harkinson to restrain her from letting her house for the purpose specified.

ESTIMATING DAMAGES FOR LAND TAKEN.

The Supreme Court of Pa. held in the E. B. & W. R. R. Co. *v.* Ruck (reported 32 Leg. Intelligencer, 336), that in estimating damages for property taken by a railroad, the declarations of value and offers of sale by the claimant just before or after the opening of the road, offered in evidence by the company, are competent to go to the jury.

MISFEASANCE BY PUBLIC OFFICER—NO PROOF OF MALICE.

The judicial committee of the privy council, on appeal from the Supreme Court of New South Wales (reported 33 L. T. Rep., N. S. 1). *Held*, that if a public officer is guilty of a misfeasance in the exercise of the powers intrusted to him by law, and in the discharge of his duty, he is liable to an action for any damage resulting from that act, without proof or malice or want of probable cause.

FRAUDULENT PREFERENCE—SECURED CREDITOR.

The English Court of Appeal in Chancery (33 L. T. Rep., N. S. 3), say the doctrine of fraudulent preference, is enforced solely with the view to the equal distribution of the bankrupt's assets among all his creditors; that a trustee in bankruptcy ought not to make, or allow to be made in his name, an application to set aside a transaction on the ground of fraudulent preference, except for the purpose of benefiting the estate, and having the property equally distributed among all the creditors; that where the setting aside of such a transaction would not benefit the estate but only a creditor, who claimed a charge on goods alleged to have been parted with by way of fraudulent preference exceeding the value of the goods, and hold that leave should not be given to the creditor to use the trustee's name in proceedings, to set aside the transaction. The rule laid down in this case is evidently correct, as the trustee acts for all the creditors and should not be allowed to act for the purpose of benefiting one creditor only.

FREIGHTS—UNDUE PREFERENCE—CONSIDERATION FOR REDUCED RATES.

The English court of the railway commission in the B. O. Co. et al. *v.* The B. R. W. Co. (33 L. T. Rep., N. S. 29). *Held*, that it is not a valid consideration for a reduced rate on coal, nor a circumstance that can substantially affect the rate at which it can profitably be carried; that the party favored is the customer of the same railway company, in goods of quite a different kind.

FREIGHTS—UNDUE PREFERENCE.

The same court, in Thompson et al. *v.* The L. & M. R. W. Co. (33 I. B., 32), say that it cannot be laid down as a general proposition of law, that an advantage given by a railway company to obtain traffic for which it competes with another company is not undue; but that the court will decide the legality or illegality of any alleged preference in each particular case. The legislation for regulating railroads in England seems to have been carried nearer perfection than in America, and much more equitable to all parties concerned. To show the spirit in which these enactments are construed, we give the following brief extract from the opinion in the above case:

"What degree of favor can lawfully be shown to some persons to the prejudice of others, under the pressure of competition, can only be decided in any case that arises, by a reference to its special circumstances. In the case before us some of the traffic would, independently of the bounty, be sent to the Northwestern; the rest would naturally fall to the Midland, for the simple reason that the breweries and the station are contiguous, and joined by lines of rails, the local relation of the Midland to the traffic is such that it must have the preference, and if another company, under such circumstances, aims at diverting that traffic into its own channels, we think, looking at the matter in its bearing on the rights under the statute of third parties, that their interests ought not to be sacrificed or placed at a disadvantage in the pursuit, however otherwise legitimate, of their object."

TAXATION—EXEMPTION OF CHURCH PROPERTY.

The Supreme Court of Ohio in Gerke *v.* Purcell, (23 Ohio, 230.) In construing the provision of the constitution relating to the exemption of houses used for public worship, hold that the express authority given in the Constitution to exempt from taxation "houses used exclusively for public worship," carries with it, impliedly, authority to exempt such grounds as may be reasonably necessary for their use; but such grounds must subserve the same exclusive use to which the buildings are required to be devoted; that a parsonage, although built on ground which might otherwise be exempt as attached to the church edifice, does not come within the exemption. The ground, in such a case, instead of being used exclusively for public worship becomes a place for a private residence. This opinion occupies twenty pages. In it many authorities are cited.

Recent Publications.

The Medical Jurisprudence of Insanity. By J. H. Balfour Browne, Esq., of the Middle Temple and Midland Circuit, etc., etc. Second edition, with References to the Scotch and American Decisions. San Francisco. Sumner, Whitney & Co.: 1875.

The first edition of this work appeared in June, 1871, and upon its title page it was stated to have been published in London by J. & A. Churchill, and in San Francisco by S. Whitney & Co. The second edition, which is the one before us, bears only the imprint of the California house, although it has the preface of the author dated London, April, 1875. The first edition has been well received by the profession both in England and America. Much new matter has been added to the second edition, and it has been greatly improved. The chapters have been subdivided into sections, to which the index and table of contents refer, and English, American and Scotch cases have been added. With the text of Mr. Browne we have no fault to find. It is a well-arranged and ably written treatise. We must say, however, for a reprint by an American house, it does not in the notes refer to the American cases as much as the American lawyer has a right to expect it would. The cases should have been brought down to the time of going to press.

A Treatise on the Law of Trespass, in the Twofold Aspect of the Wrong and the Remedy. By Thomas W. Waterman, Counsellor at Law. In two volumes. Volume II. New York: Baker, Voorhis & Co., Publishers, 66 Nassau street. 1875,

In March last the first volume, devoted to trespass to the person and personal property, appeared, and was well received by the bar. The present, which is the second volume, is devoted exclusively to trespass on real estate, and is divided into nine chapters, as follows: 1. Right to the enjoyment of land. 2. Justifiable on another's land. 3. Invasion of another's premises. 4. Trespass concerning animals. 5. Parties entitled to redress. 6. Remedy for trespass to real estate. 7. Action of trespass to try title. 8. Action of trespass for mesne profits. 9. Proceedings in forcible entry and detainer. The plan adopted by Mr. Waterman was to eschew, with few exceptions, all books of reference but law reports; to aim at the careful reading of every reported decision bearing upon the questions treated in the work; and finally, to adopt his conclusions only after a systematic and patient study and comparison of the cases, commencing with the earliest adjudications and following the stream of judicial exposition down to the latest time before going to press. In the preparation of this work Mr. Waterman has bestowed much honest labor, and he will be appreciated as well as rewarded by the liberal patronage of the profession.

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731. Maher v. Farwell and Perkins v. Maher.
732. Kimbark v. Bradley, for use, etc.
733. Tillotson et al. v. Stewart.
734. Cassidy v. Cook et al.

LIV. NEW HAMPSHIRE.

We are indebted to Hon. JOHN M. SHIRLEY for advance sheets of the 54th & 55th Vols. of New Hampshire Reports from which we take the following head notes:

RE-FORMATION OF DEED.

A deed cannot be reformed in equity, where it appears to have been made according to the intention and understanding of the parties at the time of its execution.—(Opinion by LADD., J.)—*Bradford* v. *Bradford*, p. 463.

As to a parol, contemporaneous contract for a reconveyance of the premises in certain contingencies, the parties must stand upon their rights as they exist at law.

COMPELLING ATTENDANCE OF WITNESSES—IMPEACHING EXPERTS

It is only in a capital case that the respondent is allowed the process of the State to compel the attendance of his witnesses, and not in such a case, unless the respondent is poor and unable to furnish them himself.—(Opinion by SARGENT, C. J.)—*State* v. *Archer*, p. 465.

Any person, who heard the respondent testify on a former hearing, may testify what he then stated for the purpose of contradicting his present story. Such impeaching testimony is not confined to such witnesses as took minutes of his former testimony.

A respondent is not obliged to testify so as to criminate himself in relation to any collateral matters, even though he volunteers as a witness in chief; but if the witness chooses to testify, on cross-examination, that he has been guilty of a felony, it would be competent as affecting the credit of the witness.

Witnesses, not experts, cannot, as a general rule, give their opinions as to the mental soundness or unsoundness of the respondent.

Proof of the actual commission of a rape by the respondent, would warrant a conviction for an assault with intent to commit rape.

SALE OF LIQUOR.

Sales of intoxicating liquors, if made in this State, since the act of 1855, will be presumed to be illegal and void until the vendor's authority to sell is shown.—(Opinion by SARGENT, C. J.)—*Corning & Co.* v. *Abbott & Co.*, p. 469.

But if such sale is made in another State, the presumption will be that the sale is legal until it is shown to be otherwise. A sale of spirituous liquors without license from the United States government is not void.

Information and belief on the part of a vendor of spirituous liquors, that the purchaser was intending to sell the same contrary to the law, does not invalidate the sale.

The plaintiffs will not be affected by any secret understanding or agreement between partners, not known to the plaintiffs, limiting the general powers of either partner.

PLEADING GOODS BARGAINED FOR.

When goods are bargained for and delivered, with the agreement that they shall remain the property of the vendor until they are paid for, if the same are not paid for within the time specified, the vendor may retake the goods, or bring assumpsit for the price.—(Opinion by SARGENT, C. J.)—*Clay* v. *Bohonon*, p. 474.

But neither a count for goods sold and delivered, nor for goods bargained and sold, can be maintained for the price of the goods; but a special count should be inserted, founded upon the special contract.

A declaration for goods sold and delivered, and for goods bargained and sold, may be amended by adding such special count.

In trespass *quare clausum fregit*, and for cutting down and carrying away trees, the measure of damages is the amount of injury which the plaintiff suffered from the whole trespass taken as a continuous act: the increased value of the trees, occasioned by the labor of the defendant in converting them into timber, is not to be included.—(Opinion by HIBBARD, J.)—*Foote* v. *Merrill*, p. 490.

PRIVATE RAILROAD — HIGHWAY — OBSTRUCTION—NEGLIGENCE.

The defendants, being owners of a private railroad, with the consent of the W. M. Railroad Corporation, were used to run their cars and engines over a part of the track of said corporation, including a highway crossing. *Held*, that, while thus in occupation of the track, they were to be considered proprietors of the railroad, so far as regards their rights and liabilities in obstructing the crossing, under Gen. Stats., ch. 148, sec. 7.—(Opinion by LADD, J.)—*Hall* v. *Brown*, p. 495.

That statute is directed to the object of protecting travelers against delay from the obstruction of cars, etc., at railroad crossings; its violation, therefore, does not create an absolute liability for damage which is not caused directly by such delay.

The defendants left their cars standing across the highway for more than two minutes. While the highway was thus obstructed, the plaintiff's horse was driven up to the crossing, and, after being delayed more than two minutes, took fright when an engine was attached and the cars started, ran and was killed. *Held*, that the plaintiff must show actual negligence or fault on the part of the defendants before he could recover.

A discharge under the United States bankrupt act of 1867 is no bar to a suit against a surety on a bond executed before the bankruptcy to secure the plaintiff for such damages as might be occasioned him by an injunction staying the collection of an execution, when the equity proceeding in which the injunction was issued was not determined till after the discharge.—*Eastman* v. *Hibbard*, p. 504.

LV. NEW HAMPSHIRE.

If a party employ a person, who has not been admitted to practice as an attorney, to prosecute or defend a suit in his behalf, such person, if his authority is questioned, must produce and file it with the clerk; and if not questioned, the court will ordinarily compel him to file his authority before he will be permitted to appear.—(Opinion by SMITH, J.)—*Stevens* v. *Fuller*, p. 443.

An action will not be dismissed on motion, because it appears that the writ was made by a person who is not an attorney of the court.

P. brought an action on the case against H. and others, to recover damages for flowage to his land by means of the defendants' dam. The defendants claimed they had a right to flow to the top of their dam. The plaintiff called a witness, who testified that M., one of the defendants, had stated that they did not claim the right to flow to that height. The defendants then called M. to contradict said witness, and was permitted to state that the defendants claimed the right to flow to the top of their dam. *Held*, that this, being only a statement of their defence, in itself proved nothing; and as it did not appear that the jury were misled by the statement, it was no cause for setting aside the verdict.—(Opinion by SMITH, J.)—*Perley* v. *Hilton*, p. 444.

H. and others erected a dam in the highway, and continued in the occupation thereof for more than twenty years, flowing, during the same time, land of P. above on the stream, with his knowledge, and without objection on his part, or interruption on the part of the State.

Held, that P. could maintain no action for the injury occasioned thereby to his land.

The plaintiff owned and occupied a barn and nine mows of hay therein. He sold the eighth mow to one M., and the ninth to the defendants, who occupied a portion of the barn by their horses with the plaintiff's permission. The plaintiff claimed that the defendants fed their horses from the other seven mows. The defendants' evidence tended to show that much of the hay purchased by them was of such poor quality that their horses would not eat it. *Held* it was competent for the defendants to show that the hay in the eighth mow, purchased by M., being also of poor quality, the plaintiff told M. that the hay purchased by him was good hay; but if it was not, he might take hay from the other seven mows to make up for the defective hay in the eighth mow, and that M. did so, as tending to account for the missing hay in a manner consistent with the defendants' assertion of their innorence.—(Opinion by FOSTER, C. J.)—*Brown* v. *Marr*, p. 448.

CHANCERY COURT, NASHVILLE, TENNESSEE.

Dinah Carter vs. *W. J. Montgomery and others.* Decided at special term, September, 1875.

ANSWER—SIGNATURE.—An answer in chancery should be signed by the defendant even if the oath be waived.

RESULTING TRUST.—A resulting trust can only arise at the time the conveyance is made, and if there is no money consideration for the conveyance at the time, or if he who pays the consideration manifests an intention that the title shall abide beneficially in the grantee, the resulting trust never arises.

EVIDENCE—OMISSION AND ADMISSION IN PLEADING.—The omission of a part from a bill, even when sworn to, of itself amounts to nothing, but the admission of a fact in a sworn statement is evidence against the party making it.

EVIDENCE—EXCEPTION.—Exception to documentary evidence "as incompetent" is too vague.

GIFT—CONSIDERATION—WRONG DONE.—If a gift be in consideration of a wrong done, such as seduction, or of past illicit cohabitation, equity will not interfere to deprive the donee of the legal title.

MARRIAGE PROHIBITED BY STATUTE VOID.—A marriage between a white person and a person of mixed blood to the third generation inclusive, being prohibited by statute, is void ab initio.

EVIDENCE — PEDIGREE — HEARSAY.—In this State, hearsay from others than members of the family, and public repute are admissible in questions of pedigree, especially in the case of illegitimates, hearsay in the family, other things being equal, entitled to greater consideration.

SAME.—Such evidence is admissible to prove the body of the tradition touching pedigree, but not to establish any specific fact, such as place of birth or death, or shade of color.

Opinion by Hon. W. F. COOPER, Chancellor.—*The Commercial & Legal Reporter.*

OLD FRIENDS WITH A NEW FACE.

Some years ago a new book was published in London under the title of "The Heavenly Pilgrimage described under the similitude of a Voyage," or a title as near as possible to this, with a preface by an eminent Congregationalist divine. Some curious inquirer discovered that the book was a re-print of one which had appeared in America under the title of "A Reel in a Bottle; by an Old Salt." The American publishers, if we are to believe our American legal cotemporaries, are just as clever in furbishing up old literary wares. The *Central Law Journal*, published at St. Louis, states that a New York firm have recently published Mr. Forsyth, the member for Marylebone's well-known work "Hortensius; or the Duty and Office of an Advocate," under the new title of "History of Lawyers, Ancient and Modern," without any explanation, and that the *Journal* has been threatened with an action of damages for commenting on the fact. The *Albany Law Journal* mentions that the same publishers have published Stephen's "Adventures of an Attorney in Search of Practice," accrediting it to a better known writer, Samuel Warren.

Now there can be no doubt that an author, or any other person to whom the right of publishing a book belongs, may change the title of the book. The original title may not be a suitable one, may not properly indicate the nature of the work—may not be such as to attract the attention of the class of persons for whom the work is intended. The title of Bishop Berkeley's "Essay on Tar Water," did not indicate to an ordinary person, the metaphysical moonshine to be found in the book; and we are far from thinking that "A Reel in a Bottle; by an Old Salt," was a suitable title for a work of a religious character. A man is quite entitled to change his own name or the name of his book, but, when the change is made, he should give notice of the fact, so that the public may not be deceived. When, a few years ago, Mr. Josiah Bug changed his name to Norfolk Howard, he exercised very probably a wise discretion; but he was honest enough to advertise the change of appellation, so that everybody was aware that it was the same popular old insect after all. And when some gentlemen of the name of Gammon changed their name to Grenville (they always do get into the peerage when they change their names) they advertised the fact; so that the public knew it was all Gammon after all. In the same way the American publishers, when advertising the book in question, ought to have informed the public that the History of Lawyers was the same old Hortensius after all; just as Bug and Gammon did; so that no person by mistake should provide himself with a second specimen of the same article, and feel sorry afterwards.

Of course we are not expressing any opinion on the merits of the controversy between the American publishers and the American journal. We have only seen the statement of one side; and we are far from approving of the notion (and we are sure that our legal contemporaries in America are far from approving of it either), that a journalist is as privileged as if he were the wretched little representative of a wretched little half-caste State, and that he is entitled to say things about a publisher which are not correct in point of fact, and to threaten him, if he will not submit to that sort of nonsense, he will hurt the sale of his books.

We take the above from the *Edinburgh Law Magazine* for September. We fully agree with our cotemporary, that a journalist is not privileged to say things about a publisher which are not correct, but, at the same time, he should speak the truth boldly about publisher's books, and should not allow a worthless book to be put upon the market without sounding the alarm. Many publishers and authors are not exercising the care they ought to in the preparation of books, and, as a consequence, we have law books that are not worth what it costs to bind them. When one of this class makes its appearance, every honest legal journal should caution the profession against the imposition.

The London *Law Times* says: "On Tuesday last an application was made to the vacation Chancery Judge, Vice-Chancellor Bacon, to discharge a solicitor out of custody under the following circumstances: The solicitor in question has been imprisoned under an order of attachment from the Court of Chancery, issued in the ordinary course, but it was contended on behalf of the prisoner that the arrest was illegal, he having been captured by the officer of the court (the sergeant-at-mace) while actually within the precincts of the Mansion House Court. The Vice-Chancellor, after hearing counsel for the applicant, held that a solicitor is privileged from arrest *eundo et redeundo*, and accordingly ordered the solicitor to be discharged upon his undertaking to take no further proceedings in the matter."

CONSTRUCTION OF DRAM-SHOP LAW.

The following letter from Mr. CHAFEE suggests some questions of interest relating to the construction of the dram-shop law. We have no doubt Mr. HURD, the revisor, will be able to respond to the concluding portions of the letter:

SHELBYVILLE, *Sept.* 21, 1875.

Editor LEGAL NEWS, *Chicago:*

At our present term of County Court I raised the question of the power to imprison for selling liquor to minors, or without license, under our dram-shop law. Have you any knowledge of the law being construed by any court of the State? What is the construction?

§ 182, State Ed. County Court Act, confers jurisdiction and fixes mode of procedure in county court—practice being same as in circuit court. The last clause, however, provides that jurisdiction of justices of the peace shall not be affected. §§ 2 and 6 of the dram-shop act provide, that parties convicted of selling liquor, etc., shall, for each offense, be fined not less than $20 * * and imprisoned in the county jail * * *. § 12 is peculiar: "Any fine *or* imprisonment mentioned in this act, may be enforced by indictment in any court of record having criminal jurisdiction, or the fine above may be sued for and recovered before any justice of the peace * * * and in case of conviction, the offender shall stand committed to the county jail until judgment and costs are fully paid.

(2.) In other words an offender under this law may be proceeded against for two sales before a justice of the peace, and upon conviction pays the fine, anything less than $200 and costs, and that ends it. But if the State's attorney proceeds in the county or circuit court against an offender for like offense, the offender must go to jail at least 20 days, possibly 60, and pay a fine as large as it would be in a justice court, and costs.

These two laws do not harmonize, and applying the general rule of construing penal statutes strictly, and giving him the benefit against whom the penalty is inflicted (Dwarris, page 245, and note) *only* the fine could be imposed. "It's an invariable rule that the law favors liberty, so in the interpretation of a penal statute, if it is dubious, that sense must be pursued which is more beneficial to the party suffering." Dwarris, page 279.

Was it a mistake in the framer of the law regulating dram-shops, in using the conjunction in fixing the penalty, or was it a shrewd act of some anti-sumptuary to tack sec. 12 on the otherwise dangerous law?

Can you throw any light on the subject? GEO. D. CHAFEE.

BETS AND BETTING HOUSES.

In the case of Oldham *v.* Ramsden (32 L. T. Rep., N. S., 825), there are two points worthy of notice. In the first place it shows the uncertainty that exists in the mind of the public, and to a certain extent apparently in judicial minds, as to what should be deemed a "house, office, room, or other place," within the meaning of Sir Alexander Cockburn's Betting House Act (16 and 17 Vict., C. 119), ss. 1, 3. The court of common pleas in Oldham *v.* Ramsden, decided that "an ordinary club at which bets were made" was not within the purview of the act. This seems reasonable, and indeed, as was observed incidentally in the course of the argument, to hold the contrary would be to declare that the act applied to such "places" as the Athenæum, the Carlton, and other clubs of a similar nature. As a matter of fact it may well be doubted whether, looking at previous decisions, the term "place" has not received a judicial interpretation wide enough to cover such places of resort. The court of common pleas in Doggett *v.* Catterns, (11 L. T. Rep., N. S., 422), held that a "spot under a tree in Hyde Park," was a place within the meaning of the act, though this decision was subsequently reversed by the Exchequer Chamber (12 Ib., 355) on the ground (per Bramwell, B.), that "the act was intended to put down ascertained places of resort." But why should not a spot of ground under a tree be considered an "ascertained place of resort," as well as a "stool covered by a large umbrella." (Bows *v.* Fenwick, 43 L.J., N.S., 107, M.C.)? A "strip of ground six feet wide outside a race-course" is a "place" (Shaw *v.* Morley, L. Rep., 3 Ex., 137). So is a "pigeon shooting ground" (Eastwood *v.* Millar, 43 L. J., N. S., 139, M. C.) So is a "cricket ground" (Haigh *v.* Town Council of Sheffield, L. Rep., 10 Q. B., 102, approving Eastwood *v.* Millar). It is somewhat difficult to see clearly the *ratio decidendi* upon which the above cases proceeded—the four last mentioned at any rate appear to be at variance with Doggett *v.* Catterns. Oldham *v.* Ramsden certainly does not make the matter any plainer. It was there decided that the bare fact of bets being made at any place is not sufficient to bring such place within the meaning of the act. But if, as the judges seem to have thought, the "place" must be one expressly and solely designed and kept open for the purpose of betting, then we must be permitted to entertain some doubt as to the correctness of the decisions in Eastwood *v.* Millar and Haigh *v.* The Town Council of Sheffield (*sup.*), for it can hardly be said that pigeon-shooting grounds and cricket-grounds are expressly and solely kept open for the purpose of betting. As of late years questions under the first and third sections of Sir Alexander Cockburn's act have been continually cropping up, we think if our legislature were to pass a short bill, clearly defining what is a "place" under that act, a great boon would be conferred on the general public, the unpaid magistracy, and the judicial bench.

Secondly, Oldham *v.* Ramsden furnishes further refutation of the erroneous idea entertained by some that there is anything intrinsically illegal in a pure and simple bet. Bubb *v.* Yelverton (Lord Charles Ker's claim, 24 L. T. Rep., N. S., 822), was quoted in the course of the argument, and no dissent from that case was expressed. There a testator—the late Marquis of Hastings—had requested a friend to bet on his account at Newmarket, and the friend having done so, and paid the amount lost, it was held by Lord Romilly, M. R., that the request to bet implied an authority to pay the debts if lost, and that the friend was entitled to prove against the testator's estate for the amount paid by him in respect of the bets, which he clearly could not have done if the betting transaction had been illegal: (Compare Clayton *v.* Dilly, 4 Taunt., 165, a case arising under the old betting statutes of 16 Car. 2, c. 7, s. 2. and 9 Ann. c. 14, s. 6, and see the cases there cited). Bubb *v.* Yelverton followed the well-known case of Rosewarne *v.* Billing (9 L. T. Rep., N. S. 441, inaccurately reported 33 L. J., N. S., 55, C. P.), where Chief Justice Erle said, "The law is that the contracts made by way of gaming or wagering, shall be null and void, but not that they shall be illegal." The case of Bubb *v.* Yelverton above alluded to must not be confounded with the case of the same name reported L. Rep., 9 Eq., 471, which, however, is also important with respect to the subject we are considering. In it Sir R. Palmer (Lord Selbourne), *arguendo* (473), quoted a host of cases to show that "a wagering contract is not illegal, and a security given for it is only voluntary:" (Fitch *v.* Jones, 5 E. & B., 238; Hill *v.* Fox, 4 H. & N., 359; Johnson *v.* Lausley, 12 C. B., 468).—*The London Law Times.*

DIGEST OF INSURANCE DECISIONS.

[From the Insurance Law Reporter.]

COURT OF APPEALS OF NEW YORK.

PAROL CONTRACT—LOSS.

Henry F. Smith v. *Glenn's Falls Insurance Co.*

In an action upon a parol contract, after the loss, between the company and the insured, to pay a specified sum in liquidation of the claim, the agreement operates as a waiver of any limitation of time or breach of warranty in the policy unless the contract was procured by fraud.

Where there has been no request to find as to the fact of a breach of warranty, and no exception to a refusal so to find, a court of review will not look into the evidence to reverse a judgment.

SUPREME COURT OF NEW YORK.

WARRANTIES—UNTRUE ANSWERS.

Sarah L. Fitch v. *American Popular Life Ins. Co.*

The policy provided that the statements and answers in the application are warranties, and in all respects true.

Held, that if the answers were shown to be false or untrue, from whatever cause, whether material or not, the policy was void.

HEALTH.

§ 132. *Life—Condition at Time of Renewal.*—The premium was not paid when due. Subsequently the policy was reinstated upon application of the insured, who furnished his own certificate, together with that of the company's examining physician, that he was in good health. The renewal receipt was delivered two week's later. *Held*, that the insured was not obliged to furnish any further statements as to the variation of his health between the time of applying for renewal and the delivery of the renewal receipt.—*Day* v. *Mut. Ben. Life Ins. Co.*

PAROL CONTRACT.

§ 135. *Fire.—Definite Time and Rate Essential to Validity of.*—A verbal arrangement with an agent for insurance, in which the time the insurance was to run and the premium rate were left subject to future adjustment, does not constitute a valid parol contract. To constitute a valid contract of insurance the minds of the parties must meet as to the premises insured, the risk, the amount insured, the time the risk should continue, and the premiums. Baptist Church v. Brooklyn Fire Ins. Co., 28 N. Y., 153; Audubon v. Excelsior Ins. Co., 27 N. Y., 216; Kennebec Co. v. Augusta Ins. Co., 6 Gray, 204; Monsur v. N. E. Mut. Mar. Ins. Co., 12 Gray, 520; Walker v. Metrop. Ins. Co., 59 Me., 391, distinguished.

The principle of a promissory note or check, silent as to time, cannot be applied to a contract of insurance. Proof of usage of a company, in its dealings with other parties, is immaterial when no complete contract has been made. *Strohn et al.* v. *Hartford Fire Ins. Co.*

TAXATION.

§ 139. *Life.—Of Premiums of Mutual Companies in Michigan.—The Acts of* 1869 *and* 1871.—The Michigan act of 1869 prescribed a tax on "all premiums received in cash or otherwise." The act of 1871 required the tax to be "upon the premiums received," and also upon such sums as within the year "shall have been agreed to be paid for any insurance effected or agreed to be effected or procured" The full premiums called for by the contracts of a mutual life company in that State, were $287,019.25. In conformity with an understanding, as claimed by the company, with its policyholders to restrict its exactions to the cost of insurance, the actual collections of that year were reduced to $163,275.58, the amount being determined by crediting on the premiums due the amount of over-payments in 1872. *Held*, that the excessive payment of 1872 was resolved into a part payment of the premiums of 1873, and as such liable to taxation, and that under either statute the whole sum collectable, $287,019 25, was liable to taxation, and not merely the amount actually collected. Shargo's Case, L. R., 8 Ch'y App., 407; 5 Eng., 626; Owen *v.* Dunton, 5 Tyrw., 360; Pratt *v.* Foote, 5 Seld., 463 6, ib. 599; Domat's Civil Law, Pt. 1, B. 4, Tit. 2, Cush. Ed.

Held, that the act of 1871 was meant to enlarge the scope of the act of 1869, not merely to more accurately define it. People ex rel. Conn. Mut. Life Ins. Co. *v.* Collier, State Treasurer.

ADMISSIONS TO THE BAR.—A large class was examined for admission to the bar last week, at Ottawa, and several of the applicants rejected. It is a fact worthy of mention, that in the class there was one woman and a colored man. The colored man failed to pass. Miss Mary Perry was more successful. One of the examiners, who is not noted for being a woman's rights man, informed us that she took the court, the examiners and the bar by surprise, and passed by far the best examination of any member of the class. Miss Perry is polite and lady-like in her manners, and so conducts herself as to gain the respect of all who make her acquaintance. She has been a thorough student, and enters upon the practice of law with a good knowleage of the principles upon which it is founded. Miss Perry will honor the profession, and, being a lawyer, will be none the less a lady. We know nothing of her intentions for the future, but we should like to see her connected with some one of the leading law firms in the city.

HON. SAMUEL F. MILLER.—One of the justices of the Supreme Court of the United States, on taking his seat in the United States Circuit Court, at St. Louis, on Monday last announced that he could remain there only two weeks unless some cases of more than usual importance should detain him, as the Supreme Court of the United States would meet on the eleventh of October, and he always made it a practice to be present at the opening of the court. He would not hear any appeal cases from the District Court in bankruptcy or admiralty, or any minor cases. Judge MILLER is one of the ablest of the Federal judiciary.

COCKROFT & Co's PUBLICATIONS.—The firm of James Cockcroft and Co. of New York, formerly of this city, have opened a branch office in this city at No. 7 Honore Block, for the sale of their publications, which will be under the charge of Frank Shepard, who is well known to the bar as having been in the law book house of E. B. Myers of this city for the last four years, and formerly with Mr. Cockcroft. Frank is an efficient and obliging young man, and we hope he may succeed in his undertaking.

THE Hon. W. J. HYNES, who was last year Congressman-at-Large from Arkansas, is again in this city, and has decided to make Chicago his home. He has been admitted to practice law here, and has united with a Chicago law firm, under the name of Scates, Hynes & Bennett.

CHARGES of unprofessional conduct have been preferred in the Supreme Court at Ottawa against D. James Leary and Edward J. Hill, by the Bar Association of this city.

A LEGAL MONSTROSITY.—A hard word for a caption, no doubt; but the subject referred to is a "hard case," also. I would be pleased if any one would rise and explain why matters are thus, in a supposable event; namely, by hard joint labor and co-operative economy, a husband and his wife gain a little home, which stands, as to title, in his name, of course. He dies intestate, without children. Thereupon, she must submit to a "partition" with collateral heirs, as to the real estate; and the half of the real estate—of the forty acres, or an extra house and lot, which may not be a homestead—must go off among those who did nothing to establish it, and will rather escheat than return to her ownership. Ought she not, in all reason and justice, have all the real estate as well as the half of it?

She might marry again, might she? Well, granted. Then, what? I admire the generosity of the man who provided by will that, should his widow marry again, she should have $600 more out of his estate for incidental expenses.

Now, somebody, in the proper place, (that is, in the legislature) ought to suggest the substitution of the little word "all," instead of the little word "half," in our statute of descent; which provision could be accounted for, as I think the present one cannot be. W.

The *American Newspaper Reporter* says:

Mr. Travis, a Cincinnati lawyer, filed a document worded as follows: "The defendant Now on the 28 day of July 1875 gives notice to the honorble police court City of Cincinnati that he Will repplication for rit errоer to court of common poliece and in the main time he ask that the sentance and judgment be suspended and born fixed as the court may think Just."

CHICAGO LEGAL NEWS.

SATURDAY, OCTOBER 2, 1875.

The Courts.

[From JOSIAH H. BISSELL, official reporter.]

U. S. DIST. COURT, W. D. OF WIS.

UNITED STATES *v.* SAMUEL RINDSKOPF et al.

INDICTMENT FOR CONSPIRACY WITH INTENT OF DEFRAUDING THE UNITED STATES OUT OF TAX ON SPIRITS.

1. WHAT IS A CONSPIRACY.—It is an agreement or combination between two or more persons to effect the purpose declared by the act to be illegal. It consists in an agreement expressed or implied, to do one of the things prohibited in the act. The indictment here charges the conspiracy to be to defraud the United States out of the tax upon certain spirits to be distilled at the distillery of Alexander Rogers in Middleton. The first count charges an agreement to manufacture illicit spirits at that place. In other parts it is alleged also that the agreement was to do so by breaking seals and stamps placed upon certain tubs, and to use them unlawfully for the purpose of manufacturing illicit spirits. *Held*, that the gist of the offense was the illegal conspiracy to manufacture, and that the particular manner in which it was done or to be done, was not the material question in the case: that the question to be determined under this count was whether there was a conspiracy between the parties to manufacture and remove spirits so manufactured without the payment of the lawful tax to defraud the United States. If the parties, or any two of them, entered into a scheme to illegally manufacture spirits, with intent to defraud the government out of the tax by law imposed thereon, it is a conspiracy within the meaning of the act, whether a seal or stamp was broken or not.

2. OVERT ACTS—SEVERALLY CRIMINAL.—That the fact each of the overt acts constitutes an offense is no answer to the indictment for conspiracy. Upon a charge of conspiracy, an overt act, which is itself criminal, may be proven to show the existence of the conspiracy charged.—[ED. LEGAL NEWS.]

The defendants were indicted for conspiracy under section 30, act March 2, 1867. It was found and alleged in the indictment that Alexander L. Rogers was the owner of a distillery at Middleton, and, for the purpose and with intent to defraud the United States out of the tax upon the spirits manufactured thereat, conspired with Samuel Rindskopf, liquor dealer, of Milwaukee, Albert Mueller, his distiller, and James W. Bull, storekeeper at said distillery, to aid and assist him in carrying out such purpose; and that they did, in pursuance thereof, manufacture, dispose of, and defraud the government out of the tax upon, large quantities of spirits manufactured thereat and setting forth the various and illegal means and devices used for that purpose. Before the trial commenced, a *nolle prosequi* was entered as against the defendant, Alexander L. Rogers. On the trial against the other defendants, he was called as a witness, and testified that he established and went into the business for the purpose and with the intent to manufacture illicit spirits, and says that after he had commenced, he went to Milwaukee and saw Mr. Rindskopf, and there told him, in substance, that he was engaged in manufacturing illicit spirits, and that he could get them from the still or government warehouse to his rectifying house without paying taxes, but he did not know how to get them from there upon the market, and asked Mr. Rindskopf to assist him, and that Mr. Rindskopf then told him he would go in with him and take the wines, and pay him Chicago prices less twenty-two cents, which he was to retain as his share of the speculation or risk, and that he told them how to proceed to get to him or his house, to wit, that he (Rogers) should put them in new barrels at the rectifying establishment, and get the guager here to guage them as whisky, and put on whisky stamps and ship them to his firm as such; and that they would receive them at the depot, and pay for them at the prices named. And he further stated that, under that agreement, he sent high wines under such false labels, to them from time to time, and that they were received and paid for upon the terms of that agreement; stating the mode and amount of two of the payments. He stated that, after that, he continued to manufacture illicit spirits and that Mueller was the distiller and did the work, or superintended it, and that Mr. Bull, the store-keeper, had full knowledge of it, and received from him $100 per month for neglecting his official duty, and permitting him to use what material he wished, and to take the spirits from the warehouse without payment of the tax. He further stated that, after some trouble with the revenue officers in February, he was ordered to send them two-stamp goods, and, if not detected, he would not enter them on the books.

Mr. Henry Lacher, another witness, testified that he had charge of the rectifying house under Mr. Rogers first, and afterwards under Rogers & Bunker, and that spirits were often received at the rectifyer and dumped, upon which the government tax had not been paid, and described the means adopted to accomplish that purpose, particularly, and that such spirits or highwines were afterwards placed in other barrels and marked whiskies, kimmel or bitters, and stamped by the gauger either as whisky at 66 or 68 proof, or as bitters, no proof, and that they were shipped by rail to Rindskopf Bros., Milwaukee; that they were entered on their book at the rectifier according to the gauger's mark, and Rindskopf Bros. were charged with them at the market rates for such goods. This, he said, continued up to about the 11th of February, when he changed and shipped them as highwines with two stamps, but that they were, with a few exceptions, got out of the warehouse and placed in stamped barrels and no tax paid thereon. He further said that he received statement of sale and amount and that they were paid for as highwines at the rate stated by Mr. Rogers, to-wit: Chicago prices and 22 off; that those statements and letters accompanying were returned to Mr. Rindskopf at his request after seizure.

Other testimony was given sustaining and corroborating these general facts. Whereupon, Judge Hopkins, who presided at the trial, among other things, charged the jury as follows:

The defendants are indicted under section 30 of the act of March 2, 1867, U. S. Revenue Laws, for a conspiracy, which reads as follows:

"If two or more persons conspire, either to commit any offense against the laws of the United States, or to defraud the United States in any manner whatever, and one or more of said parties to said conspiracy shall do any act to effect the object thereof, the parties to said conspiracy shall be deemed guilty of a misdemeanor, and on conviction thereof shall be liable to a penalty of not less than one thousand dollars, and not more than ten thousand dollars, and to imprisonment not exceeding two years."

The act declares what illegal purposes constitute a conspiracy. But in construing it, it becomes necessary to ascertain what is meant by conspiracy, in this act. I think it may be defined as an agreement or combination between two or more persons to effect the purpose declared by the act to be illegal. It consists in an agreement, express or implied, to do one of the things prohibited in the act. The indictment here in substance charges the conspiracy to be to defraud the United States out of the tax upon certain spirits to be distilled at the distillery of Alexander Rogers, in Middleton.

In the first count the charge of an agreement to manufacture illicit spirits at that place is expressly alleged. In other parts it is also alleged that the agreement was to do so by breaking seals and stamps placed upon certain tubs, and to use them unlawfully for the purpose of manufacturing illicit spirits. I have ruled during the trial that the gist of the offense was the illegal conspiracy to manufacture, and that the particular manner in which it was done, or to be done, was not the material question in the case. That the question to be determined under this count, was whether there was a conspiracy between the parties to manufacture, and remove spirits so manufactured without the payment of the lawful tax, to defraud the United States. Now the question here is, did the parties, or any two of them, enter into a scheme to illegally manufacture spirits, with intent to defraud the government out of the tax by law imposed thereon. If they did, I think it constituted a conspiracy within the meaning of the act above mentioned, and that on that question it is immaterial whether a seal or stamp was broken or not.

In order to charge the parties as conspirators, I do not think it necessary to prove an express agreement between all the parties to do the illegal act. It would be enough if you should find that all of them had the same illegal purpose in view and each acted a certain part to accomplish or tending to accomplish it. But you must be satisfied that each had the same common design and acted to carry such design into effect. In other words, if you should find that Mr. Rogers' purpose was to unlawfully manufacture spirits and remove the same from his distillery, and to place them upon the market without paying the tax thereon, and as a part of such corrupt purpose, induced the storekeeper, Mr. Bull, to abstain from doing his official duties, so that he could obtain the material contrary to law, to use for such purpose, and employed Mr. Mueller, his distiller, to secretly manufacture the same into spirits, and further obtain the consent of Bull to run them from the cistern of warehouse without the payment of the lawful tax thereon, and further employed to assist him in his unlawful purpose aforesaid, Mr. Lacher to faudulently receive and conceal such spirits into the rectifying establishment of said Rogers, and that by an agreement with the defendant Rindskopf, and at his suggestion, Mr. Lacher and the government gauger were employed to place said spirits into other barrels and gauge them as whiskey and other articles of less proof, and then ship them under such false and fraudulent stamps to the defendant, or to the house of which the defendant was a partner, and that said defendant personally knew of their receipt, under such false labels and stamps, and concealed or aided in concealing such facts to defraud the government, and for the purpose of enabling the said Rogers to defraud the government out of the legal tax thereon and share the proceeds with him, you might be at liberty to infer from these facts that the parties acting for the common purpose to defraud the government, were all guilty of conspiracy. It would not, in such a case, be necessary to show that the parties had any previous acquaintance, or, with the exception of Rogers, knew of the exact part the other was to perform. In such case, each might be considered a co-conspirator with Rogers, and being so, would be responsible for his acts in carrying out the illegal purposes. And if you should find such acts to have been done in the carrying out of such illegal purpose, and that the illegal purpose was common to all—that is, to defraud the government out of the tax—I think you would be authorized to find that the conspiracy was established as to all. If they knew the intention of Rogers, in procuring them to do such acts, to be to defraud the government, and that their acts respectively aided and assisted him to carry into effect such illegal purpose, and that they did the several acts to them assigned, on purpose to enable Rogers to successfully carry out his illegal designs, I think it would be a conspiracy as to all of such parties, if their overt acts are satisfactorily proven.

In determining the question of conspiracy, Mr. Rogers may be reckoned as one, so that if either of the others conspired with him to do the acts alleged in the indictment, although you might find that the other defendants did not conspire with them, you might find that one guilty under this indictment, provided the overt act to effect it is satisfactorily proven.

The defendants were all found guilty by the jury.

Whereupon a motion for a new trial was made by the defendants, upon which Judge HOPKINS announced the following opinion:

The defendants having been convicted by the jury of the conspiracy charged against them, now move the court for a new trial and in arrest of judgment, and have, in the argument in support of the motion, mainly relied upon the following points:

1st. That the court erred in its charge as to what constituted a conspiracy.

2d. That as the overt acts set out and proven were severally criminal, and the parties committing them were liable to a specific punishment, that after such acts had been performed the parties could not be held liable for a conspiracy to do them; and

3d. That the verdict is against evidence.

The first two are those mainly relied upon. As to the first, after listening to the able and ingenious argument of the learned counsel, and after a careful and critical re examination of my charge on the question, I am thoroughly satisfied that I correctly instructed the jury on that point. The instruction and charge on that question is supported and warranted by the following authorities:

Rex *v.* Cope, 1 Strange, 144; The People *v.* Mather, 4 Wen., 260, et seq; Rex *v.* Parsons, 1 Wm. Black Rep., 392; 2 Deys (Conn.) R., 205; 34 Eng. Com. Law Rep., 314-404; 5 M. Lean, U. S. *v.* Cole, 513; 6 Mass. R., Commonwealth *v.* Warren, 74; 8 Car & P. Regina *v.* Murphey, 297; 3 Greenl'f Ev., section 93; 1 Bishop on Cr. Pro., section 77, and 2 id., section 187; 5 Cox Cr. Cases, Reg. *v.* Rowland, p. 485 & 497.

The law upon the second point I find too well settled and uniform against the defendants to be at this time questioned.

The fact that each of the overt acts constitute an offense is no answer to this indictment for conspiracy. Upon a charge of conspiracy, an overt act, which is itself criminal, may be proven, to show the existence of the conspiracy charged. Conspiracies, from their very nature, are usually entered into in secret, and are consequently difficult to be established by direct evidence. It has been therefore universally held that they may be inferred from circumstances. The common design is the essence of the charge, and may be shown by circumstances and the acts psrformed by the different alleged conspirators, and the fact that the several acts constitute separate criminal offenses, does not exonerate the parties from the crime of conspiracy, or bar a prosecution therefor. This is sustained by an almost unbroken chain of authorities, both in this country and England.

In Regina *v.* Boulton and others, 12 Cox. Cr. Cases, part 3, page 87, in Court of Queen's Bench, before Ch. J. Cockburn, in 1871, although, the course of receiving proof of the commission of the substantial crime is not regarded as satisfactory, yet it is decided that such a course is *legal*, and in that case, it being a charge of conspiracy to commit a felonious crime, proof of the commission of the crime itself was allowed. The chief jnstice cited and relied upon the authority of the late Lord Cranworth, in Reg. *v.* Rowland, 5 Cox Cr. C., 497, note. In that case the parties had been indicted, not for the offense they had committed, but for a conspiracy to commit it, and the judge, after stating that it would have been more satisfactory if the parties had been indicted for what they had done and not for conspiracy to do it, stated "that the course pursued was *no doubt legal* and being legal," he said, "I shall not now step out of the path of my duty by speculating upon the policy that has been adopted in this case. It would be much more satisfactory to my mind if parties were indicted for that which they have directly done, and not for having previously conspired to do something, the having done which is proof of the conspiracy. It never is satisfactory, although *undoubtedly it is legal.*" I have quoted this language as expressive of my first view of the question when raised during the trial, and I can say now, as I said then, that the better way, in my judgment, would have been to have indicted all parties here for the particular offense committed by each, but under the law it seems I have not the right to say they *must* be so prosecuted. The course pursued in this matter by the government attorney, in the language of those cases, is "undoubtly legal," and I can therefore only consider the case as it is presented on this indictment.

These cases dispose of the second question so strenuously pressed by defendants' counsel. The case of Commonwealth *v.* Kingsley, 5 Mass., 106, laying down a contrary doctrine, does not seem to have been followed in that State, for the same Judge, Parsons, in Commonwealth *v.* Warren, 6 Mass., 74, refused to arrest a judgment on a charge of conspiracy, where the overt act was a felony, and was completed and the avails of the crime divided; and in Commonwealth *v.* Davis, 9 Mass., 415, it is held that acts in execution of the conspiracy may be shown, in aggravation. In the case in 1st Lowell, 266, U. S. *v.* Boyden et al., being an indictment under the same act and section as this, this question was raised and examined upon principle and authority, and Judge Lowel, before whom it was tried, arrived at the conclusion that though the act concerning which the conspiracy was formed, was completed, and there was a specific penalty for doing that act, still the Government could elect under which to proceed. This doctrine is also supported

by People *v.* Mather, 4 Wen., 259; Collins *v.* Commonwealth, 3 S. & R., 220. The dictum in the opinion of Senator Spencer, in Lambert *v.* The People, 7 Cowen, 578, I do not think, entitled to much weight. The case there did not turn on any such question. Indeed, it is impossible to tell what principle was settled in that case in the Court of Errors. The Senators seemed to have embarked on an uncertain sea of generalities, and to have spent their energies in magniloquent declamation, better suited to the forum than the bench.

The plain, simple sentences in the opinion of Chief Justice Savage in same case on page 166, of same volume, are far more satisfactory, reasonable and convincing. The law on this question is too well established to be now overturned.

On the other point, that the verdict is not supported by the evidence, I need only say that if the jury believed the testimony of Rogers and Lacher the charge was most clearly made out. Assuming their testimony to be true, the fact of an unlawful conspiracy to defraud the Government out of the tax upon spirits to be manufactured at Rogers' distillery, as charged, is established beyond all controversy. The section of the act declaring the conspiracy expressly provides that the parties may be tried in any district where the conspiracy is committed, or an overt act is done in furtherance of the illegal purpose. The overt acts were performed in this district, and the case is properly triable here.

During the trial several questions were raised of a technical character as to the particular means by which illicit manufacture was effected. I then overruled them as not tenable and as too critical, and since that time my attention has been called to section 8 of the amended Practice Act of 1872, 17 Stat. at La., 198; and if I had any doubts upon the questions before, that section has removed them. The objections have not, however, been renewed in this motion, and I presume the counsel are satisfied that that they are made unavailing by the section of the act above referred to, even if they were good before its passage.

The motion for a new trial and in arrest of judgment is overrruled.

J. C. MCKENNEY, for U. S.

H. S. ORTON, GEO. B. SMITH, P. L. SPOONER, GREGORY & PINNEY, G. W. GOODWIN & H. M. LEWIS, for defts.

SUPREME COURT OF ILLINOIS.

OPINION FILED SEPT. 27, 1875.

MARK SHERIDAN et al., Police Commissioners *v.* H. D. COLVIN, Mayor of the city of Chicago, et al.

Appeal from Cook.

POWER OF COMMON COUNCIL TO RE-ORGANIZE THE POLICE FORCE.

THE GENERAL ACT OF 1872.—The court, after stating that the validity of the new organization of the city under the general act of 1872 could not in any respect be drawn in question in this case; that such a question can be determined only by a direct proceeding in the nature of a *quo warranto*, and assuming then that the city of Chicago became incorporated under the act by virtue of the election of 1875, the provisions of the act of 1872 thereby became its charter, to which the court must look for the extent of its corporate authority with such limitations as may be found to arise from the provisions of section 6 of the act, hold as follows:

1. POWER TO PASS THE ORDINANCE.—That the city council had the power, under the provisions of the act of 1872 to pass the ordinance re-organizing the police force.
2. POWER LEGISLATIVE.—That the power to pass the ordinance is legislative and discretionary.
3. CHANCERY—JURISDICTION.—That the court of chancery had no jurisdiction to interfere with the exercise of that power.—[ED. LEGAL NEWS.]

Opinion by M'ALLISTER, J.

Elaborate printed arguments have been filed by the counsel for the respective parties in this case, and able and exhaustive oral arguments delivered at bar, all of which having been considered, we are prepared to give our conclusions.

It is not claimed by counsel for appellants that the validity of the new organization of the city under the general act of 1872 can be in any respect drawn in question in this suit. Such a question can be determined only by a direct proceeding in the nature of a *quo warranto*. Assuming, then, that the city of Chicago became incorporated under that act, by virtue of the election held April 23, 1875, the provisions of the act of 1872 thereby became its charter, to which we must look for the extent of its corporate authority with such limitations as may be found to arise from the provisions of section 6 of the act.

With these preliminary observations we will proceed to state, as briefly as possible, our views and conclusions. The case involves itself into three principal questions, viz.:

1. Had the city council the power under the provisions of the act of 1872 to pass the ordinance in question?
2. What is the nature of the power thereby sought to be exercised?
3. Had the court of chancery jurisdiction to interfere with its exercise?

These questions will be considered in the order stated. First, then, as to the power. That question can properly be determined only by a consideration of the legal status of the police commissioners at the time of the new incorporation of the city, and reference to the several provisions of the act of 1872 pertinent to the subject. We have, however, no concern with the legal status of the police commissioners any further than relates to their functions as city officers. Now, the act creating the board of police declares that "the said board shall assume and exercise the entire control of the police force of said city, and shall possess full power and authority over the police organization, government appointments, and discipline within said city." By the same law that board also had the custody of all property belonging to the police department. Such was the authority vested in the board of police, composed of appellants, at the time of the new incorporation of the city under the act of 1872, and it amounted to an exclusive control over the police force of the city. But it has not been and cannot be denied that these functions and their continuance with these municipal officers were entirely subject to legislative control. The legislature could in its discretion provide for the creation of another officer, and for taking these functions from the board of police and bestow them upon that officer. Appellants' counsel concede this, but insist that the legislature has not done so. Let us see whether this be so or not.

Upon this point we would say that in our opinion, from a consideration of the whole scope and purpose of the act, as well as the provisions of section 3, the new incorporation did not *ipso facto* repeal the act creating and defining the powers and duties of the police commissioners, or abolish their office in toto. That section says: "If a majority of the votes cast at such election shall be for city organization under general law, such city shall thenceforth be deemed to be organized under this act; and the city officers then in office shall thereupon exercise the powers conferred upon like officers in this act until their successors shall be elected and qualified."

This clause, taken in connection with one in section 6, evinces the legislative intent in respect to the manner in which reincorporation should be effected. The latter is as follows: "And from the time of such organization, or change of organization, the provisions of this act shall be applicable to said cities and villages, and all laws in conflict therewith shall no longer be applicable. But all laws or parts of laws not inconsistent with the provision of this act shall continue in force and be applicable to any such city or village, the same as if such change of organization had not been made."

There is a plain difference between a legislative declaration, that an inconsistent prior law shall not be applicable to certain municipal corporations, and one that is repealed. The legal effect of that provision is that if the law creating the board of police, or any prior statute relating to a corporation reorganized under the act of 1872, shall be found in conflict or inconsistent with any of the provisions of that act, such inconsistent law shall no longer have any applicability within the territorial limits of such new organization. If such inconsistent law originally applied beyond such territorial limits, it may continue to do so, but not within them.

The act of 1872, like much of our legislation, is wanting in that complete mechanism requisite to the exact fitting on one part with every other part, so as to make one harmonious whole. But the intention of the legislature to provide a general system of local municipal government required by the policy of the constitution prohibiting, the passage or alteration of city charters by special law, and to enable existing corporations to effect changes in their organic law with as little disturbance as possible, is very apparent from the whole act. The powers confided to the local legislative department of such new corporations are broad and plenary, especially as respects the police department, the only matter now before us. And one object of the clauses from the sixth section, above quoted, clearly was to remove all obstacles arising from prior laws to the exercise of such powers.

The first subdivision section 62, article 5, of the act of 1872, gives the city council the control of all the finances *and property* of the corporation. This, of course, would include the property belonging to the police department the entire custody of which by prior laws was given to the board of police. Subdivision 66, of same section, gives the power to regulate the police of the city, and pass and enforce all necessary police ordinances; section 68, to prescribe the duties *and powers* of a superintendent of police, policemen, and watchmen. By section 73, it is provided that "the city council may in its discretion, from time to time, provide by ordinance for the election by the legal voters, or appointment by the mayor with the approval of the city council, of a city collector, a city marshal, a superintendent of streets, a corporation council, a city comptroller, or any or either of them, and such other officers as may by said council be deemed necessary or expedient. This section further provides: "The city marshal shall perform such duties as shall be prescribed by the city council for the preservation of the public peace and the observance and enforcement of the ordinances and laws."

Section 74 provides that "all officers of any city, except where herein otherwise provided, shall be appointed by the mayor (and vacancies in all office be filled by like appointment) by and with the advice and consent of the city council. The city council may, by ordinance not inconsistent with the provisions of this act, prescribe the duties and define the powers of all such officers, together with the term of any such office, provided the term shall not exceed two years."

It seems to us clear beyond doubt that by their several provisions ample authority is conferred upon the city council to not only provide for the appointment of a city marshal and vest him with the entire control of the police force, but to organize that department as purports to be done by the ordinance in question. If the council had the power to pass the ordinance, it must have the power to carry it into effect; and if it had the power to pass and enforce it, then the effect must be to take the functions given the board of police by the act of their creation away from that board, and confer them upon the officers named in the ordinance. The continued possession, therefore, by the board of police of exclusive authority over the police force is utterly inconsistent with the exercise of the plenary power over the subject matter conferred upon the city council by the act of 1872, and by force of the sixth section of that act, the prior law can no longer be applicable. The last section of the ordinance, it is conceded by appellee's counsel, is too broad. But that cannot affect the other provisions of the ordinance, because they are in no respect dependent upon it. It may be regarded as applying to appellants only as city officers, in which view it might be sustained. For authority in the city council to take away their functions as city officers, which we think the council has, is virtually to deprive them of their offices, so far as they were such city officers.

The second question is: What is the nature of the power sought to be exercised in passing the ordinance under consideration? To that question there can be but one answer, and we shall not stay to discuss it. The power is legislative and discretionary.

The third and last question is: Had the court of chancery jurisdiction to interfere with the exercise of that power?

We are clearly of the opinion that it had not. The subject is purely political. The only title to relief shown by the bill is that arising from the mere fact of complainants being police commissioners, vested, as it is alleged, with the entire control of the police force, etc. The bill does not go upon the theory of any property right, but is an application to a court of equity to restrain the city council and other officers of the city from carrying said ordinance into effect, on the ground that it will deprive them of the functions of their office. It is elementary law that the subject matter of the jurisdiction of the court of chancery is civil property. The court is conversant only with the questions of property, and the maintenance of civil rights. Injury to property, whether actual or prospective, is the foundation on which the jurisdiction rests. The court has no jurisdiction in matters merely criminal or merely immoral, which do not effect any right to property. Nor do matters of a political character come within the jurisdiction of the court of chancery. Nor has the court of chancery jurisdiction to interfere with the public duties of any department of government, except under special circumstances, and where necessary for the protection of rights of property.—Kerr on Injunctions, pp. 1 and 2.

In the case of Shirlock *v.* The Village of Winnetka, 59 Ill., 398, this court said: "There are some acts which a municipal corporation, while acting within the limits of its charter, may do, without being subject to the supervision of any court. Such acts are those done under its legislative and discretionary powers." Willard's Eq. Jur., 405. Again, in High on Injunctions, the author says: "A court of equity is not a proper tribunal for determining disputed questions concerning the appointment of public officers, or their right to hold office, such questions being purely of a legal nature, and cognizable only by courts of law. Thus, equity will not interfere by injunction to restrain persons from exercising the functions of public officers on the ground of the illegality of the law under which their appointments were made, but will leave that question to be determined by a legal forum, and a temporary injunction granted *pendente lite*, and until the question of validity of the law under which defendants claim their office can be determined, will be dissolved." Delehanty *v.* Warner et al., September term, 1874. (Unreported.)

We are of opinion that the demurrer to appellant's bill was properly sustained and that the decree of the court below should be affirmed.

Decree affirmed.

CIRCUIT COURT OF ALEXANDER COUNTY.

SEPTEMBER TERM, 1875.

MARY N. MAYO *v.* S. STAATS TAYLOR et al.

REMOVAL OF CAUSES TO FEDERAL COURTS —THE NEW ACT OF CONGRESS CONSTRUED.

1. THE CORRECT PRACTICE.—That it is the correct practice for the State court, in applications for the removal of suits under the act of 1875, to act upon the petitions and bonds; that such a practice is consonant with the practice prior to the act of 1875.
2. DUTY OF STATE COURT.—That the mandate that the State court shall "accept said petition and bond," implies that the State court should take some action, make some order in the case.
3. THE PROPER PRACTICE.—That if a petition and bond are filed in term time for the removal of a cause, the court should ascertain that the applicants are "entitled to the removal," before it ceases to exercise jurisdiction. If the petition and bond are filed in vacation and a copy of the record filed in the Federal court, it would, upon motion, if fully satisfied that the party filing the petition was not "entitled to the removal," order the cause to be placed on the docket, and proceed to trial there, as in other cases.
4. THE PARTIES.—*Held*, that where the plaintiff was a citizen of New York, one of the defendants a citizen of Missouri, the other of New York, and the Missouri defendant appeared and moved for a continuance for want of service on his co-defendant, and the plaintiff took a rule on the Missouri defendant to plead, etc., etc.; that under the Illinois statute and the act of Congress, it was a controversy wholly between citizens of different States, and that the Missouri defendant was entitled to have the suit removed on his petition into the Federal court.—[ED. LEGAL NEWS.]

Opinion by BAKER, J.

This is an action of assumpsit commenced in the Alexander county Circuit court by Mary N. Mayo against S. Staats Taylor and Edwin Parsons, trustees of the Cairo city property. The declaration is based upon certain written contracts alleged to have been executed, jointly, by the defendants. The damages claimed in the declaration are $20,000. A summons was issued returnable to this, the September term of court, which was duly served upon S. Staats Taylor, one of the defendants, and returned "not found" as to the defendant Parsons.

A motion was made early in the term by the defendant Taylor, for a continuance "for want of service on the co-defendant Parsons." This motion was overruled by the court, and on motion of the plaintiff, a rule was entered upon the defendant Taylor to plead to the declaration.

Thereupon the defendant Taylor filed in the suit a petition for the removal of

the suit into the Circuit court of the United States for the Southern District of Illinois, and filed therewith a bond, with good and sufficient surety, conditioned as required by law. It is now claimed by the attorneys for Taylor that the suit is no longer pending in this court; that, from the moment the clerk placed his file marks upon the petition and bond, *co instanti*, this court was ousted of its jurisdiction; that it can make no further order in the case, and has no right under the law to examine the petition and bond filed in the suit and pass upon the question as to whether they are in compliance with the act of Congress. This question, it is claimed, can be passed upon only by the Federal court. It is also claimed by the attorneys for defendant Taylor, that, even admitting the right of this court to judge as to the sufficiency of the petition and bond, the petition and bond filed in this suit are such as give the defendant Taylor the right to have the desired transfer.

The question now before the court is as to the present *status* of this suit as to the defendant Taylor.

The determination of this question necessarily requires a consideration of the provisions of the act of Congress of March 3, 1875, and a discussion as to what is the correct practice in the removal of suits thereunder, from the State Court to the circuit court of the United States.

The judicial power of the United States is conferred and limited by Article III of the Federal constitution, it extends, so far as it has application or claim of application to this case, "to controversies between citizens of different States."

The act of March 3, 1875, is not only a consolidation of all the several previous acts of Congress upon the subject of the removal of cases from the State to the Federal courts, but is an extension of the jurisdiction of the circuit courts of the United States. This act is of so recent a date, that it has not, as yet, received a fixed and settled judicial construction. So far as I am advised, the case, reported in 7 CHICAGO LEGAL NEWS, 241, of Osgood *v.* The C. D. & V. R. R. Co. et al., in which two opinions were delivered by the learned and distinguished Judge Drummond, is the only case in which this act has been judicially considered.

In that case the plaintiff filed a bill in the Will county circuit court against the railroad company, and certain other defendants to foreclose a mortgage. The court ordered an injunction and appointed receivers at the time the bill was filed. After various other proceedings in the case, the court adjourned for the term. On the 22d day of March, 1875, in vacation, petitions were filed in the suit, with the clerk of the court, by the railroad company and several other defendants, asking for the removal of the case from the State court to the circuit court of the United States for the Northern District of Illinois, under the act of Congress of the 3d of March, 1875. Bonds were filed, conditioned as required by the act of Congress. A transcript of the record of the suit in the State court, duly certified by the clerk of the State court, was filed in the circuit court of the United States, on the 24th of March. A motion was then made in the Federal court to dismiss and remand the suit on the ground that the Federal court had no jurisdiction.

In the first opinion delivered in this case, reported in 7 CHICAGO LEGAL NEWS, 241, Judge Drummond says, "the language of that section (section 5 of the act of 1875) is peculiarly significant as affecting the motion now before the court. The copy of the record has been filed in this court, and the law seems to indicate under what circumstances only, in such an event, the case would be remanded back to the State court. It is when it shall appear to the satisfaction of the Federal court, that the suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of the court, or that the parties have been improperly or collusively made, or joined, for the purpose of creating a case cognizable under the act. It is true that the act prescribes the manner in which the removal shall be made, and the directions of the law should be complied with. But the fifth section does not authorize the court to remand or dismiss the cause, for the reason that it may appear that there was any irregularity in the means taken to procure the removal. The purpose obviously was, if the record was filed in the Federal court under the law, and the court could see that it had jurisdiction of the case, it should retain it, notwithstanding there might be defects in the manner of removal."

Afterwards, upon a re-argument before Drummond and Blodgett, J. J., a second opinion was delivered by Judge Drummond, also reported in 7 CHICAGO LEGAL NEWS, 241 and 242, in which he says: "The fifth section contains provisions which are new. It is true that in practice under previous laws, when a case came into the Federal court by removal from the State court, motions could be made to dismiss and remand the cause, but their decision depended upon general principles. Now, the fifth section controls the action of the Federal court both as to the dismissal and remanding of cases. It did not intend the suit should be dismissed or remanded on account of irregularities, provided it satisfactorily appeared that the court had jurisdiction of the cause. Here the only thing to which objection is now made is as to the character of the suit and *the want of opportunity of the State court*, as a court, to act or refuse to act. There is no complaint made against the sufficiency of the bond. It may be admitted there are difficulties in any view we may take of this part of the case." * * * * * *

Here, then, in this case, there were "defects in the manner of removal," and "irregularities," but as the records and petitions filed showed a case where "it was entirely competent for the defendants to remove it to the Federal courts," and as the bonds filed were conditioned as required by the act of congress, and as the record from the State court was "certified by the clerk under the seal of the court," and was on file in the Federal court; therefore, notwithstanding the "irregularities" and "defects in the manner of removal," and notwithstanding that the State court had not acted or had opportunity to act upon the application for removal, the Federal court, being governed by the provisions of the fifth section of the act of 1875, overruled the motion to dismiss the suit. In other words, the United States Circuit court, while admitting the "defects" and "irregularities," refused to dismiss on that account, holding that under the fifth section it was only competent to dismiss for the causes specified in said section.

The Federal court having thus decided and having decided that the petition and bond were such as were required by the act of congress, had disposed of the whole matter before it.

Is it the correct practice for the State court, in applications for the removal of suits under the act of 1875, to act upon the petitions and bonds? It strikes me forcibly that it is.

Such a practice is consonant with the practice prior to the act of March 3d, 1875 This act of Congress should be construed in the light of former legislative and judicial determinations.

The act itself provides in the third section that any person "*entitled* to remove any suit. * * * who shall desire to remove such suit * * * may make and file a petition in such suit in such State court * * * for the removal of such suit * * * and shall make and file therewith a bond, with good and sufficient surety. * * * *It shall then be the duty of the State court to accept said petition and bond, and proceed no further in such suit.*" Why does the act require that the petition and bond should be filed in the State court? Why does it not require them to be filed in the Federal court and provide for a writ of *certiorari* to be issued, forthwith, to the State court?

Does not the mandate that the State court shall "accept said petition and bond" imply that the State court should take some action — make some order? How otherwise can the court "accept the petition and bond?" When is it that the court shall "proceed no further in such suit?" If we follow the natural order of the several mandates we would say, "When it has accepted the petition and bond."

Again, this act of Congress applies only to those who are "entitled to remove a suit," and even they are required to file such a petition as brings them within the purview of the act, and to "file a bond with good and sufficient surety." Suppose that some plaintiff or defendant who is *not* "entitled to remove a suit" should make an application for a removal? Is not the State court to be allowed to say that he is not entitled to the removal? Suppose a petition is filed which is clearly no petition whatever under this act? Is not the State court allowed to ascertain that fact? Suppose that in each one of the several hundred civil cases now pending in this court, one party or the other should place upon the files a petition—not sworn to—for the act does not require the petition to be sworn to—and should offer of evidence of the truth of the petition, and should file with his or her petition a bond for a merely nominal sum, and with mere straw surety for such nominal sum? In such state of the case what is the State court to do? Must it adjourn until "court in course," and wait until after the next January term of the Circuit court of the United States for the Southern District of Illinois, in order that the Federal court may come to its assistance by remanding the several causes and punishing the refractory litigants by compelling them to pay costs?

If the doctrine contended for is correct, what is there to prevent such a result? If a reasonable construction can be given to the act of Congress, and such construction does not lead to such absurdities, ought not such "reasonable construction" be the accepted construction?

The Circuit courts of this State have almost unlimited common law and chancery jurisdiction. Are the rights and interests of the litigants in these courts wholly worthless? A citizen of this State sues another citizen of this State, in the State court, on a simple contract for a money demand. What power has Congress to interfere with his suit? What authority has the Circuit court of the United States to interfere with his suit? Where is the constitutional provision giving the power to Congress? Where is the act of Congress giving jurisdiction to the Federal court? In such cases, is not the State court allowed to protect its own litigants? Is it not allowed to protect its own lawful jurisdiction, and exercise the powers given to it, and perform the duties required of it by the law of the land?

I would take the correct practice to be this: that the State court should approve of the bond, and allow the removal of the cause. Any other practice would degenerate into a farce, and hazard the rights and interests of the citizen in the hands of the unscrupulous and reckless, without any adequate remedy.

If the party applying for the transfer of the cause is entitled to it under the law, the State court will be bound to give it to him. If the State court decides erroneously, the evidence may be preserved by a bill of exceptions, and the party aggrieved may have the question passed upon by the Supreme court of the State, and finally by the Supreme court of the United States, or he may proceed more expeditiously under the seventh section of the act of 1875, by sueing out a writ of *certiorari* from Circuit court of the United States to the State court, commanding the State court to make return of the record, * * * * * and may enforce said writ according to law. If the applicant is entitled to the removal, and makes the proper application, any subsequent proceedings by the State court would be *coram non judice.*

Ample power is given to the Federal court in this act to protect the legal rights of all who are entitled to call for its assistance. And that, too, without delaying and endangering the rights of litigants whose suits are properly cognizable in the State court.

Even if we admit that the Federal court should not, under section five of the late act, remand a cause for mere "irregularities" or "defects in the manner of removal," it does not follow that this "irregular" and "defective" practice is the correct practice.

If petitions and bonds for the removal of causes are filed in term time in this court, the court will insist upon ascertaining that the applicants are "entitled to the removal" before it ceases to exercise jurisdiction. If the petition and bond are filed in vacation, and a copy of the record filed in the Federal court, it would, upon motion, if fully satisfied that the party filing the petition was not "entitled to the removal," order the case to be placed upon the docket, and proceed to trial therein as in other causes. For if it was a suit in which the applicant was not "entitled to a removal" of the cause, then the act of 1875 would have no application to the case, and the jurisdiction of the cause, under the law of the land, would have remained all the while in this court.

The second point of inquiry is this: Is this suit, as it now stands, "a controversy between citizens of different States?" Is it cognizable in the Circuit court of the United States?

As we have already stated, the plaintiff sued S. Staats Taylor and Edwin Parson, Trustees, etc., jointly on a joint contract.

It appears that the plaintiff is a citizen of the State of New York; that the defendant Taylor is a citizen of the State of Missouri, and that the defendant Parsons is a citizen of the State of New York—the plaintiff and Parsons being citizens of the same State.

The second section of the act of 1875 states when a case can be removed from the State to the Federal court. Omitting some causes for removal which can have no possible application to this case, it appears that it must be a suit of a civil nature, at law or in equity, * * * * where the matter in dispute exceeds, exclusive of costs, the sum or value of $500.00, * * * in which there shall be a controversy between citizens of different States. * * * This clause refers to a removal by either party; that is by the whole of what constitutes the one side or the other. The section then proceeds as follows: "And when in any suit mentioned in this section there shall be a controversy which is wholly between citizens of different States, and which can be fully determined as between them, then either one or more of the plaintiffs or defendants actually interested in such controversy may remove said suit in the Circuit Court of the United States for the proper district." This clause refers to the case in which the cause can be removed by one or more of the plaintiffs or defendants—less than the whole "party."

Is there in this writ a controversy wholly between citizens of different States?

The tenth section of chapter 110 of the Revised Statutes of Illinois provides, that if a summons or capias is served on one or more, but not on all of the defendants, the plaintiff *may* proceed to trial and judgment against the defendant or defendants on whom the process is served."

The same section further provides that "at any time afterwards" the plaintiff may have a new suit by "summons in the nature of *scire facias*" against the defendant not served.

And the twelfth section of the same chapter also gives to the plaintiff a separate and original action against the defendant not served in the first suit.

Thus we see that the common law rule is changed, and that under the Statute of Illinois the plaintiff *may*, at his or her election, only one of the defendants being before the court, proceed under the statute against that one alone.

In this case, the plaintiff, by resisting the motion for a continuance "for want of service on the co-defendant Parsons," and by taking a rule on the defendant Taylor to plead to the declaration, and by her election announced in open court, has, as is averred in the petition, elected to proceed to trial and final judgment against Taylor alone.

Thus, by virtue of the statute, and at the election of the plaintiff, there is now in this suit, in substance, effect and fact a controversy which is wholly between citizens of different States—between the plaintiff, a citizen of New York, and Taylor, a citizen of Missouri—a controversy which may, under the statute, proceed to trial and final judgment and be fully determined as between them without any service upon or appearance by the defendant Parsons.

The petition and bond filed in this suit will be accepted, the bond will be approved and the proper orders made for the removal of the suit to the Circuit Court of the United States for the Southern District of Illinois.

U. S. DIST. COURT, W. D. OF MO.

THE UNITED STATES *v.* SIMON ADLER et al.

INDICTMENT FOR FAILING TO DEFACE AND OBLITERATE FROM CASKS OR PACKAGES OF DISTILLED SPIRITS, AT THE TIME OF EMPTYING, MARKS, BRANDS, OR STAMPS REQUIRED BY LAW TO BE THEREON.

Judge KREKEL, after addressing the

jury at some length as to the facts of the case concluded by giving them the following written charge as to the law:

Under a statute of the United States regarding internal revenue, Adler & Furst, the defendants, have been indicted for failing to deface and obliterate from casks or packages of distilled spirits, at the time of emptying, marks, brands or stamps required by law to be thereon. The indictment, in fifty eight counts, charges this offense, varying in manner and the packages regarding which the omission occurred, so as to meet the testimony in the case. The U. S. statutes, in section 3, 324, under which the indictment has been found, provide that "every person who empties or draws off, or causes to be emptied or drawn off, any distilled spirits from a cask or package bearing any mark, brand or stamp required by law, shall at the time of emptying such cask or package, efface or obliterate said mark, stamp or brand. * * * * * Every person who fails to efface and obliterate said mark, stamp or brand at the time of emptying such cask or package, shall be deemed guilty of felony, and shall be fined, etc."

I have cited such parts of the section only as bear directly upon the issues. You will observe, in the first place, that the section begins with declaring it to be the duty of every person who empties or draws off, or causes to be emptied or drawn off, any spirits, shall, at the time of emptying such cask or package, efface and obliterate said mark, stamp or brand. The object of the provision obviously was to secure the destroying of the mark, stamp or brand at the time of emptying; and the words "shall efface and obliterate" are apt words to express that intention. The language, "at the time of emptying such cask or package," leaves no room for construction as to the time when the act of effacing and obliterating is to be done. It must be done at the time of emptying and at no other time. The object is so providing was no doubt to prevent the opportunity of defrauding the government by an improper use of the package or stamps, or both. The law, however, will not require an impossibility, and if a case was presented in which the person whose duty the law makes it to efface and obliterate, without any fault of his own, was prevented from the discharge of the duty imposed on him, the law might excuse him. Such a case, however, is not before you, for there is no evidence tending to show even, that the party upon whom the obligation to "obliterate and efface" rested was in any way interfered with or prevented from doing so. But the important inquiry is, upon whom, under the testimony before you, did the law impose the duty of cancelling and effacing? Was it upon Adler & Furst, the defendants? And if so, are they responsible for the acts of their employes? In reading the clause of the section pronouncing the penalty as a separate and distinct part of the section, countenance may be found for the construction that the penalty was denounced against the person only who did the act of emptying. A close examination of the language of the part of the section denouncing the penalty shows beyond a doubt that it refers to the duty which the section in its beginning imposes, for it provides that every person who fails to efface and obliterate SAID mark, stamp or brand at the time of emptying, etc.

As we have already seen, the provisions of the section imposing the duty to efface and obliterate is of such mark, brand or stamp only, *as are required by law* to be upon casks or packages, and hence the language in the penalty clause —SAID mark, stamp or brand. To read the penalty clause without reference to to the preceding one would leave us without any designation as to what mark, brand or stamp the law is applicable to. To read the provision providing the penalty in connection with the clause imposing the duty of effacing and obliterating such mark, brand or stamp required by law to be upon casks and packages, gives us an intelligent reading of the statute.

But it does more. The construing of the duty and penalty clause together enables us to ascertain to whom the statute applies, namely: To "every person who empties or draws off, or causes to be emptied or drawn off, any distilled spirits." Such a construction, in entire harmony with the provisions of the statute, accomplishes its evident object to hold those responsible, among others, who cause the drawing off. This leads us to the urgency under the evidence whether a person or partnership engaged in rectifying and employing persons who empty distilled spirits from casks and packages bearing marks, brands and stamps required thereon by law, can be said to cause the emptying or drawing off of such spirits. The owners, possessors and operators of a rectifying establishment engaging hands, furnishing the materials and receiving its products, may be said to cause the emptying of spirits used in their business by those in their employ. And any failure on their part to efface and obliterate marks, stamps or brands at the time of emptying casks or packages of distilled spirits on which cask or package marks, stamps or brands were required by law, or cause the same to be done, such person or persons so causing the emptying without effacing or obliterating such mark, brand or stamp is amenable to the law. The jury is instructed that if they find from the evidence that Adler & Furst were rectifiers and carrying on a rectifying establishment in the Western district of Missouri; that they emptied or caused to be emptied by their employes as explained any distilled spirits from casks or packages bearing any mark, brand or stamp required by law and failed to efface and obliterate said mark, stamp or brand at the time of emptying such cask or package, as charged in the indictment, they should find the defendants guilty, otherwise acquit. It was the duty of Adler & Furst, the defendants, to efface or obliterate the marks, brands and stamps on emptying, or cause it to be done, and the failure of their employes to do what the law imposes as a duty on them does not excuse them.

The jury then retired, and after an absence of an hour returned with a verdict of "guilty on all counts of the indictment except the first."

SUPREME COURT OF TENNESSEE.

[From the Commercial and Legal Reporter.]

W. B. Miller v. *John H. Speed et al.*

RIGHTS OF SURETIES—BILL, QUIA TIMET.—Upon bill filed by the surety upon the forthcoming bond of a decedent, who was the husband of the life-tenant of a fund, to be indemnified against probable ultimate loss of the fund, upon the ground that, by the changed condition of the property of his principal since his death, and since the complainant became his surety, he fears he will finally have to pay the amount if permitted to remain unprovided for until the termination of the life estate; *Held*, that complainant was entitled to relief against the personal representatives.

Where property is covenanted to be secured for certain purposes and in certain events, and there is danger of its being alienated or squandered, courts of equity will interpose to secure the property for original purposes; and to this end will require security to be given, or will place the property under the control of the court.

DEADERICK, J., delivered the opinion of the court.

S. D. Williams v. W. *A. Lenoir—From Loudon—Knoxville June Term*, 1875.

PLEADING—SET-OFF—STATUTE OF LIMITATIONS.—Upon a proper plea of set-off, the statute would not operate to bar the defendant's claim, nor run after the commencement of the plaintiff's suit, in cases of mutual accounts arising between the parties about the same time.

In the case of a set-off pleaded, which is in the nature of a cross-action, the plaintiff as to that plea is a defendant, and his replications in substance pleas; and he may, without leave of the court, file as many as are necessary to his proper defense.

ACCOUNT FROM ANOTHER COUNTY—COMPETENCY OF PARTIES AS WITNESSES.—The Act of Feb. 24, 1870, was not intended to affect the mode of proceeding under Sec. 3780 of the Code, as to making up an issue upon an account coming from another county, but leaves the affidavit of plaintiff as conclusive evidence unless denied by the affidavit of the defendant, and excluding all evidence in his behalf without such denial. Upon the point that the plaintiff and defendant are both incompetent witnesses, the case of Wilkhorn *v.* Gillespie, 6 Heisk., 329, is overruled, and it is held that both are competent.

DEADERICK, J., delivered the opinion of the court.

Charles A. Merrill v. *R. H. Elam and others.—From Davidson.—Nashville, April* 17, 1875.

2. GARNISHMENT—LIEN.—A garnishment bill held to give to the complainant the benefit of the lien, to secure the indebtedness of the debtor to the garnishee for unpaid purchase money for land. As to other indebtedness not so secured by lien, a judgment only should have been given against the garnishee.

2. SALE.—Frror to sell land on time and free from equity of redemption, when not asked for in the bill.

3. INTEREST.—Error to compute interest from the date of Masters' Report to the rendition of the decree, thus compounding interest upon the garnishee.

NICHOLSON, C. J., delivered the opinion of the court.

Mary J. Perkins, by her next friend, v. *P. G Stiver Perkins and others.*—Error to Chancery Court of Giles.—Decided at Nashville.

PRACTICE—FEES OF COUNSEL FOR PERSONS UNDER DISABILITY.

1. Where the client is *sui juris*, the court should, in the cause in which the services were rendered, do no more than declare the lien upon the recovery for reasonable counsel fees; leaving the attorney to enforce his claim by an appropriate proceeding against his client, unless the amount be settled by contract. But if the client is under disability, a reference may be allowed, in which case the attorney and client assume an antagonistic position; the attorney cannot in this matter represent his client, and the client should have actual notice.

LIEN—HOW SATISFIED.

2. If fees are due the solicitors, then their liens for these several fees would be upon the fund recovered by their several clients, and out of the sum realized from the sale of the debtor's land their fees should be paid. But land, until sold and the sale confirmed, still belongs to the debtor, and as such the solicitors has no lien upon it.

MCFARLAND, J., delivered the opinion of the court.—*Com. and Legal Reporter.*

LIV. NEW HAMPSHIRE.

WE are indebted to Hon. JOHN M. SHIRLEY, Official Reporter, for advance sheets of the 54th New Hampshire Reports, from which we take the following head-notes:

The plaintiffs and the defendant associated themselves together under the name of the Danbury cornet band, but not as a corporation. They adopted and subscribed certain by-laws, one of which was as follows: "If any member shall leave the band, he leaves all his interest with the band." Musical instruments for the use of the members were bought by the association, one of which was intrusted to the defendant for use. The defendant voluntarily withdrew from the association, taking with him said instrument, which he refused to surrender upon demand made for the same. *Held*, that trover for the same might be maintained by the remaining members of the association against him.—(Opinion by SMITH, J.)—*Band* v. *Bean*, p. 524.

BURDEN OF PROOF—PREPONDERANCE OF EVIDENCE—DISTINCTION BETWEEN THEM.

A sale of a chattel by the mortgagor, with the consent of the mortgagee, will convey a good title to the purchaser, even though such consent be not in writing, or, if it be so, though it be not entered or indorsed upon the mortgage or the record of the same.—(Opinion by SARGENT, C. J.)—*Roberts* v. *Crawford*, p. 532.

LIABILITY OF RAILROADS AS COMMON CARRIERS. AS WAREHOUSEMEN, AND AS DEPOSITARIES.

After the responsibility of a railroad as a common carrier has ceased, they may charge for storage of goods as warehousemen, in which case they will be liable for ordinary care in relation to the goods.—*Brown* v. *Railway*, p. 535.

But where they are acting in good faith as mere depositaries, without pay, they are only responsible for slight care, and would not be liable for an act of ordinary negligence on the part of their servant in taking care of the goods.

SUPREME COURT OF INDIANA.

[From the Indianapolis Sentinel.]

VENDOR AND PURCHASER—RIGHT OF ACTION.

3984.—Cole and wife *v.* Wright et al. Elkhart, C. C. DOWNEY, J.

Wright sued Cole and wife and William J. Church, alleging that in 1863 Cole purchased of one Benedict certain real estate, and was put in possession thereof. In 1865 Benedict demanded payment of Cole, who agreed with Wright to pay the amount for him, and that Wright should take and hold the title to the land as his security. Accordingly Wright paid Benedict and he conveyed the land to Wright. Now Wright brings this action and asks judgment for $4,000, and asks that the same be declared a lien on said real estate, and that the court will foreclose the mortgage lien against Cole and wife, and order sale, etc. Judgment for plaintiff. Without considering all the errors assigned, the court is of opinion that before Wright can sue for specific performance, and to enforce his lien, it is necessary that he shall have tendered performance on his part by offering to Cole a deed for the land, to be delivered upon payment of the purchase money, as he stands in the place of Benedict for all practical purposes. [See Sugden on Vendors, 162, 163; 35 Ind., 1.] Reversed.

CONSTITUTIONALITY OF THE ACT OF MARCH 9, 1875, ESTABLISHING A SUPERIOR COURT IN TIPPECANOE COUNTY.

5134.—Vickery *v.* Chase et. al., Tippecanoe C. C. BUSKIRK, J.

The record prcsents the question whether the act of March 9, 1875, establishing a superior court in Tippecanoe county, is constitutional.

It is claimed that the act is local and special, and hence in conflict with sections 22 and 23 of article 4 of our constitution. The act is not embraced by section 22. The act is both local and special. But in 33 Ind. 201, the validity of a special act creating the Jefferson Criminal Circuit Court was held valid, upon the ground that the constitution did not prohibit special acts creating courts of inferior jurisdiction. Besides, the legislature is the exclusive judge whether a law on any subject not enumerated in section 22 of article 4 of the constitution can be made general and applicable to the whole State. The doctrine laid down in 5 Ind. 4 was overruled in 29 Ind. 409. (See 46 Ind. 355, 33 Ind. 418.) Affirmed.

NEW TRIAL ON GROUND OF ABSENCE OF MATERIAL WITNESS—ALLEGATION OF DILIGENCE.

4228.—Nordman *v.* Stough, Greene C. C. DOWNEY, J.

This was a complaint for a new trial, to which a demurrer was sustained, which is the error assigned. The ground on which the new trial was asked was the absence of a material witness.

The following is the allegation of diligence in the complaint: "That he used due diligence to ascertain, before trial, the whereabouts of said Rudisill."

There is no case, when the allegation of due diligence is required, in which such an allegation would be sufficient. The party should state what acts of diligence he used Affirmed.

The lawyers and doctors are generally on excellent terms and very charitable as to each others mistakes, as well they may be; but there are exceptions to this as to all rules, as the following may serve to illustrate: A practicing lawyer named Stone and a Doctor Mason were rival candidates for the Senate in Tennessee, and were stumping the district together. Dr. Mason was an advocate of law reform, and, as an argument in its favor, he referred to a certain case in which his competitor had been recently non-suited on some technical point—"Now," said the Doctor, "we need law reform, or else Mr. Stone is incompetent to bring a suit correctly." Mr. Stone, in reply, said: "The Doctor has the advantage of me; for, when I make a mistake in my practice, he has only to go to the records of the court to find it and to publish it to the world; but when he makes a mistake *in his practice*, he buries it six feet under ground." If his "fellow-citizens" had a due appreciation of ready wit, Mr. Stone became a senator.—*Irish Law Times.*

CHICAGO LEGAL NEWS.

Lex vincit.

MYRA BRADWELL, Editor.

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We would ask all our subscribers, who have not already done so, to at once forward us the required two dollars and twenty cents, to renew their subscriptions and pay the postage.

We call attention to the following opinions, reported at length in this issue:

Chicago—Re-organization of Police Force.—The opinion of the Supreme Court of this State, by McAllister, J., upon the re-organization of the police force of this city. The court holds, assuming the validity of the new organization of the city under the general act of 1872, could not in any respect be drawn in question in this suit; that the common council had the power under the act of 1872 to pass the ordinance re-organizing the police force of the city of Chicago; that such power is legislative and discretionary, and that the Court of Chancery has no jurisdiction to interfere with the exercise of such power.

Removal of Cases to Federal Court.—The opinion of the Circuit Court of Alexander county, by Baker, J., construing the recent act of Congress, relating to the removal of causes from the State to the Federal courts and holding that it is the duty of the State court, in applications for the removal of causes under the act of 1875, to act upon the petition and bond, and if the State court can satisfy itself that the applicant is not entitled to the removal, it should proceed with the case that where the plaintiff was a citizen of New York, one of the defendants a citizen of Missouri, and the other of New York, and the Missouri defendant only appeared; that on his petition he was entitled to have the case removed to the Federal court. Although the opinion in this case is not of a court of last resort, on account of the importance of the questions involved, and the absence of any direct authority, we give it entire.

Indictment for not Defacing Marks, etc., from Casks.—The charge of the United States District Court for the Western District of Missouri, by Krekel, J., upon an indictment for failing to deface and obliterate from casks or packages of distilled spirits, at the time of emptying, marks, brands, or stamps, required by law to be thereon.

Cook County Judges.—We see it stated in some of the daily press of the city, that the friends of Judge McAllister are urging him as a candidate for Judge Gary's place. This is a mistake. The judge's friends are urging his claims to be elected Circuit Judge in place of Judge Tree, resigned. We understand Judge McAllister would be willing to accept this position should it be tendered him by the people. As judge of the Recorder's Court he distinguished himself, and was the terror of evil doers. The criminal portion of the community feared his judicial power so much that they threatened to take his life. Judge McAllister at the bar or on the bench has always been recognized by his professional brethren as a man of great ability and power. His opinions on the Supreme bench have been able and always vigorous. While the profession at large would suffer a loss in his retirement from the Supreme Court, the bar of this city would be greatly benefited in securing the services of such an able and experienced judicial officer upon the bench of the Circuit Court.

NOTES TO RECENT CASES.

TROVER—CONVERSION—BROKER.

The first eleven pages of the *London Law Times'* reports for September 18, are occupied by the opinions delivered in the House of Lords. In Hollins *v.* Fowler it was held that any person who, however innocently, obtains possession of the goods of a person who has been fraudlently deprived of them, and disposes of those goods for his own benefit, or for that of another person, is guilty of a conversion. In this case the appellants purchased some cotton from B; in so purchasing they intended to act as brokers, and to resell the cotton to any of their clients whom it might suit, charging only a commission; but they had no immediate principal at the time of the purchase. They afterwards sold it to M. B had obtained the cotton by a fraud from the respondents, but the appellants were not aware of this. In an action of trover brought by the respondets against the appellants, to recover the value of the cotton, the jury found that it was bought by the defendants in the course of their business, and that they dealt with it only as agents to their principals. The House of Lords held, affirming the judgment below, that the defendants were guilty of a conversion.

LANDLORD AND TENANT — DISTRESS FOR RENT—DISTRESS WITHOUT SALE.

The English Court of Exchequer, in Lehaine *v.* Philpot, 33 L. T. Reps., N. S., 98, held, where a landlord who elects to enforce his remedy by distress against his tenant in arrear with his rent, cannot, so long as he detains the distress without sale, maintain an action against the tenant for the same rent, even although the goods distrained are not of sufficient value to satisfy the amount of rent distrained for.

ADMIRALTY — COLLISION—FAILURE TO RENDER ASSISTANCE.

The English Court of Admiralty held, in the *Adriatic*, 33 L. T. Reps., N. S., 102, that a ship failing to render assistance to another with which she had been in collision, and showing no reasonable cause for such failure, will be held to blame for the collision, unless proof be given to the contrary on her behalf.

ACTION FOR DEATH OF INFANT—CARLISLE TABLES.

The Supreme Court of Iowa in Walter's administrator *v.* the C. I. & P. Railway Co., (9 W. Jurist, 535.) *Held*, That in an action by an administrator to recover damages for the death of an infant, it is proper to prove his expectancy of life by the Carlisle tables.

BANKRUPTCY—BOOKS OF ACCOUNT.

The United States District Court for the District of Massachusetts, *in re* Reed, 12 N. B. R., 390, held that a retail dealer in groceries, who keeps no invoice books but keeps all his invoice bills carefully together, so that a comple account of all the goods received by him can be made out from them; the other customary books being also kept, keeps proper books of account, that the qustion of book-keeping is a question of fact in each case.

BANKRUPTCY—JURISDICTION OF STATE COURT.

The Court of Appeals of Maryland, in Jourdan, assignee, *v.* Downey, 12, N.B. R., 427, held that a State court may entertain an action by an assignee to recover money received by a creditor as a preference; that if money is brought into a State court under a *fi fa.*, the assignee may intervene and claim the fund on the ground that the levy is void under the bankrupt law.

SUNDAY CONTRACTS.

The Supreme Court of Arkansas, in Tucker, admr., *v.* West et al., reported in a recent issue of the *Central Law Journal*, hold that contracts founded on an act prohibited by statute, under a penalty, are void. That contracts made on Sunday are not, by the common law, void. That a note executed on Sunday for property previously sold is illegal and invalid under the Sabbath Act; but such a note may be ratified by a subsequent promise to pay it made on a working-day.

Lectures on Law.—Among the books purchased by Mr. Rosenthal for the Law Institute, during his recent visit east, are three volumes of law lectures, entitled Wilson's Works. They consist of lectures on law delivered by James Wilson, one of the associate justices of the Supreme Court of the United States and professor of law in the college of Philadelphia. The style is pleasing, and they could be read with profit by attorneys as well as by law students. It is a fact worthy of note that although these lectures on law were delivered nearly ninety years ago, they are addressed: "Ladies and gentlemen." We were pleased and entertained by their hasty perusual.

Law Books in Preparation.—Baker, Voorhis & Co. announce as in preparation by Thomas W. Waterman, author of Waterman on Trespass, etc., a Treatise on Corporations, to cover the entire law on that subject; also Waterman's United States Criminal Digest, which we are told, is to be a complete compendium of the American criminal law. We are among those who believe that Mr. Waterman is one of the honest legal authors, but at the same time we feel it to be our duty to caution him against multiplying his works too fast. One man can do only about so much work in a given time. We hope Mr. Waterman will not, by hastenin the appearance of these works, injure hi present good reputation.

Briefs and Abstracts.—We would call the attention of aitorneys to the fact that we have the largest fonts of small pica type, and are working the greatest number of compositors on briefs and abstracts of any office in the city, and are therefore able to complete such work without the least possible delay. We employ none but the best of compositors, and have the most experienced proof readers, which ensures accurate and tasty briefs.

Bankruptcy Blanks.—We call attention to our list of red line bankruptcy blanks, revised in accordance with the provisions of the Revised Statutes of the United States and the amendments thereto. These blanks are good for any State in the Union. Send for a sample blank.

Obituary.

HON WILLIAM H. UNDERWOOD.

The Honorable William H. Underwood, one of the most experienced and able lawyers of the Illinois bar, died at his residence in Belleville, on Thursday, the 23d ultimo. The fatal disease was paralysis, brought on, no doubt, by overwork. The first attack came on the 3d of May last, and though at times he seemed much improved, it rendered him almost helpless from that day until his death.

No member of the bar in Southern Illinois could have been taken away whose death we should have mourned more than Judge Underwood's. He was one of the best friends The Legal News ever had. When our enterprise was an experiment he came forward with his powerful influence and aided and supported us. He has been, from the commencement of The Legal News up to the time of his last illness, a frequent contributor to its columns. His suggestions have often been valuable to us. In his death the State has lost one of its best and most gifted citizens, the bar one of its wisest and purest counselors, his family one of the kindest of husbands and fathers. He was a firm advocate of the eqality of man and woman before the law. The distinguished services rendered to the State in his published works, in his various public offices, as well as at the bar, make it not only proper, but a pleasing duty, for us to surrender so much of our space to the proceedings of the St. Clair County bar, in respect to his memory, whose members knew him best and appreciated him most.

PROCEEDINGS OF THE ST. CLAIR COUNTY BAR.

The members of the St. Clair County bar met, pursuant to call at the courthouse in Belleville, on Friday, September the 24th, at 12 M., Hon, G. Koerner in the chair, Hon. John Hinchcliffe was appointed secretary. The president, Gov. Koerner, stated the objects of the meeting, with much feeling, as follows:

REMARKS BY GOVERNOR KOERNER.

Gentlemen of the Bar: We have met here for the purpose of signifying in a suitable way the great regret that we all feel at the loss of one of the most distinguished members of our Bar, and to present our sentiments in the form of resolutions to be presented to the Court.

I will say, having been called to preside over this meeting, that I certainly had no expectations that it would ever fall to my lot to preside over a meeting commemorating the merits of our deceased friend. In the course of nature he ought to have survived me. Until a very short time ago, he gave promise of a long life. His constitution was an excellent one, his habits were temperate and there was nothing at all to prepare us for such a loss as we have now suffered.

I have known Judge Underwood for the last thirty-five years. I believe I heard the first speech he ever made in the Court House, and it so happened that I heard his last. I have been, as a member of the bar, connected with him intimately for all that time with the exception of a comparatively short period when I was absent from the country. It may be interesting, perhaps, to some of you if I embrace this opportunity of giving you a very brief statement of his career, since I believe I am perhaps the only one amongst you who is able to do so with some degree of accuracy.

If I mistake not Judge Underwood came here as early as the early part of 1840. As far as I knew then, and as far as I know now, he had no relatives or friends in this country or in the State of Illinois. How his attention was directed to the particular place where he finally settled I have never learned; it may have been merely accidental. At the time he came here there were only a few lawyers here—in fact there were only

four who were actively engaged in business, snd they constituted but two firms. Governor Reynolds had formed a partnership with Lyman Trumbull, and Mr. Shields, afterwards General Shields, had formed a partnership with me. Shields, Trumbull and myself were comparatively young lawyers, Mr. Trumbull being of about the same age as Judge Underwood. There was then an opening, and Judge Underwood concluded to stay here although there was otherwise no particular inducement for him as far as I could discover. He, about that time, Judge Trumbull having been appointed Secretary of State, early in 1841, then formed a partnership with Governor Reynolds, and commenced the practice of law. I had noticed him only in one or two cases before justices of the peace, but I found that he was always in his office—that he was constantly reading law, that when appearing even before a justice, he had studied his case admirably well and was prepared even at that time to bear out his statements by a reference to authorities, and upon the whole I concluded that Judge Underwood would make after a while a safe and good lawyer. While holding this opinion, I received a letter from the Hon. Adam W. Snyder, who had been a member of Congress, and was then a senator representing the counties of Madison, St. Clair and Monroe in the legislature—the leader, I might say, of the then democratic party in the State—in which he informed me that an election would take place for State's attorney in our circuit, then comprising about twelve or thirteen counties, that the candidates that had already applied were not men that were really very fit for the office, and that inasmuch as St. Clair county had not had the office of State's attorney for a number of years, it was desirable that some one from St. Clair county should be appointed. The mode of appointment then was by the legislature, but the members from each circuit met together and made the nomination which was merely indorsed afterwards by the legislature in open session. He suggested that some one from St. Clair county should become a candidate. He desired me to do so, but I declined. But at the same time I suggested to him William H. Underwood, of whom Mr. Snyder at that time knew but very little. Mr. Snyder acted upon my suggestion, and I believe Judge Underwood, without having known a word about it, received the appointment very much to his surprise. He entered his office with a great deal of zeal, and it was one which required at that time a considerable sacrifice of comfort, because it was expected that the State's attorney would go to all those counties, a great many of which were very small, hardly accessible, and the fact was that some of his predecessors had only attended some of the larger counties and let the business go as it might in the other counties, relying upon the special appointment of State's attorneys by the court. But Judge Underwood had a different view of his office. He attended to it at all places and at all times. I am not aware that he was absent at any one time, and as long as he was in the office—being re-elected in the session of 1842-3—he performed its duties with the greatest industry and application, and I may say also, with a good deal of success. This made him known all over the circuit, and his business on tne circuit, being always in attendance and there being a great many counties where there were but few, and some where there were no lawyers at all, after a while increased. Of course he improved the opportunity, and from that time on he became a leading lawyer on the circuit. He then was made a Judge of our circuit court, which office he filled also to the great satisfaction of the bar, and in which he showed the same application and talent which he had done before while he was practicing at the bar. I am not aware that at any one time he was absent from the bench.

After that time his career is known to nearly all of you; and I may say here that certainly in many respects he may be placed before the members of the bar as a model. I do not think that I have ever known any lawyer who was his superior in application, industry and fidelity to his causes. With him it was immaterial whether the case involved a large or a small amount, whether it involved a legal question of great or small interest, he treated all his cases and all his clients alike; that is to say he always did his very best in every case. I am sure that you will agree with me that I am not exaggerating his merits in that respect.

And not only did he practice law extensively and unceasingly, I might say, but he devoted some of his time, and I suppose a great deal of it in later years, to the instruction of the profession. The annotations which he made to our revised statutes have proved and will prove hereafter of immense benefit to the profession. And no one, let me tell you, gentlemen, who has not himself tried his hand at this kind of work is able to appreciate the immense industry, application and ability which is required for it. I have no doubt that the sickness which finally carried him off was induced to a very great extent by this additional labor which he took upon himself, not, as I understand, for the purpose of making it lucrative, but rather that the profession should have the benefit of his long years of industry and application in collecting all the authorities with which he has, I might say, illustrated our statutes, and noting their relations to one another, and to former laws. In this respect, the bar is under very great obligations to him. It is not a work that is very attractive, it requires a strong resolution to go through with it. There is, as a general thing, no very great reputation connected with it, for the very reason that but very few people know how difficult the task is. Those who do know it will appreciate it very highly.

There is one other thing remarkable in Judge Underwood's career: While he was devoting apparently all his time to the law, he took a great interest in politics. It is usually said, it has almost become a maxim, that it is destructive to a lawyer's professional success to connect himself with politics. Like a great many other maxims which we make use of almost every day, or which we see made use of by others, it is not quite true; it is a one-sided view. We all know that some of our greatest statesmen were excellent lawyers; need I mention more names than those of Webster, of Clay, of Chase or Trumbull? Judge Underwood was well versed in the political affairs of the country, always kept his eyes open to what was going on, and as we all know, he himself was a member of the legislature, I think probably twice, and he was ten years a member of the senate of our own State, and lastly a member of the Constitutional Convention of 1870, and when you saw him at Springfield you would not imagine he was thinking of law, because he was always in his place, the first man there and the last man to leave. I do not think that he was ever absent except, perhaps, in cases of illness, and I am not aware that he was much afflicted with sickness; always there, always attending his committees—in fact it was almost incomprehensible how he could unite the pursuits of legislator and of a lawyer in such a remarkable way as he did, and yet none of his clients had ever any reason to complain. Now, it is very true that there are a great many lawyers who spoil their prospects by being politicians, but those are politicians of a lower grade. A man who thinks only about offices and how to arrange for the success of himself and his friends; who knows how to organize primary meetings and to lead conventions, and who is, in one word, one of those successful managers who sometimes get to be called statesmen—such a man will always be a poor lawyer as a matter of course. No one can be a good and distinguished lawyer without being a man of high aspirations, a man of large views, who despises those tricks which to be sure frequently produce success for a short time. Now it may be true that politicians of the kind just mentioned, will not succeed in the profession, but men that are real statesmen, men who care little about the political success of themselves or their friends, but only for the good of their country, may at the same time be shining lights in the higher walks of the profession and secure themselves great reputation at the bar of the country.

I think, then, that as respects industry, application, zeal, legal talent, concentration of mind to the profession which he had embraced, and, above all, as regards fidelity to the cause of his clients, our deceased brother may well be pointed out as a model, and it may be said that the loss which we as members of the bar have sustained in his death, is very great, while at the same time the community at large is bereft of a highly useful citizen. It is therefore eminently fit that we should assemble in order to bear public testimony to the great merits of the departed.

On motion of S. M. Kase, a committee of five was appointed by the chair to draft suitable resolutions expressive of the sentiments of the bar; and to present them to the Circuit Court upon its convening on the following morning, The chairman announced S. M. Kase, John B. Hay, Jehu Baker, T. J. Krafft and M. W. Weir. Upon motion of T. J. Krafft the chairman of the meeting was added to the committee. The meeting then adjourned *sine die*.

At the opening of the circuit court, on Saturday morning, Hon. W. H. SNYDER presiding, the Hon. JEHU BAKER, of the committee of the bar, arose and addressed the court as follows:

REMARKS OF HON. JEHU BAKER.

May it please the court: The committee which was appointed yesterday has taken into consideration the subject-matter submitted to its charge, and has agreed upon and directed me to report to the court the following series of resolutions:

Resolutions adopted by the members of the St. Clair County Bar, on the occasion of the death of HON. WILLIAM H. UNDERWOOD.

1st. *Be it resolved:* That it is with pain and sorrow that we learn that Hon. Wm. H. Underwood has departed this life.

2d. That we feel that a sad breach has been made in our number by the loss of one who not only filled so large a place at the Belleville Bar, but whose professional standing was eminent throughout the State of Illinois.

3d. That in his editorial labors, in connection with the jurisprudence of our State, the deceased has left a monument of industry and talent which will entitle him to the lasting gratitude of the profession.

4th. That in view of his long residence in our community, his prominent connection with our bar, and the various stations he has filled, we recognize in the deceased an honest man, a very able, devoted, and learned lawyer, an upright judge, and a patriotic statesman.

5th. That we heartily tender our sympathy and condolence to his afflicted family; and that the secretary of this meeting be directed to transmit a copy of these resolutions to his bereaved widow.

6th. That the court be requested to direct the clerk to place these resolutions upon the records of this court, as a permanent testimonial; and that the court be further requested to adjourn, in honor of the deceased, until Monday morning the 27th inst.

7th. That as a further token of regard for the deceased, the members of the bar will, in a body, attend his funeral obsequies.

I am further requested by members of the committee to add some remarks in connection with the presentation of these resolutions. This is a duty from which I cannot shrink, but I confess that I find it one of much difficulty. There is probably no subject upon which it is more difficult to speak with real propriety than upon one of an obituary character. The reason is that on the one hand, the common, stereotyped routine of remark is comparatively tame and meaningless; whilst on the other, to grasp the individual subject aright is a task of extreme difficulty and delicacy.

There are three main topics of thought to which the mind is naturally drawn upon such an occasion; the first relating particularly to the deceased, his character, his career; the second relating to the general consideration of death, its mystery, its significance; the third relating to the influence which such bereavements may rationally have upon the living. I will make a few remarks upon each of these topics.

About 1839 or '40, I think—which would be thirty-five or thirty-six years ago, Mr. Underwood was a young man of about twenty-one or twenty-two years of age. He then came from the State of New York to Illinois, which was at that time for the most part a wild and unsettled country. The prospects of life was open before him in the vast west. He settled in our town, where he has since resided. The change that has taken place within these thirty-five years is one of the most marked which has taken place in any population upon the face of the earth within a like time. Belleville at that time probably contained not more than five hundred or one thousand people—I cannot be accurate as to numbers; our forests were comparatively unbroken; our prairies wide and thinly settled, and there was a charm, which Mr. Underwood, in common with many other immigrants to the west, felt in penetrating into this comparatively new country, with a view of pursuing his profession, building up his fortune, and achieving a success in life. He acheived that success. Probably there is no lawyer in the State of Illinois, all things considered, who practiced his profession more successfully than Judge Underwood. Certainly, no lawyer was more devoted to his profession. And here I will remark, that so very great was the industry of Judge Underwood, that it had the illusive effect of putting into comparative obscurity his really powerful talent. I regard Judge Underwood's native talent as having been decidedly superior. It is clear to me that industry can never achieve such a success in the law, such a knowledge of the Anglo-American judiciary system, such an eminent professional career, unaided by superior native ability. In view of the resolutions reported, which are a high testimonial of the talent, the moral worth, and the prominent professional standing of our deceased brother, I need say no more in the way of personal characterization.

Time passes and man changes. A few years remove a generation of men from the stage of life. When they enter upon it, they experience that feeling which has been so often noticed by the poets, and which has such a deep significance in connection with the problem of life. The young man sees promise in every venture, and success along every line of effort. His imagination explores the future, and busies itself in constructing forms of realization which are destined, for the most part, never to be realized in fact. A great poet has very beautifully described this morning phase of life:

"There was a time when meadow, grove and stream,
The earth, and every common sight,
To me did seem
Apparel'd in celestial light,
The glory and the freshness of a dream."

This is the time when the earth appears greener, the air purer—when the clouds appear to float in a higher heaven—and when the heart is wont to leap, like the startled hare, in anticipation of its objects of desire. As men pass from youth to age, this enchantment gradually disappears, and the whole external world seems to change. They realize that there is much illusion mixed up in their lives, and that nature has two tales to tell—one to the young and another to the old—the one inspiring the heart with confidence in every object of desire in life, the other chilling it with the prospect of "the valley of the shadow of death." As life still proceeds—as its battle and its struggle still continue, men more and more become sensible that their knoweldge is ignorance, that their wisdom is folly, that their strength is weakness, that their days "are few and full of evil," and that there is no boast in that little and obscure kingdom of the grave with whose honors they hasten to be crowned.

Meantime nature moves on in perennial strength. The flowing river mocks the shortness of human life—ever murmuring as it seeks the sea, "man comes and goes, but I go on forever." The seasons return and the stars rise and set as they did before man had a place upon earth. The brightness of yesterday morning reminded me of what I have often observed—the joyous freshness with which the new day rises upon the corpses of dead men. Even art, the creation of man, is far stronger than he to resist the tooth of time. I have, suspended over my office table, the identical eagle with the national motto, under which in the old court house Judge Breese presided, and A. P. Field, Lyman Trumbull, Gustavus Koerner, Wm. H. Underwood, Joseph Gillespie, Adam W. Snyder, John Reynolds, Wm. C. Kinney, J. L. D. Morrison, Nathaniel Niles, James Shields, and others, practiced law in years far agone. Its colors are well nigh as fresh as when it received the finishing touch from the hand of the pioneer artist; but

what inroads time has made upon that group of talented and strong men!

But nature is so full of illusions and surprises, and she works by such secret means to such secret ends, that, viewed as a purely rational question, it may be, after all, that man's apparent weakness and transitoriness is itself only an illusion. However great a mystery death may be, it is perhaps not quite entirely a mystery. Some tracing of light may be discerned upon the rim of the cloud. There is something in human nature which prompts men to feel—as another great poet has finely expressed the thought, that "The awful shadow of some unseen Power floats, though unseen, among us." There is something which prompts the sorrowing heart to bind wreaths of the *immortelle* around the crumbling column—in dim metaphorical expression of a hope that reaches across the night of death. There is something which has placed stony fingers pointing upward in the cemeteries of the world; something which has encircled the earth with altars of worship, and temple spires piercing the heavens. Looked at philosophically, these, reinforced by very many kindred phenomena, may be taken as evidence of some vague sense of the soul, connecting it veraciously with a fundamental fact of its being—somewhat, though not entirely—as the murmur of the shell is a reminiscence of the deep and vast ocean by whose forces it was formed.

Finally, death is a wonderful teacher of charity; from which we see that nature knows how to extract the divinest use from her ugliest fact. In the presence of death, the rudest heart feels the influence of a chastening spell. When we walk among the graves of the dead, we perceive that the inscribed slab, the etched head-stone, the carved column, are cold and white and still; but they are not more silent than the mouldering forms that sleep beneath. We contrast this utter silence with the loud rush of life, its angry collisions, its sharp and bitter rivalries; and, touched by this mute teaching, we feel that our lives are foreshortened and unworthy. The lesson of charity so taught by death—if appropriated as it should be—would not only add to the dignity, the beauty, the grace and the happiness of life, but it would also contribute greatly to increase its efficient force. And thus it is that death—to which all are doomed—continually aspires to purify and elevate the life of the living.

REMARKS BY JUDGE W. H. SNYDER.

There is no task, in the whole course of life, more delicate, than the attempt to offer a proper tribute on occasions like this, to the memory of the lamented dead. An attempt, I may justly and emphatically term it, for who can presume, I care not how gifted he may be, to perform it? And I have many times painfully felt the utter inadequacy of language to express one's feelings upon such an occasion, and to give utterance to our appreciation of the many excellent and noble qualities which have been made manifest by an intimate acquaintance of many years.

Having passed my fiftieth year, and reached the period when those with whom I have been long and most intimately associated, are rapidly passing from life to death, I have come to think more and more upon life, its mysteries, its surroundings—the conditions and the laws that hem it on every side.

These occasions teach us grave lessons. One is the transitoriness—the utter nothingness in results, I may say, of this fearful struggle for existence, we call life. One great trouble with us all is our egotism, our high opinion of ourselves and our species. We arrogate to ourselves that all the earth. almost the whole universe, has been created for our exclusive use. Instead of seeing man as he really is, the crowning work of animated nature, we look upon him as constituting a superior, almost separate order in nature. It is calculated to dissipate our pride very considerable to guage man by the laws of nature. When we measure him by the inexorable conditions that constantly stare us in the face, we find that he, though so superior and possessed of such marvelous powers, as to startle the candid student of nature, upon a little observation and reflection, he is found to be only the highest of a long gradation of animate and inanimate organisms—I say it greatly dissipates man's arrogance when he learns that the same rigid, unbending, remorseless law governs him which rules the lowest and the most contemptible of animated beings, and even vegetable existences. To arrest a certain amount of force, to organize it into a material existence, to continue that existence for a brief time to have that force suddenly pass away from the particles of matter it animates and holds together, and the elements composing the organism quickly remanded back to their respective places in nature, is his course. No amount of exertion on his part will prevent this inexorable destiny. And the smallest worm, the crudest bactria, the lowest of animated creation, goes through precisely the same process, and there is as little of man when he is dead, and his body has been remanded to its original elements, as there is of the least important of animated nature or the coarsest and the most valueless blade of grass when life has passed from them. For the "laws of nature," as is well said by a great intellect, "are without morals and without heart." They crush alike the high and the low, the good and the bad. No amount of agony and supplication can turn them from their course; they ruthlessly snap the heart-strings and cruelly rend the dearest ties.

When we thus reflect, we come to understand that in view of the task before us, our lives should be so ordered as so elicit the best results from what surrounds us, instead of being allured by anticipations of bliss or alarmed and driven by fear of punishment; instead of being treated like children and scared into what is good, it is our duty to go back to the noble doctrine of the Stoics—the noblest ever announced—that virtue should be loved for its own sake, and practiced for no other consideration or expectation than its own unaided reward. Let us commend to ourselves the lesson of the woman who marched at the head of the last crusade of St. Louis, carrying a pitcher of water in one hand, and a pot of fire in the other, saying: "With this I will burn all sin, and with that I will extinguish hell, so that there may be no inducement and no fear to drive me to doing good."

Another lesson is taught us by the departure from this earth of our honored and esteemed brother, and that is, that we hasten too much through this world. We are brought by such events—calamities, I might call them—to look more closely at our people and see what a feverish life they lead, to see the mass of the American people hurrying and jostling one another as though all were in a race, and each were striving to reach the goal first in order to clutch some great prize. We work and fret our lives away. We draw inordinately upon our mental and physical resources, in a manner that should prevent us from reproaching the dissipated man, who, with his eyes wide open to the consequences, destroys himself. Ours is another, but not much better kind of intemperance. Let us remember that in proportion as we inordinately draw upon our resources, as we hurry, as we tax our powers beyond what they are capable of bearing, in so much do we shorten our days, and render what are left to us miserable until we reach the condition that doing our duty in this world is impossible, or becomes exceedingly imperfect and irksome.

The great German intellect, which stands to-day, deservedly, at the head of all, in profundity, in grasp and in range of thought, owes the marvelous progress it has made to the deliberation with which its people have prosecuted their studies and investigations, though it has been jeeringly termed, and is in fact, habitually spoken of as phlegmatic.

It is to be regretted that the American people have not a little more phlegm, and consequently, more deliberation in their composition. The progress of the German nation, intellectually, has been with all their phlegm and patient deliberation, wonderfully rapid. It is less than two centuries since the German intellect began to claim a place with other nations of Europe, and it now stands in its confessedly commanding and illustrious position. This position a great people has reached by observing the precept of their grandest genius, the immortal Goethe:

> "Oh, let your course be like the star,
> Though unhasting, yet unresting."

It is not necessary that man should stand still. He may, by husbanding his power, labor almost constantly, if he will but labor with discretion and proper deliberation, and simply up to a fair adequacy of his resources.

In saying thus much, I cast no reproach upon our departed friend. He has, by his immense and constant labor drawn upon his life, in such manner as to have passed away perhaps fifteen or twenty years before his time. We have no right to cast blame upon him, for many of us are given to the same manner of disposing of our time. He has engaged in the feverish race, which we all are running, and in which, impelled by our surrounding, it is perhaps impossible to avoid taking part. The time may come when this shall not be.

Perhaps we are passing through a phase to which this feverishness belongs. The vast resources of our country, the splendid opportunities of acquiring fortune and distinction are too great an inducement to permit us to bear ourselves in our professional and business pursuits with moderation. The allurements are too great. We are called upon too irresistibly by our struggling fellows to refuse to follow. It may be, I say, that we are passing through a phase of our existence as a people. I sincerely hope we are, otherwise this feverish, hurrying life will wear us out, not only individually but nationally, and in a few years this great and brilliant nation will have burned out and passed away like a meteor.

The profession of which our friend was an illustrious member, has, as its history has shown, tended to produce the highest state of practical morals. Its members have been notable for their probity, their integrity, their high sense of honor, and their jealous guarding of human rights. The science of jurisprudence is the only system that practically applies moral dealings and right, just and honorable conduct to the every-day affairs of life. Its history shows, notwithstanding the vulgar opinion entertained by ignorant minds, that to belong to the legal profession is naturally to be tricky and dishonest, that as a body the legal profession has ever manifested a high state of morals, a pure integrity and the highest sense of justice and of right of any body of men in all time. From the foundation of the Republic down to the dissolution of the Empire, through a period of a thousand years, we but rarely hear even the least reproach cast upon the Roman Praetor, and we need but mention, to commend them in the highest terms, the Mutius Scævolas, the Papinians and the Ulpians, her great and splendid lawyers. Turning to England, from whom we have drawn our law and our legal inspiration, we find that from the Heptarchy to the present time, throughout her whole history, with the exception of a Scroggs and a Jeffries and a very few other excerable names, her judiciary has been one of illustrious integrity, and her judges have been drawn from her lawyers, of whom they were, and who by them were but fairly represented.

We shall soon finish the hundredth year of our national existence. From a small and insignificant beginning we have grown to be a mighty Republic, the greatest marvel as a nation that this world has seen since the time of the Romans. As we have grown great we have become rich, and, not escaping the fate of the nations which have gone before us, corruption stalks in our midst. But, though its taint is manifest almost everywhere, and though it has possessed itself of many high places, we can proudly say that our Judiciary, National and State, and our Bar, have remained wonderfully pure and honest; and, while immorality and crime have been rife in the land, and even though another great profession has incurred just reproach, and some of its members have humiliated us in the eyes of the nations, it is our boast that fewer of the legal fraternity have been charged with crime than those of any other occupation, in proportion to numbers.

I will conclude by saying that our departed brother was as bright, as honorable, as upright, as any member of our profession throughout the land. He honored his profession. It would be compliment enough to him, or to any man, to say that he had not dishonored it.

I will with melancholy pleasure—it being the last mark of respect that can here in the place illustrated by his labors and success, be paid to the dead—order the resolutions just presented to be spread upon the records, and this court will now adjourn until Monday morning, at nine o'clock.

SUPREME COURT OF ILLINOIS.

ABSTRACTS OF OPINIONS FILED AT SPRINGFIELD, IN JUNE, 1875.

[Continued from page 4.]

183.—George L. Horn *v.* Martha Smith.—Appeal from Coles.—Opinion by WALKER, Ch. J.

DEGREE OF EVIDENCE REQUIRED UNDER THE LIQUOR LAW IN A PROSECUTION BY A WIFE FOR FURNISHING LIQUOR TO HER HUSBAND—CIRCUMSTANTIAL PROOF.

Held, That in a prosecution under the liquor law, it is not required that the evidence shall be clear, positive and specific, as to the time place, manner and each item of loss, to authorize the jury to find injury to the means of support of the family, but that fact may be proved, like any other, by circumstances.

184.—Toledo, Wabash and Western Railroad Company *v.* Patrick Donahue.—Appeal from Morgan.—Opinion per CURIAM.

KILLING STOCK ON TRACK—ERRONEOUS INSTRUCTION.

STATEMENT.—This instruction was given in the case: "The court further instructs the jury for the plaintiff, that, if they believe from the evidence in this case, that the public road spoken of by the witnesses is 33 feet wide, the law makes it incumbent upon the defendant to fence said railroad up to the line of said county road, as near as reasonably may be. And if the jury believe from the evidence in this case that the striking and injury of said mare of plaintiff's was at any other place on said railroad than upon the public highway as laid out and established, and not in a town, city, or village, and within five miles of a settlement, and that said railroad had been open for more than six months, the defendant would be liable to the plaintiff, if the jury should believe that the defendants' locomotive or servants, caused the injury complained of, in such a sum as the evidence shows plaintiff sustained, if any has been proven"—the ground of complaint being the insufficiency of the cattle-guard and fence adjoining.

Held, that the instruction was erroneous in declaring the liability of the defendant for the mere killing of the animal, under the circumstances therein mentioned, without reference to the sufficiency of the cattle-guard and fence, or other default of defendant.

186.—Francis G. Lombard *v.* Francis Johnson et al.—Appeal from Morgan.—Opinion by CRAIG, J.

MECHANIC'S LIEN—PROPER PARTIES—RULES GOVERNING—COPY OF CONTRACT IN EVIDENCE—PROPER AUTHENTICATION THEREOF.

STATEMENT.—There was a written contract between Lombard and Johnson for building a house for Lombard. Johnson at the time had a partner who joined in enforcing the lien. It was contended that the written contract was not admissible in evidence, because signed by only one of the parties sueing as complainants. *Held*,

1. That the contract, being made for the benefit of both the partners, though signed by one alone, was admissible in evidence. A proceeding to enforce a mechanic's lien is similar to a suit in chancery, and is governed by the same rules. And as to parties, therefore, all persons interested should be brought in as plaintiffs or defendants.

2. There is no rule of law requiring one who transcribes a copy of a written instrument to be produced as a witness, before the copy can be read as evidence, where the party himself can testify that it is a true copy.

187.—Ezekiel N. Palmer *v.* Thomas Gardner et al.—Appeal from DeWitt.—Opinion by WALKER, Ch. J.

SUIT BY PAYEE OF AN INDORSED PROMISSORY NOTE—PRESUMPTION FROM POSSESSION—RULES GOVERNING APPEALS IN SUPREME COURT—IMPEACHMENT OF A WILL.

STATEMENT.—Bill to enjoin the collection of two judgments, one in the DeWitt Circuit Court, the other in the Supreme Court, for damages on dismissal of an appeal. As to the first judgment, the

grounds for injunction were: That suit was brought by the payee, although he had indorsed the note in blank, and that suit was brought on the note, one day after due, without allowing days of grace. *Held*,

1. That the possession of a note by a payee is *prima facie* evidence of ownership. And where the note has been indorsed in blank, the pre umption is that it has been negotiated but again taken up by the payee—the ownership legal and equitable, returning to him thereon, so that he could maintain an action in his own name.

2. Where a note is entitled to days of grace, which are not allowed before suit, the objection must be pleaded in abatement and not in bar.

As to the judgment in the Supreme Court, *held*,

1. That it is the duty of an appellant to file a transcript of the record in the case, by the close of the second day of term, or procure an order of the court extending the time. Failing in this, an appellant loses all right to further prosecute his appeal, nor can the court give him that right.

2. If the record is lost, his course is to apply for leave to supply the loss, which would be granted, and, if necessary, a continuance to enable him to supply. But failing in this, he is in default.

3. It is not the duty of a defendant in error to enter his appearance. And, in case of his death, [as in this case with appellee], the law does not require his executors or administrators to enter their appearance, but it is the duty of the plaintiff in error to get them into court, by service of writ or notice. He may suggest the death, and revive the suit in the name of the representative, and then bring him into court. An appellant, in all respects, occupies the position of a plaintiff in error, and is required to take the same steps to revive a suit, and prevent its abating by the death of appellee. The representative of appellee, or plaintiff in error, may, if he chooses, suggest the death, and revive the suit in his own name, or he may have the appeal or writ of error abated, if appellant, or plaintiff in error, fail to so revive.

4. As to the judgment dismissing the appeal, the dismissal being treated as an abatement of the appeal, the judgment for costs of appellant was regular, but not for costs of appellee. But, although a judgment for costs may be unwarranted, through an error in fact, as to the death of appellee, the error cannot be corrected by an injunction, but only by a proper application to the appellate court to set aside the dismissal, and correct the judgment for damages.

A will of the deceased appellee being called in question as to the disposition of the testator's estate, in Ohio, to one of the parties, in its bearing on the note in controversy.

Held, That a will cannot be contested in this collateral proceeding, out of the State where it has been probated, and beyond the jurisdiction of the estate devised.

190.—George Pinkard *v.* George Milmine et al.—Error to Piatt.—Opinion by SCOTT, J.

ESTOPPEL BY THE RECITALS IN A MORTGAGE—PROPER NAMES OF PARTIES MISNAMED IN A DEED TO BE USED IN SUIT.

STATEMENT.—Ejectment brought by George Milmine and Edwin C. Bodman, against appellant, to recover premises which plaintiffs claimed "in fee simple, as mortgagees of Charles Fisher, for condition broken." Plea in abatement filed on the ground that "the said Edwin C. Bodman was named Edward C. Bodman, and not Edwin C. Bodman." Replication, that the mortgage was executed by Charles Fisher, who afterwards sold to Robert Fisher the land embraced therein; the appellee being in possession as tenant of Robert Fisher; and that, therefore, appellant was estopped to deny the name of plaintiff Demurrer to the replication overruled, and defendant elected to abide by the demurrer. *Held*,

1. That the demurrer should have been sustained. Although the court recognizes the doctrine of estoppel by the recitals of a deed; and that a party claiming under the deed, cannot be permitted to deny any fact admitted to exist by such recital—the principle being that whatever rights legitimately arise on such admitted facts, may, at all times, be asserted, whether it be to obtain or defend the possession of such rights, yet the recital in this mortgage could not invest the plaintiffs with the right to sue in a fictitious name; for there is nothing in the mortgage admitting such right.

2. When a contract or deed is executed in a wrong name, plaintiffs must sue in the proper names, and may aver in the declaration that defendants made the deed or contract, by the name mentioned.

191.—Louis Famer *v.* The People.—Error to Macon.—Opinion by WALKER, C. J.

CONSTRUCTION OF STATUTES—BEARING OF A REPEAL OF A CRIMINAL STATUTE ON PROSECUTIONS PENDING—KNOWLEDGE OF MINORITY OF ONE TO WHOM DRINK IS SOLD, ON THE PART OF THE SELLER.

STATEMENT.—Prosecution for selling liquors to a minor. Application for a change of venue overruled, August, 1874, under the idea that the statute of 1874, enacted after prosecution commenced, did not apply, but the former statutes governed (viz: acts of 1845 and 1861).

Held, 1. That the repeal of a law under which a penalty has been incurred, defeats the right, where it has not been prosecuted to judgment, unless there is a saving clause in the new law.

2. Where there is such a sav.ng clause, it operates only on the right, and not on the modes of procedure. And, although a suit, or prosecution, may have been commenced under the repealed law, it shall, after the repealing law takes effect, proceed in conformity with the repealing law then in force.

3. A man selling liquors must see that he sells only to such as he is permitted by his license to sell to, and where it is prohibited to sell to a minor, he is bound to know that the person to whom he sells is not a minor, at his peril. It is not as though it were lawful to sell generally. He sells under a special permit, or license, and, therefore, undertakes to perform the conditions thereby imposed.

193.—Michael Hackett et al. *v.* Mary E. Smelsly.—Appeal from Macon.—Opinion by SHELDON, J.

LIQUOR PROSECUTION—INADMISSIBLE EVIDENCE—NOT CURED BY INSTRUCTIONS—DAMAGES—EVIDENCE OF CONSENT—WIFE ABLE TO MAINTAIN HERSELF NO EXCUSE—STATUTE WHERE DEATH ENSUES—OWNER OF BUILDING AND SELLER—EXEMPLARY DAMAGES—MITIGATION.

STATEMENT.—Prosecution against appellants (seven in number), saloon keepers, for causing the intoxication, and consequent death of the appellee's husband. The declaration only counted on the destruction of the means of support, and not on injuries to the person, from the intoxication of the husband.

Held, 1. That, under the declaration, the evidence should be confined to injury to the means of support, and it was error to admit evidence of personal injury even to show the fact of intoxication; which fact could be directly testified to.

2. That such evidence admitted cannot be remedied by an instruction to the jury to exclude it from their consideration.

3. It is proper to instruct the jury in such a prosecution (where the evidence calls for it), that, if they believe from the evidence, that the intoxicated person drank at other places than the saloon of the defendant, within the time specified in the declaration, such fact should not be considered in reduction or mitigation of damages. The statute gives an action to the person injured, severally or jointly, against those who caused the intoxication.

4. If evidence is introduced tending to show that plaintiff consented to her husband drinking, and sometimes drank wine and beer with him at beer gardens, and at home, it is proper to introduce evidence explaining this conduct—as that she went under compulsion of her husband.

5. It is improper to instruct the jury that if the plaintiff can maintain herself as comfortably as her husband did, from her own property, or by her own exertions, they should find the defendant not guilty. It is the duty of the husband to provide for his wife, and wherever he is disabled to do so by the sale to him of intoxicating liquors, she is injured in her means of support, within the meaning of the statute. The right of support is not limited to the bare necessaries of life, but embraces comforts suitable to the condition in life.

6. It is in the discretion of the jury to award vindictive or exemplary damages, in addition to the actual damages proved

7. The action extends to cases where death has occurred, notwithstanding the statute which, in general terms, gives an action to a survivor, etc; where death is caused by a wrongful act; for this statute only gives an action where, if the deceased had lived, he would have been entitled to an action; which does not apply to this case. Nor does it signify anything that the liquor law gives an action in terms to a "wife," and does not employ the term "widow." To exclude the widow thus, would be a construction too strict and unjustifiable.

8. Nor does the statute intend to draw a distinction between the seller and the owner of a building in which the liquor is sold, so as to subject them to a different measure of liability—the one for actual damages only, and the other for exemplary damages. In a joint action, there are not to be separate judgments rendered against the one for actual damages sustained, and against the other for both actual and exemplary damages. In a joint, or in a separate suit, actual and exemplary damages may be recovered against both, or against either, as the case may be.

9. It is not proper to instruct the jury that the liability to exemplary damages depends upon the defendants, after being notified not to sell the liquor, continuing to sell it; or tempting and seducing the buyer, trying to reform back into the habit of drunkenness again.

10. It may be proper for the jury to take into consideration the drunkard's drinking at his own house, in considering the question as to whether the drunkenness was caused by the defendants.

195.—Charles Drohn v. William Brewer.—Error to Macon.—Opinion by CRAIG, J.

REBUTTING EVIDENCE IN ASSAULT FROM HABITS OF LIFE—EXEMPLARY DAMAGES—DISCRETION OF A JURY AS TO DAMAGES.

STATEMENT.—Assault with a padlock inflicting severe injuries on the head from which erysipelas followed.

Held, 1. That where a proper foundation is laid, evidence in such case may be introduced to show that the aggravated injury resulted, in whole, or in part, from habits of intoxication.

2. Exemplary, or vindictive damages may be given when the act committed was accompanied by malice, violence, oppression, or wanton recklessness; and even if the assault was made under considerable provocation.

3. In an action of this kind, the amount of damages rests so much in the discretion of a jury, that the verdict will not be disturbed on the ground of excess, unless it is manifest the jury have been governed by passion, partiality, or corruption.

196 — John W. Skidmore *v.* Annabel Bucker.—Error to Piatt.—Opinion by WALKER, C. J.

CHARACTER IN MALICIOUS PROSECUTION—MALICE—RECORD OF ACQUITTAL NOT ADMISSIBLE—MOTIVES OF.

STATEMENT.—Appellant had, after consultation with the State's attorney, prosecuted appellee for a riot. She was acquitted, and brought an action for malicious prosecution. The complaint in the prosecution for riot, was not an information or belief, but on appellant's own knowledge.

Held, 1. That where the complaint is on personal knowledge, then, in a subsequent action for malicious prosecution, it is not proper to introduce evidence to show the general character of the accused. Had the charge been made on information and belief, such evidence of character, on the part of the plaintiff, might be proper to show that the accuser was actuated by malice, and had no proper grounds for a belief of guilt.

2. Where one, in bringing an accusation, acts under the advice of a prosecuting attorney, it requires stronger evidence to show malice on his part, in instituting the prosecution.

3. In no case can the record of acquittal in the prosecution be read in evidence in an action of malicious prosecution thereon.

4. Nor can the motives of plaintiff in the conduct which led to the prosecution, be adduced in evidence, since the question is not one of the guilt of the plaintiff, but whether defendant, as a prudent man, had reasonable cause, from the circumstances, to believe in the guilt of the accused—unless, indeed, the motives or intentions can be brought home to the notice or knowledge of complainant at the time.

199.—William Newton et al. *v.* Frank Locklin.—Error to Piatt.—Opinion by BREESE, J.

ARBITRARY ARREST BY POLICEMEN—LIABILITY OF A MAGISTRATE IN IMPRISONING FOR CONTEMPT—EXCESSIVE DAMAGES.

STATEMENT.—Appellee had been arrested, without warrant or authority, while quietly passing along in the evening on his own business, having, however, been intoxicated in the morning, but having slept it off. Brought before the magistrate, he became disorderly, as his demands for an immediate trial were not complied with, and was sent to the calaboose for contempt. Action against the magistrate and policeman for trespass. Verdict for $325.

Held, 1. That a policeman has no right to make an arrest on the mere order of a town marshall without a warrant of a citizen not engaged in the violation of law.

2. A magistrate has no authority to commit for contempt but only to levy a fine, and then commit if the fine is not paid at once. But the usual process of collecting fines needs not first to be resorted to. The imprisonment is merely the mode of collecting the fine.

3. That the damages though greater than ought to have been allowed will not justify the interference of the Supreme Court, since the jury do not seem to have been led by passion or prejudice.

201.—City of Bloomington *v.* Abraham Brockaw et al.—Appeal from McLean.—Opinion by WALKER, J.

CONTRACT OF CITY TO PAY DAMAGES—LIABILITY—NO EXECUTION AGAINST MUNICIPAL CORPORATIONS—MANDAMUS.

STATEMENT.—In changing the grade of a street, water was thrown on appellee's lot, Temporary injunction allowed and then the city agreed to appoint commissioners to assess damages. This was done but the city afterwards refused to pay it, and the court ordered an execution on judgment thereon. The refusal was on the ground that the assessment of compensation was not under the eminent domain law.

Held, 1. That the city had a right to make a private arrangement, or contract without any proceedings under the eminent domain law; and having done so, is bound by its contract.

2. A city is liable for damages done to lots by changing the grade of streets in throwing water thereon, if, by the construction of culverts or drains, etc., the injury can be avoided.

3. An execution cannot issue against a municipal corporation on a judgment against it. The proper mode of enforcing a judgment is by mandamus.

204.—Andes Insurance Co. *v.* Elias Shipman.—Error to McLean.—Opinion by CRAIG, J.

STATEMENT.—Action on insurance policy for loss by fire. Verdict, $10,825. Defense, misrepresentations as to the risk in procuring the policy, and also in breach of the contract in that when the fire occurred there was no watchman on the premises, the company maintaining that this meant the premises actually insured, whereas the watchman was in an office within the inclosure, but not within the terms of the policy. *Held*,

That this construction was not tenable.

Again it was claimed that the watchman was to keep a record. But *held*,

1. That as the clause requiring this was inserted by the agent in the application, and signed by the insured without knowing its contents, on the representation of the agent that it was all right; and,

2. As there was no watch-clock provided by the company, without which no record could be kept:

The excuse or defense was unavailing, and the company was liable.

ADVERSE USER.

Where it appeared that A and B raised the water by their dam so as to flow the land of A above—*Held*, that this was not an adverse user.—(Opinion by CUSHING, C. J.)—*Wilder* v. *Clough*, p. 359.

CHICAGO LEGAL NEWS.

SATURDAY, OCTOBER 9, 1875.

The Courts.

U. S. DIST. COURT, N. D. OF ILL.

In re JOHN H. DANIELS, a bankrupt.

BANKRUPTCY—CLAIM OF PERSON HOLDING STOCKS ON A MARGIN—SALE DEFICIENCY—EXPUNGING CLAIM.

The bankrupt was a banker in Illinois. The claimants, who were stock brokers in New York, purchased stocks upon the order of Daniels, the bankrupt, paying the money therefor and receiving and holding the stocks, together with a margin of ten per cent., or less, as security for the money advanced by them. At the time Daniels was declared a bankrupt, the stocks could have been sold by the claimant so as to have left a small balance in favor of Daniels, but the claimant held the stocks until they depreciated, sold them, and then filed his claim against the bankrupt's estate for the balance. The court *held*, that it was the duty of the claimants to take notice of the adjudication of bankruptcy of Daniels, and that they were bound to know that their correspondent had lost his ability to pay, and that the management of his affairs was thereafter in the hands of the court, and if they had notified the court it would have ordered the stocks sold before they depreciated in value, but not having done so, and sold them without the order of court, the debt having accrued after the adjudication in bankruptcy, the claim is not allowed, but expunged.—[ED. LEGAL NEWS.]

Opinion by BLODGETT, J.

This is an application on the part of the assignee of said bankrupt to expunge a claim filed for between fourteen and fifteen thousand dollars, by the firm of F. B. Wallace & Company, of New York city.

It appears from the evidence in the case that Daniels was for some years, prior to his being declared bankrupt, a banker at Wilmington, in Will county, in this district; that F. B. Wallace & Company, the claimants, were engaged in the business of stock brokers in the city of New York; that Daniels filed his voluntary petition in bankruptcy on the third day of July, 1873, upon which he was immediately adjudged bankrupt; that for two or three years prior to his bankruptcy, Daniels had been operating to a greater or less extent in stocks upon the New York market, through the firm of F. B. Wallace & Company, who purchased stocks upon the orders of Daniels, paying the money therefor and receiving and holding the stocks together with a margin of ten per cent, or less, as security for the money advanced by them.

At the time Daniels was declared bankrupt, Wallace & Company held seven hundred and fifty shares of the stock of the Chicago & Alton Railroad Company, which had been purchased pursuant to the arrangement I have mentioned, upon which, however, the margin was nearly exhausted, but the stock at that time could have been sold so as to have left some balance to the credit of Daniels in the hands of the brokers. After Daniels' adjudication, and until about the 18th of September, 1873, said stock remained at about the same price. After the 18th of September—being about the date that Jay Cooke & Company failed—said stock declined rapidly in value, and on the 24th of October, Wallace & Company sold the same, and passed the proceeds to the credit of Daniels, leaving Daniels, by their account rendered, in debt to said brokers in the sum of thirteen thousand four hundred dollars ($13,400). This amount, together with the interest accrued thereon, said Wallace & Company have brought as a claim against the estate of Daniels, and the assignee seeks to have the same expunged on the ground that it is not a valid claim to be paid out of the assets of said estate.

It will be noticed from the recital of facts, that at the time Daniels became bankrupt the adventure in these stocks could have been closed so as to have left something to the credit of the bankrupt; in other words the bankrupt did not owe his brokers anything at that time. True it is claimed on the part of the brokers that this transaction was in all respects that of a loan from Wallace to Daniels of the amount of money necessary to buy the stocks in question, and that they simply held the stocks as security for their loan, but it is equally apparent from the evidence and from the nature of the transaction as developed by the proof that Daniels was engaged merely in speculating upon the fluctuations in the value of this stock. He never intended to become the owner of this stock upon the books of the corporation by whom it was issued, but simply bought the stocks upon a margin which he had put up with his brokers for the purpose of making a profit if any should accrue in an advance on the price of said stocks. The real owners of said stocks were the brokers who had advanced the money to buy the same and held the stocks in their own name for their own security, together with whatever margin Daniels might have from time to time remaining in their hands.

It does not appear that any application was made by Wallace & Company to this court for leave to sell these stocks, nor did the assignee of the bankrupt, who was elected on the 18th of August, receive any notice from Wallace & Company of any such intention, but the brokers held such stock probably as long as under the circumstances they thought it profitable or safe to themselves to hold them, and then, without notice, sold them upon the market for whatever price they would bring.

The bankrupt in his schedule refers to these stocks as held on a margin, and in which he had no interest except for a disputed difference between himself and his brokers in regard to the interest which had been charged him. As I said before, there was no indebtedness between the broker and the bankrupt at the time Daniels became bankrupt.

It was undoubtedly the duty of Wallace & Company under the circumstances, to take notice of Daniels' adjudication in bankruptcy. They were bound to know that their correspondent had lost the ability to control this venture from the time of his adjudication, and that the management of the affair was thereafter in the hands of this court; and as it is no part of the duty of an assignee in bankruptcy to speculate in stocks, there can be no doubt but what this court would have at once, on information being imparted to it of the condition of the bankrupt's estate with reference to these dealings with Wallace & Company, ordered said stocks sold and the adventure terminated; but without disclosing the relations which they bore to the court, Wallace & Company continue to hold these stocks upon a declining market, through a critical financial period, and finally sell them out without leave of court, and seek now to make the bankrupt's estate responsible for this large difference.

I do not think the claim, as it is presented under the evidence, should be allowed. It has all accrued since Daniels was adjudged bankrupt, and under such circumstances that I cannot conceive that the creditors or assignee of Daniels are morally or legally bound to sustain this loss.

The claim is therefore expunged.

THROUGH the kindness of the law firm of TENNEYS, FLOWER & ABERCROMBIE, of this city, we have received the following opinion:

U. S. CIRCUIT COURT, E. D. OF PA.

MICHENER, plaintiff in error, *v.* PAYSON, assignee of the REPUBLIC INS. CO., of Chicago.

Error to the District Court.

BANKRUPTCY—RECORD OF AS EVIDENCE—CORPORATION—ASSESSMENT BY AUTHORITY OF COURT.

1. *Held*, That the record as certified by the clerk was properly admitted, not only to prove the assignment, but also to show that an assessment by authority of the bankrupt court upon the stock of the bankrupt insurance company to pay losses had been made; that the certificate being of all "matters of record" touching the assessment, it was properly admitted to show that fact, although it did not purport to be a complete record of the whole proceedings.

2. ASSESSMENT—JURISDICTION.—That the court appointing the assignee has exclusive jurisdiction of the administration of the bankrupt's assets, and of their distribution among creditors; that any adjudication which it may make in the exercise of this jurisdiction is unquestionable in a collateral proceeding in another form; that the assessment in question was directed and sanctioned by the court, which has authority so to adjudge, and for and excess in it redress must be sought in that tribunal.—[ED. LEGAL NEWS.]

MCKENNAN, Cir. J.—The first assignment of error relates to the admission in evidence of a record of proceedings in bankruptcy in the District Court for the Northern District of Illinois, against the Republic Insurance Company of Chicago, as assignee of which the defendant in error brought this suit. It was objected to on the ground that it does not purport to be a copy of the whole record, but it was admitted to show (1), an assignment to the plaintiff below, and (2), an assessment by the authority of the bankrupt court upon the stock of the bankrupt company to pay losses.

There can be no doubt of the admissibility of this record to show the assignment, because the 14th section of Bankrupt Act expressly provides, that a copy thereof, duly certified by the clerk of the court, under the seal thereof, shall be conclusive evidence of the assignee's title to sue for the bankrupt's property.

But was it properly admitted for the additional purpose for which it was offered?

The Bankrupt Act, while it enacts that the proceedings in all cases in bankruptcy shall be deemed matter of record, does not treat these proceedings as constituting an integral record, for it declares that they shall not be recorded at large, but shall be filed, kept and numbered, in the office of the clerk of the court, and copies of such record duly certified by that office, under the seal of the court, are made presumptive evidence of all the facts therein stated. It would, therefore, seem to be the intent of the act that in so far as any of these proceedings might be used as evidence, copies of them are to be authenticated as separate records, and so are competent presumptive evidence of the facts stated in them. The certificate of the clerk of the court authenticates the copies of the papers and proceedings contained in the record "as true copies of all the papers filed, proceedings had, and record and docket entries made in said case, and of the whole thereof, in any way relating to an assessment upon the stockholders of said company," etc. It is an exemplification of all "matters of record" touching the assessment and, as such, was properly admitted to show that fact.

The second assignment is founded upon the rejection of the offer to prove by the plaintiff in error, certain representations made by the agent of the Insurance Co. to him, when he made his subscription of stock, touching the establishment of a branch in Philadelphia, of which the subscriptions made there were to be the capital which was to be under the control of a local board of directors, and was to be set apart for losses in Philadelphia risks, accompanied by further proof that this local office had been withdrawn and the assurances given had not been fulfilled.

While it did not appear that any loss or injury whatever could result to the plaintiff in error from the partial nonfulfillment of these representations, it is at least questionable whether such evidence could have the effect of relieving the plaintiff in error from the payment of any part of his subscription. But in this suit it is altogether unavailable to him. Like a creditor's bill in equity, this suit is a proceeding by the constituted representative of a bankrupt corporation to collect its assets that they may be applied to the payment of its debts. The plaintiff in error is a subscriber to its stock, of which subscription he has paid only twenty per cent. The remaining eighty per cent. is part of the assets of the corporation, indispensably required for the payment of its debts, and its creditors may lawfully insist that it shall be so appropriated. Now, it is plain that the plaintiff in error cannot gainsay this right of the creditors, unless he can show such an equity as would entitle him to a preference over them, if he had paid up his stock subscription in full. But he took and held a certificate for the full amount of the stock subscribed for by him, and received dividends upon it, and upon the basis of his subscription and that of others, the company was enabled to create its indebtedness. Surely, as against those who became creditors of the corporation upon the faith and security of its stock subscriptions, his equity is subordinate and unavailing, and was rightly so treated by the court below.

The only remaining question which requires notice, relates to the legal sufficiency of the assessment upon the stockholders, which this suit was brought to recover.

By virtue of the adjudication of bankruptcy and the appointment of an assignee, not only was the control of the bankrupt corporation over its assets, of every kind, superseded, but complete domain over them was conferred upon the assignee. He alone can sue for and recover them, and whatever rights the bankrupt had in reference to their collection he can claim and enforce. He is also the representative of the creditors, for they can make the assets of their debtor available only through his agency. As Mr. Justice Dillon has well said: "However it might have been before, creditors can not, since the supervention of bankruptcy bring bills in equity, or other actions in their own names directly against the stockholders to enforce their liability with respect to their unpaid stock."

It was one of the unquestionable faculties of the bankrupt corporation to assess ratably upon its unpaid stock a sum sufficient to pay its debts, and the exercise of this power the creditors might have compelled. But by the proceedings in bankruptcy, the power of the directors and the direct remedies of the creditors, in reference to the assets of the corporation, were superseded and the assignee was constituted the representative of both these interests. In the exercise of all his functions in this twofold character, he is subject to the control and direction of the court in which the bankruptcy proceedings were instituted. It has exclusive jurisdiction of the administration of the bankrupt's assets, and of their distribution among creditors. Any adjudication which it may make in the exercise of this jurisdiction is unquestionable in a collateral proceeding in another forum. The assessment in question was directed and sanctioned by the court, which has authority so to adjudge, and for any excess in it redress must be sought in that tribunal.

The record then shows a valid assessment upon the stockholders of the bankrupt, and the instruction given to the jury, in reference to it and to the right of the plaintiff below to recover, was correct.

The judgment is therefore affirmed.

TENNEYS, FLOWER & ABERCROMBIE, Chicago; J. COOKE LONGSTRETH, Philadelphia, for deft. in error.

[From JOSIAH H. BISSELL, official reporter.]

U. S. CIR. COURT, E. D. OF WIS.

OPINION SEPT. 1875.

WILLIAM S. WARNER *v.* AARON H. CRONKHITE.

BANKRUPTCY—DEBT CREATED BY FRAUD—JUDGMENT—MERGER—AGREEMENT NOT TO ARREST.

1. DEBT CREATED BY FRAUD is not discharged in bankruptcy even though reduced to a simple judgment for money in which there is no mention of fraud; if the original action was based upon fraud, the fraud is not merged in the judgment.

2. EFFECT OF AGREEMENT NOT TO ARREST.—A stipulation between the parties, after the judgment, by which the plaintiff waived his right to execution against the body of defendant, does not affect this question of discharge.

3. MASSACHUSETTS INSOLVENT LAW, and many cases, commented on and distinguished.

STATEMENT OF FACTS.

This action comes into this court by removal from the Circuit Court of Ontagamie county.

The complaint sets forth the following state of facts: That on the 11th June, 1859, the plaintiff brought an action against the defendant in the Circuit Court of Ontagamie county to recover damages claimed to have been sustained by the plaintiff, by reason of alleged frauds practiced by defendant upon plaintiff in the sale of certain lands; that the action and the right of the plaintiff to recover therein were founded solely upon the said frauds; that issue was joined in that action by the parties thereto, trial by jury had, and verdict and judgment were rendered in favor of plaintiff against defendant, for $1258 87, damages and costs; that this judgment has never been appealed from, reversed or set aside, and has not been paid.

The complaint then alleges, that after the rendition of this judgment, the defendant procured from the U. S. District court for the Eastern District of Missouri, his discharge in bankruptcy, and that the defendant claims that by this discharge his liability to the plaintiff, upon the debt represented by the judgment, is discharged. The complaint next alleges, that the debt represented by the judgment was created solely by the fraud of the judgment debtor, and that the debt is not cancelled by the discharge in bankruptcy; and closes with the allegation that this action was commenced upon such judgment by leave of the Circuit Court of Ontagamie county, and judgment is demanded for the amount alleged to be due upon said former judgment, with interest.

The defendant answers this complaint and says, that after the rendition of the judgment mentioned in the complaint,

the parties to that judgment entered into a written stipulation, by which the plaintiff waived his right to an execution against the body of defendant upon the judgment, and expressly agreed that no execution should ever be issued against the body of the defendant in that action; and by which stipulation the defendant, on his part, waived all errors in entering said judgment and in all orders prior to the entry thereof, and further agreed that he would not take any appeal from the judgment or any of said orders. It was further stipulated between the parties, that said judgment should be and remain in all respects binding upon the real and personal property of the defendant, and that no other or further right of the plaintiff than that of execution against defendant's body, was relinquished by the stipulation.

To this answer the plaintiff interposed a demurrer, and the question is, does the stipulation set forth in the answer, constitute a defense to this action?

Annexed to the complaint, is a certified copy of the judgment record in the original action, from which it appears that that action was founded upon certain alleged false and fraudulent representations made by defendant to plaintiff in an exchange of property between the parties. The gravamen of the complaint in that action, and the gist of the action was fraud. The judgment rendered was in terms and form a simple money judgment, no reference to the ground of action being mentioned therein.

DYER, J.—Sec. 33 of the Bankrupt Act provides, "*that no debt created by the fraud* or embezzlement of the bankrupt, or by his defalcation as a public officer, or while acting in any fiduciary character, shall be discharged under this act; but the debt may be proved, and the dividend thereon shall be a payment on account of said debt." It is claimed by the plaintiff that the ground of the action in which the judgment now sued on was rendered being fraud, the debt was not discharged by the bankruptcy proceedings, and that the stipulation in question did not extract from the judgment which at the time of the bankrupt's discharge represented the debt, the element of fraud upon which it was originally founded. It is claimed by defendant's counsel that the original debt or claim was merged in the judgment; that to show the alleged fraud, within the meaning of Sec. 33 of the Bankrupt Act, so as to make the debt in this case one from which the defendant was not discharged by the bankruptcy proceedings, it must be disclosed by the judgment itself; that it was necessarily based upon the fraud, and that in any event, the stipulation made by the parties gave to the judgment the character of a mere contract debt, which was discharged by the debtor's discharge in bankruptcy.

When the original action between these parties was commenced, and when the judgment here sued upon was rendered, there was no statute in force in this State authorizing an arrest of a defendant or an execution against his body in a case where fraud in contracting a debt or incurring an obligation was the sole ground of action. It was not until 1868 that a statute was enacted, authorizing an arrest in such a case. So that, although the parties seem by their stipulation to have supposed that the right to an execution against the body in that action then existed, in fact it did not exist. This being so, that stipulation becomes insufficient as a defense to this action, if the action itself can be maintained. For it is apparent, that the plaintiff's demurrer to the defendant's answer reaches back to the question whether the original demand, debt or judgment was discharged by the defendant's discharge in bankruptcy, and consequently, whether this action will lie. There is some conflict of authority upon the question, as to whether the recovery of a judgment upon a debt fraudulently contracted merges the original cause of action, so as to relieve from liability to arrest, even where there is a statute authorizing arrests in civil actions founded upon fraud. In the case of McButt *v.* Hirsch, 4 Abbott, 441, it was held, that in an action upon a judgment recovered upon a debt fraudulently contracted, the defendant was not liable to arrest on the ground of fraud in the original debt, and that the original cause of action was merged in the judgment recovered upon it. It will be observed here, that the point was not, whether an execution could be issued upon the judgment, against the body of the defendant, but the question was, whether, in a new action upon the judgment, the defendant could be arrested because of the fraud in the original debt; and in this state of the case the principle above stated was applied.

In the case of Mallory *v.* Leach, reported in note, 14 Abb., 449, there was a similar decision of the question. A judgment was recovered in an action for fraud. Another action was brought upon that judgment, and it was held that this second action was upon contract, and not for fraud, and the defendant could not, therefore, be arrested.

I have referred particularly to these two cases, because they as strongly affirm the principle of merger as any I find. The case at bar must be distinguished from those cases. We do not have here an action upon the judgment with an accompanying proceeding to procure an arrest, on the ground that the original cause of action upon which the judgment sued on was recovered, sprung from the defendant's fraud. The question here is, whether the original cause of action was so merged in the judgment, and the original fraud so extinguished by the judgment, that it must now be held a debt which was discharged by the defendant's discharge in bankruptcy.

Judge Blatchford, in the case of Patterson 1, N. B. R., 308, after stating that the point involved was, whether the debt in that case was one excepted by sec. 33 of the Bankrupt act from the operation of a discharge, says: "It is claimed by the bankrupt that the debt being in the shape of a judgment, this court cannot, in applying the 33d section, go behind the judgment to see whether the claim on which the judgment was recovered, was created by fraud; that the judgment which is now the only debt, was created by the claim, and not by the fraud, and that though the judgment was created by the claim, and the claim by the fraud, yet the judgment was not created by the fraud. This view is unsound. Wherever the debt, no matter whether it be in the shape of a judgment or in any other form, was created by fraud, had its root and origin in fraud, then it is not to be discharged. To hold that the recovery of a judgment, in an action where the gravamen of the complaint is fraud, condones that very fraud by so merging the original claim that the judgment cannot be said to be a debt created by the fraud set out in the complaint as the ground for recovering the judgment, would fritter away entirely the good sense and plain intention of the 33d section."

The same principle is recognized and applied by Judge Lowell, *in re* Whitehouse, 4 N. B. R., 63, and I think that the conclusions arrived at in these cases are sound, when applied to a case in which it appears by the record that the original demand or cause of action sprung from fraud. Now, in the case at bar, what does the record show? The complaint in the action in which the judgment sued on was rendered, shows a cause of action springing exclusively from alleged fraudulent representations in an exchange of property. It was not an action upon contract with immaterial allegations of fraud, but it was an action grounded solely upon the fraud. The summons in the action was not upon a liquidated money demand, but in terms demanded relief as it should in an action to recover unliquidated damages. The issue joined between the parties was upon the question of fraud as appears by the complaint and answer. There was a trial by jury and an assessment of damages, and a judgment upon the issue of fact involved was entered on the verdict. Was it necessary that the judgment on its face should show that the ground of the action, or that the origin of the plaintiff's demand was fraud, in order to make it a case of a debt or demand created by fraud not dischargeable under the bankrupt law? I cannot think so. As the record of the action shows a material and traversable allegation of fraud as its sole foundation, the debt or demand may fairly be said to be one founded in fraud, and the action to be one founded upon a debt or claim from which the bankrupt's discharge would not release him." *In re* Whitehouse, 4 N. B. R., 64. The distinction must not be ignored between the question as it presents itself in the case at bar, and as it would be presented in a case where the allegations of fraud in the original action were incidental and immaterial, or in a case of an attempted remedy against the person of the defendant in an action on the judgment. Upon the record, it would seem that had there been no fraud there could have been no claim, and had there been no fraud, and consequently no claim, there would have been no judgment. Accepting the record as evidence of the character of the original cause of action, the debt in this instance, though now represented by a judgment, was created by fraud, and so excepted by the bankrupt act from the operation of a discharge.

Shuman *v.* Strauss, 52 N. Y., 404, is cited by defendant's counsel. But that was an action for the recovery of money only, and the summons was in the form prescribed by subdivision one of the section of the Code relating to the form of the summons, which subdivision has reference to actions upon liquidated demands. It was held in such a case that upon the non-appearance of the defendant, judgment being perfected upon an assessment of damages by the clerk, the defendant is not concluded by the allegations of fraud in the complaint; but that the plaintiff's right of action for, or remedy under the statutes by reason of the fraud, is merged in the judgment. The court, after speaking approvingly as I understand their decision, of the doctrine laid down in the case of Patterson, 1 N. B. R., 308, and some other similar cases, say that they come far short of the claim of the plaintiff in the case then decided, and a mere statement of the character of that case, as already given, makes the correctness of that observation of the court, obvious.

Wood *v.* Henry, 40 N. Y., 124, is also cited.

In that case the defendants, as commission merchants, received certain property for sale from the plaintiff. They sold the property but did not account for the proceeds. These facts were alleged in the complaint, and so it appeared that the defendants acted in a fiduciary character. Judgment was taken by default. No order of arrest had been obtained during the pendency of the action, and the question was whether an execution upon the judgment could be issued against the persons of the defendants. A majority of the court held that the allegations of the fiduciary character of the defendants were not traversable, and that no execution could issue against the person upon the judgment, because the cause of action did not necessarily import liability to arrest, the cause of action and cause of arrest not being identical. In other words, upon trial, *proof of the fiduciary relation was not indispensable to recovery.* Here is a plain distinction between that case and this at bar; for here there could have been no recovery without proof of the alleged fraud, for the fraud was the entire basis of the action. It was, in short, the sole cause of action. Prouty *v.* Smith, 51 N. Y., 594, is in character and principle like Wood *v.* Henry, while Roberts *v.* Prosser, 53 N. Y. 260, enforces the principle applied in the case at bar as distinguished from the other cases cited. I do not think Bangs *v.* Watson, 9 Gray, 211, is applicable to the question we have here. The original cause of action in that case arose upon contract. Judgment was recovered, and it was held that there was a merger of the original indebtedness in the judgment, and that the judgment did not, within the provisions of the insolvent law of Massachusetts, constitute a claim for necessaries not dischargeable under the act, although the original demand was for necessaries. The language of that act was: "No discharge of a debtor shall bar any claim for necessaries furnished to such debtor." The language of the 33rd section of the bankrupt law is: "No debt *created* by fraud shall be discharged under this act." The Massachusetts statute specifies the claim in the form in which it exists at the time of insolvency proceedings. It must, then, to be excepted from the operation of a discharge, be in the *form* of a claim for necessaries, and it is not in such form when in judgment. The language of the bankrupt act requires an inquiry into the origin, the creation of the debt, and if created by fraud, it is not to be held discharged. In the case of Palmer *v.* Preston, 45 Verm., 156, cited by defendant's counsel, the action was upon contract. Fraudulent representations had been made to procure a certain indorsement, but the fraud was not the foundation of the judgment recovered. The judgment was held to be discharged by the bankruptcy proceedings, and not to be within the exception of the 33rd section of the bankrupt act, because the debt in question was created by contract, and as the debt had been treated as a demand so created, it was held that the fraud was waived. The case is, therefore, inapplicable to that under consideration.

The demurrer to defendant's answer must be sustained.

D. G. HOOKER for plaintiff.
W. P. LIND for defendant.

We have received from the law firm of ROSENTHAL & PENCE, of this city, the following opinion:

SUPREME COURT OF ILLINOIS.

OPINION FILED OCT. 6, 1875.

THE CHARTER OF THE CITY OF CHICAGO—ACT OF 1872.

1. MINORITY REPRESENTATION.—That under the act of 1872 no formal submission of the question of minority representation was necessary.
2. NOTICE OF ELECTION.—That it was not a fatal objection that the notice of the election did not mention the polling places.
3. CHANGING THE POLLING PLACES.—That the common council had the lawful authority to change the polling places.—[ED. LEGAL NEWS.]

STATEMENT OF THE CASE.

On the 10th day of April, 1872, the General Assembly of this State passed an act entitled, "An act to provide for the incorporation of cities and villages." (Revised Statutes 1874, p. 211.)

By the first section of this act it was provided that whenever one-eighth of the legal voters of any city, voting at the last preceding municipal election, should petition the mayor and council to submit to a vote of the electors of the city, the question of becoming incorporated under said act, it should be the duty of the mayor and council to submit such question.

The 53d section of the same act provided that whenever said act should be submitted to a vote of the electors there should be submitted at the same time for adoption or rejection, the question of minority representation in the city council.

On the 4th of January, 1875, the common council of the city of Chicago, having received a petition signed by the requisite number of voters, passed a resolution appointing the 23d of April, 1875, as the day for holding such election, and by said resolution submitted the question of becoming incorporated under said act, without providing for the submission of the question of minority representation. It was further provided in said resolution that the polling places should be the same as at the election of State and county officers, held in said city on the 3d day of November, 1874.

On the 20th of March, 1875, a notice was given, by publication in a Chicago newspaper, that an election would be held on the 23d day of April, 1875, as to whether the city should become incorporated under said act.

The notice gave no information as to the places where the election was to be held, and contained nothing in regard to the question of minority representation.

On the 16th of April, 1875, the common council passed another resolution fixing other places for holding said election, than those specified in the resolution of the 4th of January above named.

Under the resolution of Jan. 4, there would have been ninety-two polling places, while under the resolution of April 16th there were but twenty; one in each ward in the city; there being twenty wards.

An election was held on the 23d of April, 1875, the result of which, as declared by the common council upon a canvass of the votes, was the adoption of the act of 1872 as the city charter.

This result was announced on the 3d of May, 1875, and from that date the city claimed to be incorporated under said act.

On the 14th of May, 1875, there was filed an information in the nature of a *quo warranto* against the city of Chicago, asking that the city be required to answer by what warrant it claimed to use and enjoy the franchises conferred by said act of 1872.

The court below sustained demurrers to several pleas of the defendant, and gave a judgment of "ouster." From that judgment the city brings this appeal.

Opinion of the Court, by SHELDON, J.

In view of the statement made by

the counsel for the appellee, that the fifth plea sets up all the facts presented in the other pleas, and on which depends the validity of this election, and that for the purpose of deciding the substantial questions presented by this record, it will only be necessary for the court to direct its attention to this plea, and as the opposing counsel state that if the fifth plea be a good one, it disposes of the case, we shall confine ourselves to the question raised and discussed under the fifth plea, to which a general demurrer was sustained. This plea sets forth in detail all the steps which were taken about the submission of the question of incorporation here involved, and, owing to its great length, we will omit to give the plea in full, deeming it unnecessary to do so for the purpose in hand.

It is insisted, on the part of the relators, that the election as set forth in this fifth plea was invalid on three different grounds, all of which appear in the plea.

First—The act of 1872 required the question of "minority representation" to be submitted to the popular vote at the same time with the question of the adoption of the new charter, and that this was not done.

Second—The notice of the election as set forth in the plea was fatally defective, in not stating the places where the election was to be held, and the two questions upon which the vote was to be taken.

Third—The resolution of the common council of the 4th of January, 1875, directing that the polling places should be the same as at the election of State and county officers, held on the 3rd day of November, 1874, in said city of Chicago, was, as to this provision, rescinded by a resolution of the council passed April 16, 1875, by which other and different polling places were fixed, and this was done only seven days prior to the day of election. which was held at the polling places fixed by the resolution of April 16. The first two sections of the act under consideration are as follows:

"*Be it enacted, etc.* First. That any city now existing in this State may become incorporated under this act in manner following: Whenever one-eighth of the legal voters of such city voting at the last preceding municipal election shall petition the mayor and council thereof to submit the question as to whether such city shall become incorporated under this act, to a vote of the electors in such city, it shall be the duty of such mayor and council to submit such question accordingly, and to appoint a time and place or places, at which such vote may be taken, and to designate the persons who shall act as judges at such election; but such question shall not be submitted oftener than once in four years.

Second—The mayor of such city shall give at least thirty days' notice of such election, by publishing a notice thereof in one or more newspapers within such city; but if no newspaper is published therein, then by posting at least five copies of such notice in each ward."

Article 4 of the act headed "Elections" in section 53 provides:

"Whenever this act shall be submitted to the qualified electors of any city for adoption, there shall be submitted at the same time for adoption or rejection, the question of minority representation in the city council or legislative authority of such city. At the said election the ballots shall be in the following form: 'For minority representation in the city council,' or 'against minority representation in the city council.'"

Then follow in the same section provisions for subsequent submissions, in case the first vote is against the propositions, and provisions as to the canvass of the votes and the effect of adopting minority representation.

As respects the first of the foregoing reasons for holding the election invalid, that there was a failure to submit the question of minority representation, it is contended that that particular question should have been submitted by the passage of an ordinance by the city council, directing its submission, and by a notice given by the mayor, stating the fact of such submission. Certainly, the statute does not expressly require this. It is silent as to by whom, or how, the question of minority representation shall be submitted. The language, "There shall be submitted at the same time for adoption or rejection the question of minority representation," etc. What the need of an ordinance directing that there shall be submitted such question when the statute itself says there *shall be* a submission of it? It would be superfluous for the mayor and council to appoint a time and place at which a vote should be taken on the question of minority representation distinctly, because, when they had appointed a time and place for the vote upon the question of incorporation under the act, there was then already fixed a time and place for voting upon the question of minority representation, namely, the same time and place with the vote upon incorporation so expressly fixed by the act itself. There was, moreover, the action of the city council upon the question of minority representation recognizing and virtually declaring its submission. The plea avers that on the 19th day of April, 1875, the common council adopted and spread upon its records a resolution directing the city clerk to cause to be printed one hundred thousand ballots with the words, "For minority representation in the city council," and one hundred thousand ballots with the words "Against minority representation in the city council," printed on the ballots, and to see that the same were properly distributed among the wards and delivered to the judges of election on the 23d of April, 1875, and that in pursuance of the resolution the ballots were so printed and distributed, and were, in fact, distributed among the voters before and at the election, and that said proceedings of the common council, embracing a copy of the resolution, were published in the corporation newspaper of the city on the 21st day of April, 1875; that the voters at such election did vote upon the question of minority representation; that returns of such votes were made, and the result as declared by the common council upon a canvass of such votes, was that a majority of the votes cast at such election on that subject were against minority representation in the city council. We must think that the electors rightfully voted upon this question; that their vote upon it was a valid one, although there had been no formal submission of the question by the common council—that the act authorized such vote.

We are of opinion then, that the question of minority representation should be regarded as having been submitted to the popular vote at the same time with the question of the adoption of the new charter. We arrive at this conclusion with the less reluctance from the fact that the submission is not a finality; the statute providing that at any subsequent time, not more than once in two years, the question of minority representation shall be submitted to the popular vote on the requisite petition.

As to the second ground, that of defective notice of the election, the notice was as follows:

"ELECTION NOTICE.

"MAYOR'S OFFICE, CITY OF CHICAGO, March 20, 1875.—Notice is hereby given that on the (23) twenty-third day of April, 1875, an election will be held in the city of Chicago, at which said election the question will be submitted to be voted upon by the legal voters of said city, as to whether said city shall become incorporated under an act of the general assembly, entitled 'An act to provide for the incorporation of cities and villages,' approved April 10, 1872.

"H. D. COLVIN, Mayor."

The alleged defect in the notice is in not stating the place where the election was to be held, and the two questions upon which the vote was to be taken.

The first section of the act provides that the mayor and common council shall submit the question of becoming incorporated under the act, and appoint a time and place or places at which the vote may be taken. The second section as to notice, provides that the mayor shall give at least thirty days' notice of such election by publishing a notice thereof in one or more newspapers within the city. There is no express requirement that the notice should state the places where the election is to be held, or that the question of minority representation was to be voted upon, but only that thirty days' notice shall be given "of such election by publishing a notice thereof," that is, of an election, as to whether the city shall become incorporated under the act.

According to the averment of the plea, the common council, in pursuance of the first section of the act, did, in the same resolution by which they submitted the question of incorporation, appoint the time and places of the election, and such resolution was, on the 6th day of January, 1875, published in a daily newspaper in Chicago, the corporation newspaper, in which it was required by law that the proceedings of the common council should be published.

Had any electors wished to ascertain the places of election, beyond what the notice informed him, the means of knowledge were at hand by recurring to the records of the common council, the body whose duty it was to appoint the places, as the law informed him.

An analogous case with the present is that of The Chicago and Iowa Railroad Company *v.* Pinkerton, decided at the September term, 1873, of this court, which was the case of an election by a town, as to whether it would make a donation to the railroad company of $75,000 in bonds. The statute required that the petition for the election should state the amount of the bonds, the rate of interest they were to bear, and the time when the bonds should be payable, and that notice should be given of the election, "stating fully in the notice the object of the election." The notice said nothing about the length of time the bonds should run or the rate of interest they should bear. The petition filed with the town clerk complied with the requirement of the statute. The notice stated that a petition had been filed in the town clerk's office for an election as to whether the town would make a donation to the company of $75,000 in bonds. An objection to the validity of the election because the notice was insufficient in the particulars above named, it was held that the petition on file in the clerk's office afforded information how long the bonds were to run and their rate of interest, and that the notice in connection with the petition was sufficient.

So here, the notice given in connection with the resolution of the common council fixing the polling places, we are of opinion sufficiently fulfilled the requirement of giving "notice of such election," although the notice itself did not state the places where the election was to be held. Any elector wishing information upon that subject was referred by the law to a source of information—the record of the proceedings of the common council. Electors must be supposed to have knowledge of such a public law, and one notified as about to be submitted to their action for approval or rejection. Viely *v.* Thompson, 44 Ill., 9, and Harding *v.* R. R. Co., 65 id., 90, are referred to as cases where this court has held special elections to be void when held without the required notice. We regard these cases as quite distinguishable from the one under consideration. The one was an election as to levying a county tax, the other an election as to a subscription by a county to the capital stock for a railroad company. In both cases the statute required notice for a specified number of days to be given of the election. The notices given were not for the required length of time, and the elections were held invalid on that account. There was there a violation of an express statutory requirement. Here, as has been stated, there was no violation of any express requirement of the statute.

The places *only*, and not the time of holding the election are here involved. The place of holding an election would seem to be one of the least important of the things pertaining to the notice, especially when the place is not to be fixed by the notice, but is fixed by public authority, as in this case by the legislative body of the city.

Previous notice of the time may be important to enable the voter to arrange beforehand with a view thereto. Notice for the full prescribed length of time may be essential, to afford opportunity for information and consideration, in order to enable the voter to vote intelligently.

But it would not seem to subserve any important end that the voter should have previous notice for any length of time of the place for holding the election. There was here a polling place appointed in each elector's ward. Had an elector, on the morning of election day, been desirous of voting, but did not know the place of the election, he obviously might have ascertained it at once, without difficulty, upon inquiring; and it is not perceived wherein he was subject to be prejudicially affected by the want of a previous knowledge of the place where the election was to be held. As to the notice not stating that minority representation would be submitted to be voted upon, there is, as before remarked, no express requirement of the statute that the notice should so state. The act, as we hold, by its own force, authorizing a vote upon the question of minority representation, without the formal submission of it hy the common council, and the act also fixing the time and place of the vote upon the question, viz: the time and place of voting upon the question of becoming incorporated under the act, the election upon the question of minority representation might be legally holden, we think, without notice having been given of it. The electors may be well presumed to know when an election, fixed by law at a certain time and place, is to be held. The case in this respect of the question of minority representation, we are of opinion, falls within the general rule laid down in Dillon on Corporations, Sec. Ed., 316. Elections fixed by law at a certain time and place, may be legally holden although notice has not been published or given, but if the time be not defined by statute and is to be fixed by notice, the notice required is imperative, and see Cooley, Const. Lim., 603; The People *v.* Cowles, 13 New York, 350; The People *v.* Hartwell, 12 Michigan, 508; Foster *v.* Scarff, 15 Ohio St., 532; State *v.* Goetz, 22 Wisconsin, 363.

So soon as the time and place were appointed of the election on the question of becoming incorporated, then the time and place for the voting upon the question of minority representation was fixed by law as at the same time and place with the former. Notice of such former election taken with the law would serve as notice of the election upon the question of minority representation.

The third ground of objection to the validity of the election is the change made by the common council April 16, 1875, in the places of holding the election. The plea avers that on that day the common council had definitely ascertained that several of the places at which the vote was taken at the November election, 1874, could not be procured for such purpose for the election to be held on the 23d day of April, 1875, and that thereupon the common council passed a preamble and resolution declaring the ascertainment of such fact, and did thereby fix as the places where the election should be held, one place in each ward of the city, nine or more of which places were the same ones fixed by the first named resolution of Jan. 4, 1875, and the remainder were in the vicinity of the polling places of such wards as fixed by said resolution of Jan. 4, 1875, and that such preamble and resolution were published in the corporation newspaper on the 18th of April, 1875, and that the places at which the elections was to be held were before the 23rd day of April, 1875, generally known to the voters of the city.

This change in the polling places was made by the lawful authority, the common council, and the election was held at the places last fixed. To be sure, there was not thirty days' notice given that the election would be held at these places, but there was thirty days' notice of the time of the election. It must be admitted that there may be cases where a notified place of holding an election may be properly changed without notice thereof; as, for instance, where a building designated for such purpose should be destroyed by fire.

There is reason to believe, from the circumstances, that the places at which the election was held were generally known to the voters of the city before the day of election.

It is not seen wherein the change made was calculated to produce any injurious effects, and we are of opinion that it should not, under the circumstances, be held a sufficient ground to invalidate the election.

Appellee has assigned cross-errors on the ruling of the court below in sustaining demurrers to certain replications to the third amended plea. But as application was made to the court below, by the defendant, after the filing of the fifth plea, for leave to withdraw the third plea, which was refused, and as appellant's counsel state in their brief that they do not desire to rely upon this plea, and are content that it shall be treated as abandoned, we shall regard it as not in the record, and not consider the cross

errors. The defendant had the right to withdraw the plea, and the court should have granted leave to do so.

Being of the opinion the demurrer was improperly sustained to the fifth plea, the judgment will be reversed and the cause remanded.

Judgment reversed.

THROUGH the kindness of JOSIAH H. BISSELL, of the Chicago bar, we have received the following opinion:

SUPREME COURT OF ILLINOIS.

OPINION FILED JUNE 16, 1875.

FREDK. SCHWEIZER, impl'd, etc. v. JAMES M. TRACY.

Appeal from Champaign county.

SALE—FRAUDULENT REPRESENTATIONS—RIGHTS OF ATTACHING CREDITORS.

1. SALE—FRAUDULENT REPRESENTATIONS—Under the evidence in this case the court finds that the representations as to the value of the Urbana stock, and the amount of the indebtedness thereon were false and fraudulent, and that the goods were sold upon the faith of these representations, and that no valid title passed to the purchaser, but that the purchase was voidable at the option of the vendors, on the ground of fraud in the making of it, whilst the property remained in the hands of the vendee.

2. RIGHTS OF ATTACHING CREDITOR.—*Held*, that the vendors discovering the fraud, might, while the goods remained in the hands of the fraudulent vendee, replevy them, but had the vendee, before the reclaiming of the goods by the vendors, sold them to an innocent purchaser for value under the decisions of the Supreme Court, the purchaser would have acquired a valid title to the goods: that an attaching creditor could attach nothing but the interest of the debtor and fraudulent vendee in the property seized, he had not an absolute title, but only a voidable one, subject to be avoided by the defrauded vendors, the same right of avoidance of the fraudulent purchase which they had against the fraudulent vendee himself existed against his attaching creditors.—[ED. LEGAL NEWS.]

SHELDON, J.

This was a suit upon a replevin bond which had been given by appellant as surety, and Mack, Stadler & Co. as principals, in an action of replevin commenced by the latter in the Circuit Court of Champaigne county on the 22nd day of October, 1872, to rocover a lot of merchandise previously sold by them and then in the possession of the sheriff of said county, taken under a writ of attachment against the vendee of the goods from Mack, Stadler & Co., sued out Oct. 18th, 1872.

Mack, Stadler & Co. having been nonsuited in their action, a return of the property replevied awarded and failure therein, this suit was brought against the principals and surety in the replevin bond. No service, however, was had upon Mack, Stadler & Co., nor did they enter their appearance.

Appellant pleaded, in substance, to the declaration under the statute in that behalf, that the merits of the suit in replevin were not determined in that suit, and that at the time of the commencement thereof, and now, Mack, Stadler & Co. were, and are the absolute owners of the goods replevied and entitled to the possession of the same.

Upon replication filed traversing the fact of such ownership and right of possession issue was joined, and upon trial by the court, without a jury, it was found in favor of the plaintiff below, and judgment rendered for $1198.58 damages, from which defendants appealed.

It is first objected that the court below erred in admitting in evidence, against the objection of the defendant, the deposition of Isaac H. Mack of the firm of Mack, Stadler & Co., which had been taken in the replevin suit. Upon perusal of the deposition we do not discover in it anything of such injurious effect to the appellant as should cause a reversal of the judgment, even were the deposition improperly admitted in evidence. We will not, therefore, stop to discuss the question of its admissibility.

It is further assigned for error, that the finding of the court below is contrary to the law and evidence.

The record discloses that Mack, Stadler & Co, were wholesale dealers in clothing in the city of Cincinnati; that one C. K. Weil, doing business in the town of Urbana, in this State, in the name of his father-in-law, Moses Black, purchased at the store of Mack, Stadler & Co., on the 6th of September, 1872, the goods which were afterwards replevied, in value about $1900, on credit, stating to them that the stock which he then had on hand at Urbana amounted in value to about $4800; that he had a considerable amount of outstanding debts due him; that he did not owe to exceed $500, and this in Louisville, and that he owed nothing anywhere else. The fact was that Weil was, at the time, indebted in about the sum of $5,000 to a merchant in Chicago, for merchandise sold to him prior to the purchase from Mack, Stadler & Co., some of which indebtedness had become due, and the inability to obtain further credit there had induced him to resort to the Cincinnati market for the purpose of getting goods on credit.

We have no doubt, from the evidence, that the representations as to the value of the Urbana stock and the amount of the indebtedness thereon, were false and fraudulent, and that the goods were sold upon the faith of these representations, and that no valid title passed to the purchaser, but that the purchase was voidable at the option of the vendors, on the ground of fraud in the making of it, whilst the property remained in the hands of the vendee. The point is made by appellee that Weil was doing business in the name of Black, and so known by Mack, Stadler & Co., and that they shipped the goods in the name of Black, and that these circumstances should, in some way, disentitle Mack, Stadler & Co. to question the validity of the purchase from them.

Whether Weil was acting either for himself or as agent for Black is immaterial. In either case the effect upon the sale, of the fraud and false representations would be the same, it being manifest that the goods were not parted with because of the credit given to either Weil or Black, but because of the representations of the value of the Urbana stock and the amount of the indebtedness thereon. But it is supposed that there was fraud here on the part of Mack, Stadler & Co. in assisting Weil to perpetrate a fraud upon the community, which should debar their rights to avoid the sale

The matter of the use of Black's name by Weil in the manner it was, was understood by the Chicago creditors as well as by Mack, Stadler & Co. It was not shown how any one was defrauded or likely to be so by the conduct of Mack, Stadler & Co. They simply knew that Weil was carrying on business in the name of Black, and bought and requested the goods to be shipped in the name of the latter, that Weil was owing some $500, and perhaps that Black was insolvent. We discover nothing in this which should deprive Mack, Stadler & Co. of redress for a fraud practiced upon them in the purchase of the goods.

Coming, then, to the conclusion that we do, that Mack, Stadler & Co. discovered the fraud practiced upon them whilst the goods remained in the hands of the fraudulent vendee, and replevied them, they could have successfully maintained their action. The question is presented whether the attaching creditor here, or the sheriff, by virtue of his writ of attachment, acquired any other or greater title than the fraudulent vendee possessed. Had the vendee, before the reclaiming of the goods by Mack, Stadler & Co., sold them to an innocent purchaser for value, no doubt, under the decision of this court, the purchaser would have acquired a valid title to the goods. Jennings *v.* Guy et al., 13 Ill., 610; M. C. R. R. Co. *v.* Phillips et al., 60 Ill., 190; Young et al. *v.* Bradley et al., decided at the September term, 1873.

The case of Burnell *v.* Robertson, 5 Gilm., 282, is cited as sustaining the doctrine that an attaching creditor stands in the light of a purchaser, and is to be protected as such. That was a case where the debtor had title to the property, and the controversy was between a prior purchaser from the debtor who had not obtained possession of the property, and a subsequent attaching creditor; and in reference to such a state of facts the court say: "In case of two sales of personal property, both equally valid, his is the better right who first gets possession of the property, and the attaching creditor stands in the light of a purchaser, and is to be protected as such." That is, the attaching creditor stands in the light of a purchaser, not necessarily as against the world, but as against another purchaser, the creditor having, by virtue of his attachment, first obtained possession of the property; thus acknowledging the common doctrine respecting the sale of personal property that a sale without possession is void as against subsequent purchasers and creditors. This is the full import of that decision. But in the case at bar the only title of the debtor is one acquired by fraud and false representations and voidable at the option of the vendors. The general expression used in the case cited is to be understood with reference to the facts of that case, and is not authority in support of the view that an attaching creditor under the circumstances of such a case as the present stands in the same position as an innocent purchaser for value. In Martin *v.* Dryden et al., 1 Gilm., 188, where there had been a sale and conveyance of real estate, but the deed not recorded, this court held that an attaching creditor without notice of the prior deed would hold the land as against the prior purchaser. But that was under our recording act containing the provision that all deeds and title papers shall take effect and be in force from and after the time of filing the same for record and not before, as to all creditors and subsequent purchasers without notice; and as to them all such deeds and title papers shall be adjudged void, until the same shall be filed for record in the county where the land may lie. Gale's Statute, 664, § 5.

In the cases above cited the attachments were sustained against prior purchaser in obedience to plain rules of law. In the first case the rule of the common law made the prior sale of the goods without the delivery of possession void as against creditors. In the second case a statutory enactment declared the prior deed void as to creditors until it was recorded. But in the case before us the attaching creditor has no such plain rule of law to invoke in his behalf. He can cite the doctrine that where personal property has been obtained by means of a fraudulent purchase, a bona fide purchaser thereof from the fraudulent vendee for a valuable consideration, without notice, will acquire a good title. But that does not embrace the case of a mere attaching creditor. He cannot be regarded as such a purchaser, or be viewed like a mortgagee, who is considered a quasi purchaser. The claim of an attaching creditor to protection is not of equal strength with that of a bona fide purchaser for a valuable consideration. He parts with nothing in exchange for the property, nor does he take it in satisfaction of any precedent debt. The property is merely seized for the purpose of having it afterward so appropriated. The attaching creditor by means of his attachment obtains but a lien. It is a well settled rule, certainly of equity, that the general assignees of a bankrupt take his estate subject to every equitable claim which exists against it by third persons; and so it is with judgment creditors, as respects the lien of their judgment. Ex parte Howe, 1 Paige, 125. As to such assignees the Supreme Court of the United States say: "In cases like this the assignee stands in place of the bankrupt; his rights are their rights, and theirs, like the lien of judgment at law, are subordinate to all prior liens legal and equitable, upon the property in question. Gibson *v.* Wharden, 14 Wallace, 249. In Tousley *v.* Tousley, 5 Ohio St., 78, it is held that a judgment creditor is not a purchaser nor entitled to the privileges of that position. It is there said: "So far as the statute goes in giving him (a judgment creditor) a preference over mortgages not perfected by delivery to the recorder, his rights are absolute, but for everything else, he is remitted to general principles; and upon general principles it is very clear that he acquires a lien only on the interest of his debtor, and is bound to yield to every claim that could be successfully asserted against him. See also Drake on Attachment, § 220; Nathan *v.* Giles, 5 Taunt., 558. The only difference as effects the present question between the lien of a judgment and one acquired by attachment is, that one is general and the other is specific. We are unable to see that this distinction should change the rule in its application to a case like the present. Nothing was here attached but the interest of the debtor, and fraudulent vendee in the property seized. He had not an absolute title, but only a voidable one, subject to be avoided by the defrauded vendors. The same right of avoidance of the fraudulent purchase which they had against the fraudulent vendee himself, we are of opinion existed against his attaching creditors. Had he made an assignment of the property for the benefit of these attaching creditors, the assignee would have taken only such interest as the assignor had in the property — his voidable interest. We can not see upon what principle the creditors could require any greater interest by the levy of an attachment to secure the payment of their claims than they would have done by a voluntary conveyance made by the debtor himself for the same purpose.

It is the general rule that a better title is not obtainable from anyone than he possesses.

But the levying of an attachment comes within none of the recognized exceptional instances, where one can acquire from another a greater interest in property than such other himself possesses. We perceive no laches on the part of the vendors in the exercise of their right of avoiding the sale. It follows then that the right of possession and property in the goods was in Mack, Stadler & Co; that their suit of replevin was rightly brought, and that there is no liability upon the replevin bond for the non-return of the property replevied. The finding and the judgment of the court below being manifestly against the evidence the judgment is reversed.

Judgment reversed.

HOADLY, JOHNSON & COLSTON, and SOMERS & WRIGHT for appellants.

SWEET & DAY for appellees.

LIV. NEW HAMPSHIRE.

WE are indebted to Hon. JOHN M. SHIRLEY, Official Reporter, for advance sheets of the 54th New Hampshire Reports, from which we take the following head-notes:

A person who would justify his acts as a public officer, must show that he is such an officer *de jure*.—(Opinion by FOSTER, J.)—*Roberts* v. *Holmes*, p. 560.

A collector of taxes, deriving his authority from the appointment of selectmen *de facto*, is an officer *de jure*.

This court has power to allow the amendment of town records conformably to the fact.

CONTRACT — DISCLOSED AND UNDISCLOSED PRINCIPALS—AGENT.

Where a principal carries on business in the name of his agent as a business name, the principal is liable upon a contract made by his agent for him in the agent's name, whether it is verbal or written; and if written, whether it is negotiable or not, and whether the agent disclosed his agency or not.—(Opinion by HIBBARD, J.)—*Chandler* v. *Coe*, p. 561.

An undisclosed principal is liable to be sued and entitled to sue upon an express verbal contract, and also upon a simple written contract not under seal, but not upon a negotiable instrument, made by his agent for him in the agent's name.

A disclosed principal is not liable to be sued nor entitled to sue upon a written contract made by his agent for him in the agent's name.

A principal is not liable to be sued nor entitled to sue upon an implied contract arising from the passage of the consideration between his agent and the other contracting party where there was an express contract in the agent's name, whether verbal or written, unless an action might be sustained by or against him upon the express contract.

Where an agent is sued upon a written instrument executed in his own name, whether it is negotiable or not, and whether he disclosed his agency or not, parol evidence that he contracted only as agent is not admissible for the purpose of discharging him from liability.

ADMISSION OF ATTORNEYS IN NEW YORK.—On the 22nd of last month the Judges of the court of appeals so amended the rules relating to the admission of attorneys as to provide that "an allowance of one year shall be made to applicants who are graduates of any college or university, who in their course of study shall have been instructed in the theory and general principles of jurisprudence, and in the historical development of the constitutional law of the United States and Great Britain. The proof of which shall be the certificate of the president of the college where such applicant graduated to the satisfaction of the supreme court, that he has been taught and has sustained a satisfactory examination in said studies, specifying the same, and no other allowance shall be made to such applicants, for study prior to the time of the graduation, which time shall be made to appear."

CHICAGO LEGAL NEWS.

Lex vincit.

MYRA BRADWELL, Editor.

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We would ask all our subscribers, who have not already done so, to at once forward us the required two dollars and twenty cents, to renew their subscriptions and pay the postage.

We call attention to the following opinions, reported at length in this issue:

Bankruptcy—Claim of Person Holding Stocks on a Margin.—The opinion of the United States District Court for the Northern District of Illinois, by Blodgett, J., in a case where a stock-broker purchased stocks for a bankrupt before his bankruptcy, held them until after, sold them without notice, and then filed his claim against the bankrupt's estate for the difference between what the stock brought and his advances.

Bankruptcy—Record as Evidence—Assessment.—The opinion of the United States Circuit Court, by McKennan, J., as to the effect to be given to a certified copy of the record of the assignment of a bankrupt, or of the assessment upon the stockholders of the bankrupt insurance company, under authority of the court when introduced in evidence in another district from the one where the assignee was appointed. The court also considers the power to make an assessment upon the stockholders of a bankrupt corporation for the purpose of paying its debts.

Charter of Chicago—Act of 1872.—The opinion of the Supreme Court of this State by Sheldon, J., in the Quo Warranto cases brought originally in the Criminal Court of this county for the purpose of testing the question whether the act of 1872 had been legally adopted by the city of Chicago. The opinion reverses the judgment of "ouster" entered in the court below, and remands the cause.

Rights of Attaching Creditors.—The opinion of the Supreme Court of this State, by Sheldon, J., as to the rights of an attaching creditor as against a vendor of a fraudulent vendee. The court reviews its former decisions upon the question involved, and makes a distinction between the facts in this and former cases. We regard this as an unusually interesting opinion.

NOTES TO RECENT CASES.

INDIVIDUAL NAMES AS TRADE MARKS.

The New York court of appeals, in Meneely *v.* Meneely, reported 12 Albany *Law Journal*, 220, *Held* that every man has the absolute right to use his own name in his own business, even though he may thereby interfere with or injure the business of another person bearing the same name, provided he does not resort to any artifice or contrivance for the purpose of producing the impression that the establishments are identical, or do any act calculated to mislead.

CONNECTING LINES—LIMITING LIABILITY.

The Supreme Court of the United States in Evansville and Crowfordsville R. R. Co. *v.* the Androscoggin Mills, 32 Leg. Intel., 355, *held* where the provision "this company will not be liable for loss or damage by fire from any cause whatever" was printed upon defendants bill of lading, who were a Railroad Company, and who advertised and took freight through from the south to Boston passing over their line and other lines, that this limited their liability on any part of the route.

FIRE COMMUNICATED FROM PASSING ENGINE.

The Supreme Court of Missouri, in Lester *v.* The K. C., St. J. & C. B. R. R. Co., 2 *Central Law Journal*, 641, *held* when the plaintiff's evidence tends to show that fire escaped from one of defendant's engines, and was communicated to plaintiff's premises, and the defendant offers evidence tending to prove that such engine was provided with the best-known appliances for preventing the escape of fire, that the fire in question could not have escaped therefrom, and that its employees were, at the time, in the exercise of due care, it is error to permit the plaintiff in rebuttal to show that other fires had been occasioned in that neighborhood about that time by sparks emitted from passing engines belonging to the defendant.

PATENT—NEW ARTICLES OF MANUFACTURE.

The Supreme Court of the United States in the Rubber-Tip Pencil Co. *v.* Howard, 2 Am. L. T. Rep., 150, *held* that an article of manufacture, to be patentable as such, must be an invention, in the usual sense of the word; that a rubber-head, to be used upon lead-pencils, although a new article of commerce, is not the proper subject of a patent.

Recent Publications.

A Treatise on the American Law of Elections. By Geo. W. McCrary, of the Iowa Bar, Member of the House of Representatives of the United States, and late Chairman of the Committee of Elections of that body. Keokuk, Iowa: R. B. Ogden, Publisher. Chicago: E. B. Myers, Law Bookseller. 1875.

Law books upon special subjects are growing more common every year, and the lawyer sometimes feels that a great service would be done the profession, if all text-books were destroyed, except his Blackstone, Kent and Story. But since it has become a habit from which the lawyer cannot escape, to accept and use books upon special studies, we do not know of a good reason why a book upon Elections should not be published. When a writer devotes himself to a single subject, it is expected that he will omit no case nor leave any branch of his subject untouched.

We suppose the work before us was suggested to Mr. McCrary by his experience as chairman of the Election Committee of U. S. House of Representatives. It is a work that will be of great practical utility, without doubt, to all members of election committees in all legislative bodies in this country. It seems to be a full collection of authorities upon elections contested before such bodies, and we should think our friends Farwell and LeMoyne, of the 1st Congressional District of Illinois, would at once purchase a good sized edition of the work for themselves and their lawyers and the committte before which they will soon carry their case.

But contested election cases before political bodies, are of little value, as authority, before the courts. There is too much of partisanship in them to stand as precedents for our courts.

We do not mean to say that Mr. McCrary has not made a valuable work for lawyers generally. His text is well written and lucid, and we have not observed that he has misstated a proposition of law; but we think that he has omitted several subjects and many cases which he might have introduced, and he has thus rendered his book of much less value to the courts and the profession. The courts do not, nor do the lawyers care, for the opinion of plain Mr. McCrary, unless supported by the adjudications of the courts. It is very rarely that a text book is referred to by the English Courts, and they should be omitted much more frequently by ours. We think Mr. McCrary grew especially weary when he came to the topic of *special elections*. Upon a brief examination of the authorities in two or three States, we find the following important cases omitted from his work upon this topic, viz: Viely *v.* Thompson, 44 Ill.. 9; People *v.* Salomon, 46 Ill., 420; People *v.* Gochenover, 54 Ill., 123; Harding *v.* R. R. Co., 65 Ill., 90; Knox county *v.* Davis, 63 Ill.; McMillan *v.* Lee county, 3 Iowa, 313; State *v.* Young, 4 Iowa, 563; Fort Dodge City, etc. *v.* District, etc., 17 Iowa, 85; 22 Wis.; 363 State *v.* Lutfring.

The validity of railroad bonds, special taxes, location of county seats and city charters depend upon this branch of election law, and its knowledge is of more value to the public than the ability to determine who is entitled to a particular office. We must say that the work is well nigh worthless upon this special topic. Its merits in other respects we cheerfully concede, though we must say that the author's "better opinion" so frequently referred to, is not always supported by citation of authorities, which the lawyer so greatly desires in a work of this kind. We think the courts would not much care for Mr. McCrary's "better opinion," without the book and page where he obtains it.

Reports of Cases Argued and Determined in the Superior Court of Indianapolis, With Collection of Authorities cited to cases. Vol. I. By Oliver M. Wilson, Official Reporter, Indianapolis *Journal* Company, Printers. 1875.

This is the first volume of a new series of reports. We examined it very closely to see if good judgment has been exercised in the selection of the cases, and if the reporter had performed his portion of the labor in a creditable manner. The cases reported will not only be useful to the Indiana lawyer, but many of them will be of interest to the members of the bar in other States. We have no hesitation in saying that Mr. Wilson shows evidence of being a skillful reporter. His head-notes are short, clear and accurate. They are preceded by headings, the principal words of which are given in small caps and followed by others in italics. We do not remember to have seen this style in any other book. We think it a good one. The concise notes at the end of the opinions will be found very useful in practice. This series of Reports should readily find a place in every Indiana lawyer's library. This volume contains a table of cases reported and one of cases cited. In two or three of the late volume of reports of our own State, Mr. Freeman has omitted the table of cases cited; it may have been from the fact that he thought the space it would occupy would be better filled by opinions. Orders for this volume should be addressed to Mr. Wilson, at Indianapolis.

Leading Cases on the Law of Torts Determined by the Courts of America and England. With Notes. By Melville M. Bigelow, Boston: Little, Brown and Company. 1875. Sold by E. B. Myers, Law Bookseller, Chicago.

The mechanical execution of the volume is not liable to criticism. Mr. Bigelow, as a law writer, is well and very favorably known to the profession in America. It is a sufficient compliment to the book to say it is just such an one as might be expected from Mr. Bigelow. He says the work is the result of an attempt to furnish for ready service a collection of recognized authorities on the existing law of torts, with a consideration of the rise and growth of the law as thus represented, followed by a statement in greater detail of its present aspect; that he has confined himself to a consideration of the typical branches of the subject, omitting bailments, marine torts, statutory torts and the torts of persons under legal disability. In short, the object of the work is to present a full and complete view of the essential doctrines of the law of torts. We do not remember to have seen a volume of leading cases prepared with as much skill, or one upon which there was as much labor bestowed as this one. It took more time and labor to prepare the notes than it would to write an ordinary treatise; they contain the very essence of the law reduced to the smallest possible compass. The following is the order of subjects in this volume: 1. Deceit, Slander and Libel, Malicious Prosecution, Conspiracy. 2. Assault and Battery, False Imprisonment, Seduction and Enticing Away, Trespasses Upon Property, Conversion, Nuisance, Dangerous Animals and Works, Obstructing and Diverting Water, Support of Ground and Buildings. 3. Negligence. The cases have generally been selected with judgment. But we would suggest to Mr. Bigelow, in case he should add another volume, that we have some leading cases in Illinois and other Western States, which we should like to see inserted in the body of the volume, as well as to be cited in the notes. Massachusetts, although a great State, has more than her share of cases in the body of the work.

The Southern Law Review. — This quarterly has improved since it came into the hands of the present publishers. We have just received the third number of the present series. Its contents are, 1. Laws impairing the obligations of contracts, by Robert Hutchinson. 2. Contributions to the history of the Roman law in England, by John Edward Leonard. 3. Some remarks on Executory Devises, by Thomas J. Freeman. 4. The right of railway passengers to suitable accommodations, By Charles A. Choate. 5. Notes to Code Pleading, By P. Bliss. 6. The Reporters and Text writers, By Franklin Fiske Heard. 7. Summary of English Decisions, By Geo. M. Stewart. 8. The King's Bench and growth of the law, By Emory Washburn. 9. The Federal Courts, By Gustavus Schmidt. 10. The Bench and Bar of the South and Southwest, By Henry S. Foote. 11. Foreign selections. 12. Book Reviews. The subscription price of The Review is five dollars per annum. It should be in the office of every attorney.

The American Law Review.—The October number, which is the first of the volume, is received. Its contents are: 1. The ring suits. 2. Is copyright perpetual? An examination of the origin and nature of literary property. 3. The Greville

memoirs. 4. The history of a title. 5. French tribunals of commerce, and of arts and manufactures. 6. Claims against governments. 7. Digest of the English law reports. 8. Selected digest of State reports. 9. Book notices. 10. List of law books published in England and America since July, 1875. 11. Summary of events. As a literary legal publication, the *Law Review* has no equal. It is a great favorite with the most scholarly of the profession. This being the first number of the volume, now is a good time to subscribe. The subscription price is five dollars per annum.

THE CORPORATION TAXES.

CIRCULAR LETTER BY THE ATTORNEY GENERAL DEFINING THE STATUS OF THE SUITS PENDING IN THE FEDERAL COURTS TO ENJOIN THE COLLECTION OF TAXES UPON RAILROADS AND OTHER CORPORATIONS.

STATE OF ILLINOIS,
ATTORNEY-GENERAL'S OFFICE,
SPRINGFIELD, *Sept.* 27, 1875.

To the several County Boards and County Collectors of Illinois:

To avoid the necessity of answering numerous letters of inquiry, and to convey the desired information to those interested, I have prepared this circular respecting the condition of the suits pending in the Federal courts to enjoin the collection of State, county and other taxes assessed against railroads and other corporations. You are aware that the Supreme Court of the State, in a series of decisions, have sustained the constitutionality of the revenue law of the State respecting the assessment of the property and franchises of such corporations. These decisions of the Supreme Court are as yet unreported, but I have a pamphlet copy of them, which can be furnished to those who may wish to use the same. After the Supreme Court had thus decided the disputed legal questions adversely to those who had resisted the payment of such taxes, one or more of the non-resident stockholders in the several railroad or other corporations, organized under the laws of the State (with but few exceptions), filed bills in the United States Circuit Courts in the northern and southern districts of the State, praying for injunctions against the collection of such taxes, on substantially the same grounds as was so decided by the Supreme Court of the State to be insufficient to warrant such injunctions.

The questions involved were argued at length, on both sides, in the United States Circuit Court, at Chicago, in March, 1874, and subsequently before Judges Drummond and Treat, at Springfield, in June of the same year, and the question was then taken under advisement by Judge Drummond to determine whether he would follow the decision of the Supreme Court of the state and dissolve the injunctions. No formal decison of the questions submitted was annonced by the Federal Circuit Court until the following year, when Judge Drummond delivered the opinion published in the number of the Chicago *Legal News*, dated April 10, 1875, (Vol. 7, p. 229.) In the meantime the Federal courts continue to grant injunctions against the collection of the taxes assessed under the designation "capital stock," in all cases where the parties asked therefor. By reference to the opinion of Judge Drummond, published in the *Legal News*, it will be observed that he not only held the tax assessed under the designation "capital stock," invalid, but also held that the action of the state board of equalization, and the law itself, which provided for the assessment and distribution of the value of the tangible property of railroad corporations among the various counties for the purposes of taxation, to be unconstitutional and void. After the rendition of this opinion, it naturally followed that Judge Drummond would not only grant injunctions restraining the collection of the tax upon "capital stock" of corporations generally, but also taxes assessed upon the tangible property of railraod corporations, when bills were filed praying therefor. The district judges, Blodgett and Treat, for a time refused to restrain the collection of taxes assessed upon the tangible property, but at length yielded to the opinion of the circuit judge, and modified their injunctions so as to include the taxes assessed upon the tangible property of railroad corporations, whenever applied to for that purpose.

One ground upon which the federal court held the assessment of the tangible property of railroad corporations to be illegal was, that the State Board raised the valuation placed upon such property by the companies, in their returns to the auditor, without first giving notice to the corporations concerned, of their intentions so to do. We then insisted that, conceding this to be correct, it showed no ground why the corporation should not, at least, pay the tax upon the valuation which they themselves had placed on their own property, and that the court ought to require them to do so, as conditional to the granting of the injunctions for the residue of the tax. Judge Blodgett sustained this view, and, accordingly, in one or two cases, granted injunctions upon this condition. Subsequently, the question was argued before both the judges at Chicago, and the result was, the court relapsed into its former habit of granting injunctions restraining the collection of all such taxes, including that upon the valuation which the corporations themselves had placed on their property. This being the case, no alternative was left but to press one or more of the cases to a final decree in the Circuit Court, from which appeals could be prosecuted to the Supreme Court of the United States. We accordingly filed answers in three of the cases, viz: that of the C., B. & Q R. R. Co., the Chicago and Alton, and the T. P. & W. R. W. Co., and have succeeded in getting final decrees and perfecting appeals to the Supreme Court of the United States in time to submit the same to that court at its term comm ncing on the second Monday of October next. I have the transcript of the records made up and am now engaged in the preparation of the cases for hearing in that court, and hope to have them decided within a few months. In the ordinary course of business the cases would not be likely to be reached for argument in the Supreme Court in less than two years, but the court has power to advance upon the docket and assign an early day for the hearing of appeals from decrees restraining the enforcement of State revenue laws. [U. S. Rev. Stat., p. 189, sec. 949.]

I have no doubt the court will regard the state of Illinois as entitled to this privilege, in respect to these cases, and I intend, in behalf of the State, to apply to the court for such an order soon after it convenes in October next. If this motion is allowed, the cases will probably be argued and decided during the coming winter. When the United States Supreme Court has decided the questions involved in the cases which have been appealed, the federal court will, as a matter of course, apply the same principles thus settled, to the various other cases pending before them. In the meantime, it is thought not to be advisable to press the other cases where temporary injunctions have been granted, to final decrees, but to permit them to remain in *statu quo*, until we get the decision of the United States Supreme Court. There is a general understanding to this effect, between counsel upon the opposite side of the cases and myself, which meets with the approval of the judges of the United States Circuit Courts. Should we prepare the other cases for hearing, and insist on final decrees at the present time, the United States Circuit Court would undoubtedly simply make perpetual the temporary injunctions now pending, and thus place it beyond our power to procure their dissolution, in case the Supreme Court should decide the appealed cases in our favor.

I am, very respectfully,
JAMES K EDSAL,
Attorney General.

SUPREME COURT OF TENNESSEE.

JACKSON, APRIL, 1872.

SCHONFIELD & HANOVER *v.* R. A. MOON.

From Shelby.

1.—COMMERCIAL LAW—BANK CHECK—HOLDER—DRAWER—DRAWEE—PAYEE.

It is a settled rule of commercial law that where the holder of a check sues the drawer—if the drawer, drawee, and the payee live in the same place—the drawer is liable if the check be presented within the business hours of the next day after it is drawn. Citing 2 Parsons on Bills and Notes, 72; Chitty on Bills and Notes, 385.

2 SAME.—As between the drawer and the holder, the check is an appropriation to the latter of so much money in the banker's hands: and unless injured thereby the drawer cannot complain if the money is allowed to remain in bank, though after the second day the risk is with the holder.

OBITER.—1st. As between the holder and endorser, or the drawer and transferrer, the check must be presented immediately or within a reasonable time, according to the relative localities of the parties, otherwise the endorser is released. Citing 2 Parsons, on Bills and Notes, 73.

2nd. If the holder sue the endorser or transferrer, it is competent to show that the check was received as cash or in payment of the debt.

NICHOLSON, Ch. J., delivered the opinion of the court.

J. N. Hall bought a bill of goods of plaintiffs amountig to $141.27, and proposed to go to the Gayoso Savings Bank for the money with which to pay for them. They said they would save him the trouble of going to the bank, as the check of R. A. Moon on the bank was as good to them as money, and they would take it as cash. Hall thereupon passed to them the check of R. A. Moon for $141.27 by delivery, the same being payable to him or bearer. This occurred on the 4th of February, 1868, at 10 o'clock, the bank having paid all the checks presented up to that time. The check of R. A. Moon was not presented until after the bank closed and suspended on the 5th of February, when it was duly protested for non-payment, and notice given to R. A. Moon, the drawer. Moon had a deposit of $400 in the bank when it closed. Schonfield & Hanover have sued R. A. Moon for the amount of the check.

On the trial of the cause the Circuit judge charged the jury:

"As a general rule the holder of a check has the day on which the check is drawn and the business hours of the following day to present the same for payment, but this is not absolute. The holder of a check must use due diligence in the presentation of the check for payment; and if the bank failed after the holder could have got his money on the check, the loss is his."

Under this charge the jury found for defendant, and the plaintiffs have appealed.

The proof makes it certain that if the check had been presented on the 4th of February, or on the 5th before the time when it closed up and failed, it would have been paid. It was manifestly in view of this proof that the judge charged the jury that "if the bank failed after the holder could have got his money, the loss is his." The question arises, is the general rule laid down by the judge, that the holder of a bank check has the day on which it is drawn and the business hours of the succeeding day within which to present it, subject to the qualification stated? It is important to keep in mind the distinction between the liability of the drawer and of the endorser or transferrer of a check. When the holder of a check sues the drawer, if the drawer, the drawee and the payee live in the same place, the drawer is liable if the check be presented for payment within the business hours of the next day after it is drawn. This is a settled rule of commercial law, applicable to the liability of the drawer, to the holder of bank checks.—2 Parsons on Bills and Notes, 72; Chitty on Bills, 385. The check is an appropriation, as between the drawer and the holder, to the latter of so much money in the banker's hands. The holder of the check may allow the money to remain in the banker's hands, and the drawer cannot complain unless he is injured thereby. But the risk of allowing the money to remain in the banker's hands, after the expiration of the banking hours of the day after the check is drawn, rests upon the holder of the check.

But as between the holder of a check and an endorser of it, and the transferrer and the drawer, it must be presented for payment within a reasonable time; and it seems by the best authority that this is the same as required in the case of a bill or note.—2 Parsons on Bills and Notes, 73. As it is one of the peculiar characteristics of a bank check that it has no days of grace, it is necessarily due as soon as it is drawn and delivered to the payee or holder. As between the holder and indorser, therefore, the holder is bound to present it for payment immediately, or at least within a reasonable time acording to the relative localities of the parties, otherwise the indorser ceases to be liable. It is obvious that if this rule should be applied as between the holder and the drawer, the bank check would cease to be anything but a bill of exchange, and could no longer fill the special channel in commercial transactions for which it is designed. The proof in the case shows clearly the commercial usage in respect o bank checks, and the reason of the rule which gives the holder the day in which they are drawn and the next day for presentation. During that period the check is at the risk of the drawer, afterwards it is at the risk of the holder. This is the fixed law which governs the bank check and controls the rights and obligations of the holder and drawer. The drawer issues it with the implied understanding that it need not be presented for payment, except within the business hours of the next day after its issuance, and the holder takes it with the same understanding. During this time, therefore, no laches can be imputed to the holder, unless he received it with a different contract. The fact proven, in this case, that the plaintiffs received the check as cash from Hall in payment of a bill of goods, has no effect as between the plaintiffs and the defendant. If the plaintiffs had sued Hall as indorser or transferrer of the check, this proof would have been pertinent.

We are therefore of opinion that the Circuit Judge erred in his charge to the jury. The judgment is reversed and a new trial awarded.—*Commercial and Legal Reporter.*

SUPREME COURT OF PENN.

MAY '75, 52. MAY 18.

ALEXANDER *v.* MCCULLOUGH et al.

Error to Common Pleas of Blair county.

EVIDENCE—RECORD—BANKRUPT ACT.

In ejectment plaintiff gave in evidence a certified copy of a petition in bankruptcy, a certificate of the bankrupt's discharge, and a deed from the bankrupt's alleged assignee.

Held, (affirming the judgment of the court below), that there was no evidence of the appointment of the assignee, and without this the plaintiff could not recover.

This was an action of ejectment by Alexander against McCullough and another. The plaintiff derived his title from Barr, the alleged assignee in bankruptcy of Lockard, the former owner of the premises. To prove his title he read in evidence (*a*) a certified copy of the petition of Lockard to be declared a bankrupt, with a schedule thereto annexed, containing a description of the property in dispute; (*b*) the certificate of discharge of the bankrupt, dated Nov. 21, 1871; (*c*) deed of Barr, as assignee in bankruptcy of Lockard, to the plaintiff, dated November 8, 1871.

The court below, DEAN, (P. J.) directed a verdict for the plaintiff, reserving the point whether the plaintiff had sufficiently shown Barr's title, as assignee, to the property in question. Judgment was afterwards entered for the defendant on the point reserved, the court saying: "There was no copy of the decree or order of the court upon the petition, or evidence that any was made. The plaintiff's title depended on an injunction in bankruptcy, as against Lockard, and regular appointment of Barr as assignee, under the act of Congress and rules of the District Court. No exemplification of the record, containing the full and entire proceedings of that court, was produced; detached portions of the record alone were offered. We think the plaintiff failed to show authority in Barr to make the sale and conveyance of the lot, or Lockard's estate in it; that authority could only have been shown by an exemplification of the record, setting forth the preliminary steps necessary to the appointment of an assignee. This could not be shown by detached portions of the record; it must be made up and certified as a whole."

To this judgment Alexander took a writ of error, assigning as error the entry of judgment for the defendant on the point reserved.

D. J. NEFF, for plaintiff in error.

[In the paper book of the plaintiff in error were printed the docket entries in the District Court of the United States in The Estate of Lockard, a Bankrupt, together with the assignment by the register in bankruptcy to Barr as assignee of that estate, neither of which had been offered in evidence.]

The plaintiff's testimony showed a good title in the assignee. The assignment to the assignee set out that he was duly appointed assignee. This assignment is part of the record of the District Court of the United States, and it is not necessary to put in evidence the record of the entire proceedings to prove this one. A copy of the deed of assignment, duly

certified, is conclusive evidence of the title of the assignee to sue. He will be admitted as a party to a suit, upon the production of such duly certified copy. Hendon *v.* Howard, 9 Wall., 664.

S. S. BLAIR, contra.

The Bankrupt Act, § 38, provides that a copy of the record must be duly certified to be *prima facie* evidence. A record must be made up and certified as a whole. Susquehanna Railroad Co. *v.* Quick, 18 P. F. Smith, 25, 189.

May 24. THE COURT. The plaintiff in error was the plaintiff below, and, therefore, could recover only on the strength of his own title. His title depended on a sale by an assignee in bankruptcy, but of this he had no legal evidence. An uncertified (*certified*—Ed.) copy of the petition to be declared a bankrupt, and a certificate of discharge, were no evidence of the appointment of Simon B. Barr as assignee, or of his authority to sell. The plaintiff, therefore, had nothing to support his alleged deed by an assignee in bankruptcy. This puts an end to his ejectment, as the verdict would necessarily be against him, without regard to the other questions in the case.

Judgment affirmed.

PER CURIAM. Opinion in full.

WILLIAMS, J., absent.—*Pittsburg Legal Journal.*

ENGLISH COURT OF APPEALS IN CHANCERY.

FRIDAY, MAY 28.

[*Before the Lord Chancellor* (CAIRNS), *and Lord Justice* JAMES.]

BATSTONE *v.* SALTER.

ADVANCEMENT—TRANSFER OF STOCK INTO JOINT NAMES OF TRANSFEROR, DAUGHTER, AND SON-IN-LAW—SURVIVORSHIP.

A widow transferred stock which had previously stood in the joint names of her husband and herself, and to which she had become entitled by survivorship on the death of her husband, into the joint names of herself, her daughter, and her daughter's husband; and the dividends of the stock were enjoyed by the transferor during her life. The daughter died before her mother, and the son-in law survived the mother.

Held, (affirming the decision of Hall, V. C.), that there was no resulting trust and that the son-in-law was entitled to the fund by survivorship.

This was an appeal from a decision of Hall, V. C.

The facts of the case, which are more fully stated in the report of the hearing before the Vice-Chancellor (31 L. T. Rep. N. S. 600), were shortly as follows:

On the 15th Sept. 1864, Mary Anne Wakeford sold out 100*l.* consols part of a sum of 1000*l.* consols standing in her name, and applied the proceeds to her own use, and transferred the remaining 900*l.* consols into the joint names of herself, Margaret Salter her daughter, and Henry Salter, who had married her daughter about a year before the date of the transfer.

The 1000*l.* had formerly belonged to Mrs. Wakeford's husband, who had transferred it into the joint names of himself and his wife, and on her husband's death Mrs. Wakeford had become entitled to the fund by survivorship.

At the date of the transfer, Mrs. Wakeford was sixty-nine years of age, and very infirm, but she herself received the dividends of the 900*l.* consols for three or four years afterwards, and subsequently Henry Salter received them and paid to her.

Margaret Salter died on the 4th July, 1869, without issue.

Mrs. Wakeford died on the 9th Nov., 1871, having by her will, which was made in 1868, appointed the plaintiff her executor.

The plaintiff, by the direction of Wickens, V. C., instituted the present suit against Henry Salter, praying that he might be declared a trustee of the 900*l.* consols for the residuary legatees named in the will.

The suit was heard before Hall, V. C., who held that the defendant was entitled to the fund, and dismissed the bill with costs.

From this decision the plaintiff appealed.

DICKINSON, Q. C. and SIMMONDS for the appellant.

There is no evidence that Mrs. Wakeford intended to benefit her son-in-law by this transfer, and it would appear that her intention was only to benefit her daughter. She did not stand *in loco parentis* to her son-in-law, and therefore, in the absence of clear evidence of an intention to benefit him, it must be held that there is a resulting trust: Stock *v.* McAvoy, 27 L. T. Rep. N. S. 441; L. Rep. 15 Eq. 55; George *v.* Howood, 7 Price, 646; Lloyd *v.* Read, 1 P. Wms., 608; Kingdon *v.* Bridges, 2 Vern., 67; Dumper *v.* Dumper, 6 L. T. Rep. N. S. 315; 3 Giff., 583.

Without calling upon

INCE, who appeared for the respondent,

The LORD CHANCELLOR (CAIRNS) said: I am not able to arrive at a different conclusion from that of the Vice-Chancellor. The transfer of this fund was made by Mrs. Wakeford in Sept., 1864. It appears that about a year before that date the defendant, Henry Salter, had married a daughter of Mrs. Wakeford. The fund came to Mrs. Wakeford herself in a somewhat singular way. The stock, of which this fund formed a part, had during the life of her husband been transferred by him into the joint names of himself and his wife, and she had become absolutely entitled to it by survivorship. Thus her attention had been called to the operation of a transfer of this kind, as she became mistress of the fund by a similar transfer, a circumstance which probably has not occurred in any previous case. With this knowledge, she transferred 900*l.* of the stock into the joint names of herself, her daughter, and her daughter's husband. Now, supposing that she acted with the intention of endowing her daughter, who was a married woman, how else could she have done it than by transferring the fund in this way? Assuming that to have been her intention, she could not have transferred the fund into her daughter's name alone, at least without deceiving the Bank of England as to the fact of her daughter being a married woman, for the bank would not allow a transfer of stock into the name of a married woman, without her husband, before the passing of the Married Women's Property Act 1870. She was, therefore, obliged to make the endowment in this way, namely, by transferring the fund into the joint names of her daughter and her daughter's husband, and in order to secure her own control over it during her life she put in her own name as transferee jointly with their names. Now if that be so, and if it be true that the doctrine of resulting trust is only adopted where there is no other probable explanation of the transaction, here there is a reasonable explanation of the transaction in the fact that there was a daughter to be endowed, and that she could only be endowed by this form of transfer. In my opinion every inference which would have been drawn in the case of a transfer into the joint names of a mother and an unmarried daughter, ought to be drawn here too. Then, if the intention of the transferor at the time when the transfer is made is ascertained, it cannot make the least difference whether the daughter and her husband both survive the transferor, or, as in the present case, the husband only survives. I am of opinion, therefore, that the decision of the Vice-Chancellor is correct, and the appeal must be dismissed with costs.

Lord Justice JAMES.—I entirely agree.

Appeal accordingly dismissed with costs.

Solicitors for the appellant, NEWMAN and PAYNE.

Solicitors for the respondent, HIRD and SON.—*The Law Times.*

THE *American Law Review*, in its book notices, says of Waterman on Trespass, that it has certain merits which it cheerfully commends; that the style is concise; that cases, on the whole, are fairly stated; and the selection of topics is, as far as it goes, practical; and it has no doubt the book will prove of considerable service for some time. But concludes than it can but feel, that the volume exhibits too many marks of compilation for sale, and too few of thoughtful labor and patient digesting, to entitle it to more than a limited term of usefulness. We cannot say that we agree with all that is said by the *Review* of this book. The same care and labor that produced the present edition, bestowed on subsequent editions, will give it an extended term of usefulness.

HON. E. M. HAINES has announced a new edition of his Justices' Treatise as in press.

WHEREAS, ON THE 3D DAY OF JULY, A. D. 1871, Strange A. Holman executed his trust deed to the undersigned, Chalkley J. Hambleton, as trustee, thereby conveying the property hereinafter described, to secure his four notes, of even date therewith, payable to the order of Charles W. Ayers, one for $733.34, in one year; one for $738.33, in two years, one for $366.67, in three years, and one for $366.66, in three years, all with interest at the rate of ten per cent. per annum, payable semi-annually, which trust deed was recorded in the recorder's office of Cook county, Illinois, in book 435 of records, on page 21.

And whereas, it was provided in said trust deed, that on default in the payment of said notes, or any part thereof, and on the application of the legal holder of either thereof, the said trustee might sell said premises, and all the right and equity of redemption of the said Holman, his heirs and assigns therein, at public auction, at the northeast corner of the court house square, in the city of Chicago, Illinois, for the highest and best price the same would bring in cash, two weeks' notice having been previously given of the time and place of such sale by advertisement in any newspaper at that time published in said city of Chicago, and on such sale to execute and deliver to the purchaser good and sufficient deed or deeds of the premises sold, and that it should not be obligatory on the purchaser to see to the application of the purchase money.

And whereas, default has been made in the payment of the note for $733.34, falling due in one year from its date, and in the semi-annual installments of interest falling due January 3d and July 3d, 1875, the amount of said note and said interest being now claimed to be due.

Now, application having been made to me by the legal holders of said last named note to sell said premises for the payment thereof, pursuant to the provisions of said trust deed, notice is hereby given, that on Saturday, the sixth day of November, A. D. 1875, at the hour of ten o'clock A. M., at the northeast corner of the court house square, at the corner of Randolph and Clark streets, in the city of Chicago, and State of Illinois, I, the undersigned, Chalkley J. Hambleton, will sell at public auction, for the highest and best price the same will bring in cash, the premises in said trust deed mentioned situate in Chicago, Cook county Illinois, and described, as follows, to wit:

Sub-lot two (2) in the subdivision by Chas. W. Damier, Robert L. Elder, and Chas. W. Ayers of sub-lot six (6), in the subdivision of lots eighty-one (81) and eighty-two (82) in Ellis' east addition to Chicago, more particularly described as follows: Beginning at a point in the westerly line of said sub-lot six (6) eighteen feet and ¼ of an inch southeasterly from the northwesterly corner of said sub-lot six (6), and running thence northeasterly to a point in the easterly line of said sub-lot six (6) twenty-two feet 9¼ inches southeasterly from the northeasterly corner of said sub-lot six (6), thence southeasterly along the easterly line of said sub-lot, eighteen feet and five inches, thence southwesterly to a point in the westerly line of said sub-lot six (6) thirty-six feet five ¾ inches southeasterly from the northwesterly corner of said sub-lot six (6), thence northwesterly along said westerly line of said sub-lot six (6), said westerly line being also the easterly line of Ellis' avenue, eighteen feet and five inches, to the place of beginning, it being the intention to convey a lot the northerly and southerly boundary lines of which shall coincide with the middle of the partition wall separating the houses erected on the lot herein described from the houses erected on the lots south and north of and adjoining the same, respectively, together with all the right and equity of redemption of the said Holman, his heirs and assigns therein.

CHALKLEY J. HAMBLETON, Trustee.
Chicago, Sept. 30, 1875. 2-5

A. W. WINDETT,
Attorney.

TRUSTEE'S SALE.—WHEREAS, JAMES R. MAY, by his certain trust deed, dated the twenty-second day of September, one thousand eight hundred and seventy-three, recorded in the recorder's office of Cook county, Illinois, in book 312 of records, at page 189, conveyed to me, the undersigned trustee, as hereinafter set forth, all those parcels of land situate in the city of Chicago, county of Cook and State of Illinois, described as follows, to wit:

The south three and one-third (3⅓) feet of lot twelve (12), and the north seventeen and two-thirds feet (17⅔) of lot thirteen (13), in block nine (9), in Ashland second addition to Chicago, with the appurtenances thereon, to secure the payment of his certain promissory note, for the sum of forty-five hundred dollars, being purchase money for said premises, payable in three years from the date thereof, and also of his six other promissory notes, for two hundred and two dollars and fifty cents each, payable, respectively, in 6, 12, 18, 24, 30, and 36 months from the date thereof, being for semi-annual interest upon the first mentioned sum, all said notes signed by said May, payable to the order of himself, and by him indorsed, bearing even date with said trust deed and described therein, and are made payable at the Manufacturers' National Bank of Chicago.

And whereas, it was, among other things, provided in said trust deed, that in case of default in the payment of said principal note, or of any of said interest notes, or any part thereof, then, on the application of the legal holder of either of said notes, it should be lawful for the undersigned, trustee, to sell and dispose of the said premises, and all the right, title, benefit and equity of redemption of the party of the first part, his heirs and assigns therein, at public auction, at the court house, in said county of Cook, to the highest bidder, for cash, twenty days notice having been previously given of the time of sale by advertisement in a newspaper published in the county of Cook, and to make, execute, and deliver to the purchaser or purchasers at such sale, good and sufficient deed or deeds of conveyance of the premises sold.

And whereas, default has been made in the payment of two of said interest notes due, respectively, on September 22d, 1874, and March 22d, 1875; and the legal holder of said notes has elected to declare the whole principal debt due and payable, in accordance with the terms of said trust deed, and has applied to me, as trustee, to sell said premises.

Now, therefore, public notice is hereby given, that I, the undersigned, will, under the powers and for the purposes expressed in said trust deed, on the twenty-eighth (28th) day of September, 1875, at ten o'clock in the forenoon, at the court house at the southeast corner of LaSalle and Adams streets, in the city of Chicago, in the county of Cook and State of Illinois, at the west door or entrance of said court house on Adams street, offer for sale, to the highest and best bidder, for cash, the above described premises, with the improvements thereon, and all the right, title, benefit and equity of redemption of the said James R. May, his heirs and assigns.

Chicago, August 24th, 1875.
EDWARD ROBY, Trustee.
A. W. WINDETT, Atty. 49-52

The above sale is postponed to Oct. 28th, 1875. 2-5

GARDNER & SCHUYLER,
Attorneys.

CHANCERY NOTICE. — STATE OF ILLINOIS, Cook county, ss. Circuit court of Cook county. September term, A. D. 1875. Martha Williams vs. Godlove Williams.—In chancery.

Affidavit of the non-residence of Godlove Williams, defendant above named, having been filed in the office of the clerk of said Circuit court of Cook county, notice is hereby given to the said Godlove Williams, that the complainant heretofore filed her bill of complaint in said court, on the chancery side thereof, and that a summons thereupon issued out of said court against said defendant, returnable at the court house, in the city of Chicago, in said county, on the third Monday of November next (1875), as is by law required.

Now, unless you, the said Godlove Williams, shall personally be and appear before said Circuit court of Cook county, on the first day of a term thereof, to be holden at Chicago, in said county, on the third Monday of November, 1875, and plead, answer, or demur to the said complainant's bill of complaint, the same, and the matters and things therein charged and stated, will be taken as confessed, and a decree entered against you according to the prayer of said bill.

JACOB GROSS, Clerk.
GARDNER & SCHUYLER, Complts. Solrs. 2-5

TRUSTEE'S SALE.—WHEREAS, JAMES BLIGH (a bachelor) by a certain trust deed duly executed, acknowledged and delivered, bearing date the twenty-fifth day of February, A. D. 1874, and recorded in the recorder's office of Cook County, in the State of Illinois, in book 347 of records, on page 598, did convey unto William Loeb, as trustee, all the following described premises, situated in the city of Chicago, county of Cook and State of Illinois, to wit:

Lot number one (1) be the same more or less in block number five (5) in Davis' subdivision of the north half (n½) of the east half (e½) of the southwest quarter (sw¼) of section number twenty-eight (28), in township number thirty-nine (39), north range fourteen (14), east of the third (3d) principal meridian, to secure the payment of one principal promissory note for the sum of one thousand ($1,000.00) dollars, executed by the said James Bligh and payable to the order of himself three (3) years after date, and six (6) semi-annual interest notes for fifty ($50.00) dollars each, due respectively in six (6), twelve (12), eighteen (18), twenty-four (24), thirty (30) and thirty-six (36) months after date, all bearing interest, after due, at ten per cent. per annum, for value received, all being indorsed by said James Bligh.

And whereas, it is provided in and by said trust deed, that in case of default in the payment of said seven (7) promissory notes, or any of them, or any part thereof, or of any interest thereon, according to the tenor and effect of said notes, or in case of the breach of any of the covenants and agreements in said trust deed contained, then on the application of the legal holder of said notes, or either of them, it should and might be lawful for the undersigned, William Loeb, to sell and dispose of the said premises, and all the right, title, benefit and equity of redemption of said James Bligh, his heirs and assigns therein, at public auction at the north door of the Board of Trade building, in the city of Chicago, in the county of Cook and State of Illinois, or on said premises, for the highest and best price the same will bring in cash, two weeks notice of such sale having been previously given of the time and place of such sale by advertisement in the Chicago Legal News, or in any newspaper at that time published in said city of Chicago, and to make, execute and deliver to the purchaser or purchasers at such sale, good and sufficient deed or deeds of conveyance for the premises sold, and out of the proceeds of such sale to pay all costs and expenses incurred in advertising and selling said premises, including attorney's fees, also the principal and interest on said notes up to the day of such sale.

And whereas, it is further provided in said trust deed, that in case of default in any of said payments of principal or interest, according to the tenor and effect of said promissory notes, as aforesaid, then, and in that case, the whole of said principal sum thereby secured, and the interest thereon to the time of sale, may at once at the option of the legal holder thereof, become due and payable, and the said premises be sold in the manner and with the same effect as if the said indebtedness had matured.

And whereas, default has been made in the payment of two semi-annual interest notes for fifty dollars each, due respectively in twelve (12) and eighteen (18) months after the date thereof; and whereas, in accordance with the terms of said trust deed, the legal holder of said principal note for one thousand dollars, and of said interest notes, has elected to consider the whole of said principal sum secured by said trust deed due and payable, and the whole amount thereby secured to be paid, is claimed to be now due and payable,

And whereas, said legal holder of said principal and interest notes has made application to the undersigned, the trustee in said trust deed named, and requested him as such trustee, to sell and dispose of said premises under the power in said trust deed, and for the purposes therein stated,

Now, therefore, public notice is hereby given, that in pursuance of said trust deed, I, the undersigned, will, on Wednesday, the 20th day of October, A. D. 1875, at ten o'clock A. M., at the north door of the Board of Trade building in said city of Chicago, sell and dispose of the premises above and in said trust deed described, and all the right, title, benefit and equity of redemption of the said James Bligh, his heirs and assigns therein, at public auction, for the highest and best price the same will bring in cash.

Chicago, October 1st, 1875.
2-4 WILLIAM LOEB, Trustee.

FRANK J. CRAWFORD,
Attorney, 180 Clark Street.

ADMINISTRATOR'S SALE OF REAL ESTATE.—Public notice is hereby given, that by virtue of a decree of the County court of Cook county, and State of Illinois, made at the October term, A. D. 1873, of said court, in the certain cause of R. Biddle Roberts and Emil B. Weishaar, administrators of the estate of John Weishaar, deceased, petitioners, and Clementine George, Aristides George, her husband, and Pauline Weishaar, defendants, the undersigned, as such administrators, will sell at public vendue, at the hour of two (2) o'clock in the afternoon, on Saturday, the twenty-fifth day of September, A. D. 1875, at the east door of the court house in which said county court is held, in the city of Chicago, in said county, to the highest and best bidder, the following described real estate, situate in the county of Cook and State of Illinois, viz:

Lot two (2), in block four (1), Assessors' division of out-lot "B" in Wrightwood, being in the southwest quarter of section twenty-eight (28), township forty (40), north of range fourteen (14), east of the third principal meridian, deed to be executed to purchaser on confirmation of such sale by said court.

TERMS OF SALE:—One-third cash at the time of sale; balance in two equal payments, the first in six months, the second in twelve months from date of sale, deferred payments to bear interest at 8 per cent. per annum, for which purchasers' notes, with personal security, and a mortgage on the premises sold to secure the same to be given.

Dated Chicago, Illinois, August 21, 1875.
R. BIDDLE ROBERTS,
EMIL B. WEISHAAR,
Administrators as aforesaid.

FRANK J. CRAWFORD, Solr.

The above sale is adjourned to the 30th day of October, A. D. 1875, at 2 o'clock P. M., at the place above stated.
R. BIDDLE ROBERTS, } Admrs.
2-5 EMIL B. WEISHAAR, }

TRUSTEE'S SALE.—WHEREAS, CHARLES ROADNIGHT and Mary A. Roadnight, his wife, did, on the 10th day of February, 1866, make, execute and deliver to the undersigned, Levi D. Boone, as trustee, their trust deed, dated on that day, conveying to him the property therein and hereinafter described, for the purpose of securing the payment of a certain promissory note, made by the said Charles Roadnight and James F. Roadnight, of the same date, and payable to the order of the Union Mutual Life Insurance Company, of Maine, for the principal sum of two thousand dollars, with interest at eight per cent. per annum, payable semi-annually, said note being payable three years after the date thereof, which trust deed was recorded in the office of the recorder of deeds of McLean county, Illinois, February 13th, 1866, in book S of mortgages, at page 497.

And whereas, default has been made in the payment of said principal sum of money, and the amount of principal and interest now claimed to be due thereon is about $2,800.

Now, therefore, I, the said Levi D Boone, trustee, at the request of the said Union Mutual Life Insurance Company, the holder of said note, do hereby give notice that I will, on Saturday, the 23d day of October next, at the hour of 12 o'clock, noon, at the most westerly of the two north doors of the court house, situated on the southeast corner of Adams and LaSalle streets, in the city of Chicago, Illinois, sell to the highest and best bidder, for cash, the following described premises, to wit:

Lots 1, 2, 3, 4, 7, 8, 9, 10, 12, 13, 14, 15, and 19, in block six (6), in the town of Towanda, in the county of McLean, in the State of Illinois, together with the two warehouses and other improvements situate on said lots, together with all the right, title, claim and equity of redemption of the said Charles and Mary A. Roadnight, their heirs or assigns therein, for the purpose of raising money for the payment of said indebtedness and the expenses of said sale.

LEVI D. BOONE, Trustee.
Sept. 30th, 1875. 2-4

WHEREAS, WILLIAM HEADLAM, JR., AND Ellen Headlam, his wife, of the city of Chicago, county of Cook and State of Illinois, by their certain trust deed, duly executed, acknowledged, and delivered, bearing date the twenty-third day of July, A. D. 1874, and recorded in the recorder's office of Cook county, in the State of Illinois, in book 271 of records, at page 603, did convey unto the undersigned, W—. A—. Stevens, as trustee, all the following described premises, situated in the county of Cook and State of Illinois, to wit:

Lot number sixty-one (61), in Hopkins' subdivision of block nine (9), in Canal Trustees' subdivision of section seven (7), township thirty-nine (39) north range fourteen (14), east of the 3d P. M., subject to a mortgage or trust deed for $1,000, made June 10th, A. D. 1872, by Gurdon S. Hubbard, Jr., trustee for Augusta A. Beech, and recorded in the recorder's office of said Cook county in book 152, at page 6, to secure the payment of one principal promissory note, for the sum of eight hundred ($800) dollars, executed by William Headlam, Jr., and payable to the order of Thomas G. Atwood, bearing date the twenty-third (23d) day of July, A. D. 1874, and payable in two (2) years after date, at the Commercial National Bank of Chicago, bearing interest at the rate of ten per cent. per annum, payable annually.

And whereas, it is provided in and by said trust deed, that in case of default in the payment of said promissory note, and interest, or any part thereof, according to the tenor and effect of said note, or in case of a breach of any of the covenants or agreements in said trust deed contained, then, on the application of the legal holder of said note, it should and might be lawful for the undersigned, as such trustee, to sell and dispose of said premises, or any part thereof, and all the right, title, benefit and equity of redemption of said William Headlam, Jr., and Ellen Headlam, their heirs and assigns therein, at public auction, at the north door of the Chamber of Commerce, in the city of Chicago, in the county of Cook and State of Illinois for the highest and best price the same will bring in cash, four (4) weeks previous notice of such sale having been first given in one of the newspapers published in said city of Chicago, and to adjourn such sale from time to time, and for such time, as may be thought expedient, and to make, execute, and deliver to the purchaser or purchasers at such sale good and sufficient deed or deeds of conveyance for the premises sold, and out of the proceeds of such sale to pay all costs and expenses incurred in advertising and selling said premises, and all other expenses of this trust, and all money advanced for taxes and other assessments, with the interest thereon, also the principal and interest on said note.

And whereas, default has been made in the payment of the interest due on said note, and the legal holder of said note has made application to the undersigned, the trustee in said trust deed named, and requested him as such trustee, to sell and dispose of said premises under the power in said trust deed, and for the purposes therein stated.

Now, therefore, public notice is hereby given that in pursuance of said trust deed, and by virtue of the power and authority to me granted in and by the same, and by virtue of the statute of the State of Illinois, the undersigned, will, on Wednesday, the third day of November, A. D. 1875, at two o'clock P. M., at the north door of the Chamber of Commerce, in the city of Chicago, county of Cook and State of Illinois, sell and dispose of the premises above and in said trust deed described, and all the right, title, benefit and equity of redemption of the said William Headlam and Ellen Headlam, their heirs or assigns therein, at public auction, for the highest and best price the same will bring in cash.

Dated Chicago, September 28th, 1875.
W. A. STEVENS, Trustee.
GOGGIN & SCALES, Attys. for Trustee. 2-5

S. P. NORTON.
Attorney, Rooms 17 & 18, Times Building.

TRUSTEE'S SALE.—WHEREAS, JOHN MONZEL did, by his certain deed of trust, dated September 22d, 1874, and recorded in the recorder's office of Cook county, Illinois, in book 420 of records, page 430, convey the real estate hereinafter described to Francis M. Corby, as trustee, to secure the payment of the promissory note (said promissory note being given for purchase money of the premises in said deed of trust described, hereinafter again described) of said John Monzel, for the sum of $174, payable to the order of Prentice H. Putnam, dated September 22, 1874, payable on or before three years after date, with interest at the rate of eight per cent. per annum, payable annually, signed by said John Monzel, which said note is indorsed by said Prentice H. Putnam to Wheelock Corby, by whom it is now owned and held.

And whereas, default has been made in the payment of the interest for one year on said promissory note, which default still continues; and the legal holder of said note having declared the whole of the same due, both in principal and interest (the principal being $174, and the interest which has accrued on the same since September 22, 1874, the date of said note), due and payable as especially provided for and agreed to in and by said deed of trust in case of such default, and having applied to me, as trustee as aforesaid, to cause said real estate hereinafter described to be sold, as authorized by said deed of trust:

Now, therefore, notice is hereby given, that on Tuesday, November 2d, 1875, at eleven o'clock in the forenoon of said day, at the north door of the Chamber of Commerce building, (situate at the southeast corner of Washington and LaSalle streets), in the city of Chicago, in the State of Illinois, I shall, by virtue of the power and authority in me vested in and by said deed of trust, sell at public auction, to the highest and best bidder, for cash, the following described real estate, known and described as follows, to wit:

Lots twenty-five (25) and twenty-six (26), in block four (4), in Putnam's subdivision of all the southwest quarter of the southwest quarter of section nine (9), in township thirty-eight (38), north of range fourteen (14), east of the third principal meridian, except the south twenty-three (23) acres thereof, situated in the county of Cook and State of Illinois, and all the right, title, benefit and equity of redemption of said John Monzel, his heirs and assigns therein.

Dated Sept. 29th, 1875.
FRANCIS M. CORBY, Trustee.
S. F. NORTON, Atty. 2-5

PUBLICATION NOTICE IN ATTACHMENT.—State of Illinois, county of Cook, ss. Superior court of Cook county, November term, A. D. 1875. Isaac McConihe vs. The Sandlake Warp Mill Company.—Attachment.

Public notice is hereby given to the said The Sandlake Warp Mill Company, that a writ of attachment issued out of the office of the clerk of the Superior court of Cook county, dated the fifteenth day of September, A. D. 1875, at the suit of the said Isaac McConihe, and against the estate of The Sandlake Warp Mill Company for the sum of twelve thousand five hundred and seventeen dollars and forty cents, directed to the sheriff of Cook county to execute.

Now, therefore, unless you, the said The Sandlake Warp Mill Company, shall personally be and appear before the said Superior court of Cook county, on or before the first day of the next term thereof, to be holden at the court house, in the city of Chicago, on the first Monday of November, A. D. 1875, give special bail and plead to the said plaintiff's action, judgment will be entered against you, and in favor of the said Isaac McConihe, and so much of the estate attached, as may be sufficient to satisfy the said judgment and costs, will be sold to satisfy the same.

ALEXANDER F. STEVENSON, Clerk.
DANIEL GOODWIN, JR., Atty. 2-4

McCAGG, CULVER & BUTLER,
Attorneys, Room 27 Bryan Block.

ESTATE OF DWIGHT KLINCK, DECEASED.—Notice is hereby given to all persons having claims and demands against the estate of Dwight Klinck, deceased, to present the same for adjudication and settlement at a regular term of the County court of Cook county, to be holden at the court house, in the city of Chicago, on the third Monday of November, A. D. 1875, being the 15th day thereof.

Chicago, September 28th, A. D. 1875.
LEONARD G. KLINCK,
Administrator, with the will annexed.
McCAGG, CULVER & BUTLER, Attys. 2-7a

PERKINS & CHASE,
Attorneys.

MORTGAGE SALE.—WHEREAS, GEORGE L. Murchie and Janet Murchie, his wife, of the city of Chicago, in the county of Cook and State of Illinois, by their certain mortgage deed, duly executed, acknowledged, and delivered, bearing date the 27th day of July, A. D. 1874, and recorded in the recorder's office of Cook county, in the State of Illinois, in book 406 of records, at page 69, did convey unto the undersigned all the following described premises, situated in the county of Cook and State of Illinois, to wit:

Lot forty-four (44), block two (2), of McChesney's subdivision of the southeast quarter of the southeast quarter of the northwest quarter, and the east eleven (11) acres of the north half of the southeast quarter of the northwest quarter of section nine (9), township thirty-eight (38) north, range fourteen (14) east of the third principal meridian: also, lots forty-eight (48) and the north five (5) feet of lot forty-seven (47), in block two (2) of Mrs. Hilliard's subdivision of the north half of block three (3) in Hilliard & Dobbins' first addition to Washington Heights, in said Cook county, as laid out on map of said subdivision recorded in the recorder's office of said Cook county in book one (1) of plats, page eleven (11), to secure the payment of one promissory note, for the sum of three hundred dollars, executed by said George L. Murchie, by the name and style of G. L. Murchie, and payable to the order of the undersigned, nine months after date, with interest at the rate of ten per cent. per annum, bearing even date with said mortgage deed.

And whereas, it is provided in and by said mortgage deed, that in case of default in the payment of the said promissory note, or any part thereof, according to the tenor and effect of said note, or in case of a breach of any of the covenants or agreements in said mortgage deed contained, then it should and might be lawful for the undersigned to sell and dispose of the said premises, and all the right, title, benefit and equity of redemption of said George L. Murchie and Janet Murchie, their heirs and assigns therein at public auction, at the south door of the Criminal court house, in the city of Chicago, in the county of Cook and State of Illinois, for the highest and best price the same will bring in cash, three weeks previous notice of such sale having been given by publication in the Chicago Legal News, or in any newspaper at that time published in the said city of Chicago, and to make, execute and deliver to the purchaser or purchasers at such sale, good and sufficient deed or deeds of conveyance for the premises sold, and out of the proceeds of such sale to pay all costs and expenses incurred in advertising and selling said premises, including attorney's fees, also the principal and interest on said note.

And whereas, default has been made in the payment of a part, to wit: two hundred dollars, of the principal of said note, and of interest upon said sum of two hundred dollars from the date of said note.

Now, therefore, public notice is hereby given, that in pursuance of said mortgage deed, and by virtue of the power and authority to me granted in and by the same, and by virtue of the statute of the State, I, the undersigned, will, on Friday, the 5th day of November, A. D. 1875, at ten o'clock A. M., at the south door of the Criminal court house, in the said city of Chicago, sell and dispose of the premises above and in said mortgage deed described, and all the right, title, benefit and equity of redemption of the said George L. Murchie and Janet Murchie, their heirs or assigns therein, at public auction, for the highest and best price the same will bring in cash.

Dated October 1, 1875.
JOHN J. OSWALD, Mortgagee.
PERKINS & CHASE, Attys. for Mortgagee. 2-5

MUNN, MUNN & POPE,
Attorneys.

TRUSTEE'S SALE.—WHEREAS, LUTHER L. Greenleaf, of the town of Evanston, county of Cook, State of Illinois, by his trust deed, duly executed, acknowledged, and delivered, bearing date the first day of April, A. D. 1872, and recorded in the recorder's office of Cook county, in the State of Illinois, in book 100 of records, page 49, did convey to Alexander McDaniel, trustee, the following described premises, situated in the village of Wilmette, in the town of New Trier, in the county of Cook, State of Illinois, to wit:

All of the southeast fractional quarter of section number twenty-seven (27), in fractional township number forty-two (42), north of range number thirteen (13), east of the third principal meridian—excepting a certain portion of said fractional quarter, conveyed by John S. Clark, by deed, dated the sixteenth day of February, A. D. 1841, to one Mary Dennis; and also the following described lot or parcel of land, situate in the county of Cook and State of Illinois, to wit: Fifteen acres (15), to be taken from the south end (by an east and west line) of the southeast fractional quarter of section twenty-seven (27), in township forty-two (42), north of range thirteen (13), east of the third principal meridian—reserving about one acre of land heretofore conveyed by said Lombard Dusham to James Jones, and by James Jones to Nicolas Smith, to secure the payment of his three certain promissory notes, bearing date April first, A. D. 1872, payable to the order of Lombard Dusham—excepting about 13 acres heretofore released—the first note for two thousand dollars, in one year from the date thereof; the second note for two thousand dollars, in two years from the date thereof; and the third note for seventeen thousand seven hundred and sixty-eight dollars, at the expiration of seven years from the date thereof, with interest on the whole principal at the rate of seven per cent. per annum, payable semi-annually, the said notes being given in payment of the purchase money for the lands above described.

And whereas, it was provided in and by said trust deed, that in case of default in said payment of said notes, or any part thereof, or the interest accruing thereon, according to the tenor and effect thereof, or in the payment of any taxes or assessments, ordinary or special, which might be levied or assessed against the premises during the continuance thereof, on the application of the legal holder of said promissory notes, it should be lawful for the undersigned, Alexander McDaniel, trustee to sell and dispose of said premises, and all the right, title, claim, interest, and benefit and equity of redemption of the said Luther L. Greenleaf, his heirs, executors, administrators, or assigns therein, at public vendue, to the highest bidder, for cash, at the south door of the court house, in the city of Chicago, in said county, after having advertised such sale thirty days in a public newspaper, published in the city of Chicago, in said county, or by posting up written or printed notices in four public places in said county (personal notice being expressly waived), and to execute and deliver to the purchaser or purchasers thereof deeds for the conveyance in fee of the premises sold, and out of the proceeds of such sales to pay all advances of the trustee for the payment of taxes and assessments, and expenses for advertising, selling, and conveying, as aforesaid, including attorney's fees; second, the amount due on said notes; third, rendering the overplus, if any there be, to the said Luther L. Greenleaf, or his legal representatives.

And whereas, default has been made in the payment of the taxes levied upon said premises since the purchase thereof by said Greenleaf, and the interest on the last mentioned promissory note of $17,768 now remaining unpaid—amounting to the sum of $4,065 48-100, exclusive of the expenses of this sale, and the amount paid for taxes on said property amounting to $590 33-100, and the said Dusham, as the legal holder of said last mentioned note, has made application to the undersigned, as the trustee in said instrument named, to sell and dispose of said premises under the power in said trust deed, and for the purposes therein stated.

Now, therefore, public notice is hereby given, that in pursuance of said trust deed, and by virtue of the authority to me granted thereby, I, the undersigned, Alexander McDaniel, will, on Thursday, the 4th day of November, A. D. 1875, at ten o'clock A. M., at the south door of the court house on Michigan street, between Clark street and Dearborn street, in the city of Chicago, in said county, sell and dispose of said lands and premises above and in said trust deed described, and all the right, title, interest, and equity of redemption of the said Luther L. Greenleaf, his heirs and assigns therein, at public vendue, for cash, subject only to the existing lien upon said lands, for the payment of said outstanding note of $17,768.

Dated September 1st, A. D. 1875.
ALEXANDER McDANIEL, Trustee.
MUNN, MUNN & POPE, Attys. 2-5

CHICAGO LEGAL NEWS

SATURDAY, OCTOBER 16, 1875.

The Courts.

U. S. CIR. COURT, D. OF OREGON.

OPINION FILED OCT. 4, 1875.

W. W. MORELAND *v.* MARION COUNTY.

ACTION TO RECOVER POSSESSION OF REAL PROPERTY.

In an action of ejectment the defense may consist of either a denial of the plaintiff's right to recover by controverting any or all of the material allegations of the complaint, or of an averment or plea of such an estate in the premises, or license, or right to the possession thereof, in the defendant, as is inconsistent with a present right of possession in the plaintiff, or both. (Or. Civ. Code, § 316.)

The statement of new matter in the answer must be "concise," and it must constitute a "defense" to the action, and like the statement in the complaint of "the facts constituting the cause of action," it must be limited to the ultimate facts of such defense, and should not contain the evidence of them.

A defense which states in detail the circumstances by which it is claimed that a dedication of the premises was made to the defendant to certain public uses, is irrelevant as a pleading; it should have alleged a right of possession in the defendant, in pursuance of a dedication, for the purposes and time claimed as prescribed by statute. (Or. Civ. Code, § 316.)

Facts stated in a defense do not amount to an estoppel, unless pleaded as such.

A plea of estoppel must allege that the plaintiff ought to be precluded from showing some fact or matter stated in the complaint, to which the estoppel is interposed, because of some other fact or matter alleged in the plea, which constitutes the estoppel.

A district attorney, by virtue of his office, is the attorney for the several counties in his district, and as such must prosecute or defend all actions to which any of such counties may be a party, without reference to the locality of the court in which they may be pending.

The County Court may employ council to assist the district attorney in the prosecution or defense of a particular action, but the district attorney is entitled to control the proceedings in court, and the county cannot appear by any other attorney.

If the pleading of a county is not subscribed by the proper district attorney, it is not duly subscribed, and may be stricken out of the case. (Or. Civ. Code, §§ 79, 103.)

Opinion by DEADY, J.

This action is brought by a citizen of the State of California, against the defendant, a county of the State of Oregon, to recover the possession of block 6 in the town of Salem in said county, alleged to be worth $130,000, together with the sum of $500 damages, for withholding the possession of the same.

The answer of the defendant first denies the material allegations of the complaint except those concerning the citizenship of the parties and the value of the property. It also contains a second defence styled "a further and separate answer," which the plaintiff moves to strike out as irrelevant and frivolous, as well as the whole answer, because "the same is not subscribed by the defendant or its attorney."

The second defense is divided into 12 articles or paragraphs, and states substantially, that about the year 1844 William H. Willson and Chloe A., his wife, settled upon a tract of public land including the premises, since designated in the United States surveys as Donation claim No. 44; that in July, 1853, the said Willson and wife having resided upon and cultivated said claim for four successive years, and otherwise complied with the provisions of the Donation act of September 27, 1850, the surveyor general of Oregon, issued to them Donation certificate No. 20, for said claim, designating therein the north half thereof, which includes the premises in controversy, as enuring to the wife, and the south half to the husband; that on February 4, 1862, a patent issued from the United States for said claim, to said Willson and wife; that between the years 1844 and 1850 said Willson, with the knowledge and consent of his wife, laid off the town of Salem upon said claim, and on March 22, 1850, recorded the plat thereof, and that upon said plat said block 6 was designated as a public square and dedicated to the use of the people of said county and town for the purpose of building a court house thereon; that said people, in 1852, with the knowledge and consent of said Willson and wife, took possession of said block and built a court house thereon, and by virtue of said dedication, have used the same for public purposes ever since, and that said Willson contributed largely to the building of the court house; that said Willson and wife, after they acquired title to said claim, sold lots with reference to said plat, and continued to recognize said dedication of the premises until the death of said Willson, in 1856, after which the said Chloe A. sold lots in said town with reference to said plat, and continued to recognize the dedication aforesaid up to the time of her death in 1874, and assented to the said dedication of said block; that, in 1872, the defendant erected a court house upon said block, with the knowledge and consent of said Chloe A., at a cost of $100,000; and that whatever interest the plaintiff has in the premises is derived from said Chloe and was acquired since the erection of said last mentioned court house and with a knowledge of these facts.

In an action of this kind the defense may consist of either a denial of the plaintiff's right to recover, by controverting any or all of the material allegations of the complaint, or of an averment or plea of such an estate in the premises, or license or right to the possession thereof in the defendant, as is inconsistent with a present right of possession in the plaintiff, or both. (Or. Civ. Code, § 316).

The answer of the defendant substantially admits that the plaintiff is the owner in fee of the premises, but undertakes to set up in bar of the action to recover the possession, a dedication of the same to the use of the defendant, by Chloe Willson, under whom it is alleged the plaintiff claims.

This attempt to plead a license or right to the possession in the defendant, consists of a detailed narrative of the settlement and occupation of Donation claim No. 44, by William H. Willson and Chloe A. Willson, from 1844 to 1874, including their acts and doings with reference to the defendant and said block 6.

The motion to strike out the second defense as irrelevant must be allowed. Much of it is immaterial—even as *evidence* of a dedication by Chloe A.—while none of it is relavent as an allegation or pleading to the complaint. (The President, etc. *v.* Kitching, 7 Bosworth, 668).

The statement of new matter in the answer is required to be "concise," and to constitute a "defense" to the action. Like the statement in the complaint of "the facts constituting the cause of action," it must be limited to the ultimate facts of such defense, and should not contain the evidence of them. (Wooden *v.* Strew, 10 How., p. 50).

§ 316 *supra* provides that in an action to recover the possession of real property: "The defendant shall not be allowed to give in evidence any estate in himself or another in the property, or any license or right to the possession thereof, unless the same be pleaded in his answer. *If so pleaded, the nature and duration of such estate or license or right to the possession, shall be set forth with the certainty and particularity required in a complaint.*

For instance, if the defendant relies upon a right to the possession of this property, arising from a dedication thereof by Chloe A. Willson to itself, for the purpose of building and maintaining thereon, forever, a court house, it should plead that fact as directed by this statute, and not what council may consider the evidence of it. This could be done in a few words, without burdening the record with a story of a dozen folios concerning the circumstances out of which the defendant claims such a right arose, or imposing upon the plaintiff the unnecessary hardship and disadvantage of replying in detail to this statement of these circumstances before any proof is offered in support of them, and thereby in effect convert the answer into a bill of discovery.

On the argument, counsel for the defendant claimed that the facts stated in this defence was also relied upon as a bar to the action by way of estoppel. But they are not pleaded as such. There is no fact stated in the complaint, which the defendant alleges the plaintiff ought not to be permitted to show. A plea of estoppel must allege that the plaintiff ought to be precluded from showing some fact or matter stated in the complaint, to which the estoppel is interposed, because of some other fact or matter alleged in the plea, which constitutes the estoppel. For instance, in an action of ejectment by the vendor of the premises claiming under an after acquired and superior title, the vendee and defendant might plead that the plaintiff ought to be precluded from showing that he was seized of the premises and entitled to the possession thereof, because on some day prior to the commencement of the action he had conveyed the same to the defendant with full covenants of warranty.

§ 79 of the Or. Civ. Code provides that "every pleading shall be subscribed by the party or his attorney;" while § 103 declares that any pleading not "duly subscribed" may be stricken out of the case. In support of the motion to strike out the whole answer, upon the ground that it is not duly subscribed, counsel for plaintiff contends that the district attorney for the judicial district, including Marion county, is the attorney for the defendant. That he is appointed such attorney by means of a public election in the district held in pursuance of law, and that the defendant cannot disregard such appointment and appear in this action by another, and, therefore, this answer is not duly subscribed and is liable to be stricken out of the case.

§ 945 of the Or. Civ. Code prescribes the duties of the district attorney, as follows:

"He shall prosecute for all penalties and forfeitures to the State, which may be incurred in any county in his district, and for which no other mode of prosecution and collection is expressly provided by statute, *and in like case, prosecute or defend as the case may be, all actions, suits or proceedings in any county in his district to which the State or such county may be a party.*"

The answer is subscribed by certain attorneys of this court as "attorneys for defendant." The motion is not made upon affidavit or other proof as to who is the district attorney for the third district, which includes the defendant. I do not think the court can take judicial knowledge of the fact that any particular person is district attorney for that district, or that neither of the attorneys who have subscribed the answer is not such officer. On the other hand, the subscription to the answer does not profess to be made by a district attorney, as it should, if made by one. The motion asserts that the answer is not subscribed by defendant's attorney, and upon the argument it was substantially admitted that neither of the attorneys subscribing the answer is the district attorney for the district including the defendant.

Assuming, then, that the answer is not subscribed by the attorney for the third district, is it subscribed by the attorney of the defendant as required by statute?

Until the contrary appears, the court will presume that when one of its attorneys subscribes a pleading as the attorney of a party, to a proceeding before it, that he is authorized to do so. But in the case of a public corporation, like the defendant, which has a regular official attorney, appointed by law, there is no room for the presumption that any other attorney has authority to represent it. The voters of the various counties in the third district have, by the election of the district attorney, constituted him the attorney of such counties, with authority "to prosecute or defend, as the case may be, all actions, suits or proceedings" to which any of them may be a party, during his continuance in office. Admitting even, what is very doubtful, that a county may authorize an attorney, other than the proper district attorney, to represent it in court, there is certainly no presumption that it has done so—the fact must be made to appear.

Regularly this should be done by an order of the county court, and a copy of the same, under its seal, filed with the appearance of the attorney. The presumption is, that the defendant has an official attorney in the person of the attorney for the third judicial district upon whom the law casts the authority and duty of defending this action. The court is therefore not at liberty to presume that the gentlemen whose names appear signed to the answer of the defendant were authorized to do so.

It is not doubted but that the county court may, with the assent of the district attorney, and it may be without his assent, employ counsel to assist him in the prosecution or defense of a proceeding to which it is a party; but even then the district attorney would be *the* attorney of the county and entitled to control the proceedings and required to authenticate the pleadings by his subscription. It may, also, as representing the county, control and direct the conduct of a cause to which the latter is a party the same as a natural person might do (Or. Civ. Code, § 871); but unless there is a vacancy in the office of district attorney, it must appear in court by him. He may be assisted, but he cannot be ignored.

It has been suggested that this action is not within the purview of § 945 supra, because it is not prosecuted or defended "*in any county*" in the third district. But it is quite certain from the language of the whole section that it was the intention of the legislature to make the district attorney the law officer of the county, and require him to appear for the county in any action to which it might be a party, without reference to the locality of the court in which it may be pending. It is true, this action is not prosecuted *in* the county of Marion, because this court does not happen to sit there, but the cause of action *arose* therein, and the county is a party to it, and this brings it within the statute which requires it to be defended by the district attorney of the third district.

The motion to strike out is allowed on both grounds.

H. Y. THOMSON & W. LAIR HILL for plaintiff; REUBEN P. BOISE for defendant.

U. S. CIRCUIT COURT, E. D. OF PA.

Error to the District Court.

GUILLOU, assignee in bankruptcy of Charles Vezin (trading as Charles Vezin & Co.), a bankrupt, *v.* WILLIAM FONTAIN.

1. Under the provisions of the act of June 5th, 1872, Revised Statutes, § 915, the Federal courts may issue process of foreign attachment against the property of non residents, where the same would lie under the laws of the State in which such court is held.

2. An action of debt, by the assignee of a bankrupt firm, against a special partner, upon his statutory liability under the laws of Pennsylvania, to restore the amount of his original capital, where the same has been reduced by the payment of interest or profits to him, may be commenced by process of foreign attachment.

This was an action of debt, commenced by the plaintiff in error, in June, 1873, by process of foreign attachment, in the District Court of the United States, for the Eastern District of Pennsylvania.

The attachment was served on July 1st, 1873, upon property of the defendant in error, in the hands of the garnishees, as endorsed upon the writ; and on the 23d day of July, following, the plaintiff filed his declaration, setting forth, that on the 18th day of October, A. D. 1869, a limited partnership was formed under the provisions of the acts of Assembly of the commonwealth of Pennsylvania in such case made and provided, between the said defendant, as special partner, and Charles Vezin, as general partner, for the transaction of the business of the importation and sale of gloves, under the firm name of Charles Vezin & Co., for a term to commence on the 18th day of October, A. D. 1869, and to terminate on the 18th day of October, A. D. 1872, the amount of the capital contributed by the said special partner being fifty thousand dollars in cash. That afterwards, at various specified times, and while the said limited partnership continued and was in existence, portions of said capital so contributed by said special partner to the common stock of said firm were withdrawn by and paid to the said defendant as and in the name of interest on the said capital, amounting together to the sum of five thousand seven hundred and eighty-two seventy-seven one-hundredth dollars. That by such payment of interest to the said special partner, the defendant in this action, the original capital has been reduced by an amount of five thousand seven hundred and eighty two seventy-seven one-hundreth dollars. That afterwards, to wit, on the 29th day of November, A. D. 1871, the said Charles Vezin, trading as Charles Vezin & Co., was, on creditors' petitions filed in said court, duly adjudicated a bankrupt; and this plaintiff was afterwards, to wit, on the 22nd day of January, A. D. 1872, duly appointed assignee, and an assignment by instrument of writing under the hand of Edwin T. Chase, Esq., one of the registers in bankruptcy of said court, bearing date January 22nd, A. D. 1872 (here shown to the court), assigning and conveying to this plaintiff all the estate real and personal of the said Charles Vezin, bankrupt, with all his deeds, books, and papers relating thereto, was duly made and delivered to this plaintiff. By means and reason whereof an action has accrued to this plaintiff to demand, and have of and from the said defendant the sum of five thousand seven hundred and eighty-two seventy-seven one-hundredth dollars above demanded.

The defendant failing to appear, a motion was made, at the third term of the court ensuing the execution of the writ, for judgment for such default, which was refused; the court, Cadwalader, J., saying, "that if the jurisdiction which the first section of the act of Congress of the 2d of March, A. D. 1867, to establish a uniform system of bankruptcy throughout the United States, confers upon this court, of suits for collection of assets of the bankrupt, enables the assignee in bankruptcy to proceed as plaintiff in such a suit by way of foreign attachment, in any case the demand of the present plaintiff, as appears from his declaration, is not such as to sustain a proceeding by foreign attachment."

The case was then removed to the Circuit Court upon a writ of error; the assignment of error being the refusal of the court below to grant judgment against the defendant for default of an appearance.

J. C. LONGSTRETH, Esq., for plaintiff.

The opinion was delivered by McKENNAN, Circuit Judge, on October 4th, 1875.

As far back as 1809, at least, it was the practice in the Federal courts, in this district, to issue writs of foreign attachment according to the laws of the State of Pennsylvania. Fisher *v.* Consequa, 2 Wash. C. C. R. 382, and Toland *v.* Sprague, 12 Pet. 300, are proofs of the existence of this practice. In some, only, of the United States Circuits did this practice prevail, while in others its legality was denied. But in Toland *v.* Sprague a majority of the Supreme Court held, that, in the courts of the United States, the right to attach property to compel the appearance of persons can be properly used only in cases in which such persons are amenable to the process of the court, *in personam*. The question was certainly presented in the case, and although it was not necessary to the judgment to decide it, as was held by the four dissenting judges, yet the case must be considered as deciding that the Federal courts, under the law as it then stood, had no authority to proceed by foreign attachment, as it was regulated by the laws of Pennsylvania.

But, doubtless, in view of this decision, the act of Congress of June 6th, 1872, greatly enlarges the authority of the Federal courts in the employment of remedies. By the sixth section of that act, Rev. Stat. sec. 915, it is enacted that "in common law causes in the Circuit and District Courts the plaintiff shall be entitled to similar remedies, by attachment or other process against the property of the defendant, which are now provided by the laws of the State in which such court is held for the courts thereof."

The Federal courts in this State are thus invested with undoubted authority to proceed against non-resident persons by attachment of their property, as may be done by the laws of the State.

Was the plaintiff, then, entitled to an allowance of his motion for judgment against the tdefendant for default of appearance? It was denied by the court below, for the reason that the cause of action, as appears from the declaration, would not support a proceeding by foreign attachment.

The action is debt, and the declaration avers that a limited partnership was formed between Charles Vezin and the defendant, to the capital of which the defendant contributed $50,000 as a special partner; that during the continuance of the term, at certain times stated, the defendant withdrew from the capital contributed by him specific sums of money, as and in the name of interest on the said capital, whereby the original capital was reduced by the amount so received by him; and the demand is to recover from the defendant these several sums as received by him in violation of law.

The suit is brought to enforce a statutory liability claimed to be imposed upon the special partner, under the circumstances stated in the declaration. By the statute (Brightly's Purdon, 937,) it is enacted "that if it shall appear that by the payment of interest or profits to any special partner the original capital has been reduced, the partner receiving the same shall be bound to restore the amount necesssry to make good his share of capital with interest." The liability to restore is complete, if the payments to a special partner reduces the capital, and he may be compelled to repay the deficiency in his share of the capital thus caused by an appropriate action.

Is a foreign attachment then an allowable method in Pennsylvania of commencing such action?

Any demand arising *ex contractu* which is susceptible of ascertainment by a definite standard may be the foundation of a foreign attachment. In Strock *v.* Little, 9 Wr. 418. Mr. Justice Woodward, says "under our statutes, which being remedial, are to be liberally construed, foreign attachments may issue in all actions sounding in contract, where the plaintiff can swear to the amount claimed, or the court, upon a rule to show cause of action, can get at the sum in controversy with sufficient accuracy to fix the amount of bail which the defendant is to give to dissolve the attachment." This is the settled construction of the Pennsylvania statutes, and the demand in this case is fully within it. It is a determinate and certain sum, received under circumstances, stated in the declaration, which imposed upon the defendant a statutory obligation to repay it, and for the recovery of which an action *ex contractu* is the appropriate remedy.

The motion of the plaintiff in error for judgment for default of appearance by the defendant ought, therefore, to have been granted, and the cause is remanded to the District Court, with directions to allow said motion and to enter judgment accordingly.—*Legal Gazette.*

U. S. CIR. COURT, W. D. OF PA.

THE SCHUYKILL NAVIGATION CO. *v.* ELLIOTT.

1. The act of Congress of July 14, 1870, re-enacts the sections of the act of 1864, in reference to the tax of five per cent. on the amount of interest upon a corporation's bonded indebtedness.

2. Congress has the right to impose a tax by a new statute, although the measure of the tax is governed by the income of the past year.

Opinion by McKENNAN, CIR. J. October 4th, 1875.

On the 10th and 16th of September, 1870, the plaintiff returned to the internal revenue assessor the amount of interest upon its bonded indebtedness, payable on and between the 1st days of January and July, 1870, upon which a tax of 5 per cent. was assessed by the assessor and paid by the plaintiff under protest to the defendant, as collector; and the question to be determined is, whether this interest was subject to taxation.

If the 120th, 121st, 122nd, and 123d sections of the Internal Revenue Act of June 30th, 1864, and its Amendments in 1866 and 1867, did not expire by limitation with the year 1869, except as to the income tax properly so considered, as was held by the Circuit Court for the first Circuit, in the Concord R. R. Co. *v.* Topliff, Int. Rev. Record, vol. 21, No. 10, there can be no doubt of the liability of the plaintiff for the tax imposed. And, indeed, it is very difficult to gainsay the conclusion of the court in that case, supported, as it is, by very cogent reasons.

But whether this be so or not, the Act of July 14th, 1870, Stat. at Large, vol. 16, p. 261, is decisive of the plaintiffs liability. Nothwithstanding the peculiarity of its phraseology, the Supreme Court holds in the case of Stockdale. Collector, *v.* The Atlantic Insurance Co. of New Orleans, 20 Wall. 323, that the 17th section of that act re-enacts sections 122 and 123 of the Act of 1864, as modified by subsequent statutes, and subjects to the tax imposed by them the earnings of corporations which accrued before its passage. Mr. Justice Miller, delivering the opinion of the court, says: "The right of Congress to have imposed this tax by a new staute, although the measure of it was governed by the income of the past year, cannot be doubted; much less can it be doubted, that it could impose such a tax on the income of the current year, though part of that year had elapsed when the statute was passed. * * * The paragraph we have been considering was not, in its essence, an attempt to construe a statute differently from what the courts had construed it, for no construction on this subject had been given by any court. Nor was it an attempt, by construing a statute, to interfere with or invade personal rights, which were beyond the Constitutional power of Congress. But it was a legitimate exercise of the taxing power, by which a tax, which might be supposed to have expired, was levied and continued in existence for two years longer. It was, therefore, valid for that purpose, and the tax must be upheld."

Although the contested assessment in that case was upon corporate earnings, the principle of the decision is equally applicable to a tax levied upon the interest payable on corporate bonds, because the tax upon both is imposed by the same sections of the Act of 1864, 1866 and 1867, which the court declare are continued in force by the Act of 1870. As the tax in question was assessed after the passage of that act, it must be held to have been legally demandable; and judgment will, therefore, be entered on the special verdict for the defendant.

WM. M. TILGHMAN and R. C. McMURTRIE, Esqs., for plaintiff.

JOHN K. VALENTINE and WM. McMICHAEL, Esqs., for defendant.—*Legal Intelligencer.*

U. S. DIST. COURT, W. D. OF MO.

DELIVERED OCT. 11, 1874.

We are under obligations to Mack J. Leaming, of the Jefferson City bar, for the following charge of KREKEL, J., to the jury in the case of the United States *v.* James Blackburn et al., charged with conspiring and going in disguise on the highway for the purpose of depriving Frank Lucas and others as a class of persons, and because of their being colored citizens of the United States of African decent, of the equal protection of the laws and of the equal privileges and immunities under the laws. The court charged the jury as follows:

JUDGE KREKEL'S CHARGE.

U. S. *v.* Blackburn et al. } Indictment for conspiracy to deprive colored citizens of the equal protection of the laws and equal privileges and immunities.

The defendants are indicted for conspiring together and going in disguise on the highway, and on the premises of Lucas and others for the purpose of depriving them, as a class of persons, and because of their being colored citizens of the United States of African descent, of the equal protection of the laws, and of equal privileges and immunities under the laws. The offenses charged consist in the conspiring together, for the purpose of depriving colored citizens as a class, of the equal protection of the laws and of equal privileges and immunities to which they are entitled.

At the present stage of the proceedings the indictment must be treated not only as charging an offense against the laws of the United States, but as doing so in due form of law. No inquiry or suggestion as to the constitutionality of the law will therefore be proper or indulged in. In the first place the indictment charges a conspiracy, which is defined to be a combination of two or more persons, to commit the crime charged in the indictment, namely: the depriving colored citizens as a class, and because of their being colored, of the equal protection of the law and of equal privileges and immunities to which they are entitled. It is not necessary that there should be direct proof of a conspiracy but such as may be inferred from acts of the parties, such as going together in disguise in the night-time, the doing of illegal acts, in which two or more unite, using language in the hearing of each other indicating a common purpose, in fine, anything satisfying your mind that they acted in harmony with a common design and for a common illegal purpose. The indictment further charges, and you must be satisfied from the evidence in the case, that the object in the conspiracy was against the persons named in the indictment or some one or more of them as a class, and because of their being colored citizens. You cannot find these defendants guilty of any offense under this indictment, if you shall come to the conclusion that their acts, however criminal, were crimes committed without any design and purpose to deprive the colored citizens named in the indictment, or some of them, because they were colored, of the equal protection of the law or equal privileges and immunities, which the law guarantees to them.

Acts such as entering the houses of *colored* persons only, while on their nightly, illegal and criminal errants; talk such as, we will give you a touch of the Civil Rights Bill; notices such as indicate hostility to *colored* schools, more or less tend to lead you to proper conclusion in reference to their object, design and intention. Crimes, however, such as these defendants are charged with when committed without any design to effect particular persons or a particular class, are punishable under State laws only.

The law guarantees equal protection to all. It is no defense, or even a mitigation in the legal sense, that the colored persons named in the indictment were charged by the perpetrators of the outrages, or other parties, with illegal acts or crimes, for if they had been guilty of any such, they were entitled to trials in the courts ordained for that purpose.

The failing to resort to them strongly tends to show that the wrongs pretended to have been committed were private, rather than public wrongs, and that the charges against them were invented to palliate, if not justify their illegal acts. Further, if you shall find, from the evidence, that the colored people of the township in which the colored persons named in the indictment resided, were, under the law, by virtue of the number of children of suitable school age, entitled to have a public school, and that the defendants, or any two or more of them, conspired by illegal means to deprive them, as a class, and on account of their color, of such school, either by driving them off or intimidating them, in order to prevent them from availing themselves of the benefit of the law, such acts tend to show, in the language of the indictment, that their object was the depriving them, as a class of persons and because of their being colored, of their legal rights.

By the equal protection of the laws, spoken of in the indictment, is meant that the ordinary means and appliances which the law has provided shall be used and put in operation alike in all cases of violation of law; hence, if the outrages and crimes shown to have been committed in the case before you, were well known to the community at large, and that community and the officers of the law wilfully failed to employ the means provided by law to ferret out and bring to trial the offenders, because of the victims being colored, it is a depriving them of the equal protection of the law.

Aside from the depriving of colored persons, as a class, of the equal protection of the laws, charged in the indictment, it also charges that they were deprived of equal privileges and immunities under the laws.

The privileges and immunities here spoken of are defined in an early decision by Justice Washington to be such as "belong of right to citizens of all free governments, and which have at all times been enjoyed by the citizens of the several States, and comprehend the enjoyment of life and liberty with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety." The enjoyment of life and liberty implies safety to person and property. The illegal and criminal interference with either by the defendants, or two or more of them, is to deprive the person or persons so interfered with, of equal privileges and immunities, and if such interference was with the intent to solely affect the colored persons named in the indictment as a class, and on account of their color, this charge of the indictment is made out.

The government, through a grand jury, has accused the defendants of the crime charged. For the purpose of the trial, the defendants are considered innocent. The government must prove the charges, and satisfy your minds as to the guilt of the defendants, or two or more of them, beyond a reasonable doubt. By a reasonable doubt is meant the waivering of the mind in coming to a conclusion, from the evidence, as to the guilt or innocence of the party charged.

If, on a careful examination of the whole testimony in the case, your mind shall be in hesitation or doubt as to the guilt or innocence of all, or any of the parties, you shall acquit all, or such regarding whom you have such doubt. If you are satisfied beyond such doubt of the guilt of two or more of the defendants, you should find a verdict of guilty as to such, about whom you have no doubt.

You are the sole judges of the weight, under the law as laid down by the court, you will give to the facts testified to, and of the credibility of the witnesses. Of the credibility of the witnesses, you must judge as men who are familiar with

the affairs of life. Before you, on the one side, is a class of witnesses, who but a short time since were denied the right to testify against their former masters, the whites. As witnesses, we have had but little experience with them. Whether flaws in their moral character will similarly affect their character as to truth and veracity when upon the witness stand, as we suppose of whites, you must judge. Their conduct on the witness stand, the promptness and directness, the intelligence with which they answered or failed to answer inquiries made of them in your presence, are proper to be considered in estimating their credibility. On the other hand, you have their former masters, whites, testifying against them. How far *they* may, unknown to themselves, possibly be influenced by prevailing prejudices, you are to judge. I can but ask you to give these matters the most careful consideration.

In reference to the alibi undertaken to be shown by the defendants, I call your attention to the fact that it is a defense which is set up by the defendants and must be made out by them to your satisfaction. The law regarding the strength or weakness of the alibi made out by the facts and circumstances testified to, has been so fairly presented on both sides in the arguments of counsel, that I need not further allude to it. You are authorized to find all, or as many of the defendants guilty, or not guilty, as you in your judgment, in the application of the law as given you by the court, applied to the facts and circumstances testified to, may determine.

We are indebted to the law firm of ROSENTHAL & PENCE, of this city, for the following opinion:

SUPREME COURT OF ILLINOIS.

THE CHARTER QUO WARRENTO CASE.

We published, in 8 CHICAGO LEGAL NEWS, 18, the opinion of the Supreme Court of this State, by SHELDON, J., passing upon the validity of the reorganization of this city under the act of 1872. In that opinion the court failed to pass upon the cross-errors assigned by Judge LAWRENCE and A. M. PENCE, counsel for the Citizen's Association. Last week they moved the court to take up and dispose of the cross-errors. The court granted the motion, and on Monday last the following opinions were filed in the case:

SHELDON, J.

Appellee has assigned cross-errors on the ruling of the Court below in sustaining demurrers to the fourth, fifth, and sixth replications to the third amended plea.

The sixth replication was as follows:

And by way of further replication to said third plea as amended, leave of the Court for that purpose being first had and obtained, said Charles H. Reed, State's Attorney, etc. says, precludi non, because he says that at the pretended election so held on the 23d day of April, 1875, no poll books were kept of the votes at the polling places in the First, Second, Seventh, Eight, Ninth, Eleventh, Eighteenth, and Twentieth, Wards in said city. That no clerks were appointed for said polling-places, nor were any clerks present at such places, nor were any poll-books or other record kept upon which were entered the names of the voters so voting at such places, nor were any numbers placed upon the ballots so cast at such polling-places.

And he further avers that all the ballots, so cast at such polling places, were counted by said judges of said polling places.

And he further avers that the judges of said polling-places made returns of the ballots so cast at said places to the Common Council of the City of Chicago.

And he further avers that no clerks attested the returns of said judges of said polling-places.

And he further avers that no poll-lists or tally-sheets were returned by said judges with the said returns so made by them to the said Common Council.

And he further avers that said Common Council did canvass said pretended returns of the judges of the polling-places in said First, Second, Seventh, Eight, Ninth, Eleventh, Eighteenth, and Twentieth Wards, and did count and allow the returns so made by the said judges of election in said wards last mentioned as having been cast at said pretended election in said wards.

And he further avers that the returns of said judges of election in said wards last mentioned, so canvassed by said Common Council, showed a majority in favor of incorporating said city under said law of 1872, in said plea referred to, which majority exceeded the entire majority in favor of incorporating under said act, as found and declared by said Common Council to be the result of the election in all the wards of said city, to wit, more than 5,000 votes.

And he further avers that some ballots were cast at said pretended election for and some against minority representation in the Common Council of said city.

And he further avers that at all the polling-places in said city, to wit: at the polling-places of the First, Second, Seventh, Eight, Ninth, Eleventh, Eighteenth, and Twentieth Wards in said city, only one ballot-box was used by the judges of election at said polling-places respectively, and that each voter was permitted to cast two ballots at his proper place of voting, and that many voters, to-wit: 5,000, actually cast two ballots at their respective polling-places.

And he further avers that the said judges of election, at their respective polling-places aforesaid, received two ballots from each of the voters so offering to cast two ballots, and that said judges, in said cases, deposited both ballots so cast in a single ballot-box, so kept by said judges respectively as aforesaid.

And he further avers that, during the progress of said election, and subsequent thereto, large numbers of ballots were fraudulently inserted into the said ballot-boxes at the voting of the First, Second, Seventh, Eighth, Ninth, Eleventh, Eighteenth and Twentieth wards in said city, which were not cast by any voter, and that, after the closing of the polls at the respective polling places in said wards, the said judges of election in said wards respectively, to wit: The judges of election in said First, Second, Seventh, Eighth, Ninth, Eleventh, Eighteenth and Twentieth wards, in making up their returns respectively, added to the actual count of votes in favor of said act of A. D. 1872, a large number, to wit: 2,000 votes, which were never cast, and which were never counted out of said ballot-boxes.

And he further avers that all the returns so made by said judges of election were canvassed by said Common Council, and the result was declared to be in favor of adopting said act of A. D. 1872.

Without this, that a valid election was held in said city, in pursuance of said petition, resolution and notice, in manner and form as in said plea is alleged.

And of this, he puts himself upon the country, etc.

The other two replications were like the sixth, except in the omisson of one or more of the particulars of irregularity therein alleged.

The demurrers to the replications were special, assigning various causes of special, demurrer.

The averments as to the casting of two ballots do not necessarily impute anything wrongful to the voters. There were two questions voted upon, of incorporation and minority representation, and we do not understand the averment of the voters casting two ballots to import anything more than that they cast a ballot upon each one of the two questions.

According to the averments of the sixth replication, there was gross irregularity in conducting the election in these specified wards, and fraud on the part of the judges of the election in those wards. But an election is not necessarily to be made void on such grounds, especially in the other wards of the city. The rules prescribed by the law for conducting an election are directory merely, not imperative. Piatt *v.* People, 29 Ill., 54.

There may be reason shown here for rejecting the returns made from the wards specified as evidence of the votes cast in them, as in Knox County *v.* Davis, 63 Ill., 405, where it was held that the poll-book and certificate of an election in one of the towns of the county were rightfully rejected as evidence of the vote of town because of fraudulent practices in the conducting of the election.

In support of the ruling of the court in sustaining the demurrers to these replications, we think it sufficient to say that the replications do not aver that the matters alleged affected the actual result of the election.

The averment in that respect is, that the returns in these wards showed a majority for incorporation which exceeded the entire majority in favor of incorporation, as found and declared by said common council to be the result of the election in all the wards of said city, to wit: more than 5,000 votes. It was not enough that the result of the election as found and declared by the common council should have been affected, but it must have been the actual result; the question being whether a majority of the legal votes actually cast were in favor of adopting the law. The result as found and declared by the common council was but evidence of what was the actual result.

In one or more other wards of the city there might have been equal irregularity affecting the returns of a like number of votes against incorporation, counterbalancing the effect of the irregularities charged, as respects the actual result. The issue tendered in this respect should not have been upon the result as found and declared by the common council, but upon the actual result, or as to the majority of legal votes polled.

We are of opinion that the demurrers were properly sustained to the replications.

It has not been necessary to consider whether this proceeding will be against a municipal corporation as a body.

MCALLISTER, J.—I concur, but go further than the above opinion. If the information was bad in substance, the demurrer of relators to defendant's special pleas should have been carried back and sustained to the information. I think the information was bad in substance, on the ground that neither at common law or under our statute will an information in the nature of a quo warranto upon the relation of private individuals lie against a municipal corporotion as a body. As I understand the English cases at common law, such an information against municipal corporation on the relation of private individuals will not lie. Rex *v.* The Corporation of Carmanthen, 2 Barrows, 869 S. C., 1 W., Blackstone, 187; The People *v.* Richardson, 4 Cond., 109, and cases there cited. This case is not within our statute. That includes private corporations only.

The recognition of such a doctrine would be fraught with danger to the rights and liberties of the people under local governments. If private individuals may institute and prosecute such cases against the City of Chicago as a body, they may, by parity of reasoning, against the County of Cook as a body, to test the validity of its organization, and if the proceeding will lie, then, by the default or mispleading of an attorney, judgment of ouster may go, and three-quarters of a million of people be divested of all corporate rights and privileges under such local governments.

It would lead to confusion and disorganization of society, if not revolution. If it will lie as to cities and counties, why may it not as to States? Why may not individuals institute suits in the Federal Courts against the State of Illinois, to determine whether the Constitution of 1870 was regularly adopted, and in the same way, by default or the verdict of a jury, obtain a judgment of ouster?

Such cannot be the law. The usual and legal course is to proceed against the individual officers, who, it is claimed, have usurped the franchise as complained of. The court has not passed upon this question by the above opinion; I think it is raised, and therefore express my views upon it. For the reasons given, the demurrer of relators to the defendant's pleas should have been carried back to the information, and sustained to that, as bad in substance.

BREESE, J.—I am disposed to think that an information in the nature of quo warranto, by private individuals, will not lie against a municipal corporation as such, and that the demurrer to the special pleas should be sustained to the information.

WALKER, J.—I incline to the opinion that this information cannot be maintained against a city, town, village, county, township, or other municipality as a body, but it should be against the officers, of the body. That an election for the adoption of the charter cannot be contested in such a proceeding.

SUPREME COURT OF IOWA.

JUNE TERM, 1875.

DANIELS, appellant, *v.* CHICAGO, IOWA AND NEBRASKA R. CO., et al.

Appeal from Linn District Court.

RAILROAD—LANDS TAKEN FOR—MEASURE OF DAMAGES.

When a railroad company entered upon land necessary for its convenient use without condemnation thereof under the statute, or grant from the owner, and subsequently instituted proceedings under the statute to assess the damage sustained by the owner on account of the appropriation of the land, the measure of his recovery will be the value of the land at the time the railroad entered upon it, with six per centum per annum interest, and not its value at the time of the assessment of damages.

This is a proceeding under the statute instituted by the defendants, railroad corporations, to assess the damages sustained by plaintiff on account of the appropriation and taking by defendants of a lot in Cedar Rapids, owned by plaintiff, for the use of the railroad. Upon an appeal from the assessment made by the sheriff's jury, judgment was rendered in the District Court in favor of plaintiff for the sum of $178; he now appeals to the court. Other facts in the case appear in the opinion.

E. LATHAM for appellant.

N. M. HUBBARD and E. S. BAILEY for appellees.

BECK, J.—The defendants entered upon the lot involved in the action in 1860, and have occupied it since for the use of the railway operated and owned by them. No proceedings were, prior to the present action, instituted by either party to assess plaintiff's damages resulting from such appropriation of his property. In 1871, plaintiff commenced a suit for the possession of the lot which resulted in a judgment in his favor and an affirmance thereof in this court. See 35 Iowa, 129. The defendants therefore instituted this suit, being still in the occupancy of the lot for purposes connected with the operation of their railroad. Upon the trial the court held, and so instructed the jury, that plaintiff was entitled to recover the value of the lot appropriated which it bore in 1860, the date of the appropriation; plaintiff insists that he is entitled to recover the value of the lot at the time of the assessment of damages made by the sheriff's jury. The ruling upon this point presents the only question in the case. We will proceed to its consideration.

Railway corporations are authorized "to take and hold * * * * * so much real estate as may be necessary for the location, construction and convenient use of their railways." Code, § 1241. The right of defendants to appropriate the lot of plaintiff in the manner prescribed by law is not disputed.

It is provided that if the owner of real estate required for the necessary purposes of a railway, refuse to grant the same to the railroad company, or if the owner and the corporation cannot agree upon the compensation to be paid therefor, either party may institute proceedings for the assessment of the land owner's damages. Code, §1244. There is no provision in this statute prohibiting the corporation from entering upon the land prior to the assessment, or requiring the assessment to be had before the land is occupied. The rights of the parties in case the land should be occupied before the assessment are not prescribed by the statute. But this court has held that the railroad company acquires no right to the land until payment of damages. Henry *v.* D. P. R. Co., 10 Iowa, 540, Code § 1244. If damages have not been assessed, the land owner may recover the possession from the company. Daniels *v.* C. & N. W. R'y. Co., 35 Iowa, 129. The possession of the company before assessment of damages is that of a trespasser. But the statute evidently contemplates cases where the land may be so held and gives to the owner the remedy of compensation to be recovered by the proceedings instituted by defendant in this case. Code § 1244. Proceedings of this character are not uncommon in such courts, and the right of the land owner to relief in that way cannot be questioned under the language of the section first cited. The railroad company, at any time, after occupancy of the land, if it has not before done so, may institute the proceedings in order to acquire right to hold the land and settle the amount of compensation to be paid to the land owner.

In the case before us the land has been occupied by the defendants since 1860. Since that date both parties have had

the right to institute proceedings to assess plaintiff's damages. Defendants have held the land at the sufferance of plaintiff, enjoying its benefits to the same extent as though plaintiffs damages had been assessed. Plaintiff has suffered no greater damage than would have accrued to him had defendant pursued the course pointed out by statute which they are, now by these proceedings pursuing. By these proceedings plaintiff is not deprived of the title to the land; the defendants acquire nothing more than the right to occupy it for railroad purposes. Had they been instituted prior to or upon defendants taking possession of the land no different right would have been acquired by them than they obtain in the present action. In each case the measure of plaintiff's damages is the same, namely, the value of the land without regard to benefits resulting from the improvement. Plaintiff, had the damage been assessed upon the occupancy of the land, would have received no compensation for its prospective uses other than as then would enter into the estimate of its value. The same matters now will determine the value that would have then. It will be seen, in view of these considerations, that the value of the land at the time of the appropriation, with interest upon the sum assessed from that date until judgment in the case is the just measure of the plaintiff's damages.

This conclusion is supported by the further considerations that the remedy by the same proceedings defendants have instituted, has been within plaintiff's reach all the time since the occupation of the land by defendants, and that a different rule of damages claimed by plaintiff, namely, the present value of the land, would in case of the depreciation of the property after the appropriation, work manifest injustice to the land owner.

The following authorities lend support in some degree, to the conclusion above expressed: The Delaware &c. R. R. Co. *v.* Burron, 61 Pa. St., 369; Railroad *v.* Gisner, 20 Pa. St., 240; Whiteman *v.* Boston & M. R. R. Co., 7 Allen, 313; Dickerson *v.* Inhabitants of Fetchburg, 13 Gray, 546; Parks *v.* City of Boston, 13 Peck, 198; Vanblaricum *v.* State, 7 Blackf. 209.

Affirmed.—*Western Jurist.*

LIV. NEW HAMPSHIRE.

WE are indebted to Hon. JOHN M. SHIRLEY, Official Reporter, for advance sheets of the 54th New Hampshine Reports, from which we take the following head-notes:

BOUNDARY LINE.

A deed contained the following description of one of the lines of the land conveyed: " * * westerly to the river road, so called; thence northerly *on the easterly side of said road* to," etc.; and it appeared that the grantor was the owner of the soil of the highway. *Held*, that this description located the line at the centre, and not at the easterly margin of the highway.—(Opinion by LADD, J.)—*Woodman* v. *Spencer*, p. 507.

CONTRACT IN RESTRAINT OF TRADE.

A contract in restraint of trade, but limited as to time, place, or persons, is not void upon grounds of public policy, but may be enforced.—*Perkins* v. *Clay*, p. 518.

C. sold to H. his cart and business as a butcher for the sum of $90, and agreed not to carry on the same business over the same route which he had formerly run so long as H. should want to carry on the business. Subsequently H. sold to P. the cart and business as butcher for the sum of $90; and C, in consideration that H. had released him from his former agreement, entered into a parol agreement with P. that he would not carry on the same business over the same route for a period of two years. *Held*, that there was a sufficient consideration for the promise from C. to P., and that the agreement was not within the statute of frauds.

U. S. COAST SURVEY—EMINENT DOMAIN—PAYMENT—TENDER — PUBLIC USE—STATUTE—CONSTITUTIONAL LAW.

It was not the intention of the legislature which enacted the General Statutes, that the assessment of damages, and the tender provided for in ch. 132, should precede the entry upon and injury to lands therein authorized.—(Opinion by HIBBARD, J.)—*Orr* v. *Quimby*, p. 590.

A State has constitutional authority to condemn private property for a public use by the United States.

Property taken for the use of the United States coast survey is taken for a public use.

Chapter 132 of the General Statutes is not unconstitutional, because it does not require an assessment of damages, and payment or tender of the sum assessed, before the entry upon and injury to lands therein authorized, nor provide for a definite and certain fund to secure the payment of compensation. DOE, J., dissenting.

A party injured, under the authority of ch. 132 of the General Statutes, is not entitled to commence an action of tort and maintain it, uhtil an assessment of his damages shall have been made under the statute, and the sum assessed paid or tendered.

An agent of the United States, entering upon and doing injury to land, in the service of the coast survey, under the authority of ch. 132 of the General Statutes, will be liable to an action of tort, unless such entry and injury were reasonably necessary for the purposes of the coast survey.

DIGEST OF INSURANCE DECISIONS.

[From the Insurance Law Journal.]

DESCRIPTION.

Fire.—Not a Warranty of Title.—The policy insured plaintiff "on his two buildings." *Held*, that the phrase was merely descriptive, not a warranty of ownership. Niblo *v.* Ins. Co., S. C. R., 531; Trader's Ins. Co. *v.* Roberts, 9 Wend., 404; Tyler *v.* Ætna Ins. Co., 12 Wend., 507.—*Rohrbach* v. *Germania Fire Ins. Co.*

Fire—Of the Insured by Terms of Policy.—The application was incorrectly filled by the agent from correct representations by the insured. But the policy made the agent of the insured, and not under any circumstances. The truthfulness of the application was a warranty. *Held*, that the terms of the contract must be enforced, and the breach of warranty was not avoided by the knowledge or acts of agent.

Plumb *v.* Catt. Ins. Co., 18 N. Y., 392, distinguished; Chase *v.* Ham. Ins. Co., 20 N. Y., 52; Rowley *v.* Empire In. Co., 36 N. Y., 550, accepted; Owens *v.* Holland, Purch. Ins. Co., 56 N. Y., 565-76.—*Rohrback* v. *Germania Fire Ins. Co.*

INSURABLE INTEREST.

Fire—Of General Creditor.—A general creditor of the estate of one deceased whose personal property left is insufficient for the payment of his debts, has an insurable interest in the sole real estate of the deceased debtor, when it is plain that if it is damaged by fire a pecuniary loss must ensue to the creditor thereby. 1 Arnold on Mar. Ins., 229; Bun. on Life Ins., 16; Hughes on Ins., 30; 1 Marshall on Ins., 115; 1 Phillips on Ins., 2, 107; Sherman on Ins., 93; Parsons on Merc. Law, 507; Parsons on Cont., 438; Angel on Ins., sec. 56; Flanders on Fire Ins., 342; May on Ins., 76; Hancock *v.* Ins. Co., 3 Sumner, 132-140; Putnam *v.* Merc. Mar. Ins. Co., 5 Met., 386; Wilson *v.* Jones, Law Rep., 2 Exch., 139; Buck *v.* Ches. Ins. Co., 1 Peters, 151-163; Mapes *v.* Coffin, 5 Paige, 296; Mickles *v.* Rock City Bk., 11 Paige, 118; Ins. Co. *v.* Allen, 43 N. Y., 389-95-6; Herkimer *v.* Rice, 27 N. Y., 63; Savage *v.* Howard Ins. Co., 52 N. Y., 502; Clinton *v.* Hope Ins. Co., 45 N. Y., 454; Waring *v.* Loder, 53 N. Y., 581.

TITLE.

Fire.—Agreement to Sell.—A verbal agreement to sell, payment to be made by crediting on an existing debt, without any visible outward act in furtherance of the transaction, is not a change of title which avoids the policy. Archer *v.* Zeh, 5 Hill, 294; Schindler *v.* Houston, 1 N. Y., 261; Mattice *v.* Allen, 3 Abb., Ct. App. Dec., 248; S. C., 3 Keyes, 492; Clark *v.* Tucker, 2 Sandf., 157; Ely *v.* Ormsby, 12 Barb., 570; Walrath *v.* Ritchie, 5 Laws, 362; Teed *v.* Teed, 44 Barb., 96; Barbine v. Hyde, 32 N. Y., 519.—*Pitney* v. *Glen's Falls Ins. Co.*

WARRANTY.

FIRE.—*Breach of.*—Where plaintiff made no representation as to his interest further than to show the agent the instrument by virtue of which he claimed an interest, *Held*, that the policy phrase, "on his two buildings," even if more than a mere description, was not a phrase for which the insured was in any way responsible. Plaintiff, in his notice of loss, stated his ownership as that of "legal heir of his deceased wife;" he was in reality a general creditor of her estate by virtue of an instrument executed by her before her decease. *Held*, that this was no intentional deception, or anything calculated to mislead. *Rohrbach* v. *Ætna Ins. Co.*

PRACTICE.

FIRE.—*Request to Find.*—Where there has been no request to find as to the fact of a breach of warranty, and no exception to a refusal so to find, a court of review will not look into the evidence to reverse a judgment. *Smith* v. *Glen's Falls Ins. Co.*

OTHER INSURANCE.

FIRE.—*Separate Interest.*—P. owned an undivided interest in wool, which he insured without any reference to joint ownership. He afterward insured in another company, with the policy clause attached, "loss, if any, one half payable to George N. Pitney, as his interest may appear,"—George N. Pitney being the joint tenant. *Held*, that the policies attached to the same subject matter of insurance, and the second policy was other insurance with reference to the first. Mussey *v.* Atlas Ins. Co., 14 N. Y., 84; Ogden *v.* East River Ins. Co., 50 N. Y., 389; Case of Howard Ins. Co. *v.* Scribner, excepted.

A renewal is not other insurance, and where the act of the agent amounted to a waiver of the required indorsement when the policy was issued, the indorsement is not required by the renewal. *Pitney* v. *Glen's Falls Ins. Co.*

THE REJECTED LAWYER.

RUFUS F. ANDREWS SUPERSEDED AS THE ATTORNEY OF THE WIDOW TAYLOR—THE REASONS WHY.

The New York *Herald* says concerning a case recently reported in the Indianapolis *Sentinel:* In one form and another the Taylor will case appears to be an unending legacy to the courts. On behalf of Mrs. Sarah B. Taylor, widow of James B. Taylor, the decedent, a motion was made recently before Judge Donohue, in Supreme Court chambers, to substitute Messrs. Wingate & Cullen as her counsel in place of Rufus F. Andrews. Judge Donohue rendered his decision yesterday granting the application. His decision is as follows:

"Mrs. Taylor asks leave to substitute an attorney in place of Rufus F. Andrews, her present attorney. It is objected, on behalf of Mr. Andrews, that, first, he can not be substituted without cause shown; second that he then can only be substituted on such terms as are just; that such terms should be the payment of all the amounts due him for costs and counsel fees, and some advances he has made outside of the suits; third, that Mrs. Taylor is not a person to be trusted with the direction of her affairs, because she consults and has consulted the spirits for some time past, and supposes she acts under their direction. Before disposing of the questions raised, I desire to notice a statement, in the opposing papers, that Mr. Taylor, in a charge to be made, expects and hopes there would be political influence obtained.

Such statements on this motion are entirely out of place, and, in my judgment, unworthy of counsel. If the evidence of such influence in lawsuits exists there is a place and a way in which redress for it may be had, and to that tribunal the facts should be submitted; but the mere assertion of counsel can not, on the motion, deprive Mrs. Taylor of her right. Those rights are: First, where a party has differed, as here, with the attorney, the court will not permit one of its officers to insist on the right of retaining the management of the case against her wish; second, as to any advances outside of the lawsuits, there is no lien either on the attorney's possession of her papers or her claim in her own suits; third, it is evident from the reiterated statements in the opposing affidavits, that the attorney knew that Mrs. Taylor had nothing but what the will gave her or she may get out of the estate. It would, therefore, be unjust and against good conscience for the attorney to claim immediate payment for services which his own statement shows he knew must be paid out of future assets. The substitution must therefore be made, on the party filing a stipulation that her interest in the estate, when realized, shall be subject to any judgment her attorney may have against her for the services for which he claims compensation. The allegation that Mrs. Taylor had acted under the advice of or in consultation with spirits comes with poor grace from the counsel, who has, as he claims, acted for years on her information, so obtained, and allowed her to do it. If he has deemed such communications of use heretofore he shows no reason but her desire to change why he does not think so now."

THE London *Law Times* says: The truth of the adage "penny wise and pound foolish" is well illustrated in the course adopted by a large class of persons in regard to the making of their last will and testament. It is a common practice with many people to purchase a printed form of will, which, when filled up and attested in supposed compliance with the Wills Act, satisfies the would-be will maker that he or she has disposed of his or her worldly belongings in conformity with his or her intentions. The following case of this kind has just come under our notice: A man of small property purchased at a stationer's shop a printed form of will, the printed form of attestation to which was in these terms: "Signed by the testator and acknowledged by him to be his last will and testament in the presence of us present at the same time and described by us as witnesses in the presence of the said testator and of each other." In this condition the form was used by the testator, and, as a necessary consequence, the clerk of the seat in the principal registry (on the will, oath to lead the grant, and affidavit for the Commissioners of Inland Revenue, being carried in, to obtain a grant of Probate) required an affidavit of due execution, which in the particular case has involved an expenditure of some pounds, and has occasioned considerable delay. It is readily admitted by most of the clerks of the seat at Somerset House that it is frequently necessary, in cases where printed forms are used, to require additional affidavits by which small estates of deceased persons are put to extra expense.

Novel incidents appear, now and then, to enliven the practice of law in Southern India, and give occasion to judicial remonstrances, such as the following from the judge of the Salem sessions: "Circular No. 10 of 1875. The sessions judge brings to the notice of the district magistrate that a sub-magistrate, in a case committed by him to the court, sent up the head of a sheep which had been severed from its body some three months previous to the special sessions, evidently with a view to its being identified as the head of the animal forming the subject of the theft. The sub-magistrate in question evinced an utter want of discretion in sending up this sheep's head, as he must have known, as remarked by the judge, that it would be so decomposed before the commencement of the trial of the accused as to be beyond the possibility of identification. The district magistrate hereby directs all sub magistrates to use discretion in sending up to the court such things as decomposed sheep's heads, decomposed human bones, decomposed vegetables, and other similar property, in cases committed by them for trial; all the above having, at some time or other, been sent up to the sessions court—June 29, 1875." A short time ago the chief magistrate of another part of the presidency had to remonstrate still more seriously with the head official of a remote village for exercising "undue discretion." It appeared that a stranger, an East Indian, died with suspicious suddenness while he was passing through the village. After due consideration and consultation the official determined to have the body decapitated and the head exposed on a pole in the highway "for the purpose of identification." This not proving very successful, the head was, after the lapse of three or four days, duly dispatched to the chief station in the district as the "massam" of a probable crime." "Massam" means the chief piece of criminating circumstantial evidence; and it is, according to the notion of the majority of South Indian Hindus, so necessary for conviction that they will prefer a decomposed and unrecognizable "massam" to none at all.—*Pall Mall Gazette.*

CHICAGO LEGAL NEWS.

Lex vincit.

MYRA BRADWELL, Editor.

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We would ask all our subscribers, who have not already done so, to at once forward us the required two dollars and twenty cents, to renew their subscriptions and pay the postage.

WE call attention to the following opinions, reported at length in this issue:

EJECTMENT—ESTOPPEL—COUNTY ATTORNEY.—The opinion of the United States Circuit Court for the District of Oregon, by DEADY, J., in an ejectment suit, involving several questions of pleading, estoppel, and the right of an attorney to appear for a county who is not the county attorney.

FEDERAL COURTS—FOREIGN ATTACHMENT.—The opinion of the United States Circuit Court for the Eastern District of Pennsylvania, by MCKINNAN, J., holding that under the provisions of the act of June 5th, 1872, Revised Statutes, section 915, the Federal courts may issue process of foreign attachment against the property of non-residents, where the same would lie under the laws of the State in which such court is held. The question arises, What effect, if any, section 18 of the act of March 3d, 1875, Statutes at Large, 470, has upon the act of 1872.

POWER OF CONGRESS TO IMPOSE TAX.—The opinion of the United States Circuit Court for the E. D. of Pa., by MCKINNAN, J., in the Schuykill N. Co. *v.* Elliott, 32 *Leg. Intel.*, 362, *held* that Congress has a right to impose a tax by a new statute, although the measure of the tax is governed by the income of the last year.

THE CIVIL RIGHTS BILL—RIGHTS OF COLORED CHILDREN.—The charge of KREKEL, J., of the District Court of the United States for the Western District of Missouri, to the jury in a case where several persons were tried upon a charge of whipping certain colored persons because they were colored, and that they went on the highway in disguise to frighten and maltreat certain negroes because they were negroes. This charge will attract attention. It is evident that the judge does not mean that the civil rignts bill shall remain a dead, when he is asked to apply it to a case in his court where the evidence warrants.

THE CITY QUO WARRANTO CASE.—The opinion of the Supreme Court delivered in the quo warranto case, brought to test the validity of the re-organization of the city under the act of 1872, upon the cross errors assigned by Judge Lawrence and Mr. Pence, counsel for the citizens association, it will be remembered by our readers, that the court failed to pass upon the cross errors in the opinion disposing of the case which was published in 8 CHICAGO LEGAL NEWS, 18.

RAILROAD—LAND TAKEN FOR—MEASURE OF DAMAGES.—The opinion of the Supreme Court of Iowa, by BECK, J., holding that when a railroad company entered upon land necessary for its convenient use without condemnation thereof under the statute, or grant from the owner, and subsequently instituted proceedings under the statute to assess the damages sustained by the owner on account of the appropriation of the land, the measure of his recovery will be the value of the land at the time the railroad entered upon it, with six per cent. per annum interest, and not its value at the time of the assessment of damages.

ENLISTMENT OF ALIENS IN MILITIA.—The opinion of the Supreme Court of New York, by LAWRENCE, J., holding that an alien who voluntary enlists in a New York militia regiment, cannot be discharged on the ground that he is an alien.

POWER OF ADMINISTRATOR TO COMPROMISE CLAIM.—The opinion of the Supreme Court of Tennessee, by NICHOLSON, C. J., as to the power of an administrator to compromise a doubtful claim.

NOTES TO RECENT CASES.

BILL OF EXCHANGE—INSOLVENCY OF DRAWER AND ACCEPTOR.

The English Court of Appeal in Chancery, in *ex parte* The General S. A. Co., 33 L. T. R. N. S., 112, held that the doctrine of *ex parte* Warring, 19 Ves., 345, does not apply to a case where, although both the parties to a bill of exchange are actually insolvent, yet only one of them has his affairs under judicial administration, while the other is not subject to any jurisdiction and retains the ordinary rights of property.

ARREST OF DEBTOR—DISCHARGE FROM CUSTODY—ATTORNEY—ATTACHMENT.

The English Court of Appeal in Chancery, in *ex parte* Deere 33, L. T. R. N. S. 114, where an attorney was ordered by a court of law to pay a sum of money, and did not comply with the order. And he was afterward adjudged a bankrupt, and a rule for an attachment against him for non-compliance with the order having been made absolute by the Court of Exchequer, and the bankrupt was arrested and sent to jail. It was held, on an application to the bankrupt court to discharge him from custody, that as the attachment had been issued by a court of competent jurisdiction againt its own officer, the court of bankruptcy, in the exercise of the discretion given it by the 13th section of the bankruptcy act of 1869, would not interfere with the process of the court of common law.

BANKRUPTCY—COMPOSITION—EXECUTION CREDITOR.

The English Court of Appeal in Chancery in *ex parte* Jones, held, under the English Act of Bankruptcy, that where an execution creditor delivered the writ to the sheriff, after the debtor had filed a liquidation petition and the creditors afterwards duly resolved to accept a composition, that the execution creditor was entitled to have his debt satisfied in full by sale of the goods seized by the sheriff under the writ.

DAMAGES FOR OPENING STREET.

The Supreme Court of Pa., in Tenbrooke *v.* Jahke, 32 Leg. Intel., 363, held that damages for the opening of roads and streets are a personal claim; that they are assessed in favor of the owner at the time of the injury, and do not run with the land.

The Court of Appeals of Maryland, in Weckler *v.* The 1st N. Bank of Hagerstown, 14 Am. Law Reg., N. S., 609, held in an action of deceit against a national bank, seeking to recover damages for the alleged fraudulent representations of its teller made in the sale to the plaintiff of certain railroad bonds; that the business of selling bonds on commission, is not within the scope of the powers of national banking association, and the bank cannot, under any circumstances, carry it on; and being thus beyond its corporate power, the defense of *ultra vires* is open to it, and the bank is not responsible for any false representations, by which the plaintiff may have been damnified, made by its teller, in any such dealing.

Recent Publications.

REPORTS OF CASES IN LAW AND EQUITY DETERMINED IN THE SUPREME COURT OF THE STATE OF IOWA. By John S. Runnells, Reporter. Vol. I. Being Volume XXXVIII, of the series. Des Moines: Mills & Company, Law Publishers. 1875.

The only fault we have to find with this volume is that it has been tardy in reaching the LEGAL NEWS office. This is Mr. Runnells' first volume of reports, and we must say we are agreeably disappointed to find it a model volume. There is but one long syllabus in it; all the rest are exceedingly short and accurate. The volume is so arranged that a person can soon find what is in it. The index is very short, yet so constructed that it reveals the contents of the volume at a glance. There is a general feeling of the bar that long indexes in reports should be avoided. The reporter says that the names of cases have been given in the shortest possible form. All descriptive titles and official designations have been discarded, as the object is facility of reference to the principle only, and that any thing in the name of the case more than is absolutely necessary to identify it is unnecessay and cumbersome. The law limits the number of reports to two volumes each year, and as a consequence the reporter has to contract and not expand. At the end of the volume is an appendix containing cases not otherwise reported. We notice that Mr. Runnells gives the date when each opinion is delivered. This should be done in all reports, as it enables a person to tell which is the latest utterance of the court, which is often important in case of conflicting opinions.

A TREATISE ON PLEADING AND PRACTICE IN ACTIONS AND SPECIAL PROCEEDINGS AT LAW AND EQUITY, IN THE COURTS OF IOWA, UNDER THE CODE OF 1873. Revised Edition. By William E. Miller, Chief Justice of the Supreme Court of Iowa. Des Moines: Mills & Company, Law Publishers. 1875.

Every Iowa lawyer should feel proud that so finely an executed volume is the work of a publishing house in his own State. Judge Miller very appropriately dedicates his work to the gentlemen of the Iowa bar. The country is flooded with works upon pleading and practice, written by men who are ignorant of the first principles of pleading, and never had any practice of their own. It is really a pleasure to examine a book like Judge Miller's, where the propositions in the text are clearly and concisely stated, and the forms given are founded upon legal principles and divested of all surplusage. The former edition of this work was received with great favor by the profession in Iowa. The many changes made in the statutes of that State by the adoption of the Code of 1873, rendered a revision of the work necessary. The text of the work has been largely re-written; it embodies all the decisions of the Supreme Court of Iowa published and unpublished applicable to the law of pleading and practice in that State rendered before the work went to press. The volume has a very complete general index, as well as an index to the forms, which number over two hundred and fifty. The work is not only indispensable to Iowa lawyers, but valuable to all attorneys in other States having Codes like that of Iowa. It will be forwarded to any address by the publishers upon the receipt of $7.50.

APPOINTMENT OF NOTARY PUBLIC.

CHICAGO, ILL., *Oct.* 11, 1875.

ED. LEGAL NEWS:

DEAR MADAM: You will confer a favor on us by giving your opinion on the Statute cap. 99, p. 721, sect. 1, reading thus: That the governor may appoint, by and with the advice and consent of the senate, and commission as notaries public, as many persons *having the qualification of electors*, and resident in the county in this State for which they are appointed, as he may deem necessary.

The Constitution, Art. VII, Sect. I, reads thus: Every person having resided in this State one year, in the county 90 days, and in the election district 30 days, etc., etc. And sect. 6, ib., says: No person shall be elected or appointed to any office in this State, civil or military, who is not a citizen of the United States, and who shall not have resided in this State one year next preceding the election or appointment.

Now, what I want to know is, has a person, to have the qualification (for the appointment of a notary public) of sect. 1, or of sect. 6 of art. VII, of the Constitution, or, in other words, what is meant by the words, "*having the qualification of electors*," in Statute ch. 99, p. 721, sect. 1, above set forth?

Respectfully yours, W. M. S.

ANSWER.—Construing the statute in the light of the Constitution, we are of the opinion that a person to be appointed a notary public, must be a citizen of the United States.—[ED. LEGAL NEWS.]

THE ILL. RAILROAD TAX INJUNCTION CASES.—Attorney General Edsall has prepared petitions and affidavits in what are known as the railroad tax injunction cases, and gone to Washington to get them advanced on the docket so as to secure an early hearing of the questions involved. Mr. Edsall is sanguine in the opinion that he will be able to secure a reversal of the judgments below. He is faithful and earnest in looking after the interests of the State, and makes an able and efficient Attorney General. He is in no way connected with the rings that invest the State house.

SUPREME COURT OF INDIANA—NEW RULE.—The Supreme Court of Indiana on last Wednesday entered the following new rule, which is numbered 36: "When it shall be discovered, or when objection shall be made, after a cause has been submitted, that the transcript is not legally certified, or that the clerk has not affixed his seal thereto, the appeal will not be dismissed for such reason, unless the appellant shall fail to remedy the defect within such reasonable time, as the court may fix, according to 2 G. & H., 278, section 581, of which time he shall have notice from the clerk of the court."

CHARGES of unprofessional conduct have been preferred by the Chicago Bar Association against A. Goodrich, of the Chicago bar, the rule to show cause being returnable on Oct. 20, 1875.

ONE-THIRD of the legal publications of the United States are printed and published in the State of Pennsylvania.

Dr. SAMUEL T. SPEAR, editor of the *New York Independent*, has a very able article in that publication of the 7th inst., upon the limitation of legislative power, from which we take the following extract:

Law, for the purpose of enforcing contracts, claims the right to decide as to the class of persons legally competent to make contracts and as to the subject-matter of the contracts to which it will give its support. A lawful contract is, hence, one in which the parties have the "contractual capacity" and in which the contents of their agreement lie within the scope of legal recognition. To such contracts legal rights attach, and out of them legal duties arise, and this is what is meant by the obligation of contracts. The contracting parties are left free to make their own bargain, and what the law does is not to make a new bargain, for them or alter the one they have made; but to bind them to good faith with each other according to the terms of their contract. This it does by ascertaining what the contract is and providing a suitable remedy against its non-fulfillment.

Monetary contracts, or those in which money is stipulated to be paid by one party to the other, are embraced in these general principles of law. Money in some form is one of the most universal terms of contracts. The connection between contracts and money is, hence, so intimate, so constant, and so important that law justly assumes and exercises the right of determining what shall be money. It must do so in order to supply a general rule for courts in the enforcement of contracts. That which is the standard for computing and expressing all other values and is, therefore, the medium of exchange transactions and to which courts must refer in enforcing money contracts ought to have a definite and fixed character, known to the law and established by law. What law can do on this subject is contained in two statements: 1. It can, as its own exclusive right, provide the process of furnishing the money of use within the limits of its own jurisdiction. 2. It can make this money a legal tender in payment of debts. Such money is "lawful money." It has the sanction of law, and, hence, the general rule is that whatever has this sanction is money.

It would, however, be a very serious mistake to assume that law is omnipotent as the creator and establisher of money, and can, therefore, make one thing serve as money just as well as another. There are some things on this subject which law *cannot* do and there are others which it *ought not* to do; and both classes are limitations upon its power.

Underlying the exchange transactions of society, we find the two generic elements of *quantity* as determined by a standard of weight or extension, and of *value* as ascertained and fixed by a standard of value. Each must have a standard, and it is the province of law to select and define a suitable standard for each. The Constitution assigns this duty to Congress in the grant of power "to coin money, regulate the value thereof and of foreign coin, and fix the standard of weights and measures." In the exercise of this power, Congress is subject to certain limitations which grow out of the nature of things. Take, for example, a standard of weight. What Congress can can here do is to establish such a standard by fixing upon something that has weight, and by declaring that as the unit of weight it shall be the means of computing and expressing all other quantities by weight. To this unit and to its multiples or its divisions it can give names that shall be both definite and intelligible, as forming a part of the language of contracts. It can do the same thing in respect to the measures of extension; but in regard to neither can it create the weight or the extension, or make that a standard of weight which has no weight or that a standard of extension which has no extension. The standard of quantity must have quantity, either by extension or weight; and this necessarily limits the law-making power in fixing "the standard of weights and measures."

Precisely the same necessity applies to money, considered as the standard or measure of *values*. It is only by its own value that it can compute other values. When a specific commodity is selected from all the rest, whether by usage or by law, as *the* commodity which shall perform the functions of money in computing the value of other things, and on this account be exchangeable for them, the very first condition of the selection is that the commodity should have value independently of the selection, founded on the twofold fact that men desire it and use it for other purposes and that it takes labor to produce it. This fact is not created by the selection. Those who talk about money as having no value in the material of which it is composed are talking about that which has no exchange power, to which no legal enactment can impart such a power, and which, hence, cannot compute the value of other things. Their kind of money fails in the most elementary function of money. They might as well talk about a standard of weight that has no weight or a standard of extension that has no extension. *Credit* money, so called, is not money at all, in the real sense, but simply a *promise* to pay money. Take from the United States notes the *dollars* which stand behind them as the thing promised, and thus let the question be settled that the promise is never to be fulfilled, and the value of these notes at once sinks to the level of the paper composing them; and nobody pretends that the paper itself has anything to do with their monetary character.

If, for example, Congress should repeal all its coinage and legal tender laws, and substitute iron coins of the same weight as that of gold and silver coins, and then declare them to be dollars and multiples of dollars, having the same legal value as the present coins; or, if it should abandon coinage altogether, and adopt pieces of stamped paper, giving to them the names and legal tender power of these coins, does any one suppose that such substitutes, though having all the sanction that law can give to money, would or could take the place of gold coins and circulate at the same value? Can Congress, by mere law, legislate into an ounce of iron or an ounce of paper the value that naturally belongs to an ounce of gold? He who thinks that this can be done by law is beyond the reach of discussion. The laws of value are older and stronger than human statutes, were never made by them, and can never be unmade by them. The very nature of things imposes limitations upon legislative power when exercised in establishing a standard of *quantity* or one of *value*. The exercise is rather declarative than creative.

THE MEMPHIS LAW LIBRARY.

We understand the Memphis Bar Association is not only in a prosperous condition, but its rooms are so arranged that they are a general resort for the members of the Bar. The Memphis *Appeal* of October 5th, says:

A day or two ago we had occasion to step into the rooms of the Memphis Bar and Law Library Association, and were surprised and pleased to learn the very prosperous condition of that company. The law library has already reached the number of thirty-five hundred and fifty-eight volumes, embracing sets of the reports complete of twenty-two States, and broken sets of the residue of the States, and a large number of rare and of modern micellaneous text-books. Upon the tables also are to be found all the leading quarterly, monthly and weekly law periodicals as they are published. It is gratifying to know, too, that the association is entirely free from debt, and is conducted upon the principle of paying cash for all purchases and incurring no pecuniary liability for any purpose. Nearly or quite all the important lawyers of the city are members. The library is the largest in the State, excepting, perhaps, the State library at Nashville. A noticeable feature is the liberality of the management of the library. All lawyers residing in other States, or in other counties in Tennessee, have the privilege when in Memphis, without charge or ceremony, of the full and free use of the rooms and the books, and all of all the appurtenances of the library, to the entire extent allowed to resident members. And it is the desire of the managers, we are informed, that all lawyers from abroad, when in the city, shall avail themselves of the privilege, and frequent and make use of the rooms and the facilities of the library. It is the place where to find and meet the home lawyers, some of whom are there searching the books at all hours of the day, and large numbers generally in the forepart of the day. A pleasant circumstance, it seems to us, is that the rooms and library are becoming a sort of headquarters for the legal profession. Some of the rooms are set apart exclusively for study and silence, and one large and handsomely furnished room is assigned for conversation and general and free intercourse. The whole concern is highly creditable to the bar of Memphis, and indeed an honor to the city, and deserves a large degree of public favor. A kindly and genial and social set are our lawyers. They study hard and work hard, and that is the rule, without which no one can keep up to the front of the profession here; but when off duty and out of harness, and in their intercourse with each other, they are a cheerful and, indeed, as harmonious and jolly a lot of gentlemen as one can find in a twelve months travel from one end of the continent to the other. Industry and temperance, and fair dealings and honorable conduct, is the rule; and the predominant sentiment among them exacts conformity with the rule. Any one who falls below it soon finds himself out of line and beneath the standard and respect of the better class of his fellow lawyers. Our opinion is, that for hard work, thorough learning and high intelligence, as well as for fair dealing and honorable conduct, the bar of Memphis is quite up to the level of the best professional standard found in any city in America.

WOMEN AS OFFICEHOLDERS.

THE ATTORNEY GENERAL'S REASONS FOR RULING THEM OUT IN NEW JERSEY.

Attorney General Vannatta, of New Jersey, bases his decision as to the legality of the appointment of Mrs. Jones, as jailoress of the Hudson county jail, on reasons which might apply equally to any other woman officeholder in the State. Mrs. Jones has held the place for two years, and probably secured the appointment because in the lifetime of her husband she performed all the duties of the position. No complaint was made of the kind of service rendered. The Attorney General's opinion is only upon the legal points of the case, and he interprets the law of 1874 to say expressly that no woman shall be appointed to any office, and such an appointment he believes to be contrary to the spirit of the laws of the State. Moreover, no person can be legally appointed to an office who cannot fulfill all its duties, and there are jail duties which a woman cannot perform. A married woman could not be able to perform, at all times, all the duties of any office, even if otherwise capable; and the same opinion must apply to a single woman, because she might marry and give rise to two questions: First, as to whether she still held the office, or whether it had lapsed, or whether the husband had any authority; and second, whether, in case of dereliction of duty, the responsibility would lay with the husband or wife.

Mrs. Jones, however, continues to hold the office, and though the subject has been repeatedly discussed by the freeholders, that body has persistently refused to oust her.

DELIVERY—PAROL EXTENSION OF TIME.—The London *Law Times* of Sept. 18 says:

An important decision in regard to the effect of a parol extension of the time stipulated for the delivery of goods is given in Hickman *v.* Haynes (32 L. T. Rep., N. S. 873). The case is important not because it has introduced any new principle, but because it shows that our courts of law are not disposed to shake the authority of such cases as Ogle *v.* Earl Vane (L. Rep, 3 Q. B. 272). The facts are of the usual character in this class of cases. A contract in writing is entered into containing on the one part a promise to deliver, and on the other a promise to accept, certain things by periodical instalments. Before the completion of the contract, one or other of the parties finds it convenient to defer one or more of the instalments, and it is accordingly agreed by word of mouth that the time for delivery shall be extended. Time passes, and one of the parties treats the extension of the time as being almost equivalent to a waiver of right existing under the contract. Such, broadly stated, is the generic character of these cases. In Hickman *v.* Haynes, the action was for the non-acceptance of twenty-five tons of iron. According to the terms of the original contract, the iron should have been delivered in June, but, by verbal agreement, the delivery was to stand over. In August, the seller grew tired of further waiting, and asked the defendant to accept the installment. The defendant would not. The present action was then brought, and it was held that the plaintiff was entitled to recover. The important point to be determined was whether the parol extension of time so altered the original contract as to admit of the application of the principle of Noble *v.* Ward (4 H. & C., 149). That case, as is well known, is conclusive to the effect that such a parol agreement as we are discussing, namely, one to extend the time for performing a written contract, and required to be in writing by the Statute of Frauds, does not rescind, or in any way affect such written contract. The decision clearly applicable here is that of Ogle *v.* Earl Vane, where Mr. Justice Blackburn says: "The plaintiff was willing to wait at the request of the defendant, for the defendant's convenience, and he did wait for a long time, till February; but if he had lost patience sooner and refused to wait longer, he would have had a right to bring his action at once for the breach in July. It is clearly a case of volfntary waiting, and not of alteration of the contract, and the length of time can make no difference." It was properly acknowledged that there was no defense upon the merits. We are always glad when defenses founded upon anything else prove no better than broken reeds.

THE WHISKY CASES—MERGER OF OFFENSES.—The St. Louis *Republican* of the 28th ult. says: "In the United States circuit court yesterday Justice Miller delivered the opinion of the court on the reserved point in the demurrer to indictment No. 654, the question being that of "merger." The opinion of the court on the other points of the demurrer was given in full in Saturday's REPUBLICAN. In rendering the opinion of the court, Justice Miller said that if in case of a trial in court for misdemeanor and during its progress the testimony showed that a felony had been committed, it would be a question for the court whether the proceedings for the misdemeanor should be discontinued and proceedings for the felony instituted. But in this case the court was not in that category. The first count in the indictment charged a misdemeanor, and the second a felony, and the latter having been charged by the government, it must be considered that the government was in a position to prove that offense. Whilst there was a great difference of opinion among learned authorities in relation to many points in the doctrine of merger, there was a very general agreement, that in case of an indictment charging two grades of offense, the lesser was merged in the greater. The indictment must therefore be considered bad, and the demurrer sustained."

DISQUALIFICATION OF JUDGES.—The New York *Weekly Digest* publishes the following abstract of a short *per curiam* opinion of the New York Court of Appeals, in Smith *v.* Nelson: "This was a motion for a re-argument on the ground that one of the judges who sat on the former argument was disqualified. The affidavit of the moving party showed that the firm of which the judge was a member had appeared as attorneys in the defense of another action, involving some of the questions presented by this appeal. That action was never tried, but was discontinued many years ago. The judge never had any personal knowledge of the pendency of that action, or of the legal questions involved therein. *Held*, that there was no disqualification; that the statute disqualifies only where a judge has been counsel in the same action. That the judge was compelled by law to sit and act, and even if he had had personal knowledge of the facts set forth in the motion-papers, he would have had no legal excuse for not taking part in the judgment."

SUPREME COURT OF ILLINOIS.

ABSTRACT OF OPINION FILED AT SPRINGFIELD, IN OCTOBER, 1, 1875.

John Roach and Patrick Roach *v.* The People, etc.—Error to McLean.—Opinion by McALLISTER, J.

INSTRUCTION IN CRIMINAL CASE ASSUMING FACTS—WHEN HOMICIDE IS JUSTIFIABLE IN SELF-DEFENSE—AND IN DEFENDING POSSESSION OF PROPERTY—CREDIBILITY OF WITNESSES FOR THE JURY TO DECIDE—IMPEACHMENT OF WITNESSES, AND THE EFFECT THEREOF.

STATEMENT.—Indictment for manslaughter—the defendants having killed one Dunlap in a dispute concerning the right to use water from a well which afforded an insufficient supply of water for the wants of both parties. Plea of justification, that the killing was in self-defence. Conviction, and sentence of John for twenty-one years, and of Patrick for one year, in the penitentiary.

The following instruction was given, in the court below, in behalf of the people; that, "In case of a mutual conflict, he who would excuse himself on the ground of self-defense must show that, before a mortal blow was struck, he had declined any farther conflict, and retreated as far as he could with safety. And therefore, if the jury believe, from the evidence, beyond a reasonable doubt, that the defendants, and John Byron Dunlap, and the witness, Wilcox, were engaged in a mutual conflict, all being equally willing to engage in said conflict, and on equal terms as to being armed, and the defendants mortally wounded John Byron Dunlap while so engaged in mutual conflict, and without having, in any way, attempted to decline any further conflict at the time said mortal stroke was given, in manner and form as charged in the indictment, and the jury will find the defendants guilty. *Held*,

1. That this instruction assumes that the parties were equally willing to engage in the conflict, and that they were equally armed, and that the wound was given as charged in the indictment; that is, unlawfully, feloniously, and wilfully; and, moreover, the instruction artfully directs the jury to convict the defendants.

2. That if the defendants were assaulted by the deceased in such a way as to induce in them a reasonable and well-grounded belief that they were in danger of losing life, or suffering great bodily harm, when acting under such reasonable apprehension they were justified in defending themselves, whether the danger was real or only apparent. Actual and positive danger is not indispensable to justify self-defense.

3. It was not necessary that the defendants should have the exclusive right to the possession of the well, as against the whole world; but only as against the deceased and his party, to justify their repelling force with force.

4. The credibility of witnesses is exclusively within the province of the jury, and must not be invaded by instructions; although the jury may properly be instructed that if an attempt is made to impeach a witness, they may, notwithstanding the impeaching evidence, give his testimony such weight as they judge it entitled to under all the circumstances in evidence; where they find his statements reasonable, and consistent, and corroborated by other evidence.

203.—Daniel O. Crist et al. *v.* Mary W. Wray.—Appeal from McLean.—Opinion by SHELDON, J.

AMENDMENT—CONTINUANCE.

Held, That where a plaintiff introduces his evidence, and then by leave amends his declaration by abandoning a part of the claim, and thereupon the defendant moves for a continuance, the affidavit giving no reason why the amendment should render him unprepared for trial, the court may properly refuse the continuance, since the amendment would apparently only have the effect of narrowing the issues to be met

SUPREME COURT OF TENNESSEE.

W. M. ALEXANDER et al. *v.* J. C. KELSO et al.

POWER OF ADMINISTRATOR TO COMPROMISE DOUBTFUL CLAIM.

Where an administrator was satisfied it was prudent in him to make a compromise, pending a suit, as he had no means of the estate to carry on an expensive suit, and he believed there was real doubt as to his ability to make the party liable; *Held*, that he has a right to compromise such a case, and in that way promote the interest of his estate.

Opinion by NICHOLSON, C. J.

Complainants are creditors of Henry Kelso, who died in September, 1868, and on whose estate J. D. Tilman administered in January, 1867. Some time before his death Henry Kelso loaned to J. C. Kelso, his nephew, three or four thousand dollars in gold to be used for an indefinite time, and if not returned before Henry Kelso's death, then to be paid over to his widow. At the time this loan was made Henry Kelso was heavily indebted, probably to insolvency. After the death of Henry Kelso, and before any administration on his estate, J. C. Kelso paid over to the widow of Henry Kelso about $4,100 in pursuance of his agreement; he paid also $300 to Jefferson Kelso, on a note of Henry Kelso, on which J. C. Kelso was surety.

In 1871 W. M. Alexander brought suit in the circuit court of Lincoln county against J. C. Kelso to make him responsible as executor *de son tort* of Henry Kelso, by reason of his having paid over the $4,100 to the widow and the $300 to Jefferson Kelso. Upon the trial of the cause, under the charge of the circuit judge, the jury found that J. C. Kelso was not executor *de son tort*. Alexander appealed to the Supreme Court, and while the cause was pending in that court Tilman, as administrator of Henry Kelso, and J. C. Kelso entered into a compromise, by which J. C. Kelso agreed to pay to Tilman $1,500 in the event he gained the case in the Supreme Court, and Tilman agreed for that consideration to release him from further liability to Henry Kelso's estate.

The Supreme Court affirmed the judgment of the Circuit Court, whereupon Alexander and other creditors of Henry Kelso filed this bill against J. C. Kelso, and T. D. Tilman filed this bill against J. D. Kelso and J. D. Tilman to set aside the compromise made between them, alleging that it was fraudulent in law if not in fact, and seeking a decree against J. C. Kelso for the amount of money borrowed of Henry Kelso, but asking no decree against Tilman. Chancellor Marks held that complainants were without equity and dismissed their bill.

Tilman was required to answer on oath as to the compromise made with J. C. Kelso; he did so, stating that he had no knowledge or information of the transaction between J. C. and Henry Kelso, or of the payment of the $4,100 to the widow of Henry Kelso until the facts were disclosed in the suit of Alexander, in 1874. After the case had been decided against Alexander, and was pending in the Supreme Court, he was satisfied it was prudent in him to make the compromise, as he had no means of the estate to carry on an expensive suit, and he believed there was real doubt as to his ability to make J. C. Kelso liable. He fully acquits himself of any imputation of fraud or improper conduct in making the compromise. No doubt can be entertained as to his right to compromise a doubtful case, and in that way to promote the interest of his estate. If Tilman had the power to make the compromise, it would operate as a release of J. C. Kelso from further liability to the estate, unless it should appear that it was procured by fraudulent means. We concur with the Chancellor in the conclusion that the complainants have failed to make out such a case of fraud as entitles them to relief. The decree is therefore affirmed with costs.—*The Commercial and Legal Reporter.*

SUPREME COURT OF NEW YO

[At Chambers. October 12. Before LAWRENCE, J.]

In re FITZ SCHULE.

HABEAS CORPUS—ENLISTMENT OF ALIENS IN MILITIA REGIMENTS OF NEW YORK.

LAWRENCE, J. It was conceded in the argument that the petitioner was not at the time he enlisted, and is not now, a citizen of this State, and that he had not declared his intention to become a citizen. It is quite clear, therefore, that under the provisions of the Military Code of this State the petitioner was not, at the time he enlisted, subject to military duty. (Code, sec. 1, chap. 80, Laws 1870.) It is claimed, however, that the thirteenth section of the Military Code, which provides that "volunteers may be received and enlisted in any troop, battery or company district, or not" indicates an intention on the part of the legislature to allow those not subject to military duty to waive their exemption and voluntarily submit themselves to the obligations, duties and penalties prescribed by said code. A perusal of the act convinces me that this view is correct. There would seem to be no necessity for providing for voluntary enlistments if the volunteers could only be drawn from the class of persons subject by law to the performance of military duty. If I am right in this construction of the law, then it follows that it was perfectly competent for Schule to volunteer and enlist as a member of Company D in the Fifth regiment, and that by so doing he became liable to be fined if he did not comply with the rules and regulations of the company. The return, therefore, of the keeper of the county jail seems to me to show that Schule is in his custody under a warrant issued by a court martial which had jurisdiction of his person, and which was authorized to commit him to the custody of such keeper in default of the collection of such fine imposed upon him by a levy upon his goods and chattels. The objection made to the warrant of commitment, that it does not specify the time for which the delinquent is to be imprisoned, does not seem to me material. It is stated in the warrant that the total fine imposed upon the petitioner is the sum of $84, and the jailer is required to keep said delinquent closely confined in the manner and during the time required by law, and until discharged according to law. The warrant is drawn in the exact language of the 214th section of the Military Code, which provides that in default of sufficient goods and chattles of the delinquent to satisfy the fine the Marshal is "then to take the body of such delinquent and convey him to the common jail of such city or county, whose jailer shall keep the said delinquent closely confined, without bail or mainprise, for two days, for any fine or penalty not exceeding $2, and two additional days for every dollar above that sum, unless the fine and penalty, together with the costs and the jailer's fees, be sooner paid; but no such imprisonment shall extend beyond the period of twenty days." The duty of the jailer is thus expressly defined by the law, and as the warrant states the amount of the fine, he is informed by the warrant that the case is one in which prisoner must suffer the maximum imprisonment provided by the law, unless he is sooner discharged by the payment of the fine and jailer's fees, or unless under, the subsequent provision of the statute he is liberated by order of the commandant of the division or brigade to which he belongs. The petitioner also urges, as a ground for his discharge, that he signed the enlistment paper, but, being a German by birth, he does not understand the English language perfectly; that he did not read the paper, and did not and does not know what it contained, and that he did not swear to it before the person before whom the oath purports to have been taken. This allegation amounts to a charge of fraud in the matter of the enlistment. If the enlistment was fraudulently obtained, it was no enlistment, and the petitioner is entitled to be relieved from it. I will hear the allegations and proofs of the parties. Subsequent to the rendition of the above decision, by consent of the counsel for the regiment, the prisoner was discharged on his parole. It was further arranged that evidence be taken upon the allegation of fraud in the enlistment.

A GRAVE QUESTION.—The *Indianapolis Sentinel* say

"The following letter to the Supreme Court is one involving such grave questions that after unsuccessfully wrestling with its question, the judges turned it over to the attorney general. He being unable to come to a decision, has referred it to the governor. It is to be hoped that some conclusion may be reached, as the writer has already been "procrastinated" sufficiently. His being kept out of any office for one year is a serious thing to him. The names of the writer and the city from which he sends forth his grievances are here omitted:

To the Most Respectable Supreme Court of the State of Indiana.

GENTLEMEN:—The undersigned was a professor in Germany and in this country for many years. These two years he was teaching languages in the seminary of the city of———. The board of education, according to decision of the Supreme Court, illegally elected here, dismissed of on account of personal vengeance of one of the members, Professor———, in spite of a large petition of 212 citizens, three-fourths of the inhabitants, signed by the mayor and five councilmen out of six in favor of re-election of said professor. There is a great loss and damage to the petitioner, because he is for one year without any office, having been procrastinated by said board from days to weeks till last of July. The supplication, therefore, very modestly made to the most respectable Supreme Court, is what may be done legally for a citizen of the United States to come to his rights and justice after all inquisitions with lawyers?

The Supreme Court's most humble servant, Prof.———

SUPREME COURT OF ILLINOIS.

The following opinions were filed, on Monday, the 11th inst., at Ottawa, in cases decided after the September term, 1874:

OPINIONS FILED.

Heath v. Hurless, decree reversed and remanded.
Lincoln v. Stowell, judgment reversed and remanded.
Kelley v. Trumble, decree affirmed.
Miller et al. v. Kirby, judgment reversed.
Thompson et al. v. Elliott, judgment affirmed.
Herrington v. McCullum, decree reversed and remanded.
Russell v. Mandell, judgment affirmed.
The Chicago, Rock Island and Pacific Railroad company v. Riley, judgment reversed and remanded.
Zearing v. Raber, decree affirmed.
Searles v. Galbraith et al., the same.
Wright et al. v. Gould et al., judgment affirmed.
385. Wilkins v. Marshall, and 384, the T. P. & W. R. R. Company v. Eastburn, decree reversed.
The Commissioners, etc., v. the People ex rel., judgment reversed.
Young v. Adams, judgment reversed.
King et al. v. Avery et al., decree reversed and remanded.

CENTRAL GRAND DIVISION.

SPRINGFIELD, Ill., Oct. 13.—Opinions in the following cases of 1875 have this day been filed in my office:

8. Heazle v. Indianapolis, Bloomington and Western Railroad company, affirmed.
18. Chapman v. Burt, affirmed.
41. Ross v. Chicago, Burlington and Quincy Railroad company, affirmed.
44. Quincy Railroad Bridge company v. the City of Quincy, writ of error dismissed.
65. Indianapolis, Bloomington and Western Railroad company v. Flannigan, reversed.
78. McDavid et al. v. Adams, reversed and remanded.
99. Kilgore v. Ferguson, affirmed.
96. Teutonia Life Insurance company v. Anderson, affirmed.
100. Indianapolis, Bloomington and Western Railway company v. McLaughlin, reversed and remanded.
101. Teutonia Life Insurance company v. Mueller et al., affirmed.
108. Porter v. McNabney et al., affirmed.
111. Broadwell v. Howard et al, affirmed.
115. Clark et al. v. Marfield, affirmed.
138. Chandler & Co. v. Brown, affirmed.
145. Reinback v. Crabtree et al., affirmed.
146 Andras et al. v. Ketchum, reversed and remanded.
149. Fowler v. Perkins & Co., reversed and remanded.
152. Yoakune et al. v. Yoakune et al., reversed and remanded with directions.
156. Murphy v. Larson, reversed and remanded.
158. Larison v. P. A. & D. Railroad company, affirmed.
173. Board of Supervisors, etc., v. Brush et al., reversed and remanded.
179. Gilman, Clinton and Springfield Railroad company et al. v. Kelly et al., affirmed.
181. Wickenkamp v. Wickenkamp, affirmed.
185. Toledo, Wabash and Western Railway company v. Williams, reversed.
194. Millikin v. Jones, affirmed.
200. Wheelock v. Kost et al., affirmed.
207. Bell v. Gardner et al., affirmed.
209. Smith v. Crawford, affirmed.
220. Wilson v. Kellogg, reversed and remanded.
231. Village of Princeville v. Autern et al., affirmed.
244. Wing et al. v. Sherrer, reversed and dismissed.
264. Chesnut v. Chesnut, reversed and remanded.

E. C. HAMBERGER, Clerk Supreme Court.

UNITED STATES SUPREME COURT.

PROCEEDINGS OF.

Monday, Oct. 11, 1875.

The October term of the court commenced, in accordance with law, on last Monday, Waite, C. J., and Clifford, Swayne, Davis, Field, Strong, Bradley and Hunt, J.J., were present. Miller, J., being the only judge absent.

On motion of W. W. Boyce, William U. Garrard, of Savannah, Georgia, was admitted.

On motion of R. H. Marr, Henry J. Leory and Armand Pitot, of New Orleans, La., were admitted.

On motion of E. O. Hinkley, E. Wyatt Blanchard of Baltimore, Md., was admitted.

On motion of P. Phillips, William Hoynes, of La Crosse, Wis., was admitted.

On motion of W. T. Forrest, William B. Caldwell, of Cincinnati, Ohio, was admitted.

On motion of R. M. Corwine, Adam A. Kramer of Cincinnati, Ohio, was admitted.

Waite, C. J., announced to the bar that the court would commence the call of the docket Tuesday, under the 26th rule.

Adjourned until Tuesday at 12 o'clock.

Tuesday, Oct. 12.

On motion of T. T. Crittenden, H. C. Allerman of Philadelphia, was admitted.

On motion of P. Phillips, W. J. Henry, of Danville, Ill., was admitted.

No. 502. The Farmers and Mechanics National Bank, of Buffalo, v. Peter C. Dearing. This cause was submitted on printed arguments by E. G.

Spaulding for plaintiffs, and by A. P. Nichols for defendant, under the twentieth rule.

No. 503. G. D. Newhall v. Charles W. Sanger. This cause was submitted on printed arguments by M. Blair for appellant, and by George F. Edmunds for appellee, under the twentieth rule.

No. 275. (Assigned) Jay Cook & Co. v. The United States. This cause was argued by J. E. Burrill and L. G. Ashhurst for plaintiffs, and by Solr. Gen. Phillips for defendant in error.

No. 1. George F. Kelly, complainant. v. City of Providence. Continued.

No. 2. John R. Smith, plaintiff, v. The United States. Continued.

No. 3. William H. Gaines et al., plaintiffs, v. John C. Hale, et al. Passed.

No. 4. William J. McComb, surrogate, executor, plaintiff, v. The County Commissioners of Knox county. This cause was submitted on printed arguments by W. H. Smith for defendants, no council appearing for plaintiff.

No. 5. Richard C. Kimball et al. v. William F. Evans et al. Passed.

No. 6. Joseph A. Walker v. Charles S. Sauvinet. Passed

No. 7. The Keystone Bridge Company, appellant, v. Phœnix Iron Company. Continued.

No. 9. The Wilmington & Welden Railroad Company v. Henry King, executor, etc. This cause was submitted on printed arguments by J. M. Carlisle and J. D. McPherson for plaintiffs, no counsel appearing for the defendant.

No. 10. Edward Matthews v. Nelson McStea. The argument of this cause was commenced by John Snerwood for plaintiff, and continued by J. H. Ashton for defendant.

Adjourned until Wednesday at 12 o'clock.

Wednesday, Oct. 13.

On motion of Wm. M. Evarts, James V. Brook, of Warrenton, Va., and D. N. Paul, of St. Louis, Mo., were admitted.

On motion of W. T. Forrest, W. J. Coffock, of Cincinnati, Ohio, was admitted.

On motion of C. S. Bradley, Horatio Rodgers, of Providence, R. I., was admitted.

No. 19. Edward Matthews v. Nelson McStea. The argument in this cause was continued by J. H. Ashton for defendant, and concluded by Wm. M. Evarts for plaintiff.

No. 482. C. W. Upton, assignee, etc. v J. Tribdock. This cause was submitted on printed arguments by C. C. Nourse for the plaintiff in error, and by G. G. Wright for the defendant, under the twentieth rule.

No. 11. Ophelia Burbank, widow, etc. v. E. B. Biglow et al. Passed.

No. 12. Geo. D. Snow et al. v. Geo. W. Chapman Passed.

No. 13. Peyton Grimes v. Geo. S. Peppler et al. Passed.

No. 16. Chas Weil v. United States. Dismissed under sixteenth rule.

No. 18. The Cheasapeake and Ohio Railroad Company v. Samuel H. Early et al. Continued.

No. 19. Elizabeth A. Lake v. Frederick Fitzgerald. Dismissed with costs, per stipulation.

No. 22. Chas. A. Nichols, assignee, etc., appellant, v. Amasa M Eaton et al. The argument of this cause was commenced by Horatio Rogers for appellant, and continued by Abraham Payne for the appellees.

Adjourned until Thursday at 12 o'clock.

ANECDOTES OF LORD BROUGHAM'S EARLY HISTORY.

[From the Edinburgh Law Magazine.]

You may not like Lord Brougham; you may have no respect for his personal character or his political character (assuming that the latter had any existence independent of the former); you may fancy that he was not only a consummate orator, but also a consummate inventor of facts; that his faculty of imagination grew with his growth and strengthened with his strength, until, in his closing years, in obedience to the law of the strongest, it killed off all his other powers, and his mind became of imagination all compact. You may have an opinion of this kind in greater or lesser strength; but you cannot possibly help reading everything about the marvelous man. The very best things in Mr. Greville's *Memoirs*, in which he faithfully recorded the hatreds of every day, were the stories about Brougham, the stories which displayed his dash and brilliancy, his energy, his humbug, his mendacity, his vanity, his ludicrous pretensions to omniscience. The reason why we care to read everything about Brougham is not far to seek. We do so simply because of the wonder and admiration we have for the Titanic force of the man.

For the following *ana* of Lord Brougham's early career, a matter naturally enough of special interest to Scottish lawyers, we are indebted to a veteran lawyer, whose legal note-book contains the gatherings of more than half a century:

I.

In the end of last century a distinguished citizen of Edinburgh was induced to write a comedy. The night of performance came, and the friends of the author crowded the theatre to applaud the efforts of the young Shakespeare of the North. The first act was most patiently endured on the score of friendship, but its sad dullness prevented one token of approbation. The curtain arose on the second act, and the friendly audience was fondly hopeful of some improvement with the advance of the plot, but matters were becoming worse. Impatience now sat visibly on every countenance, and a general feeling existed that the piece might be politely, "*damned with faint praise*," and gently consigned "*to the tomb of all the Capulets.*" At length a supper party was exhibited, and one of the *dramatis personæ*, in dull prosaic strains, put the questions to his companions around the scenic board, "*What toast shall we next give?*" No sooner was the question put than an answer was loudly heard from the center of the pit, "*Drink good afternoon, if you please.*" A peal of laughter followed the appropriate reply, in which the actors themselves were compelled heartily to join. It was impossible longer to persist in the dull display. The curtain fell alike on the actors and the act, which was thus gently laughed into oblivion. The voice proceeded from a young man then a student in Edinburgh; his name was *Harry Brougham*. How many times since then has his power of sarcasm driven bad men and worse measures from the political stage, and bidden "*good afternoon*" to many a flagrant abuse long played at the nation's cost.

THE CHICAGO RIFLE CLUB.

On last Saturday there were seven prizes won at the range of this club at South Park. The shooting commenced at one o'clock, and continued until it was so dark that the target could not be seen. The distance was five hundred yards. It rained all afternoon and was very cold. The Chicago Bar was well represented. Several of its ablest members were present and participated in the contest. Judges, lawyers and doctors pulled up fence posts, carried boards and brush and made a fire. It was amusing to see them stand around the fire in the rain, watching the shooting, or waiting for their turn to come. Had they been compelled to thus expose themselves, there is no doubt they would have had the chills and fever, or some other more dangerous sickness. But as it was, we are informed, it improved the health of the members. The prizes were awarded as follows:

S. W. Burnham, the Hamilton & Rowe badge, $75.

George Willard, Life Membership, $25.

S. E. Bliss, third prize, $12.

J. Muir, fourth, $10.

C. R. Prouty, fifth, $5.

C. Fuller, sixth, $3.

W. C. Dyer, seventh, valuable pocket-knife,

Members of the bar won the first and second prizes. Mr. Burnham, who was official reporter of the courts for so many years, in a score of 29 out of a possible 35, carried off the Hamilton, Rowe & Co's badge in the first contest. George Willard, the well known railroad attorney, and one of the masters in chancery of the Circuit Court, made a score of 28 in a possible 35, which gave him the second prize, and made him the first life member of the club.

The enterprising law book-publishing house of Callaghan & Co., of this city have given to the Rifle Club seventy-six dollars worth of their most valuable legal publications to be shot for as prizes. We have no doubt these legal prizes will be warmly contested for by the members of the bar. Upon the receipt of the books the club passed a vote of thanks to the firm of Callaghan & Co., and by a unanimous vote made its senior member, Mr. B. Callaghan, an honorary member. The following is the letter of the firm to the president of the club:

HON. JAS. B. BRADWELL, *President Chicago Rifle Club:*

DEAR SIR:—Having noticed in a recent number of the LEGAL NEWS, that the Chicago Rifle Club contained quite a number of the legal profession, and desiring to encourage their effort to improve their aim, we beg to offer them, as prizes, to be shot for at your next meeting, the following books: High on Injunctions, 1 vol.; High on Extraordinary Remedies, 1 vol.; Moore's Civil Practice, 1 vol.; North's Probate Practice, 1 vol.; Bissell's U. S. Circuit Court Reports, 4 vols.; Curran's Speeches, 1 vol.; Adams & Durham's Real Estate Statutes and Decisions of Illinois, 2 vols.; which you may divide into such classes as seems proper to you, or not divided at all.

We beg to say here, that we rejoice to see that the combative profession is preparing to meet all comers, whether in the forum or the field, but we trust that their liability to engage in "shoots" at law may not result in anything more sanguinary than the occasional destruction of a "bull's eye," some poor fellow's reputation for truth and veracity, or a bottle of——milk.

Very sincerely yours,

CALLAGHAN & Co.

WOMAN SUFFRAGE.—Two of the leading dailies of this city have, within the past week, spoken of the opinion of the Supreme Court of the United States, delivered by WAITE, C. J., in the case of Mrs. Minor of St. Louis *v.* Hoppersett et al., holding that women are not guaranteed the right of suffrage under the Constitution, or the amendments thereto, as having been just delivered, and contain leading editorials commenting on the opinion as the death blow to woman suffrage. This opinion was delivered months ago, and published in 7 Chicago LEGAL NEWS, on page 221.

THE *Central Law Journal* views the recent edition of Parsons on Notes and Bills, in almost as unfavorable a light as the LEGAL NEWS, judging from its notice of that work in last week's issue.

POLYGAMAY IN UTAH.—On the 13th instant Judge BOREMAN, of the United States District Court, in Utah, delivered a strong charge to the grand jury in opposition to polygamy or bigamy, and in regard to enforcing the law of Congress of 1862, punishing the offense. He stated that it had never been respected, and every possible means has been used to prevent its enforcement; that leaders of the people while teaching this crime, repudiated it themselves when brought into the court-room; that as there is no statute in that territory in regard to marriage, no ceremony is required and none need be proved, and called upon the jurymen to indict all persons known to be living in polygamy; that it depends upon the grand juries whether the laws shall be enforced or not, or whether Congress shall be called upon to give us better laws.

STATUTE OF DESCENT.—Regarding the change in the Statute of Descent, prepared by "W" in the NEWS of Sept. 25th, page 28, allow me so suggest that a copy of the Colorado Statute on the subject would probably meet his views. It reads as follows: "If such intestate leave a husband or wife, and no child nor descendants of any child, then the whole of the estate of such intestate, real and personal, shall descend to and rest in such surviving husband or wife as his or her absolute estate, subject to the payment of debts as aforesaid." Rev. St. Col., Chap. 23, part of Sec. 1.

H. M. O.

Central City, Col., Oct. 9th, 1875.

A LAWYER SHUT UP.—"Sir," asked an attorney yesterday, of a witness who was testifying in a case of assault and battery, "have you ever been in this court before?"

"Yes, sir," replied the witness, "I have been here often."

"Ah, been here often, have you?" said the attorney in a triumphant tone. "Now tell the court what for."

"Well," replied the witness, slowly, "I have been here at least a dozen times to see you to try and collect that tailor's bill you owe."—*San Francisco Chronicle.*

CONVICT LABOR.—In the late financial year the receipts on account of the productive labor of convicts, etc., in England were £11,048 4s. 2d.

JUDGES FOR COOK COUNTY.—The convention of the Opposition Party, which met in this city on yesterday, showed its good sense by nominating Judge McAllister of the Supreme Court for Circuit Judge, and Judge Gary for re-election as Judge of the Superior Court. John F. Finerty of the *Tribune* was nominated for Clerk of the Superior Court; Mr. Hesing for County Treasurer. He is an old citizen and, should he be elected, will perform his official duties faithfully.

ESTATE OF ROBERT HILL, DECEASED.—NOtice is hereby given to all persons having claims and demands against the estate of Robert Hill, deceased, to present the same for adjudication and settlement at a regular term of the County court of Cook county, to be holden at the court house, in the city of Chicago, on the third Monday of November, A. D. 1875, being the 15th day thereof.
Chicago, September 20th, A. D. 1875.
1-6a HARRIET HILL, Administratrix.

CHICAGO LEGAL NEWS.

SATURDAY, OCTOBER 23, 1875.

The Courts.

We are under obligations to J. D. Howland, clerk of the United States Courts at Indianapolis, for the following opinion:

U. S. DIST. COURT, D. OF IND.

In re MICHAEL H. SPADES et al.

BANKRUPTCY — PRACTICE UNDER THE AMENDMENT TO THE 43D SECTION OF THE BANKRUPT ACT PROVIDING FOR THE DISPOSITION OF PENDING CASES BY MEANS OF A COMPOSITION BETWEEN THE BANKRUPT AND HIS CREDITORS.

Opinion by GRESHAM, J.

By the amendment to the 43d section the bankrupt act, provision is made for the disposition of pending cases by means of a composition between the bankrupt and his creditors.

In certain cases when composition proceedings are pending, application is made to the court to settle questions of practice, and for the better regulation of this method of settlement the following statement is made for the direction of registers.

Upon an application to the court by by a bankrupt whose case is pending, setting forth that he proposes to compound with his creditors, an order will be made and certified to the proper register directing him to call a meeting, and to give notice of not less than ten days to each known creditor of the time, place and purpose of such meeting. These notices will be sent by mail, properly addressed and postpaid, and a memorandum will be entered by the register to the effect that he has received the order of the court and given the notices required.

The record of the register should show that at the time appointed the bankrupt appeared in person, or if from some lawful cause prevented from so appearing, then by another person on his behalf, with a statement of the whole of his debts and assets, showing also the names and addresses of the several creditors.

The proposition of the debtor being submitted, must then be adopted by a majority in numbers and three-fourths in value of the creditors of the debtor *assembled at such meeting*, voting either in person or by proxy.

This alone does not authorize the submission of the composition to the court, for an additional step must then be taken, that is, the resolution must be confirmed by the signature of the debtor and of two-thirds in number and one-half in value of *all the creditors* of the debtor. If the vote of those assembled at the meeting does not amount to a majority in number and three-fourths in value, the matter is at an end. But should that vote be given in that number and value, of those so assembled, a further step must be taken to confirm it by securing the signature of the debtor to the resolution and also the signatures of a larger proportion of the creditors, to wit: two-thirds in number and one-half in value of all the creditors of the debtor, This provision of the law is designed to protect the creditors from the effect of a resolution adopted by a small number assembled at such a meeting. The smaller number may adopt the resolution, but the larger number must confirm it, and it is plain from the language of the act that after the adoption of the resolution a reasonable time may be given to secure such additional signatures as may be required to confirm it.

A question arises upon the further provisions of the section as to how this voting and confirming is to be counted. The language of the amendment is: "And in calculating a majority for the purposes of a composition under this section, creditors whose debts amount to a sum not exceeding fifty dollars shall be reckoned in the majority in value, but not in the majority in number."

This language, which directs what shall be counted in *the majority*, is not free from obscurity. The majority, however, can only be ascertained by making the count, and as the method of making it is to be first determined before the vote is settled, it seems that the reasonable interpretation of this provision is that in settling the composition, whether for or against creditors whose debts do not exceed fifty dollars shall not count in determining the number, but shall count in determining the value.

As to secured creditors they are not counted at all unless they satisfy the register that there is an excess due them over the value of the security. That excess being determined by the register, they are admitted to the vote as are the creditors whose demands are unsecured.

If, however, a secured creditor abandons his security, he is admitted to vote as one unsecured.

It is proper here to observe that the secured creditors to whom this exception applies are those who are secured by the pledge, in some form, of property that, apart from their lien upon it, would go into the fund for general distribution. The language is general, to be sure, and construed strictly and without reference to other provisions of the statute, might be made to embrace those creditors who have personal security. But the law makes provision elsewhere for the protection for such sureties, allowing them to prove in full when they have paid the debt, and provides for their subrogation to the right of the creditor, if he shall have proved, and they afterward pay the debt. The provision for the abandonment of the security can only apply to such security as may be surrendered to the general fund, and can have no application to that form of security which could be abandoned only for the benefit of the surety, and not for the increase of the fund. It allows, of course, that a creditor having personal security votes upon composition proceedings as an unsecured creditor. The question of the effect of partnership relations in making a composition presents more difficulty. The law is silent as to partnerships. It proceeds apparently upon the theory that the debts and assets are all of a single class. It does not provide for a classification of debt and assets as being individual and partnership, and for a several vote and counting among the different classes of creditors. Are the creditors of A. and those of B. and those of the firm of A. & B. to be all counted together in determining the required numbers and values in these several stages for settling a composition? Or, are they to be separated into classes and to vote and be counted in such classification before the question of composition can be determined?

The act provides carefully in section 36 for the marshaling of the debts and assets and the distribution of the several individual and partnership funds, according to the well-known equity rules. The creditors being so entitled, it is easily seen that very gross inequality might in some cases result by a vote for composition without requiring a classification. If the personal assets of partners are small and the personal debts large, the personal creditors could expect only a proportionate dividend, and therefore could readily vote for a composition that would be unjust to the partnership creditors, unless a similar ratio existed between their debts and the partnership fund. If their debts were in the aggregate comparatively small and the partnership fund large, they could, by the preponderating vote of the personal creditors, be driven to accept a composition which would be greatly below the amount of their dividends were the cause to proceed to settlement by the assignee.

Congress could not have contemplated and intended any such inequality. The cases, however, to which the attention of the court has been called, are cases where the meetings have been held upon general notice to all creditors, both individual and partnership, and where the vote has been made by the creditors who assembled and those who signed the confirmation of the resolution, without any classification and without any objection on that ground from any creditor. The state of the respective debts and funds may be such as to justify this course; and where they are so it simplifies the proceedings very materially. Whether this condition of practical equality of the debts and assets, both individual and personal, exists, is shown to the creditors at the composition meeting, and it is their province to act upon it as they see proper. They may make the composition by general vote and general confirmation, if they are content with it. Or, if one of any class of the creditors perceives that the other class is about to force upon him an unjust composition, he can demand a separate vote, and so protect himself by calling to his assistance those who compose the class to which he belongs.

It would seem that by this application of the law no injustice can be done. There remains a second meeting to be called by the court, after notice to every known creditor, for the final allowance of the composition by the court, if it shall be found to be fair and to have been conducted according to law. Should it appear at this meeting that the common voting of all creditors, individual and partnership, together worked injustice, the court can then consider if any and what redress should be given.

We are under obligations to the law firm of STEVENSON & EWING, of Bloomington for the following opinion:

SUPREME COURT OF ILLINOIS.

OPINION FILED OCT. 1, 1875.

JOHN ROACH et al. *v.* THE PEOPLE, etc.

Error to McLean.

INSTRUCTIONS IN CRIMINAL CASES—WHEN HOMICIDE IS JUSTIFIABLE IN SELF-DEFENSE—DEFENDING PROPERTY—CREDIBILITY OF WITNESSES—IMPEACHMENT OF.

1. Indictment for manslaughter for killing one Dunlap in a dispute concerning the right to use water from a well which afforded an insufficient supply for the wants of both parties. *Held*, that the instruction given in relation to a mutual conflict assumes that the parties were equally willing to engage in the conflict and that they were equally armed, and that the wound was given as charged in the indictment; that is, unlawfully, feloniously and willfully; that the instruction artfully instructs the jury to convict the defendant.

2. WHEN KILLING JUSTIFIABLE.—That if the defendants were assaulted by the deceased in such a way as to induce in them a reasonable and well-grounded belief that they were in danger of losing life, or suffering great bodily harm, when acting under such reasonable apprehension, they were justified in defending themselves whether the danger was real or apparent, actual and positive danger is not indespensable to justify self-defense; that it was not necessary that the defendants should have the exclusive right to the possession of the well as against the whole world, but only as against deceased and his party to justify their repelling force with force.

3. CREDIBILITY OF WITNESS.—The court states the rule for determining the credit to be given to a witness' testimony.—[ED. LEGAL NEWS.]

Opinion by MCALLISTER, J.

John Roach and Patrick Roach, the plaintiffs in error, were indicted at the November term, 1874, of the McLean Circuit court for manslaughter in taking the life of John Byron Dunlap. The indictment contains three counts. The first count charges, in substance, that on October 10th, 1874, in McLean county, the defendants unlawfully, feloniously and willfully made an assault upon said Dunlap with a knife, held in the hand of John Roach; and upon the side of the left breast of said Dunlap then and there unlawfully, feloniously and willfully did strike, cut, stab and thrust, giving to said Dunlap, then and there, with said knife, in and upon the left side of the breast, one mortal wound of which he instantly died; then averring that said defendants the said Dunlap then and there in manner and form as aforesaid unlawfully, feloniously and willfully did kill.

The second count is the same, only that it charges the same acts to have been done by John Roach, Patrick being present aiding, abetting and assisting.

The third count is the same only that it avers the killing to have been done with a club.

It appears, by the evidence upon both sides, that there was a controversy between the deceased and one Wilcox acting in concert with him, upon the one side, and the defendants upon the other, about the right of the former to take water out of a certain well or spring for the purpose of watering stock, the defendants claiming to have a paramount right, the supply not being adequate for the stock of all parties.

Evidence was given, and not controverted, that Patrick Roach and one Malay had previously dug out the well or spring, so as to increase the supply, had put a fence around it, and the Roaches had been in the prior possession and use of it. Niccolls, the owner of the land where the spring was, testified that on the Friday before the homicide, one of the Roach boys called on him and asked him if he had any objection to his (Roach) watering there. Witness said he did not care how many watered there. Roach then asked witness if he had any objection to his digging the well deeper, and some one present asked who would have the right to the water. Nothing was said as to the exclusive right, but some one said he thought the one that fixed it up ought to have the first right. Witness replied that he thought so too, and this was all that was said on the subject. Before this, as the evidence shows, Patrick Roach, with the assistance of Malay, dug the well deeper and put a fence around it.

The evidence tends to show that after the well was thus fixed up by Roach and Malay, the deceased and Wilcox, on the occasion of the homicide, came early in the morning with stock for the purpose of watering them, before the Roaches had watered theirs, and from this attempt, a conflict ensued in which clubs were used upon both sides.

The theory of the defense was, that after the fight had been continued until Patrick was knocked down and disabled, John was assailed by the deceased and Wilcox, one of them having a rock in his hand, which was thrown at him (John) with great violence, and that acting under a reasonable and well grounded belief that he was in danger of losing his life, or suffering great bodily harm, he used his knife in self defense. Upon some questions of fact, there was a sharp conflict of evidence, but there was testimony tending to support the alleged justification, that the killing was in self defense.

The jury found both the defendants guilty, and fixed the term of imprisonment in the penitentiary twenty years for John and one year for Patrick, and they sue out a writ of error from this court.

The court on behalf of the People gave to the jury the following instruction: "The court instructs the jury that in case of a mutual conflict, he who would excuse himself upon the ground of self defense, must show that before a mortal blow was struck he had declined any further conflict, and retreated as far as he could with safety. And, therefore, if the jury believe from the evidence beyond a reasonable doubt, that the defendants and John Byron Dunlap and the witness, Wilcox, were engaged in a mutual conflict, *all being equally willing to engage in said conflict, and upon equal terms as to being armed*, and that the defendants mortally wounded the said John Byron Dunlap while so engaged in mutual conflict, and, without in any way having attempted to decline any further conflict, *at the time said mortal stroke was given in manner and form as charged in the indictment. And the jury will find the defendants guilty.* By this instruction the court assumes the fact, that all parties were equally willing to engage in the conflict, that they were upon equal terms, as to being armed. The same assumption is repeated in the eighth instruction. This was calculated to prejudice the defendants. So far as the parties were armed with clubs, they were probably upon equal terms, as to being armed. But the testimony tended to show, that the Dunlap party seized a rock for the purpose of using it upon John Roach, and this fact was material upon the question of self defense. The last clause but one, of the instruction, assumes that the mortal wound was given in manner and form as charged in the indictment—that is, unlawfully, feloniously and wilfully. This is contrary to the rule announced in various decisions in this court, and was erroneous. This instruction is unusually artful in its structure and highly calculated to mislead the jury. The direction of the court to convict at the end of the instruction, should be made expressly dependent upon their finding such and such facts established beyond reasonable doubt by the evidence. This is not so framed; but is made to appear so independent of any hypothesis in the former part of it, so that it might mislead the jury into the error of regarding it as a positive direction from the court to convict. Beginning with a capital letter, it reads thus: "And the jury will find the defendants guilty." Such a mode of instructing the jury either in civil or criminal cases, cannot receive the sanction of this court.

The court, on behalf of the people, gave the following instruction to the jury: "9. The court instructs the jury that before the defendants, or either of them, can justify the killing of John Byron Dunlap, if the jury believe from the evidence, and beyond a reasonable doubt, that the defendants did kill John Byron

Dunlap, it must appear that the danger was so urgent and pressing that in order to save their own lives, or the lives of one of them, or to prevent them, or one of them, from receiving great bodily harm, the killing was absolutely necessary; and it must further appear that John Byron Dunlap was the assailant, or that the defendants had really and in good faith endeavored to decline any further struggle before the mortal blow was given."

This instruction would convey to the minds of the jury the idea that the defendants could not sustain their alleged justification unless their danger was not only apparently imminent, but was actual and positive. In Campbell *v.* The People, 16 Ill., 17, a similar instruction was given, and it was condemned, this court holding that if the defendant was assaulted by the deceased in such a way as to induce in him a reasonable and well-grounded belief that he was actually in danger of losing his life, or suffering great bodily harm, when acting under such reasonable apprehension, he was justified in defending himself, whether the danger was real or only apparent. "Actual and positive danger," said the court, "is not indispensable to justify self-defence." This doctrine was reaffirmed in the case of Schnier *v.* The People, 23 Ill., and an instruction like the above was held to be erroneous. So, also, in Maher *v.* The People, 24 Ill., 241, to the same effect.

On behalf of The People the court gave the following instructions: "12. The court instructs the jury, that if they believe from the evidence, beyond a reasonable doubt, that the defendants did not have the exclusive right to the use of the well on Niccoll's land, then they had no such right or property to the water in said well as would justify the defendants, or either of them, in opposing by force any person desiring or attempting to get water at said well."

This instruction had a tendency to mislead the jury.

It was not indispensable to defendants' right to defend their possession of the well, or repel force with force, that they should have the exclusive right to the use of the well as against all the world. It would be enough if they had it as against the deceased and Wilcox.

The court also gave for the People the following: "The jury are instructed that even though numerous witnesses may have testified against the credibility and truthfulness of the witness Wilcox, and even though the jury may believe from the evidence, that the general reputation of the said Wilcox for truth and veracity is bad, yet the jury *should not*, upon that account, *discredit the testimony of the said Wilcox;* provided they believe the same to be reasonable and consistent, and that the same is corroborated by other credible evidence, and by the facts and circumstances otherwise proved in this case."

This instruction invades the province of the jury. The jury might properly have been instructed that they were at liberty, notwithstanding the impeaching evidence, if they found his statements reasonable and consistent, and corroborated by other credible testimony in the cause, to give to his testimony such weight as they thought it was entitled to, under all the circumstances in evidence. The credibility of witnesses is a matter exclusively for the jury. We had occasion to discuss this proposition and express our views in the case of Oliver *v.* The People, January Term, 1875, when a similar instruction was held erroneous.

The judgment of the court below will be reversed and the cause remanded.

Reversed and remanded.

STEVENSON & EWING and C. G. BRADSHAW for plaintiff in error.

JOSEPH W. FIFER for the people.

WE are under obligations to GEORGE W. SMITH, of the Chicago bar, for the following opinion:

SUPREME COURT OF ILLINOIS.

OPINION FILED OCT. 18, 1875.

O. S. HOUGH *v.* THE COOK COUNTY LAND COMPANY.

Appeal from Superior Court of Cook.

POWER OF CORPORATION TO HOLD AND CONVEY LANDS—FORFEITURE OF CHARTER—CHANGE OF NAME.

1. CHANGING NAME.—The effect of a corporation changing its name considered.

2. FORMER CASES—A DISTINCTION.—The court makes a distinction between this case and the case of Starkweather *v.* The American Bible Society, reported 7 Chicago LEGAL NEWS, 59.

3. POWER OF CORPORATION—REMEDY OF APPELLANT.—The court, assuming appellant's construction of the several statutes affecting appellee's corporate powers to be correct, upon which the court expresses no opinion, holds that appellant, as a stockholder, on a bill filed for that purpose, may restrain appellee from acting in excess or in violation of its corporate powers; and that he may also, as a citizen of the State, cause steps to be taken in its name, for the same causes, to have judgment of forfeiture of its franchise; but that he cannot, as a grantor of lands, urge such acts as a cause for decreeing his deed void and a rescission of his contract.—[ED. LEGAL NEWS.]

SCHOLFIELD, J.

This was a bill in equity filed by the appellant against the appellee in the court below to set aside a conveyance of certain lands, to cancel the stock of appellee, issued to him in payment for the same, and to restrain appellee, in the meantime, from selling such stock which had been pledged to it as collateral security for a loan made to appellant.

A demurrer was interposed to the bill which the court below sustained, and dismissed the bill.

So far as the allegations of the bill are material to the questions requiring our consideration, they are as follows: Appellee claimed to be a corporation under the laws of this State, with power to borrow and lend money; to take lands and mortgages as security; to purchase lands and make improvements thereon by erecting buildings for the purpose of renting the same; to hold buildings and lots for the purpose of improving and renting the same, and to do a general loan business, and take lands, mortgages and notes to secure the loans.

Appellant believing that appellee was possessed of the powers it claimed, and that it was authorized by its charter to buy land and issue its stock in payment therefor, and to loan money, etc., on the 24th day of May, 1873, contracted with it to sell and convey to it certain lands in Cook county, which are particularly described in the bill, in consideration that appellee would issue to him three hundred and sixty-five shares of its stock, and would also loan him eighty per cent in money of the stock and hold the stock as collateral security on the loan; the loan to be for one year from that date, with interest at ten per cent. per annum till due, and twelve per cent. per month after maturity, with power, on failure to pay, to sell, etc.

The land was conveyed, the money loaned, and the stock issued and pledged as collateral security in conformity with the terms of the agreement.

Since the transaction occurred, appellant has been advised by counsel that appellee had no authority to take the land and issue the stock; that it professes to act under authority of "an act to incorporate the Land Improvement and Irrigation Company;" approved March 1st, 1867, and the change of name to The Cook County Land Company, by vote of its stockholders on the 20th of July, 1872, at which time its capital stock was increased, in accordance with an act of the legislature in regard to changing names and increasing stock of corporations, approved March 26th, 1872; that the change of name and increase of stock was unauthorized and void, and all the authority appellee had by its charter was to purchase lands for the purpose of irrigation and improvement for the raising of crops thereon, and the sale and disposal thereof when so improved.

It is alleged that the power vested in appellee by its charter, which is made part of the bill as an exhibit, was to examine survey and purchase lands and interests therein, water courses or interests therein, for the purpose of irrigating the lands that might be so purchased, and facilitating crops in dry seasons, and to improve and cultivate such crops chiefly as require irrigation to produce the largest returns, and that appellee had no power to purchase and hold lands for any other purpose; that appellee has not purchased any lands for the purpose of irrigation or for any object contemplated by its charter, but that appellee has purchased a large quantity of land worth above $600,000, holds improved and unimproved city real estate, announces its intention to erect buildings on part of its vacant city property, and that it has been since its organization, and now is, engaged in purchasing lands, city lots, the improvement of said lots for the purpose of sale and rental, and in the purchase of tax certificates, and in loaning money on bonds and mortgages, etc.

Appellant insists that the purchase of the land, and the loaning of the money and taking notes therefor, were contrary to positive statutes, and therefore void.

The act of March 1st, 1867, under which appellee first became incorporated by its first section, empowers "The Land Improvement and Irrigation company to have, hold, possess and enjoy by themselves, successors and assigns forever, lands, tenements, hereditaments, goods, chattels, choses in action and effects of every kind, and the same to grant, sell, alien, invest, loan and dispose of, and the fourth section of that act is as follows:

"The chief objects of this association shall be to examine, survey and purchase lands or interests in lands, water-courses, or interests therein, which are as near as may be adapted by nature to the use of water to irrigate the same, to facilitate the growth of crops in dry seasons, and to improve and cultivate the same for such crops chiefly as require irrigation, to produce the largest returns." Private Laws of 1867, vol. 2, p. 241.

Section twenty-one of the general incorporation law, approved March 26th, 1872, under which appellee changed its name and increased its capital, contains this proviso: "And provided further, that any corporation, other than corporations for manufacturing purposes, availing itself of or accepting the benefits of, or formed under this act (except the mere change of name), shall be subject to the general laws of this State now in force, or which may hereafter be passed, regulating corporations of like character. 2d Gross., 59. One of the general laws then and still in force regulating corporations, provides that "no foreign or domestic corporation established or maintained in any way for the pecuniary benefit of its stockholders, shall purchase or hold real estate in this State, except as provided for in that act. 2 Gross., 106, § 36. Section ten of that act authorizes corporations to "own, possess and enjoy so much real and personal estate as shall be necessary for the transaction of their business," and "to sell and dispose of the same when" not required for the uses of the corporation; and it contains a proviso that "all" real estate so acquired in satisfaction of any liability or indebtedness, unless the same may be necessary and suitable for the business of such corporation, shall be offered at public auction, at least once every year, etc.

In case any corporation "shall fail to sell such lands, it is made the duty of the State's attorney of the proper county to proceed against the corporation, by information, to the end that such lands shall be decreed to be sold, 2 Gross, 103. And the first section authorized corporations to be formed in the manner by the act provided for any lawful purpose, except banking, insurance real estate brokerage, the operation of railroads, and the business of loaning money."

Conceding that, in determining appellee's power, these several provisions must be construed together, and that appellant's construction that appellee has authority only to examine, survey and purchase lands, or interests in lands, water-courses, or interests therein which are as near as may be adapted by nature to the use of water to irrigate the same, etc, is correct, does it follow that the title to lands conveyed to and held by it for other and different purposes, is absolutely void, and may be so declared at the instance of the grantor, seeking for that cause alone, to repossess himself of the property?

The authorities cited in the brief for appellant, Bank, U. S. *v.* Owens, 2 Peters, 538-9; Munsell *v.* Temple, 3 Gilm. 93; Cin. Mut., etc., *v.* Rosenthal, 55 Ill., 91; Green *v.* Seymour, 3 Sandford, Ch. 292; Smith *v.* Bromley, Douglas, 696, and Browning *v.* Morris, Cowp., 790, recognize the general doctrine, that a contract prohibited by statute, or against the manifest policy of the law, is void. And in Carroll *v.* East St. Louis, 67 Ill., 568, also cited by appellant, the question before us, was whether a corporation, created in another State for the sole purpose of buying and selling lands, has power to purchase and hold title to lands in this State, and we held that it has not, because it would tend to create perpetuities and is against the general policy of our legislation.

In a more recent case Starkweather *v.* The American Bible Society, term, the same doctrine was reasserted.

There seems to us, however, to be this important distinction between the principle recognized in these authorities, and that applicable here. These, by reason of the express or implied prohibition of the law, the party is absolutely denied the power to acquire any rights through the particular contract.

Here there is power to purchase, receive conveyances, and hold title to lands, but it is prohibited that they shall be purchased and held for other than a prescribed purpose. In the one case the principle affects the power of acquisition, in the other it affects simply the use to which the acquisition shall be applied.

There can be no question of the right of a stockholder to the aid of a court of equity against a corporation, to prevent it from misapplying its capital, or from doing acts which would amount to a violation of its charter; but the frame and prayer of the bill in the present case do not contemplate such relief, and we do not conceive it could be granted without material amendment, to make which, leave should have been asked in the court below.

But appellee being authorized to purchase and hold lands, and appellant having sufficient capacity to convey, the title was obviously vested in appellee by the delivery of the deed, and the question whether appellee has, by its purchase and use of lands, exceeded the powers conferred by its charter, is one between the State and appellee, with which appellant as a grantor simply has no concern. Banks *v.* Porteaux, 3 Randolph, 141; Borrow *v.* Naud. C. T. Co., 9 Humphreys, 304; Chambers *v.* St. Louis, 29 Mo., 576. Att'y Gen'l *v.* Tudor Ice Co., 104 Mass., 239; Whitman Mining Co. *v.* Baker, 3 Nevada, 391; Hayward *v.* Davidson, 41 Ind., 212; Angell & Ames on Corps., §§ 152-3; Dillon on Munic. Corps., § 444; Natorna W. & M. Co. *v.* Clarkin, 14 Cal., 544. It is well observed by Field, J., in the case last above referred to, at p. 552, "It would lead to infinite embarrassments if, in suits by corporations to recover the possession of their property, inquiries were permitted as to the necessity of such property for the purpose of their incorporation, and the title made to rest upon the existence of that necessity."

And this cannot be better illustrated than by reference to the fourth section of appellee's charter before quoted: Precisely where would the line be drawn between those lands which are, in the language there employed, "as near as may be adapted by nature to the use of water to irrigate the same, and those which are not." If it were competent to inquire whether the land conveyed is such as is contemplated by the charter, this would have to be determined, and in every conveyance it would be material in determining whether title vested, or the deed was a nullity.

Our conclusion is, assuming appellant's construction of the several statutes, affecting appellee's corporate powers to be correct (upon which we express no opinion), appellant may, as a stockholder, on a bill filed for that purpose, have relief in equity to restrain appellee from acting in excess or in violation of its corporate powers; and he may also, as a citizen of the State, cause steps to be taken in its name, for the same causes, to have judgment of forfeiture of its franchise; but he cannot, as a grantor of lands, urge such acts as a cause for decreeing his deed void, and a rescission of his contract. Treated as a bill, to rescind the contract on the ground of fraud, independently of the questions we have considered, the allegations are insufficient.

The decree is affirmed.

WALKER, C. J.—I am in favor of affirming unless complainant should be required to refund the money he received from the company.

I hold that the company exceeded their power in purchasing these lands, and that the company should be held to have taken no title by the purchase.

LYMAN TRUMBULL for appellant.

GEO. W. SMITH, for appellee.

SUPREME COURT OF TENNESSEE.

1. CARRYING PISTOL—PLEADING—A plea in abatement cannot be received after a general continuance, but must be pleaded at the proper time.

2. Plea of former conviction before justice of the peace held defective because it did not show a real conviction upon the plea of guilty under the small offense statute, and because the justice had no jurisdiction to try the offense, but could only bind the party over to the Circuit Court.

CHARGE.—A charge that if defendant carried a pistol not openly in his hands, in a public place, within twelve months, etc., he would be guilty, *held* to declare the law correctly; as applicable to the facts of the case.—[ED. *Commercial and Legal Reporter.*]

NICHOLSON, C. J. delivered the opinion of the court.

Kirk Hallum was convicted for unlawfully carrying a pistol, in the circuit court of Shelby county at Bartlett, and has appealed to this court.

The presentment contains two counts: First, for unlawfully carrying a pocket pistol, a belt pistol and a revolver pistol, not used in the U. S. army. Second, for unlawfully carrying a revolver pistol not openly in his hands. The presentment was made at the August term, 1872, and at the April term, 1873, there was a general continuance of the case. At the August term, 1873, the defendant filed his plea in abatement for misnomer, which was stricken out on motion, because filed after a general continuance at a former term. Defendant then filed a plea of former conviction before a justice of the peace, which was demurred to and the demurrer sustained.

Defendant was then tried on the plea of not guilty, and a verdict of guilty was rendered under the proof and charge of the court. The proof was, defendant was at public place, not on his premises, wearing a pistol in his belt, which was a navy six or army pistol. The charge of the court was as follows: "If you find that the defendant carried a pistol not openly in his hands, off his premises in a public place and within the jurisdiction of this court, within twelve months prior to the finding of the indictment, you will find him guilty." Several errors are assigned for reversal. First, because the court struck out the plea in abatement. It was not filed at the first term, but after a general continuance. Pleas in abatement in criminal as well as in civil cases must be pleaded at the proper time. 3 Smedes & Marsh., 587; Green *v.* Campbell, 9 Yerg., 7. A plea in abatement cannot be received after a general continuance. Shaw *v.* Bowen, 1 Tenn., 297. The error was, therefore, not well assigned.

2nd. Because the court sustained the demurrer to defendant's plea of former conviction. The conviction pleaded was had before a justice of the peace and was clearly defective, because it did not show a real conviction upon the plea of guilty, under the small offense statute, and because the justice had no jurisdiction to try the offense, but could only bind the party over to the circuit court.

3rd. Because the court refused to quash the indictment. Under repeated adjudications of this court the indictment was sufficient.

4th. Because the charge of the court is erroneous. The charge is remarkable for its brevity, but we are unable to see that it does not contain every necessary constituent of a good charge. The proof made out clearly a case of wearing an army pistol in a belt at a public place. The charge was that if defendant carried a pistol, not openly in his hands, in a public place, etc., he would be guilty. As brief as is the charge, we think it declared the law correctly as applicable to the facts of the case.

The judgment is affirmed.

SUPREME COURT OF TENNESSEE.

GEORGE NELSON, in error, *v.* THE STATE.

INVOLUNTARY MANSLAUGHTER—KILLING WITH A WAD.—Where the proof failed to show any purpose to take the life of the deceased, or to inflict any injury upon her, but showed that if the defendant fired the pistol purposely it was for the purpose of frightening the deceased, or practicing what he intended as a joke, not knowing that a dangerous wound might be inflicted without a leaded ball or shot. *Held*, that under the circumstances, a conviction for voluntary manslaughter was erroneous.—[ED. *Commercial and Legal Reporter.*]

MCFARLAND, J.—The prisoner was tried upon an indictment for the murder of Milly Ford, and convicted of voluntary manslaughter and sentenced to five years imprisonment in the penitentary, and his motion for a new trial being overruled, he has appealed in error.

The proof of the witnesses set out in the bill of exceptions shows that the prisoner, on the 25th of December last, had been shooting a small pistol about the yard at the house where the deceased resided in Memphis—shooting Christmas guns. Harriet Fane, who reside in the same house with the deceased, says: "He," meaning the prisoner, "came into my room just after he had shot once and loaded his pistol, and while in my room loading his pistol said that he intended to go into Milly's room and shoot and kill her unless she would kiss and hug him. When he loaded his pistol he went into Milly's room, and I heard him say, 'kiss me, Milly,' or 'I want you to kiss me.' She answered 'I won't do it; go away from me, George.' She then heard the pistol fire."

Henry Thomas, who was in the room with the deceased, says: "George Nelson came into the room with a pistol in his hand; he went up to Milly and said, 'Milly, I want you to hug me, or I want you to kiss me.' She answered, 'I won't do it.' He then said, 'If you don't do it I will shoot you.' He then put both arms around her, and as he did so the pistol fired, and as the pistol fired she fell over into George's arms and sank to the floor. George said, 'For God's sake forgive me, Milly; I did not think it would hurt you' He then said to me, 'Go, Henry, and bring the doctor; please go, Henry—quick!'"

The statement of this witness is corroborated by other witnesses. The proof makes it most probable that the pistol was not loaded with a bullet but with a paper or other "wad." The wound was in the back below the spine, the orifice ranging back to the spine. The parties had been entirely friendly previous to that time. Without setting out the evidence in detail, we think it fails to show any purpose to take the life of the deceased, or to inflict any injury upon her. We understand the threat to shoot or kill the deceased to have been a jest or at least the shooting he did not intend to be of a dangerous character. This was the understanding by the witnesses, for they evidently did not think at the time that anything dangerous was intended.

The evidence may support the conclusion that he fired the pistol purposely, but upon this record we think that if he did so it was for the purpose of frightening the deceased, or practicing what he intended as a joke, probably not knowing that a dangerous wound might be inflicted without a leaden ball or shot.

His entire conduct we think, with the attending circumstances, establishes this conclusion. Taking this view of the facts, is it a case of *voluntary manslaughter?* Our statute, which, in this respect, is the substance of the common law defines manslaughter thus: "Manslaughter is the unlawful killing of another without malice either expressed or implied, which may be either voluntary upon a sudden heat or involuntary, but in the commission of some unlawful act." The most common case of manslaughter is where two persons upon a sudden quarrel, fight and one kill the other. Marly *v.* The State, 1 Sneed, 407. Our statute makes two separate grades of manslaughter and affixes different punishments. See Lee v. The State, 1 Cold., 92–67. Involuntary manslaughter is defined to be "where it plainly appears that neither death or bodily harm was intended, but death is accidentally caused by some unlawful act or any act not strictly unlawful in itself, but done in an unlawful manner and without due caution. We are of opinion that neither death nor bodily harm was intended, and the proof does not sustain a conviction for *voluntary manslaughter*.

The question whether he is guilty of *involuntary manslaughter* is not before us.

Let the judgment be reversed and a new trial awarded.

NOTES OF DECISIONS OF THE SUPREME COURT OF MICHIGAN.

OCTOBER TERM, 1875.

Wallace v. *Harris.*

Appeal from Wayne. Opinion by Graves, C. J. Case disposed of as stated at close of opinion.

The objection that a case is one of legal, instead of equitable cognizance, may be considered waived, if not taken in the court of original jurisdiction.

Where there is apparently as good ground for assigning a case to the jurisdiction of a court of equity as to that of a court of law, it is held not to be a matter of great consequence in which branch it falls, especially in Michigan, where the same judge sits in both law and equity.

In determining undue influence, allowance must be made for the right of every true owner, when not hindered by personal incapacity or particular regulations, to dispose of his own property according to his own free choice, whether it be guided by friendship, benevolence, gratitude or relationship.

An entire conveyance is not necessarily void because part of it is.

Dye v. Mann, 10 Mich., 291, explained.

A husband's sole deed of land including his homestead is not necessarily invalid except as to so much as lies in the homestead.

Ells v. *Rector.*

Error to Berrien. Opinion by Graves, C. J. Reversed and remanded for new trial with no costs to either party as against the other.

Costs are withheld from both parties as against each other where error is brought on a void finding.

Gallaway v. *Burr.*

Error to Superior Court of Detroit. Opinion by Marston, J. Affirmed with costs.

To sustain an action for obtaining goods under false pretenses, the plaintiff need not have actual, personal knowledge of the facts, but if he honestly believes them to be true, he may rely on such statements received through the usual channels, as business men of ordinary prudence would act upon.

The institution of a criminal prosecution for the recovery of a private claim is strong, if not conclusive evidence of malice; if this is the motive, the advice of counsel is no protection.

A refusal to charge a correct abstract proposition is cured by the refusal of the jury to find any fact which it could relate.

Youngblood v. *Sexton.*.

Appeal from the Superior Court of Detroit. Opinion by Cooley, J. Decree below dismissing the bill affirmed with costs.

Equity has no jurisdiction to restrain the collection of a personal tax, even though illegal.

The acquiescence of parties cannot give a court of chancery jurisdiction to issue a writ of injunction.

The enforcement of a money demand does not fall within the category of "irreparable injuries," so as to require equity cognizance.

A common interest in a question at law, where the legal interests of the parties are wholly distinct, is no ground for equitable jurisdiction when the several controversies affected by the legal question are themselves purely legal; it does not, therefore, call for the action of a court of equity for the purpose of avoiding a multiplicity of suits.

Taxation is not license.

Act 228 of 1875, for the taxation of the liquor traffic, is held valid.

The tax authorized by the liquor tax law (Act 228 of 1875), is in no proper sense anything more than a local tax.

Sanford v. *Huxford.*

Error to Calhoun. Opinion by Campbell, J. Judgment reversed, demurrer overruled with costs, and cause remanded that defendants may plead over.

The withdrawal of opposition to bankruptcy proceedings already begun, is a valid consideration for an agreement between petitioning creditors and the defendants in bankruptcy.

Clark v. *Locomotive Works.*

Error to Superior Court of Detroit. Opinion by Campbell, J. Reversed with costs; new trial granted.

One who contracts to furnish machinery must, if necessary, provide suitable contrivances for making it effective. But whether a contractor should have used a certain specific device as better known and more effective than others, is for the jury to determine from evidence as to such knowledge and usage, and does not call for an expert's opinion.

A contractor furnished a steamer with defective machinery; *held*, that if during the boating season, ordinary prudence had required a timely stoppage of the boat for examination and repairs, and this precaution would have prevented continuous damage, but was neglected, enhanced damages could not be recovered.

In an action based upon a refusal to pay for defective machinery placed in a steamer, expert evidence was held admissible to show the condition of the boat as fitted to receive the machinery, as e. g. whether the stern, in which it was placed, settled more than it ought to.

Bottsford v. *Simmons.*

Error to Wayne, Opinion by Graves, C. J. Affirmed with costs.

A defendant in garnishment can not be held on the ground that he has property *belonging* to the principal defendant, when the process simply charges him with being *indebted* to the principal defendant, and *vice versa*. The grounds are distinct and the interlocutory proceedings and the nature of the judgment differ according to the form of the allegation against the garnishee.

Murphy v. *Granger.*

Error to Superior Court of Detroit. Opinion by Marston, J. Affirmed with costs.

Pendency of a suit in admiralty does not bar the institution of a suit at common law on the same subject, nor authorize a stay of proceedings therein. The principle of Granger *v.* Wayne Circuit Judge, 27 Mich., 406, is re-asserted.

National Bank v. *Burkham.*

Error to Superior Court of Detroit. Opinion by Cooley, J. Reversed with costs, and new trial ordered.

After accepting and paying a bill, the drawee cannot recover back the amount of it from the payee on the ground that he had paid it under a mistake as to the reliability of the drawer's security, which had proved to be fictitious.

Andre v. *Harden.*

Error to Saginaw. Opinion by Cooley, J. Reversed with costs and new trial ordered.

Considerable latitude should be allowed in the cross examination of experts as to their competency; *held* proper, however, to exclude evidence of a mechanic's having compromised his bill on complaint made of his work.

Where the waiver of a contract bears on the question of damages, the terms of the contract should be put in evidence.

Where a question, that might have been admissible to furnish a basis for estimating damages, was ruled out because the imperfect explanations of counsel asking it led the court to suppose it immaterial, the ruling was not treated as error.

Bissell v. *Starr.*

Error to Superior Court of Detroit. Opinion by Marston, J. Affirmed with costs.

Cross examination of plaintiff witnesses as to their character, without reference to the issue, should be regulated at the discretion of the judge.

It does not concern a bailee, sued for conversion, whether the plaintiff bought the property with his own money or not. He cannot question the bailor's right to recover its value.

In an action for conversion, it is immaterial, whether or not the plaintiff would have sold the goods for a certain price at auction; it would not fix the measure of damages.

It is competent, in a suit for conversion, to give evidence tending to show that the defendants had received the goods and delivered them to a third person not authorized by the plaintiff to receive them; also that they had the goods about the time they were demanded by the plaintiff, and did not deliver them to her, but denied having ever received them.

In trover for conversion it was proper that the answer "Yes, sir," to the question "Did you then demand the box?" should go to the jury, if not objected to at the time, as evidence of a demand, without detailing the conversation.

Robinson v. Grand Trunk Railway.

Error to Macomb. Opinion by Graves, Ch. J., Affirmed with costs.

A railroad company, though required to maintain side-fencing, is not liable for the destruction of cattle suddenly let loose upon the track through a breach in the fencing caused by a storm, and existing through no fault or neglect of the company.

McBride v. Grand Rapids.

Error to Kent. Opinion by Cooley, J. Proceedings dismissed with costs. Graves, C. J., dissents.

The provision in Art. VI., Sec. 8, of the Constitution, relating to the jurisdiction of the Circuit Courts with regard to certain writs, criticised as blind.

Writs of injunction, certiorari and habeas corpus, and informations in the nature of quo warranto are necessary to

the ordinary jurisdiction of Circuit Courts.

The history and nature of the writ of Mandamus described.

The jurisdiction given to Circuit Courts by Art. VI., Sec. 8, of the State Constitution, does not authorize them to issue writs of habeas corpus, injunction and certiorari, information in the nature of a quo warranto, and especially writs of mandamus, except for the purposes of the jurisdiction that is conferred in general terms upon these courts.

SUPREME COURT OF INDIANA.

Abstract made from recent cases published in the Indianapolis Sentinel.

PRACTICE — CROSS-COMPLAINT — ANSWER — ABATEMENT OF THE ACTION — LEASING RAILROAD—RULES OF LAW AS TO CORPORATIONS.

4442. The Board of Commissioners of Tippecanoe county et al. vs. the L. M. & B. Railroad Company.

The L M. & B. Railroad Company vs. the L. B. & M. Railroad Company et al. Petitions for rehearing, Biddle J.

1. It is insisted that the court did not decide the point of practice made by the appellees in their original brief relative to the cross-complaint. It is insisted that the code does not prescribe the form of cross-complaint, and continues in force the laws and usages of this State relative to pleadings and practice in civil actions not inconsistent therewith, and in aid thereof, and to supply any omitted case. That the cross-complaint should state the original complaint, and the proceedings had thereon, etc., according to the old chancery practice. Such a practice once prevailed in England, where a cross-bill was filed in the Court of Chancery to an original bill pending in the Court of Exchequer; but the court is not aware that it was ever the practice in this State, or in America, or even in England, where both the original and cross-bill were pending in the same court, and in the same suit, as in this case. It is true our code does not prescribe the forms of a cross-complaint, nor even mention it in terms, yet when it abolishes the distinctions between the forms of actions, prescribes the form of complaint, and gives the right to bring a cross action on the same terms with the original complaint, it is not necessary to resort to an old practice which never did prevail in this State, to ascertain the form of a cross-complaint. Besides, the practice is expressly settled in 35 Ind., 326, where it is held that the only difference between a complaint and cross-complaint is, that the first is filed by the plaintiff, and the second by the defendant. Both contain a statement of the facts and demand affirmative relief upon the facts stated. In making up the issues and in the trial of questions of facts, the court is governed by the same principles of law of practice in one case as in the other.

2. The petitioners insist that their answer to the original complaint is sufficient to abate that branch of the action, according to the judgment of the court below. This was a dilatory plea, and as such must be construed strictly. No intendment can be taken in their favor. What is not properly averred within them must be held as against them. This answer sets up the pendency of the cross-complaint in abatement of the original complaint, yet it nowhere avers on what ground the cross-complaint rests, nor what relief it prays. True, it says that in the cross-complaint substantially the same relief is prayed for that the plaintiff seeks in the original complaint. This is not a good averment. If traversed it would only present the issue, whether the relief prayed for in the cross-complaint is the same as that prayed for in the original complaint. The court cannot look to the cross complaint in aid of the answer to the original complaint. It is not made a part of the answer. The answer must stand by itself.

3. Again, the answer is pleaded in abatement of the action, and the judgment of the court below puts an end to the suit, which the answer, if good at all, is good only as a plea in suspension of the action. [See Stephen on Pleading, 47; Gould's Pleading, 223, 224; I. Chitty's Pleadings, 447.] It is not in the power of the defendant to abate a suit properly brought against him in the commencement, by afterwards creating a state of facts against the ability of the plaintiff to sue; and there can be no doubt of the right of the plaintiff in this case to sue at the time they filed their original complaint.

4. The appellees seem to think that the court ought to have decided the general question whether railroad companies can lease their roads under the laws of this State. When such a question is properly presented it will be the duty of the court to decide it.

5. It is argued that the decision in this case is in conflict with former decisions of this court—particularly 11 Ind. 104, and 47 Ind. 407. The court thinks otherwise: In these two cases the want of power to contract was pleaded in favor of the corporation to defeat the payment of the consideration for benefits it had received and enjoyed. In this class of cases the courts will go as far as is consistent with the fixed rules of law to reach the justice, equity and good conscience of the case. In the case under consideration the want of power was pleaded against the corporation to prevent the perpetration of an alleged wrong. In such cases the courts will hold corporations to the strictest rules of law.

The petition is overruled, Worden, J., dissenting, holding that a re-hearing should be granted.

THE BAXTER BILL OF 1873—LIABILITY OF OFFICER FOR MINISTERIAL ACT DONE UNDER UNCONSTITUTIONAL LAW.

4,227.—Sumner et al. *v.* Beeler, by next friend.—Marion C. C. C.—PETTIT, C. J.

Suit by appellee against appellant to recover damages for an illegal arrest, imprisonment, prosecution, and causing him to be fined, on the charge of being found drunk, under the ninth section of the Baxter bill of 1873. Defendants answered jointly and separately by the general denial, and by a third paragraph in justification under the ninth section of said law. Demurrer for want of sufficient facts was sustained to this paragraph, and this is the error assigned.

This section has been held to be unconstitutional. (47 Indiana, 150.) It is well settled that ministerial officers and other persons are liable for acts done under an act of the legislature which is unconstitutional and void. All persons are presumed to know the law, and if they act under an unconstitutional enactment of the legislature, they do it at their peril. There was no error in sustaining the demurrer to the third paragraph of the answer. The complaint is sufficient. Affirmed.

SALE OF LOTTERY TICKET.

3910. Rothrock *v.* Perkinson, Shelby, C. C. Pettit, C. J.

Rothrock ond others purchased a lottery ticket in the Louisville Library Lottery. The third paragraph of the complaint alleges that the holders of the ticket drew $75,000 and the money was deposited in a bank for them. That Rothrock transferred the plaintiff one-tenth part of his interest therein. Rothrock notified the bank not to pay over the amount to plaintiff, etc.

Demurrer to this paragraph overruled, which is the error assigned.

Article 15, section eight of the constitution of this State prohibits lotteries and the sale of lottery tickets, and section 32, 2 G. and H. 468, renders the contract set out in the complaint void. Reversed.

A POINT IN THE LAW OF HABEAS CORPUS.

BROWN V. UNITED STATES (23 Am. L. Reg. 566).

In this case Bridges was indicted for perjury by the Grand Jury of Georgia, at a term of the State court, for swearing falsely as a witness before a commissioner of the United States Court, in a case of the United States against Kinney, arrested on a warrant issued by the commissioner, charging him with a crime against the laws of the United States, committed within the district of Georgia. He pleaded the general issue, and was convicted and sentenced by the court of Georgia to the penitentiary. A writ of *habeas corpus* was sued out from a judge of the United States District Court in behalf of Bridges, who was a freedman, and alleged to be a citizen of the United States and of Georgia. A question of jurisdiction of the United States Court to inquire into the cause of imprisonment of Bridges was made, based, in the argument, upon *United States* v. *Booth*, 21 How. 506, in which, it will be recollected, the United States Court held, that, if a prisoner is held under process and by authority of the United States, no State court has jurisdiction by *habeas corpus*, or otherwise, to pass upon the question of the legality of his detention. In the words of the court, "neither the writ of *habeas corpus* nor any other process issued by State authority can *pass over the line of division between the two sovereignties.*" "We do not question the authority of a State court or judge, who is authorized by the laws of the State to issue the writ of *habeas corpus*, to issue it in any case where the party is imprisoned within its territorial limits, provided it does not appear, when the application is made, that the person imprisoned is in custody under the authority of the United States." In other words, and this is important in its bearing upon the questions presented in this case of Bridges, there is no concurrence of jurisdiction in the State and United States courts, and the action of the latter is limited to "its sphere of action prescribed by the Constitution of the United States." This objection to the jurisdiction of the court was overruled, and the marshall was directed to take Bridges into his custody, he being then in custody of the keeper of the penitentiary, and held under the sentence above mentioned.

In giving his opinion, Erskine, the district judge, examines quite a number of cases, including *Tarble's Case*, 13 Wall. 397, confirming the doctrine of the Booth case above referred to, and concludes that the State court of Georgia had no jurisdiction over the offense charged against Bridges, and adds that, "if the State court had not jurisdiction of the case, its judgment is utterly void, and the petitioner is restrained of his liberty in violation of the constitution, and the act of 1867 affords a proper and legal remedy to administer relief." "*If* he committed the crime as charged by the State in the indictment, the act was done within the authority and exclusive jurisdiction of the national courts, and, as they are the sole tribunals that could try him, so they alone could punish him." And he adds that "the Federal courts for that district are the only tribunals that have cognizance of the offense, and jurisdiction of the party offending." The case was then appealed to the Circuit Court, and we have the opinion of Bradley, J., by which he arrives at the same conclusion as the district judge.

Without presuming to doubt the soundness of this judgment, there is enough of seeming paradox to be encountered before reaching it to warrant us in occupying a moment in examining the steps by which it has to be reached. Stripped of its surroundings, we have this simple case: The persons called judges of the Superior Court of Georgia, without the least pretense of right or power, order a certain man called a sheriff, alike destitute of power or authority to act, to take a citizen of Georgia, against whom nothing has been legally alleged or proved, and shut him up in the penitentiary, and the keeper who, as to him, has no more right of detention than any man in the street, has him in his custody, all the proceedings having been utterly void. In order to be relieved from this detention, this citizen desires a writ of *habeas corpus*. To whom shall he apply? He and his wrong doers are all citizens and residents of Georgia. In the language of the court in Tarble's case, "there are within the territorial limits of each State two governments, restricted in their spheres of action, but independent of each other, and supreme within their respective spheres." "The two governments in each State stand, in their respective spheres of action, in the same independent relation to each other, except in one particular, that they would if their authority embraced *distinct territories.*" And "that particular consists in the supremacy of the authority of the United States when any conflict arises between the two governments." Now, if we suppose this order of arrest and detention had been issued by a man calling himself Judge of the Supreme Court of Alabama, and an Alabama man calling himself a sheriff were to arrest a citizen of Georgia for larceny committed in Alabama, and to hold him under such arrest while he was a resident of Georgia, to which of these courts or magistrates should he apply for a process of *habeas corpus*, for it is to be borne in mind that there is no concurrent jurisdiction in the two. If one has jurisdiction, the other has not. And in the case last supposed, there is no conceivable reason why the injured party should not seek and find ample redress in the courts of the State in which he is arrested. Under the United States law, the judges of the United States court may grant writs of *habeas corpus*, but they "shall in no case extend to a prisoner in jail, unless where he is in custody under or by color of the authority of the United States, ar is committed for trial before some court thereof." Such was the provision of the statute of 1789, and it would clearly exclude such cases as the last we have supposed, and, of course, the party imprisoned *must* resort to a State court only. In other words, it was only where a citizen was unlawfully detained under process or authority of the United States that he might resort to the United States court for relief by *habeas corpus*.

In the case we have under consideration there was no authority from any source. The whole action is void from the beginning. The proceeding was in the name of the State of Georgia, when neither Georgia nor her officers had any cognizance whatever of the matter. What authority, then, had the United States court to interpose in any way in the matter? Theoretically, each State, in its sovereign capacity, is able to take care of her citizens, and extend over them the protection of the law in every thing, except what has been expressly delegated to the United States by the Constitution. And if that is to be measured and ascertained by the judiciary act of 1789, the present case would be clearly excluded; for the first and only action of the United States in the matter was the issuing of this very writ of *habeas corpus* now under consideration. Judge Erskine himself says that the question is to him "one of original impression," and intimates that it might have been saved altogether, if Bridges, the prisoner, had properly objected to the jurisdiction of the court which tried him when he was arraigned. And it would seem that the same court would have been as ready to discharge him upon his application for a *habeas corpus*, if the want of jurisdiction were shown, as they would have done upon demurrer in the first instance. And that, at first sight, seems not only the proper tribunal to apply to, but the only one to which a citizen of that State could apply to correct the error of one or more of its judges in a process in her own courts.

But when we come to examine the opinion of Judge Bradley somewhat carefully, we find he rests his jurisdiction upon a statute made in 1833, in the days of nullification, which forms a clause in the revised statues in these words, after the words already quoted, "or is in custody for an act done or omitted in pursuance of a law of the United States, or of an order, process or decree of a court or judge thereof." "And, in more recent times," says Judge B., "it has been extended to all persons in custody in violation of the Constitution, or a law or treaty of the United States." And he adds, "the case is relieved from the impediment to the use of a *habeas corpus* which formerly existed, where the prisoner was committed under State authority."

The upshot of the matter, therefore, seems to be this: If one is charged in a State court for what is a statute offense under the Statute of the United States, and of which the court has no jurisdiction whatever, and he sees fit to make no objection to its taking cognizance of the cause, and he is, upon a trial thereof, convicted and sentenced to be imprisoned, the State court could not discharge him upon *habeas corpus* if they would; but he may apply for such a process to a judge of the United States court; and, if the process against him is for an act done in pursuance of a law of the United States, such judge has full authority to discharge him from his imprisonment. It struck us as it did Judge Erskine, as being a point "of original impression," and one of sufficient importance to merit something more than a passing notice.—*Albany Law Journal.*

CHICAGO LEGAL NEWS.

Lex vincit.

MYRA BRADWELL, Editor.

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We would ask all our subscribers, who have not already done so, to at once forward us the required two dollars and twenty cents, to renew their subscriptions and pay the postage.

We call attention to the following opinions, reported at length in this issue:

Bankruptcy — Practice—Composition. — The opinion of the United States District Court, for the District of Indiana, by Gresham, J., defining the practice under the amendment to the 43d section of the Bankrupt Act, providing for the disposition of pending cases by means of a composition between the bankrupt and his creditors.

Criminal Law — When Homicide is Justifiable.—The opinion of the Supreme Court of this State by McAllister, J., as to when homicide is justifiable in defense of person or property.

Power of Corporation to Hold and Convey Land.—The opinion of the Supreme Court of this State by Scholfield, J., as to the power of a corporation to hold and convey land. The court makes a distinction between this case and that of Starkweather *v.* The American Bible Society reported in 7 Chicago Legal News, 59. This is an important opinion, and of general interest to the people of the State.

Involuntary Manslaughter. — The opinion of the Supreme Court of Tennessee, by McFarland, J., in a case of involuntary manslaughter.

Carrying a Pistol.—The opinion of the Supreme Court of Tennessee, by Nicholson, C. J., where the defendant was charged with carrying a pistol not openly in his hands in a public place, etc.: It would be well if the laws of the States against carrying concealed firearms were enforced. It is getting quite common in some localities when parties get into a difficulty, for one to draw a pistol from his pocket and shoot at the other.

Insurance Representations.-The opinion of the New York Court of Appeals, by Folger, J., as to what representations made to an agent of an insurance company by a person about to be insured of his interest in the property to be insured will avoid the policy.

Bankruptcy—Pleading Discharge.—The opinion of the Supreme Court of Maine, stating when a judgment by default will be set aside to enable a bankrupt to plead his discharge.

Judge Van Buren of the Chicago bar was, on motion of O. H. Browning, on Monday admitted to the bar of the Supreme Court of the United States at Washington.

Recent Publications.

Reports of Cases at Law and in Chancery Argued and Determined in the Supreme Court of Illinois. By Norman L. Freeman, Reporter. Volume LXVII. Containing the remaining cases submitted at the January term, 1873, and a portion of the cases submitted at the June term, 1873. Printed for the Reporter. Springfield: 1875.

This volume contains 154 cases, which is, we believe, more than any other volume of Illinois reports. The judgments below were affirmed in 81 cases, and reversed in 68. There are 5 cases of original jurisdiction. In 9 cases the opinions were Per Curiam. The opinions delivered by Lawrence, C. J., affirm the judgments below in 5 cases and reverse them in 5; those delivered by Breese, C. J., affirm them in 12 and reverse them in 12 cases; those delivered by Walker, J., affirm them in 7 and reverse them in 13 cases; those delivered by Scott, J., affirm them in 14 and reverse them in 10 cases; those delivered by Thornton, J., affirm them in 9 and reverse them in 6 cases; those delivered by Scholfield, J., affirm them in 1 case; those delivered by McAllister, J., affirm them in 12 and reverse them in 10 cases; those delivered by Sheldon, J., affirm them in 14 and reverse them in 9 cases; those delivered by Craig, J., reverse them in 1 case. We give the names of the judges who tried the cases in the courts below, and how they were disposed of in the Supreme Court: Thomas F. Tipton, 18 affirmed and 10 reversed; Charles D. Hodges, 5 affirmed, 12 reversed; E. S. Leland, 2 affirmed; Charles Turner, 15 affirmed, 7 reversed; A. J. Gallagher, 7 affirmed, 5 reversed: Joseph Sibley, 7 affirmed, 1 reversed; Joseph Gallespie, 3 affirmed, 10 reversed; J. A. McClernand, 4 affirmed, 3 reversed; Lambert Tree, 1 affirmed, 1 reversed; C. L. Higbee, 1 affirmed, 5 reversed; H. B. Decius, 2 affirmed; James Steele, 9 affirmed, 5 reversed; C. M. Robinson, 1 reversed; H. M. Vandeveer, 2 affirmed, 2 reversed; R. S. Canby, 1 reversed; C. H. Wood, 1 affirmed; John G. Rogers, 1 affirmed; David Patton, 1 affirmed: H. S. Baker, 1 reversed; Josiah McRoberts, 1 affirmed; E. S. Williams, 2 reversed; D. J. Baker, 1 reversed; A. D. Duff, 1 affirmed; S. L. Bryan, 1 reversed. The rules of the Supreme Court, in regard to the reporting and publishing its decisions, adopted in June last, are printed at the commencement of this volume.

Criminal Law Reports: Being Reports of Cases Determined in the Federal and State Courts of the United States, and in the Courts of England, Ireland, Canada, etc. With Notes by N. St. John Green, Lecturer on Criminal Law at the School of Law of Boston University. Vol. II. New York: Published by Hurd & Houghton. Cambridge: The Riverside Press. 1875.

Great care has been exercised by Mr. Green in the selection of the opinions for this volume. There is no surplusage in it. The head-notes are re-written, and are remarkably short. It is a volume of leading cases upon interesting questions of criminal law, each opinion being followed by condensed notes to the authorities relating to the questions passed upon in the opinions. It is a work no lawyer devoting his attention to criminal law can afford to be without. Illinois is well represented in this volume. It contains seven opinions by our Supreme Court. Mr. Green failed to obtain permission from the publishers of the opinions of the Court of Appeals of New York to take cases from those Reports for this compilation. Now, Mr. Green, why did you not take the opinions of the court which you wanted, write your own notes and head-notes to them, and put them in the volume? The opinion of a court cannot be copyrighted; notes and head-notes may be. This series of reports is to be continued. The omission of the New York cases is to be supplied in the next volume.

A Practical Treatise on the Law of Horses, embracing the Law of bargain, Sale and Warranty of Horses and other Live Stock; the Rule as to Unsoundness and Vice, and the Responsibility of the Proprietors of Livery, Auction, and Sale Stables, Innkeepers, Veterinary Surgeons, Farriers, Carriers, and the Law of Negligence in the Use of Horses, including the Rules of the Road, and the Responsibility of Owners for Injuries caused by Vicious and Unruly Animals. By M. D. Hanover. Second editon, revised and enlarged. Cincinnati. Robert Clarke & Co. 1875.

The first edition of this work was received with favor by the profession and others interested in the law relating to horses. In this edition more than five hundred cases are cited which are not referred to in the first. Chapters have been added on "Carriers of Horses and Other Live Stock," "Negligence in the Management of Horses," and "the Rule of the Road." Injuries by horses and other live stock are considered in these new chapters. Horse law suits are not as common in this part of the country as they were twenty-five years ago, but any person engaged in them should procure a copy of this volume.

COURT OF APPEALS OF NEW YORK

John Rohrbach, respondent, *v.* The Ætna Ins. Co., appellant.

Where plaintiff made no representation as to his interest further than to show agent the instrument by virtue of which he claimed an interest.

Held, that the policy phrase "on his two buildings," even if more than a mere description, was not a phrase for which the insured was in any way responsible.

The policy provided that the claimant for a loss should give notice and render an account stating the ownership of the property insured. Plaintiff stated that the property belonged to him as legal heir of his deceased wife. His claim was that of general creditor of her estate.

Held, that this was no intentional deception, or anything calculated to mislead.

Folger, J.

This appeal was argued at the same time with that of the same plaintiff against the Germania Fire Ins. Co., and as one case; but they are quite different in some important facts.

The questions raised by the appellant, whether the plaintiff had an insurable interest, and whether the description of the property in the policy as "his two buildings," would avoid the policy, are fully discussed in the other case, and our conclusions in this are the same as there expressed.

The error for which the other case has been sent back for a new trial is not presented in this. It does not here appear that prior to the issuing of the policy the plaintiff made any representation as to his interest in the property further than to show to the agent of the defendant the instrument, in writing, by virtue of which he claimed an interest. Even if the phrase "on his two buildings" was more than a description of the property, it does not appear that it originated with him. It was the creation of the defendants or their agent, from the truthful information furnished them by the plaintiff. It was not a warranty, nor was it the basis of the insurance. It does not appear, therefore, that the plaintiff has made any breach of the conditions of the policy which were precedent to the issuing of it.

It is claimed by the defendants that there has been a breach of a condition subsequent. It is provided by the policy, that all persons having a claim thereunder shall give immediate notice and render a particular account thereof, stating the ownership of the property insured. The plaintiff did render an account, in which he stated that the property belonged to him as the legal heir of his wife, Margaretta Hartman, deceased, and by purchase at auction on a certain day. The policy also provides that any fraud, or attempt at fraud, on the part of the assured shall forfeit all claim under the policy. If "fraud" here means a designed deception, there was none. The defendant's agent knew all that the plaintiff knew. The disclosure, by the latter, of all the facts known to him was full and frank. Nor was there anything untrue in the statement, save that he was the legal heir of his deceased wife. This was not the statement of a fact so much as of a legal conclusion. I do not perceive that it did mislead or could mislead; rather I think that it would excite inquiry as to how a surviving husband could be the legal heir of his deceased wife, for there must be other facts existing than her marriage to him and her death to make him her heir. I do not appreciate how there could have been any imposition upon the defendants by this statement, nor any throwing of them off their guard. It does not appear, as a fact, that there was any. And I think that the statement was made use of upon the trial, not so much to show a fraud subsequent to the issuing of the policy, as to show that when the policy was issued the plaintiff was not the owner of the buildings having any title thereto, and that there was a misrepresentation, and a warranty which was broken thereby. But that we have spoken of and disposed of.

There seems no error in this case calling for a reversal of the judgment. It should be affirmed with costs.

All concur. Grover, J., absent.—*The Insurance Law Journal.*

CAN A NOTARY PUBLIC ACT BY DEPUTY?

Ed. Legal News: Under our statute can a notary public act by deputy? And will the acts of one representing the notary public, under such authorization, be valid and legal? An answer to the question through the columns of the Legal News will be a favor. D. C.

Answer. A notary has no authority to appoint a deputy.—Ed. Legal News.

Judicial Power of Consuls General. —On Friday of last week the case of Francis Dainese against Charles Hale was argued in the Supreme Court of the United States by W. P. Clarke, for the defendant in error, and S. S. Henkle for the plaintiff. Dainese was consul at Alexandria, Egypt, and Hale Consul General, and plaintiff sued defendant for attaching his goods in a case of Allen against him, claiming that the Consul General had no such power as he claimed. A demurrer raised the question as to the right of the Consul General to exercise judicial authority, and the Supreme Court of the District of Columbia in general term, in June, 1873, sustained the demurrer. The case then went up on writ of error.

Punishment for Cruelty.—John McGuire, of Ford county, took Charles O'Connell from the Christian Brother's Home, in this city, to bring up. He abused the orphan boy, compelled him to ride on horseback until his hands were frozen, whipped and otherwise maltreated him. He brought suit by his guardian, James E. Morrison, in the Ford county Circuit Court, to recover damages for such ill-treatment. The case was taken by change of venue to McLain county. It came up last week before Judge Tipton and a jury. The jury found the defendant guilty, and assessed the damages at seven thousand six hundred dollars. The verdict in this case should not only serve as a warning to all tyrannical and ill-tempered persons who are in the habit of being cruel to poor orphans, but should convince institutions that commit the care and custody of children to strangers, of the necessity of some system of visitation.

The R. R. Tax Injunction Cases.—Attorney General Edsall, on Tuesday last, moved the Supreme Court of the United States to advance what were known as the Railroad Tax Injunction Cases, on the docket.

JUDGE McALLISTER—WHO WILL SUCCEED HIM?

The Springfield *Journal*, of a recent date, says:

It was announced in the Chicago papers of Saturday that the Hon. William K. McAllister, one of the Justices of the Supreme Court of this State, had been nominated for the office of Judge of the Circuit Court of Cook county.

We presume this action would not have been taken without the sanction of Judge McAllister, and it therefore indicates the truth of the rumors we have heard of the intention of that gentleman to retire from the supreme bench.

Only a few months since, Judge Thornton resigned his place upon the bench, to resume his practice at the bar, being driven to that course by the excessive labor of the position and the inadequate compensation provided by a pusillanimous policy called economy. Now we have the prospect of losing another able and honest judge, probably from the same cause. Judge McAllister is recognized by men of all parties as a man of ability and learning, and of the purest character. It cannot but be a matter of deep regret that any circumstances should conspire to induce him to leave a position so important to the people, and which he was so well calculated to honor and adorn.

The fact is, our Supreme Court are sadly overworked. The dockets in the three grand divisions aggregate one thousand to twelve hundred cases per annum. Of these, not less than eight hundred require written opinions. Nearly one-half of the year is necessarily occupied in holding court and in consultation. The balance of the time must be devoted to writing opinions. This simply involves perpetual toil, day and night, the year round. But few men have the physical strength to endure such incessant labor. We believe the court make a great mistake in their endeavor to do too much. The public have no right to require their servants to work themselves to death. Men in the ordinary avocations of private life are enabled to get along prosperously with reasonable labor. Public servants should be expected to do no more. Let the Supreme Court Judges assert their right to protect their health and lives, and do only so much as can be done well, and consistently with safety to themselves. This might result in the docket getting behind. All the better for that. If decisions were less prompt, there would be less encouragement to the small and unnecessary litigation which now encumbers our court dockets.

If Judge McAllister should be elected to the Circuit Judgeship in Cook county—and that seems to be a foregone conclusion—he will receive a larger salary, with the prospect of a month's vacation in each year, while as Supreme Judge he could have no vacation at all.

If we did not so much regret his leaving a higher sphere of usefulness, we would congratulate him upon the prospect of so fortunate a change.

WHO shall succeed Judge McAlister on the Supreme Bench becomes an important question. His election to the position of Circuit Judge being a certainty, having been nominated by both parties. The names of Hon. Harvey B. Hurd, the reviser of the Statutes of the State, the Hon. C. W. Upton, of Waukegon, Chairman of the Committee that revised the Statutes of 1874, M.F.Tuley, late corporation counsel, Melville W. Fuller, one of the ablest and most industrious attorneys at the bar, and Hon. T. L. Dickey, the corporation counsel, who is an old resident of the State and was at one time Judge of the LaSalle Circuit Court, have been mentioned in this connection. The *Chicago Evening Journal* of Thursday, says:

"The resignation of Judge McAlister as a member of the State Supreme Court being now a certainty, the question of his successor in that important tribunal is now in order. Hon. H. B. Hurd, of this county, whose recent laborious and successful work of revising the statutes of Illinois was appreciated and applauded not only by the General Assembly, but by the entire legal profession of the State, is favorably mentioned in connection with that vacancy.

It would, we think, be a very difficult matter to find a better man in this district for that peculiar position than Mr. Hurd. With his familiarity with the statutes, and with his acknowledged judicial turn of mind, he would fill a seat on the Supreme Bench with ability.

The term to which Judge McAlister was elected, and which his successor will serve out, will expire in June, 1879. The Supreme Court District which Judge McAlister represents, and in which a special election for his successor will be called, is numerically the Seventh, and embraces the counties of Cook, Lake, DuPage, Will and Kankakee."

The successor of Judge McAlister should be able, honest and industrious. The bar of the district has ample material for the people to select from.

SUPREME COURT OF INDIANA.

Abstract made from recent cases published in the Indianapolis Sentinel.

GENERAL VERDICT — SPECIAL FINDINGS—PRACTICE.

4217. The Jefferson, M. & I. Railroad Company *v.* Worland, executrix.

Action by appellee against the railroad company; the complaint alleges a special contract by which the railroad company agreed with plaintiff's testator to transport certain hogs from Shelbyville to Jeffersonville at an agreed price; that the hogs were shipped on the morning of February 3, 1872, and by agreement were to be delivered in Jeffersonville on the following day at 9 o'clock A. M.; that by negligence of defendant the cars were delayed thirty-six hours; and alleges the damages resulting therefrom. Trial by jury with general verdict for plaintiff, and answers to interrogatories propounded at the instance of defendant.

In the answers to these interrogatories the jury found that there was no special contract between the parties, nor any agreement to deliver the hogs at a specified time in Jeffersonville. The defendant moved for judgment on the special findings on the ground that they were inconsistent with the general verdict. This motion was overruled, followed by a motion for a new trial, which was overruled. The overruling these two motions presents the questions to be considered. The court is of opinion that there is a fatal variance between the contract alleged and that which the jury found to have been proved; there was a failure of proof within the meaning of section 96, 2 G. & H., 116.

Reversed.

INDICTMENT FOR KEEPING GAMING HOUSE—MEANING OF WORD "HIRE."

4576. Carr *v.* the State of Indiana, Benton C. C. Worden, J.

Indictment for keeping a gaming house. Motion to quash overruled: verdict of guilty; motion for new trial overruled.

It is urged that the indictment is double, charging the keeping of a gaming house within section 19 of the act defining misdemeanors, etc., and the keeping of a billiard table, within the meaning of sec. 74 of the same act.

The court is of opinion that no offense is charged in the indictment within the meaning of section 74, as it is not alleged, as required by that section, that the table was kept "for the purpose of wagering any article of value thereon."

Upon the trial it was proved that the rule was, that when persons played billiards on the table the loser of the game paid for the use of the table 20 or 25 cents. There was no evidence that any one had played for "beer," "whisky" or "other articles of value."

The court is of opinion that, on the evidence, the appellant was entitled to a new trial. The only charge sustained by the evidence is, that persons were permitted to play and bet and wager upon the result of the game, "the hire of said billiard table." To constitute gambling, some "article of value" must be lost or won, and the penalty prescribed is a fine of not less than the value, nor more than twice the value of the article lost or won, (2 G. & H., 465, section 28,) and in a prosecution for gambling the value of the article lost or won must be stated, (13 Ind., 566.) Betting and wagering "the hire of said billiard table," is too indefinite and uncertain to constitute a valid charge. "Hire" means a reward, recompense for the use of a thing. But the indictment does not show that the reward had any value.

Reversed.

PROSECUTED FOR BASTARDY—CONFESSIONS OF RELATRIX NOT ADMISSIBLE EXCEPT FOR IMPEACHMENT—NEW TRIAL NOT GRANTED FOR IMPEACHMENT—CHANGE OF VENUE—WAIVING OBJECTIONS TO.

4240. Thalke *v.* The State of Indiana, ex rel., etc., Ohio. C. C. Worden, J.

Prosecution of appellant for bastardy. Trial by jury, verdict, guilty, and judgment over motions by defendant for a new trial and in arrest.

Overruling these motions are the errors assigned. The motion in arrest is based upon the alleged reason that the court had no jurisdiction of the subject matter. There was a change of venue, upon motion of defendant, from the Ohio Circuit Court to the Dearborn Circuit Court, and changed back again to the Ohio Circuit Court, for what reason the record does not show. To this last change the defendant must be deemed to have acquiesced, for he not only did not object thereto, but he appeared to the action in the latter court, again applied for a change of venue, procured a continuance and finally went to trial without objection. The case stands upon the same footing as if there had been an express agreement between the parties to the change. The court had jurisdiction of bastardy cases, and the consent of the parties gave it jurisdiction of this particular case.

Two grounds are presented upon which it is claimed a new trial should have been granted, viz: Surprise and newly discovered evidence.

The alleged surprise was the evidence given by a certain witness. The court is of opinion that no such case of surprise is made out as the law will relieve against.

Appellant filed his affidavit stating that he expected to be able to prove by A. B. that he was five miles away from Milton, the place where the alleged act was committed, on the evening of March 20th, 1871, the time when the act is alleged to have been committed. This is cumulative of the appellant's own testimony on the same subject. In the same affidavit appellant stated that he had discovered since the trial that he could prove by D. J. that the relatrix had stated to him, in a certain conversation, that the appellant was not the father of the child, but the reason she charged appellant was that he was worth something, and the real father was poor. In the conflicting state of the evidence on the trial, had this evidence been introduced, it is probable a different result would have been the consequence.

If this evidence could be introduced as the admission of the relatrix, like the admission of any other party, then it would seem that a new trial should have been granted. The writer of this opinion, and Pettit, C. J., are of opinion that the relatrix, in a bastardy prosecution, is so far a party to the action that her admissions as such may be given in evidence against her, like admissions of other parties. But a majority of the court are of a different opinion.

Her statements could only be given in, in this view, to impeach her; but a new trial will seldom, if ever, be granted for the purpose of impeachment. 16 Ind., 97; 40 Ind., 351.

Affirmed.

INDICTMENT FOR DESECRATING THE SABBATH—ALLEGATIONS IN INDICTMENT OF EXCEPTIONS IN STATUTE.

5152. Russell *v.* the State of Indiana, Marion C. C. C. Buskirk, J.

Appellant was indicted and convicted in the court below for desecration of the Sabbath, by superintending, contracting and carrying on a barber-shop on Sunday. A motion to quash the indictment was overruled. This is the error assigned. The objection urged to the indictment is that it does not negative all the exceptions contained in the body of the act. The statute, among other things, excepts "works of charity and necessity." The indictment omits the words "and necessity." This is a fatal omission. When the exception is contained in a subsequent clause or statute it is a matter of defense, and need not be negatived in the indictment. But if it be in the enacting clause, or clearly connected with it, it must be shown by negative averment that the defendant is not within the exception. 7 Blackf., 590, 9 Ind., 408.

Reversed.

U. S. SUPREME COURT CASES.

STATE LAWS AGAINST USURY AS AFFECTING NATIONAL BANKS.

The case of the Farmers' and Mechanics' National Bank of Buffalo against Dearing from the Court of Appeals of New York, now argued by the Supreme Court of the United States, presents the question whether national banks, under the thirtieth section of the act of June, 1864, have privileges of immunity from the usury laws of a State, so that they may make loans at a greater rate of interest than prescribed by State law. The State court held that they have no such right, and held a contract reserving ten per cent. interest usurious and void. It is here urged that the forfeiture under the charter of the bank could be only of the entire interest, and not the principal sum as well, as provided by State law in New York, where the interest is 7 per cent.

REDEMPTION OF SPURIOUS BONDS BY THE GOVERNMENT.

The case of Jay Cooke & Co., against the United States, also just argued before the United States Supreme Court, presents the question whether the redemption of its bonds by the government, operates as an estoppel, afterwards preventing the plea that the bonds were spurious, and a recovery of the money paid for them; also, the further question, upon whom the onus of proof rests as to the identity of the bonds.

A CIVIL RIGHTS CASE.

The case of Lanvient against Walker, from the Supreme Court of Louisiana, now pending before the Supreme Court of the United States, was brought to recover damages for refusal to sell refreshments, although full price was offered, because Lanvient was a colored person. The case was tried by a jury which failed to agree, and the court thereupon, under a statute of the State, gave judgment for the plaintiff for $1,000 as exemplary damages. This judgment was affirmed by the Supreme Court of the State, and the case is brought here, the argument being that under the fourteenth amendment, the citizen of the United States is entitled to sell his commodities or not, as he shall see fit, and the compulsion sought by the State law is an abridgment of that right. It is also said that, under the thirteenth, fourteenth and fifteenth amendments, the question of the rights of the colored man in such cases is referred to Congress, which has sole power in the premises, and that the judgment of the court of the State court was therefore void for want of jurisdiction.

SUPREME COURT OF KANSAS.

[TO APPEAR IN 18 KANSAS.]

TITLE OF OCCUPANT—ADVERSE TITLE.

A party in the quiet, peaceable and rightful possession of real estate, claiming title thereto, has such an interest therein, although his title may be ever so defective, that he may maintain an action to quiet his title and possession as against any adverse claimant whose title is weaker than his, or who has no title at all.—*Giltenan* v. *Lemert.*

LIEN FOR CARRIAGE.

The lien of a carrier of goods for charges for carriage is prior to the claims of creditors of the vendee, or the rights of the vendor. The carrier's possession can not be disturbed until such charges are paid. An officer holding an execution against the vendee of such goods, by paying the carrier's charges, becomes entitled to the carrier's lien, and is entitled to the possession even as against the vendor of such goods, claiming the right of stoppage *in transitu*, until he is reimbursed the money by him thus advanced. —*Rucker* v. *Donovan & Feiferlich.*

ACTS OF CORPORATION.

An act within the powers of a corporation, when regularly done, binds both the corporation and stockholders.—*Whetstone* v. *Ottawa University.*

ARTICLES OF INCORPORATION—CONSTRUCTION OF WORDS USED.

Where, in preparing a certificate of incorporation, the corporators employ only the words used in the statute to describe the general purposes of such in-

corporation it will be presumed that they intended to create a corporation of the same general nature, and with the same general powers granted by the statute, rather than that by such words they sought to apply special limitations on the powers of the corporation.

TOWN COMPANY—DONATION OF LOTS.

A donation of lots by a town-site corporation, with no special limitation on its powers, is not necessarily *ultra vires*. Where the direct and proximate tendency of certain improvements sought to be obtained by the donation is the building up of a town and the enhanced value of the remaining property of the corporation, the donation is within the powers of the corporation, and this though the improvements are to be made outside the town site.

A donation by the Ottawa Town Company to the Ottawa University of one hundred lots to aid in the erection of a school building outside of the town site, and distant therefrom less than half a mile, was not *ultra vires*.

CONSTITUTIONAL TERM OF OFFICE.

The provisions of sec. 3, art. 9 of the Constitution that "All county officers shall hold their offices for the term of two years, and until their successors shall be qualified," applies only to the regular term of the office, and not to vacancies, or exceptional cases.—*Hagerty* v. *Arnold.*

MORTGAGED PROPERTY.

The mere fact that one person mortgages goods to another does not authorize any person except the mortgagee or some person claiming under him to take the property from the mortgagor; and if any such person other than the mortgagee, or some person claiming under him does so take said property, he is liable for more than merely nominal damages.—*Tallman* v. *Jones.*

PARENT AND CHILD.

Where a minor son who lives with a father and is under his father's control commits certain wrongful acts, but where the said acts have not been authorized by the father, are not done in his presence, have no connection with the father's business, are not ratified by the father, and from which the father receives no benefit, the father is not liable in a civil action for damages for such wrongful acts.—*Edwrdvs* v. *Crume.*

ANECDOTES OF LORD BROUGHAM'S EARLY HISTORY.

[From the Edinburgh Law Magazine.]

II

A town in Scotland delights in certain traditionary facts connected with the early history of a great man. It is one of the towns of the Northern Justiciary Circuit. There dwelt an official, a man of wealth, highly respected, and given to much hospitality. His widow recently died at the ripe age of ninety years. She was just such a lady as would have been canonized by Dean Ramsay. She was full of anecdote, spoke the pure Doric, and eloquently upheld the past age over the degeneracy of its successors. Her husband was in use to invite all young advocates who went Circuit to his house and table. Sixty years ago, a young counsel made his first Circuit, and, it is said, earned his first fee in an appeal case—a source of revenue now extinct. He received the usual invitation to dinner. The day was exceedingly cold; and so soon as the newly-fledged barrister entered the drawing-room, he observed that the grate was monopolized and deformed by a large mass of coal, from which was emitted no particle of heat. At once, and without leave asked or obtained, the young jurist seized the poker, and with one strong, impulsive, and fell blow, he inflicted a compound fracture on the black diamond, and made the flames to leap upright and shed their light and heat around the apartment. The matron of the house stood astonished at this daring act of a stranger, and remarked, "Young man, d'ye no ken that nane shud meddle wi' a fire till seven years acquant wi' the house?" The smart reply was, "I know no such rule; but know that the use of coals is to burn and give forth heat." The lady, thereon, sarcastically observed to her spouse, "Tak' ye notice, that birkie is sure either to mak' a spune or spoil a horn." The good old lady's prediction was sybilistically soothfast. Many a spoon, both horn, silver, and gold, has the same person made; and it may be some few useless, brutish horns have been unavoidable spoiled in the process of manufacture. It was not from any doubts of Dr. Black's theory of *latent* heat that he committed the daring deed of violating the privacy of the fire-place, and interfering with the *lares et penates* of the domestic circle; but he early had intuitive notions of utilitarian policy—"The greatest good to the greatest number." He was an experimental philosopher after the school of James Watt, and delighted in the expansive power and diffusion of heat set at liberty and imparting force. Many a severe stroke has he since inflicted on dark and black masses of corruption, and has invoked heat and light where before nothing had existed save cold and deadness. It is needless to add, that the young Scotch advocate was Henry Brougham, and the Lady Prophetess lived to see the object of her censure and vaticination the honored occupant of the Woolsack, as Lord Chancellor of England.

III.

In the beginning of this century, William Hall, overseer of a farm in Selkirkshire, Scotland, was leaning against the dyke of the farmyard, patriarchial-like meditating at evening-tide, while a young gentleman came up to him, wished him a good evening, and observed that the country around looked beautiful. The two getting into conversation, Hall, after a few observations, asked him "Whaur he was gaun?" The stranger answered that he intended going to Jedburgh. "And what business can ye ha'e at Jedart?" says Wull. "Oh," says the gentleman, "I am going to attend the Circuit Court, but my feet have failed me on the road;" and, observing a pony in the farm-yard, he said, "There's a nice bit pony of yours—is it to sell?—would you like to part with it?" "I wadna care," says Wull, "but ma brither Geordie, he's the farmer, he's at Selkirk the day; but if we could get a good price for't, I daresay we micht part wi't." "What do you ask for it?" says the other. "Ma brither," quoth Wull, "says it's a thing we ha'e nae use for, and if we could get aught of a wiselike price for't it would be as weel to let it gang." There were only two words to the bargain; the gentleman and Wull agreed, and the sale was completed without missive or sale note. "But," says the gentleman, "by the way, I cannot pay you to-night; but if you have any hesitation about me, my name is Henry Brougham, and I refer you to the Earl of Buchan, or Mr. George Currie, of Greenhead, who will satisfy you." The residences of this nobleman, and Henry's brother advocate, Mr. Currie, were in the neighborhood. On this reference, without making any inquiry, Wull immediately gave the gentleman the pony, with the necessary trappings. Wull, being a man of extreme orderly habits, went early to bed, and soundly slept, without either nightmare or pony, and the next morning, when the business of the farm called him and Geordie together, says Wull to Geordie, "Ye was unco late in comin' hame last nicht; I selt the powny." "And wha did ye sell it to?" says Geordie. "Oh, to a young gentleman." "And what did ye get for't?" Wull having mentioned the price—"My faith," says Geordie, "ye hae selt it weel." "But," says Wull, "I didna get the siller." "Ye big idiot! ye didna gi'e awa' the powny without getting the siller for't? Wha was he?" "Oh, he ca'd himsel' Henry Brougham; and he said, if I had ony jalousin' aboot him, that the Earl o' Buchan, or George Currie, the advocate, the laird o' Greenhead, would say he was guid enough for the money. Oh, he was a very honest-looking lad; I could hae trusted onything in his hand." Geordie's temper became quite ungovernable at Wull's simplicity, and he was nearly subjecting him to Jeddart justice. After the whole Southern Circuit was finished, there was no word of payment, and Wull's life became quite miserable at Geordie's incessant grumbling and taunting—the latter ever and anon repeating, "What a confounded idiot, Wull, was ye to gi'e the beast awa' without the money to a man ye kenned naething aboot, and who very likely is jist ane o' the genteel vagabonds frae Lunnan;" and the other as pertinaciously insisting "that he (the gentleman) was an honest-looking man: there's nae fear o' him." In the course of six weeks, an order came for the price of the beast. "Weel," says Wull, "didna I tell ye he was an honest man? I kenned by the very look o' him." From that moment Wull stood eminently high in Geordie's eyes; and while the one chuckled at the penetration of character, the other was no less humbled at having called his superior judgment in question. Wull lived to discover that his estimate of character, *ex facie*, was not unfounded, when, after a brilliant career, the buyer of the shelty became the occupant of the Woolsack.

NUISANCE FROM SMOKE.—The Lord Justice James, in the case of Salvin *v.* North Brancepeth Coal Company, L. R. 9 Ch., 705, gives the following illustrations of the character of the damage necessary to sustain a bill for an injunction against a nuisance caused by smoke. He says:

"The bill in substance sought by a mandatory injunction to prevent the defendants, who are a great colliery company, from erecting or working any coke ovens or other ovens to the nuisance of the plaintiff; the nuisance alleged being from smoke and deleterious vapors. . .

When the Master of the Rolls said that the damage must be visible, it appears to me that he was quite right; and, as I understand the proposition, it amounts to this, that although, when you once establish the fact of actual substantial damage, it is quite right and legitimate to have recourse to scientific evidence as to the causes of that damage, still, if you are obliged to start with scientific evidence, such as the microscope of the naturalist, or the tests of the chemist, for the purpose of establishing the damage itself, that evidence will not suffice. The damage must be such as can be shown by a plain witness to a plain, common juryman.

"The damage must also be substantial, and it must be, in my view, actual; that is to say, the court has, in dealing with questions of this kind, no right to take into account contingent, prospective, or remote damage. I would illustrate this by analogy. The law does not take notice of the imperceptible accretions to a river bank or to the sea-shore, although, after the lapse of years, they become perfectly measurable and ascertainable; and if in the course of nature, the thing itself is so imperceptible, so slow, and so gradual as to require a great lapse of time before the results are made palpable to the ordinary senses of mankind, the law disregards that kind of imperceptible operation. So if it were made out that every minute a millionth of a grain of poison were absorbed by a tree, or a millionth of a grain of dust deposited upon a tree, that would not afford a ground for interfering, although, after the lapse of a million minutes, the grains of poison or the grains of dust could be easily detected.

"It would have been wrong, as it seems to me, for this court in the reign of Henry VI. to have interfered with the further use of sea coal in London, because it had been ascertained to their satisfaction, or predicted to their satisfaction, that by the reign of Queen Victoria both white and red roses would have ceased to bloom in the Temple Gardens. If some pictnresque haven opens its arms to invite the commerce of the world, it is not for this court to forbid the embrace, although the fruit of it should be the sights, and sounds, and smells of a common seaport and shipbuilding town, which would drive the Dryads and their masters from their ancient solitudes."—*The American Law Review.*

SUPREME COURT OF ILLINOIS.

SOUTHERN GRAND DIVISION.

Opinions were filed on the 14th of October, 1875, in the clerk's office at Mt. Vernon in the following cases for the June term, 1875:

4. Kester v. Organ et al., order to redocket.
7. Phillips v. Pitts et al., reversed and remanded.
9. Reitz et al. v. People, rev. and rem.
10. Clingman v. Hopkie, rev. and bill dismissed.
12. Roberts et al. v. Stigleman et al., affirmed,
16. Board Education v. Neidenberger, rev.
17. Bowman v. Cunningham, rev. and bill dismissed.
18. Claymore v. Williams, rev. and rem.
19. Kase, administrator, v. Painter, affirmed.
20. Stone et al. v. Duvall, rev.
22. Honnard v. People (filed 11th Oct.), rev. and rem.
24. Forman v. Stickney et al., rev. in part.
25. Schmidt v. Schmidt, affirmed.
27. First National Bank of Shawneetown v. Cook et al., rev. and rem.
29. Cross v. Dickens, affirmed.
32. C. & V. R. R. v. Fackney, rev. and rem.
39. Powell v. Clements et al., affirmed.
43. Challener v. Miles, administrator, affirmed.
44. McElwee et al. v. People, affirmed.
46. Regent v. Bell, rev. and rem.
47. Hay v. Baugh et al., affirmed.
51. Mitchell v. Lyman et al., rev. and rem. Walker, J., dissents.
53. Trepp v. Barker, rev. and rem.
54. Downey v. Beach, rev. and bill dissolved.
55. Hopkins v. Illinois & St. Louis Railroad Co., affirmed.
56. American Insurance Co. v. Padfield et al., rev. and rem.
69. Spring et al. v. Collector of Olney, decree modified.
72. Gallatin National Bank, Shawneetown, v. Cook et al., rev. and rem.
75. Wickersham v. Altorn, affirmed.
77. Allen v. People, affirmed.
80. Stookley, admr. v. Goodwin, affirmed.
81. Tracey et al. v. Hadden, affirmed.
82. Primmer v. Clabaugh, affirmed.
85. Chicago, Alton & St. Louis Railroad v. Smith, affirmed.
87. Race v. Brown, affirmed.
89. Burke v. Monroe County, rev. and rem.
90. Lovington v. Short, affirmed.
91. City of Collinsville v. Cole, affirmed.
92. St. L., V. & T. H. R. R. v. Dunn, affirmed.
94. Johnson v. Pace, garnishee, affirmed.
101. O. & M. R. R. Co. v. Noe, rev. and rem.
102. O. & M. R. R. v. Strattan, rev.
104. Brush v. Lemma, affirmed.
105. Smith v. McLaughlin, rev. and rem.
107. Gregory v. Martin, admr., etc. affirmed.
108. McHaney v. County of Marion, affirmed.
109. Howell et al. v. Morlan, affirmed.
111. Eisenmeyer v. Sauter, affirmed.
112. Steele et al., admr., v. Clark et al., admr., rev. and rem.
114. Desmond v. St. L. & T. H. R. R., affirmed.
116. Dowry v. Thomas, affirmed.
118. Weintz v. Hafner, rev.
119. School Directors v. Reddick, affirmed.
122. O. & M. R. R. Co. v. Lackey, rev.
123. Hagebush v. Ragland, affirmed.
126. Daniel v. Hilgard, affirmed.
129. Cairo v. St. L. R. R. Co, v. Schumaker, rev. and rem.
130. People v. Beatie et al., trustees, affirmed. Breese, J., dissents.
131. People v. Anderson et al., trustees, affir., Brease, J., dissents.
133. Cairo & St. L. R. R. Co. v. City of Sparta, affirmed.
136. Mattoek v. Krome, rev. and rem.
137. Ind. & St. L. R. R. Co. v. Smith, affirmed.
138. City of Greenville v. Henry, affirmed.
139. Cox v. Cunningham, reversed.
141. I. & St. L. R. R. Co. v. Cobb, rev. and rem.
143 Cheney v. City National Bank, Chicago, affirmed.
144. Byars v. City of Mt. Vernon, affirmed.
145. Byars v. City of Mt. Vernon, affirmed.
146. Bush v. City of Carbondale, affirmed.
148. Mead v. Thompson, affirmed.
149. Kuhlman v. Hecht, affirmed.
150. Fahrenstock, use, etc., v. Gillem et al., rev. and rem.
151. Kirkpatrick v. Cooper, rev. and rem.
152. Schaumloffe v. Belm, affirmed. Scott and Sheldon, JJ., dissent.
153. Illinois Ed'l Ass'n v. Standen, affirmed.
155. Marlow et al. v. Marlow, affirmed.
156. Trotter v. Trotter, rev.
157. Carondelet Iron Works v. Moore et al., rev. and rem.
160. French v. People, appeal dismissed.
161. Belleville Nail Co. v. Chiles, affirmed.
162. Dunstetter v. Dunstetter, rev. and rem.
164. Weir v. People, rev. and rem.
166. Darling v. McDonald, rev. and rem.
167. Barber v. Bell, affirmed.
169. People, etc., v. Phelps, rev.
172. Borders v. Murphy, affirmed.
174. St. Paul Fire and Marine Insurance Co. v. Johnson, rev. and rem.
178. Whitney v. Stevens, affirmed.
181. Town of Lebanon et al. v. O. & M. R. R. Co., affirmed.
183. Padfield v. Padfield, affirmed.
185. Shepard v. Rinks, affirmed.
193. Mason et al. v. City of Shawneetown, affirmed.

UNITED STATES SUPREME COURT.

PROCEEDINGS OF.

Thursday, Oct. 14, 1875.

On motion of Phillips, Thomas N. Waul, of Galveston, Texas, was admitted.

No. 22. Charles A. Nichols, assignee, v. Amasa M. Eaton, et al. The argument of the cause was continued by Samuel Curry for appellant, and concluded by C. S. Bradley for appellee.

No, 14. Gideon Putnam et al. v. Charles E. Bell, trustee, etc. Passed.

No. 23. Washington Ford v. James Surget. Passed.

No. 24. Ira Beard v. Mary F. McComb. Passed.

No. 25. Francis Dainese v. Charles Hale. The argument of this cause was commenced by F. P. Cuppy for plaintiff.

Adjourned until Friday at 12 o'clock.

Friday, Oct. 15.

On motion of T. J. Durant, William S. Everett, of St. Joseph, Mo., was admitted.

On motion of J. H. Bradley, Edward J. Fox, of Easton, Pa., was admitted.

Chief Justice Waite announced to the bar that the court would not be in session on Monday next for the transaction of business.

No. 649. Daniel G. Taylor, administrator, etc. v. Commonwealth, etc. On motion of R. M. Corwine, in behalf of counsel, dismissed with costs.

No. 30. (Original.) State of Florida v. E. C. Anderson, jr., et al. Assigned for argument on the 27th of October.

No. 25. Francis Dainese v. Charles Hale. The argument of this cause was continued by W. P. Clarke for defendant, and concluded by S. S. Henkle for plaintiff.

No. 26. Edward Burgess v. John C. Babbitt, assignee, etc. This cause was submitted on printed arguments by A. Myers, of counsel of the defendant.

No. 27. Thomas J. Semmes, claimant, etc., plaintiff in error, v. the United States. This cause was submitted on printed arguments by Thomas J. Semmes and Robert Mott for plaintiff, and by Atty. Gen. Pierrepont for defendants.

No. 28. John D. McLemore v. the Louisiana State Bank. This case was submitted on printed arguments by Charles B. Singleton for plaintiff, and by Edward Janin and A. C. Janin for defendant.

No. 29. James Brown and William Leavey v.

Enoch Piper. The argument of this cause was commenced by George Gifford for the appellants, and continued by Courten Brown for the appellee.
Adjourned until Monday at 12 o'clock.

Monday, Oct. 18.

On motion of O. H. Browning, Henry A. Gardner and E. Van Buren, of Chicago, were admitted.
Adjourned until Tuesday at 12 o'clock.

Tuesday, Oct. 19.

On motion of J. S. Black, G. C. Clemens, of Topeka, H. G. Webb, of Oswego, and Wilson Shannon, of Lawrence, Kansas, were admitted.

On motion of E. L. Stanton, Charles Fernald, of Santa Barbara, California, and on motion of W. H. Smith, James K. Redington, of Washington, D. C., were admitted.

No. 763. The United States v. Barbaro Soto et al. Appeal from the district court of the United States for the district of California. On motion of Blair it was ordered by the court that the appeal in this case be docketed and dismissed.

No. 764. The United States v. Jose Antonia Estu Dillo. Appeal from the District Court of the United States for the district of California. On motion of Blair it was ordered that the appeal be docketed and dismissed.

No. 13. Peyton Grymes v. George S. Repplier et al. The motion to make proper parties in this cause was argued by Robinson in support of the same, and by E. L. Stanton in opposition thereto.

No. 3. (Original.) State of Florida v. E. C. Anderson et al. On motion of L. Eugle, leave was granted to file the petition of John Darby for order on the receiver, etc.

No. 609. The Board of Liquidation of the State of Louisiana et al. v. Henry S. McComb. The motion to advance this cause was submitted by J. A. Campbell in support of the same.

No. 12. Geo. D. Snow, with Clark, executor, etc. v. George W. Chapman. The motion to revive this cause was argued by W. P. Clough in support of the same, and by T. J. Durant in opposition thereto.

No. 701. H. B. Miller, collector, etc., appellant, v. Morris K. Jessup et al.

No. 702. Isaac Taylor, collector, etc., appellant, v. James F. Secor and Wm. Tracey.

No. 703. Herman Lieb et al., appellants, v Henry P. Kidder et al. The motion to advance these causes was submitted by J. K. Edsall in support of the same.

No. 29. James Brown et al. v. Enoch Piper. The argument in this cause was continued by Causten Brown for the appellee, and concluded by Geo. Gifford for the appellants.

No. 30. Enoch Piper, appellant, v. George T. Moon et al. The argument of the cause was commenced by Causten Brown for the appellant.
Adjourned until Wednesday at 12 o'clock.

SUPREME COURT OF MAINE.

SYLVAN SHURTLEFF *v.* BENJAMIN F. THOMPSON.

If the bankrupt's counsel fails to appear for him in an action, because by mistake he supposed that the counsel for a co defendant also appeared for the bankrupt, a review of a judgment by default entered against the bankrupt may be granted, so that he may plead a discharge.

Petition for review of an action of assumpsit, brought by Mr. Thompson against Alvah and Sylvan Shurtleff. The presiding justice found and reported the following facts, upon which judgment is to be entered according to the rights of the parties, viz.: That William L. Putnam, Esq., was retained as the attorney of Sylvan Shurtleff in his application to the District Court of the United States for the benefit of the bankrupt act, as well as in the action now sought to be reviewed. The petition in bankruptcy was filed August 24, 1870, and the writ in the suit of Thompson against the Shurtleffs was entered at the February term, 1871, of the superior court. The petitioner handed the summons in that case served upon him, to his said counsel, who did not appear therein, however, because he saw that Howard & Cleaves had entered a general appearance, these gentlemen having been employed by Alvah Shurtleff, and not by this petitioner. At the March term, 1871, the plaintiff discontinued as to Alvah Shurtleff, and Sylvan was defaulted. He had no knowledge of this, or that Mr. Putnam did not appear for him in that suit, till August 10, 1872, when he was arrested upon an *alias* execution issued upon the judgment rendered therein. To obtain his release from his arrest, he gave the statute six months' bond, but performed none of its conditions, and an action is pending upon it. Sylvan Shurtleff obtained his discharge in bankruptcy, July 15, 1871. He expected and intended that Mr. Putnam would suggest his bankruptcy and plead the discharge in Mr. Thompson's suit, which was upon a claim provable in bankruptcy, being for goods delivered by the plaintiff in that case upon orders drawn by S. Shurtleff, in the name of the firm of A. & S. Shurtleff. While that cause was pending, this petitioner consulted Judge Howard about it, who procured these orders of Mr. Thompson's counsel, in order to show them to Sylvan Shurtleff.

HOWARD & CLEAVES, for the petitioner.

Bankruptcy and his discharge were a perfect defense, which Mr. Shurtleff was entitled to and intended to make; but was deprived of it by accident and mistake, without consent, knowledge, or fault on his part. This entitles him to a review of that action.

J. O'DONNELL, for the respondent.

The burden is on the petitioner to show due diligence, which he fails to do. This respondent only pursued his claim regularly, and tried to enforce it. He sued the firm of A. & S. Shurtleff. Howard & Cleaves appeared generally, and filed joint pleadings, not as attorneys for either individually. The action was tried in due course, and resulted in a discontinuance as to Alvah Shurtleff, and judgment against Sylvan, on the ground that their firm was dissolved long before the goods were sold by the plaintiff, the use by Sylvan of the firm's name in the orders for them being unauthorized and fraudulent. Should such a creditor suffer, then, becuuse Mr. Putnam did not see fit to appear, but (as well as his client) acquiesced in and ratified the general appearance of Howard & Cleaves? (Crooker *v.* Randall, 53 Maine, 355). By consenting to a default, and allowing us to take judgment, Sylvan Shurtleff prevented our proving our claim in bankruptcy, since it was merged in the judgment of a date subsequent to the 24th day of August, 1870. (Sampson *v.* Clark, 56 Mass., 173; Bradford *v.* Rice, 102 Mass., 472; Woodbury *v.* Perkins, 59 Mass., 86). The review would only create an annoyance in the action upon the bond, which virtually satisfied the judgment. (Sturdivant *v.* Greeley, 4 Me., 535; Brown *v.* Brigham, 87 Mass., 582.

Rescript.

At the March term, 1871, of the superior court, the petitioner, one of the defendants in the original action, was defaulted without appearance. He intended to appear by counsel which he had previously retained for that purpose.

He had a full, legal defense; but his counsel failed to appear and make it, for the reason that the latter mistakenly supposed that the petitioner's co-defendant's counsel also appeared for the petitioner.

Held that a review be granted.

JUST JUDGMENT.

The *Indianapolis Sentinel* says:

The difference between justice in Canada and in the United States is exemplified in the case of Dr. Davis and his wife, who have just been condemned to death at Toronto on the charge of fatal criminal malpractice. They had been guilty of the same grave crime at Rochester and other cities on this side of the great lakes, and invariably escaped the penalties of the law. When their case was called for trial at Rochester, the prosecuting witnesses could not be found, and they were discharged. Then they removed to Toronto, where they practiced their "profession" upon Miss Gilmour with fatal results. They were put upon trial and convicted upon circumstantial evidence, and were promptly sentenced to death, the court consoling them with the judicial assurance that they had better prepare to die, as there were no grounds upon which they could hope for even a stay of proceedings. The spectacle of a husband and wife being hanged on the same gallows and at the same time is a sad one, but the appalling character of their crime calls for the extreme penalty. It were better that they thus terminate their terrestrial career, than that women shall be mutilated and murdered, and society demoralized by the practice of their profession.

BRIGHAM YOUNG IN TROUBLE.—Judge BOREMAN entered an order on the 13th instant, requiring Brigham Young to show cause, on the 23d of Oct., why he should not be punished for contempt for disregarding the order of Judge McKEAN, requiring him to pay $9,500 alimony to Ann Eliza Young.

CHICAGO LEGAL NEWS.

SATURDAY, OCTOBER 30, 1875.

The Courts.

U. S. DIST. COURT, D. OF INDIANA.

OPINION OCT. 1875.

BENNETT F. WITT, assignee of WILLIAM M. AUGHINBAUGH, bankrupt, *v.* HENRY HERETH et al.

BANKRUPTCY—JUDGMENT BEFORE JUSTICE—LIEN—FILING PETITION IN BANKRUPTCY SAME DAY ON WHICH EXECUTION ISSUES.

1. On the 3d of August a summons was returnable before a justice of the peace against the bankrupt, and on that day an execution was sworn out on the judgment which was entered by default and levied on the property of the defendant. Later in the same day on which the execution was levied, the defendant Aughinbaugh filed his voluntary petition in bankruptcy and was adjudged a bankrupt. *Held*, that the lien of the execution and levy was not displaced by the subsequent proceedings in bankruptcy.

2. JURISDICTION OF JUSTICE.—The court considers the power of a plaintiff to reduce his demand so as to bring it within the limit of a justice's jurisdiction.—[ED. LEGAL NEWS.]

GRESHAM, J.

On the 31st day of July, 1875. Henry Hereth filed his complaint before William H. Schmitts, a justice of the peace in and for Center township, Marion county, Indiana, demanding judgment against William M. Anghinbaugh for two hundred dollars upon a note, the principal of which was two hundred dollars and eighty-three cents, and on the same day a summons was duly issued to a constable of said township, and served on said Aughinbaugh. On the 3d day of August, at 9 o'clock A. M., that being the time at which said cause was set for trial, the said Aughinbaugh was duly called and defaulted, and judgment was entered for the plaintiff for two hundred dollars and costs of suit.

Subsequently, on said 3d day of August, the plaintiff filed his affidavit with said justice, averring that the collection of his judgment would be endangered by further delay in the issuing of execution. Thereupon an execution was issued on said judgment, which was immediately levied upon the goods and chattels of the said Aughinbaugh sufficient to satisfy the debt and costs. And later, on said day, the said Aughinbaugh filed his voluntary petition and was adjudged a bankrupt.

On this agreed statement of facts the court is asked to decide whether the lien of the execution and levy was displaced by the subsequent proceedings in bankruptcy.

Justices of the peace in Indiana have jurisdiction to try and determine suits founded on contract, when the debt does not exceed two hundred dollars. 2 G. & H., 579.

Unless otherwise directed justices shall issue execution on all judgments, when the defendant has appeared, after the expiration of four days from the rendition thereof; and in cases of default after the expiration of ten days; but when it shall be made to appear by affidavit that delay will endanger the collection of the judgment, execution shall issue immediately. 2 G. & H., 600.

It is insisted that the justice had no jurisdiction to render the judgment, because the note sued on exceeded the sum of two hundred dollars, and that the statute did not allow the plaintiff to remit part of his claim so as to reduce it to two hundred dollars for the purpose of giving justice jurisdiction.

Even if it had appeared that the plaintiff had thus reduced his claim by remitting the interest and part of the principal, I would have no doubt on the question of jurisdiction

The amount demanded determined the jurisdiction of the justice, and not the principal of the note or the amount actually due on it. If the plaintiff saw proper to reduce his claim to a sum within the jurisdiction of the justice by remitting part of it, no one had a right to complain for no one lost anything but himself.

Wetherill *v.* The Inhabitants, etc., 5 Blackford, 357, 6 ib., 63. Clearly the plaintiff was barred from maintaining another action on the same note, even if his judgment was for less than was due him. The facts agreed upon fail to show that the plaintiff remitted any part of his claim, and the presumption is that he demanded all that was due him.

It is further insisted that the filing of the affidavit, the issuing and levy of the execution upon the same day upon which the judgment was rendered and the subsequent commencement of voluntary proceedings in bankruptcy on the same day, show collusion between the plaintiff and the bankrupt, and something more than passive non-resistance on the part of the latter. I do not think so. All these suits might have existed without collusion. It must be admitted that the circumstances excite a suspicion that the bankrupt was trying to aid the plaintiff in obtaining a lien, but they go no further. It may be that the plaintiff knew of the insolvent condition of the bankrupt before he commenced his action, and that he hoped, by diligence, to get an advantage over the other creditors. He pursued a remedy that the law gave him. The other creditors were not equally diligent, and none of them saw proper to institute proceedings in bankruptcy and invoke the aid thereby of this court to prevent the plaintiff from obtaining his judgment, execution and levy, and the law imposed no duty on the bankrupt to go into voluntary bankruptcy to defeat the plaintiff in his efforts to procure a lien, Wilson *v.* City Bank, etc., 17 Wal., 473.

It was as much a part of the plaintiff's remedy to file his affidavit and cause his execution to be issued and levied before the expiration of ten days, as it was to obtain his judgment.

An order will be entered requiring the assignee to pay said judgment and costs out of any funds in his hands not otherwise appropriated.

MORROW, TRUSLER and HENRY for assignee.

BIXBY and NORTON for Hereth.

U. S. CIR. COURT, D. OF IOWA.

OCTOBER TERM, 1875.

PITTSBURGH LOCOMOTIVE AND CAR WORKS *v.* STATE NATIONAL BANK OF KEOKUK.

CONDITIONAL SALE—PLEDGE—POWER OF NATIONAL BANKS TO TAKE PLEDGES OF CHATTELS.

1. UNRECORDED LEASE OF CHATTEL—RIGHTS OF A PLEDGEE AS AGAINST THE OWNER.—A locomotive was leased by the manufactures to a railroad corporasion in Iowa, by an instrument in writing not recorded, for a sum equal to its value, to be paid in nine months; otherwise the manufacturers were to have the right to re-possess the same. The lessee pledged the locomotive to a bank to secure a loan of money. *Held*, under § 1922 of the Iowa Code, 1873, which requires contracts for the conditional sale of chattels to be recorded in order to be valid against creditors and subsequent purchasers without notice, that the pledgee's right was superior to that of the manufacturers.

2. POWER OF NATIONAL BANKS TO TAKE PLEDGES OF CHATTELS AS SECURITY FOR LOANS.—A national bank may take a pledge of chattels as security for money lent.

JOHN F. DILLION, C. J.

Replevin for a locomotive engine. In July, 1873, the plaintiffs and the Miss. Valley & West. R. R. Co. (an Iowa and Missouri corporation) entered into a written contract, by the terms of which it "let" or leased to the railroad company the locomotive engine for nine months, for a sum equal to the value of the locomotive, one-fourth of which was paid at or near the date of the instrument, and the balance was to have been paid within the nine months. If paid, the plaintiff was to execute to the railroad company a bill of sale; if not paid, the plaintiff "was to re-possess and enjoy the engine as though the instrument had never been made."

The instrument contained a stipulation on the part of the railroad company, that the said locomotive engine should be taken to Keokuk, Iowa, by the railroad company, and there kept and used and not removed from the control of the railroad company without the consent of the plaintiff.

The engine was sent to the railroad company, and was received by it at a town on its line in Missouri. While there, to wit, in September, 1873, said railroad company borrowed of the State National Bank of Keokuk $1,250, and pledged the engine to the bank as security, placing the same in the actual custody of a third person for the security of the bank. The bank had no notice of the plaintiff's lease or claim on the locomotive, and the plaintiff's lease was never recorded. The question in the case is whether the pledge to the bank gives it a right to hold the locomotive as security for its loan to the railroad company as against the plaintiff.

At the date of these transactions there was in force in the State of Iowa the following statute:

"No sale or contract or lease wherein the transfer of title or ownership of personal property is made to depend upon any condition, shall be valid against any creditor or purchaser of the vendee or lessee in actual possession obtained in pursuance thereof without notice, unless the same be in writing, executed by the vendor or lessor, acknowledged and recorded the same as chattel mortgages." Code 1873, section 1922.

Howell & Anderson for the plaintiff; Gilmore & Anderson for the bank.

DILLON, C. J., orally said:

1. Conceding that the instrument of lease was executed in Pennsylvania, and that as between the parties it does not show a sale of the engine, and that, as de from the Iowa statute (Code 1873, sec. 1922), the plaintiffs would have the superior right, I am of the opinion, in view of the express stipulation of the contract, that the locomotive was to be taken to Iowa and there used by the railroad company, that the Iowa statute controls the case and has the effect to subordinate the rights of the plaintiffs to the lien of the bank as pledge. 2. I am furthermore of the opinion, that under the National Banking Act the bank had the right, on making the loan to the railroad company, to take a pledge of the locomotive as security. National banks are not, in my judgment, confined, in the taking of security for discounts and loans, to the security afforded by the names of indorsers or personal sureties, but may take a pledge of bonds, choses in action, bills of lading, or other personal chattels. The words "loans on personal security," in the banking act, are used in contra-distinction to real estate security. Such has been the usage of the banks, and any other construction would throw a bombshell into the community, and injure both the banks and their customers.

Judgment for defendant.

NOTE.—In Shoemaker *v.* Mechanics' National Bank, 2 Abbott (U. S.), 416, decided in the Maryland Circuit, it was held by Mr. District Judge Giles that a national bank has power to lend money on a note or other personal obligation secured by a pledge of stock of a corporation as collateral security.—*The Central Law Journal.*

U. S. CIR. COURT, OF VA., W. D.

FOWLKES *v.* FOWLKES.

REMOVAL OF CAUSES FOR PREJUDICE ON ACCOUNT OF COLOR—PREVIOUS CONDITION, ETC.

That there is no law enabling a colored citizen when impeached by another citizen of the same State to remove his cause because of local influence or prejudice. This right is only given him when sued by a citizen of another State.

RIVES, J.—*Ex parte* Peter Fowlkes and others, on a motion to remove from the Circuit Court of Pittsylvania, and docket in this court for trial, a cause pending in the former against the petitioners at the suit of the heirs of George Fowlkes, deceased.

On the first day of this term the petitioners filed their application for removal, accompanied by a full copy of the record. It is admitted that their petition was also duly filed in the State court. The motion now made to docket this cause brings before the court the question whether this removal is warranted by the act of Congress, and whether this court can entertain jurisdiction in the cause.

The petitioners allege that they are colored citizens of the United States, and of this State, to whom a certain George Fowlkes, deceased, late of Pittsylvania county, devised valuable lands and other property, by will duly recorded in the County Court of Pittsylvania, at its December term, 1873; that afterwards the heirs at law of said George Fowlkes brought their bill in chancery against those petitioners and others to impeach the validity of said will in the Circuit Court of Pittsylvania; that an issue of *derisavit vel non* was directed and tried in said cause; a verdict found against the will; that verdict was set aside by the judges; a new trial awarded, and upon the trial the jury were hung and discharged from rendering a verdict; upon these facts the petitioners predicate their averment that "they are unable to enforce their rights in the judicial tribunals of the State on account of the prejudice that exists against them in the minds of the white population on account of their color, race and previous condition of servitude." They further declare "their *belief* that if no difference existed between them and those claiming to be the heirs at law of the said Fowlkes, as to race, color and previous condition, that the juries in the State courts would have no difficulty in finding, under the facts and circumstances of the case, that the said paper writing was the true last will and testament of the late George Fowlkes."

Is this application, then, in conformity with the 641 sec. of the Revised Statutes?

It is observable that the late comprehensive act for the removal of causes from the State courts, approved March 3, 1874, embraces cases only originally cognizable by the Federal courts. The same is the case of removal on the ground of "prejudice and local influence."

The exception to this applies to cases of public officers, civil and military, sued on account of acts in the discharge of their official duties; and to persons denied or prevented from enforcing in the courts of the State their equal civil rights of citizens of the United States, and to officers, civil and military, or other persons for their acts or refusals under authority of the Civil Rights act. This departure from the fundamental principle of limiting removals to cases cognizable in the Federal courts, results from the duty of the government to its officers; and the obligation of Congress to enforce by appropriate legislation the provisions of the XIV amendment to the Constitution. These exceptional statutes, therefore, are to be strictly construed, interpreted if practicable, in subordination to and conformity with the theory of our judicial systems, State and Federal, and the provisions of the Constitution.

There is no law enabling a colored citizen, when impeached by another citizen of the same State, to remove his cause because of prejudice or local influence. This right is only given him when sued by a citizen of another State. And then the affidavit is prescribed to him, namely: "That he has reason to believe, and does believe, that from prejudice or local influence he will not be able to obtain justice in such State court." The interposition of the Federal judiciary is wholly based upon this *belief or apprehension;* and why? Because the cause was originally cognizable in that judiciary, and its removal thereto would involve an enlargement of the jurisdiction.

Had Congress supposed that it had the power under the Fourteenth amendment in a case between residents of the same State to give the colored citizen a right to remove his case on the ground of his belief that he could not obtain justice in the State court, why did it not use the language of the 639 section? Doubtless, the omission to use this language is due to the restricted and well-guarded inhibitions of the XIV amendment: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." Now, when section 641 speaks of "the denial of or inability to enforce in the judicial tribunals of the State, or in the part of the State, etc.," equal civil rights of citizenship, is such language to be satisfied by the declaration of a *belief* or apprehension that such may be the result of the prejudice of race? The latter is a state of the mind; matter of conjecture and not traversable; it may be mere suspicion. At any rate, it is vague, uncertain, and can produce no practicable issue. Not so with the former: there it appears as a fact, certain and absolute and, if need be, issuable and capable of contradiction. The petition must state "*the facts;* of what?" manifestly of "the denial or inability to enforce;" not merely of a *belief* or suspicion of these facts. When we construe this language in subordination to the constitutional amendment, it seems to me it clearly points to the action of the State in one of its three capacities—legislative, executive or judicial. Ought not the petitioner in such case to designate some law, some judicial ruling, some executive act, as the denial of his equal and civil rights, or as constituting the obstacle to his obtaining them? Surely it would be a mockery to assume his "suspicions" or "belief" in place of "the *facts*"

for which this enactment calls. So far as the record of this case shows, the petitioners are enjoying their rights under the will of Geo. Fowlkes; it is true, they are sued in respect to them; and when they were about to lose them by the verdict of a jury, the judge interposed to shield them from the effects of prejudice, they deprecate, and now their complaint is that on a second trial the jury were hung, and the plaintiffs could not obtain the verdict they wished. They are still secure in their rights, but apprehend they may not remain so.

This enactment of Congress was never designed to appease the fears or lull the suspicions of a suitor in a case wholly cognizable in the State courts; it is designed to secure him the equal protection of the laws, and his equal civil rights, when invaded by the State in any part of its administration—legislative, executive or judicial. Nevertheless, the petition does not disclose any such case; it complains of no law of the State, general or local; no judicial ruling; no executive interference; it was a *fear* and *belief* of the existence of a prejudice of race, that is obstructing or delaying a decision in favor of the petitioners. They do not allege the absence of a law for change of venue in such case. They do not complain that juries are selected contrary to the State law, to which this court is required to conform as far as practicable. The fact is, my rule is based on the State law; it uses its phraseology as to qualification, and ordains a selection by lot as nearly conformable as practicable to the State practice; the only difference is that I require a representation of the colored race in the jury-box, while the State merely allows their eligibility. I can scarcely doubt that in a case like this where there is a fear of race prejudice, the State court would guard against it by an impartial composition of the jury, as is often practiced; and may, it seems to me, be rightfully demanded in this cause. If this court were to try this case they would have to do so under the laws and judicial decisions of the State, when not in conflict with the laws of the United States and judicial decisions of its courts; hence there is eminent propriety in limiting removals to cases of such conflicts pertaining to the guaranteed, equal rights of citizens.

For these reasons, I conclude that the case of the petitioners is not embraced by the terms nor the proper construction of the section of the law, under which they prefer their application; that they allege "no denial of their civil rights nor inability to enforce them in the State court" arising from any act of the State government, either legislative, executive or judicial; and hence that this court cannot assume jurisdiction of their case by removing and entertaining it here.

The court, therefore, refuses to docket the case, and directs it to be remitted to the circuit court of Pittsylvania.

The case was elaborately argued by distinguished members of the Virginia bar. Thos. S. Flournoy and Chas. E. Dabney for the removal, and Jas. M. Whittle and E. E. Bouldin *contra*.

OUR thanks are due GEORGE HERBERT, of the Chicago bar, for the following opinion:

SUPREME COURT OF ILLINOIS.

OPINION FILED OCT. 13, 1875.

SAMUEL WING et al. *v.* EDWARD SHERRER.

Appeal from Superior Court of Cook.

EQUITY JURISDICTION—REMOVAL OF CLOUD UPON TITLE—LOST DEED—SECONDARY EVIDENCE—DESTROYED RECORDS—IDENTITY OF COMPLAINANT.

1. JURISDICTION TO REMOVE CLOUD.—That prior to the passage of the act of 1869, a court of equity would not assume jurisdiction to remove a cloud from the title to real estate unless it appeared the owner was in possession. That act extended the jurisdiction of the court so that a bill might be filed to quiet title and remove clouds from the title to real estate when the lands were unimproved, or unoccupied, and this is now the settled law, the exercise of this branch of equity jurisprudence is within the sound discretion of the court.

2. CONCURRENT JURISDICTION.—That in all cases arising out of fraud, equity has concurrent jurisdiction with courts of law, but parties will be referred to that forum where justice can be most effectually administered.

3. INTEREST OF COMPLAINANT.—That preliminary to any relief it must be proved complainant is the owner of the real estate in controversy.

4. IDENTITY OF COMPLAINANT.—The identity of complainant should have been shown.

5. EVIDENCE WHEN DEED LOST AND RECORD DESTROYED.—The record of the deed was destroyed by the fire of 1871. The original was placed in the hands of George Schoffer, in Brooklyn. Sherrer applied to him for it, but was told it was lost. Schoffer's evidence was not taken: the destruction of the deed was not shown, but it could have been found, had search been made for it. *Held*, there was no foundation laid for the introduction of evidence of its contents, either by parol or by proof of the contents of the original abstract of title, if the latter evidence was in any event admissible. Excluding this evidence, as it ought to have been, there remained nothing to connect complainant with the title to the lots.

6. REMITTED TO A COURT OF LAW.—The evidence being uncertain and unsatisfactory the complainant should be remitted to a court of law.

7. RIGHTS OF DEFENDANTS.—That the defendants bought in good faith for an adequate consideration, and they ought not to be deprived of their property, except upon satisfactory proof. Something more than the complainant's own testimony ought to be required in this case.

8. RECORD DESTROYED—CLOUD UPON TITLE.—That when complainant shall have established his identity as the grantee of Shimp, it will be appropriate, if the contract, once of record, but long since destroyed, shall be construed to be a cloud upon his title to this property, to file a bill to have it removed, and this he ought to do before coming into a court of equity to have it removed.—[ED. LEGAL NEWS.]

SCOTT, J.

Prior to the passage of the act of 1869, a court of equity would not assume jurisdiction to remove a cloud from the title to real estate, unless it appeared the owner was in possession. That act extended the jurisdiction of the court so that it might hear and determine bills to quiet title and to remove clouds from the title to real estate when the lands in controversy were unimproved or unoccupied. The reason for the previous rule that obtained was, the party had a remedy at law. He could assert whatever title he had in an action of ejectment.

That equity will entertain a bill to quiet title or remove a cloud from the title to real estate, is now the settled law, and since the recent statute it is immaterial whether the party claiming to be the owner is in possession, or whether the lands are unimproved or unoccupied. The exercise of this branch of equity, jurisprudence has always been held to be within the sound discretion of the court.

The rescission of contracts, the cancellation or delivering up of agreements, securities, or deeds, or the specific performance of contract, are not matters of absolute right upon which a court is bound to pass a final decree, but it will exercise a sound legal discretion in granting or refusing relief according to what is reasonable and proper under all the circumstances of each particular case. It may be stated as a general proposition that in all cases, arising out of fraud, equity has concurrent jurisdiction with courts of law. But parties will be referred to that forum where justice can be most effectually administered, and the right most satisfactorily established.

As a general rule it is better in all cases of doubtful character, presenting a conflict of evidence, the parties should be remitted to whatever remedy they have at law, although equity might entertain jurisdiction.

Complainant claiming to be the owner in fee of four lots described, filed a bill to remove a cloud from the title, said to have been cast upon it by reason of a contract of sale to Samuel Wing, purporting to have been executed in his name by Warren and Goodrich, and a deed made in pursuance of that agreement by a person representing himself to be Edward Sherrer, which deed purported to convey the property in fee to Wing. The authority of Warren and Goodrich to execute any agreement in the name of complainant for the sale of the property is distinctly denied, and the deed made in pursuance of the contract is charged to be a forgery. Both the contract and the deed were placed on file in the proper office in Cook county, where the property is situated.

Preliminary to any relief in any view of the case, it must be proven complainant is the owner of the real estate in controversy. By the pleadings his title is put directly in issue, and the burden of proof rests upon him to maintain it.

The admission that the Edward Sherrer from whom defendants claim title to the lots is the owner, is not an admission that Edward Sherrer, complainant, is the owner. It is not necessary, perhaps, that complainant should deraign title from the government, but it is necessary he should show title in himself to the property, otherwise he can have no standing in any court. This he has attempted to do by proving a conveyance of the lots to himself from Peter Shimp, who was and now is a resident of Chicago where the property is situated, and in whom both parties concede the title was.

No original deed was offered in evidence from Shimp to complainant for the lots; nor do we think any foundation has been laid for the introduction of secondary evidence of its contents. Whatever record of it that existed was destroyed by fire when the court house was burned in 1871. The original deed had been placed in the hands of George Schoffer, in Brooklyn, N. Y., some years ago. Sherrer applied to him for it, but was told it was lost. Schoffer's testimony was not taken, and there is not a particle of evidence that he ever made any search for it. Its destruction is not proven. *Non constat*, but it could have been found had search been made. There was then no foundation laid for the introduction of evidence of its contents either by parol or by proof of the contents of the original abstract of title, if the latter evidence was in any event admissible. Excluding this evidence, as it ought to have been, there remained nothing to connect complainant with the title to these lots. This was a vital point in the case. Failing to show by any competent evidence, title in himself to the property, the relief sought ought to have been denied.

So far as this record shows, he was a stranger to the title and may not intermeddle. This view of the law is warranted by the decisions in this court and is fatal to the present decree. Hopkins *v.* Granger, 52 Ill., 504: West *v.* Schnebly, 54 Ill., 523.

The record presents a curious and most singular state of facts. Edward Sherrer, complainant, is a native of Switzerland, but now a resident of the city of New York. His business is plating ware, but how extensively he is engaged in that business does not appear. In 1861 he was called upon in the city of New York by Peter Shimp, whom he had never seen before. Shimp represented he called upon him through the recommendation of Conrad Schoertzer, of Canton, Ohio.

After some negotiation it is insisted Sherrer purchased the lots involved in this litigation, of Shimp for the sum of $900, paying for the same partly in plated ware or jewelry, some money, his note and mortgage on the premises, and by assuming the payment of a previous mortgage.

In 1868 a stranger, representing himself to be Edward Sherrer, called at the office of Warren & Goodrich, in Chicago, and authorized them to sell these lots for him, claiming that he was the owner. On the next day Warren & Goodrich offered a sale of the lots to Samuel Wing, and gave him the contract set forth in the bill. Soon after, the preliminaries having been adjusted, this Edward Sherrer made a deed to Wing of the property, which was acknowledged before Bradly, a notary public. Upon making the deed, Wing paid over all the purchase money, which was received by Sherrer, except an amount kept back until it should be made to appear a previous mortgage had been paid. Satisfactory evidence having been produced, the residue of the purchase money was subsequently paid to Bradly in pursuance with an arrangement made with Sherrer.

This Edward Sherrer seems to have been an entire stranger to all the parties engaged in the transaction. Bradly, who took the acknowledgement of his deed, had no personal acquaintance with him and had never seen him before he called to secure his services in this matter. He was equally a stranger to Warren and Goodrich, but when he called on Bradly he gave them as reference. All agree he seemed to know all about the property and the incumbrances upon it. As soon as he received the first payment, which was nearly all the purchase money, and amounted to a very considerable sum, he left, saying he was going to send the money away by express, and has never been heard of since. The residue of the last payment, after deducting some charges, still remains in the hands of Bradly.

The proof seems to be very clear complainant is not the Edward Sherrer who made the deed to Wing and acknowledged the same before Bradly, but whether complainant is the Edward Sherrer of the city of New York, to whom Shimp conveyed these lots is left in very grave doubt by the evidence. Proof of his identity rests alone upon his own testimony and that of Shimp. But Shimp's testimony is so much discredited by proof of his notorious bad reputation for truth and veracity, that full confidence can not be placed in it. In the details of what occurred between them in New York, their testimony is contradictory in the extreme. Complainant's own account of the transaction is unreasonable and highly improbable. Schwertzer, whom complainant says he knew in his native country, is said to be still living in Ohio, but his testimony was not taken to establish his identity.

In this uncertain and unsatisfactory state of the evidence complainant should be remitted to a court of law to establish his title to the property, whatever it may be. The defendants allege in their answer, they are in possession of the property and nothing appears in the record to disprove it. Complainant can bring ejectment and may prove the deed under which defendants claimed the property is a forgery. That question can better be tried in a court of law than in chancery. It involves the identity of two persons comparatively unknown, each claiming to be Edward Sherrer, the grantee of Shimp.

Defendants bought in good faith for an adequate consideration, and they ought not to be deprived of their property except upon satisfactory proof. They are in possession, as they allege, under a deed *prima facie* good, from the apparent owner, having been acknowledged under all the solemnities and forms of the law. It is this title that complainant assails. Something in addition to his own testimony ought to be required. Whether the testimony of Shimp will be regarded as sustaining complainant and make that clear and positive proof the law requires, that the deed under which defendants claim is a forgery, is a question of fact that ought to be submitted to a jury.

This he ought to do before coming into a court of equity.

When complainant shall have established his identity as the *grantee of Shimp* it will be appropriate if the contract once of record, but long since destroyed, shall be construed to be a cloud upon his title to this property, to file a bill to have it removed.

The decree will be reversed and the bill dismissed without prejudice.

Decree reversed.

GEO. HERBERT for appellant.

GOUDY & CHANDLER for appellee.

THROUGH the kindness of the law firm of ROSENTHAL & PENCE, of this city, we have received the following opinion:

SUPREME COURT OF ILLINOIS.

OPINION FILED OCT. 11, 1875.

WILLIAM M. ZEARING *v.* JOHN RABER.

Appeal from Superior Court of Cook.

WHEN DEED DESCRIBES LAND AS FRONTING ON STREET—OWNER ESTOPPED—JURISDICTION OF COURT OF EQUITY.

1. The court cites approvingly the doctrine laid down in 2 Smith's Leading Cases, 154, that "if one owning land, exhibit a map of it, on which a street is defined, though not as yet opened, and building lots be sold by him with reference to a front or rear on that street, or lot be conveyed being described as by street, that this is an immediate dedication of that street, and the purchasers of lots have a right to have that street thrown open forever," and hold in this case that appellee is entitled to have the street kept open for use, and that appellant is estopped from denying the existence of the street.

2. JURISDICTION.—The evidence shows a threatened nuisance tending to deprive appellee and others of the full and free use of the street as he is entitled to have it used, and this is a well recognized ground for equitable jurisdiction.—[ED. LEGAL NEWS.]

SCHOLFIELD, J.

James, Springer, and Green, being owners, as tenants in common of a certain out lot, south and in the immediate vicinity of the city of Chicago (except a strip extending through its center from north to south, used as railroad right of way), laid out a street, across such lot from east to west, extending from State street to what was then called Thompson street, but is now known as Wentworth avenue.

They caused ditches to be dug and a roadway thrown up along the street, so far as it extended on their ground, and erected a fence on its north side from State street to the railroad right of way. They also prepared a map of the lot showing the location of this street, designated thereon "Green street." The map, however, was neither acknowledged nor recorded, for the purpose of making a statutory dedication of the street. Walenta subsequently became the purchaser of a portion of the lot which was conveyed to him by deed from James, Springer and Green, by the following description: "Commencing at the south-

east corner of said lot five, and running thence due north 152 feet to a street 66 feet wide, extending from State street to Thompson street; thence due west 672 feet, more or less, to land owned and occupied by the Michigan Southern and Chicago and Rock Island Railroads; thence south 152 feet, thence east 672 feet, more or less, to the place of beginning."

This property was subsequently conveyed to appelle by deed by the same description.

After the sale and conveyance to Walenta, we may assume for the purposes of the questions to be determined, without critically noticing the several deeds relating to his title, appellant became the owner of the residue of the lot, except that part occupied as railroad right of way.

In the deeds under which he derived title, this language occurs in describing the property conveyed to him: "* * * lot number 5, in section 16, township 38 north, range 14 east, excepting and reserving so much of lot 5 as was sold to Rudolph Walenta, October 4th, 1859, and described as follows (as in said deed to Walenta): the premisis hereby conveyed, containing 3 65-100 acres, more or less, subject to any and all railroads, public streets, lanes, alleys or highways running upon, along or through said premises, or any part thereof."

Aside from the language in the deeds, the evidence is clear that Walanta, in purchasing from James, Springer and Green, and appellee in purchasing from him, did so with express reference to the supposed existence of the street; and that when appellant purchased, he was fully informed of what had been done to establish the street, and what rights had been acquired on the faith thereof.

The question is, can appellant now be heard to deny the existence of the street?

It is unimportant whether the public have so far accepted the dedication as to be bound to keep the street in repair, since the question involved is simply one of private right. Nor do we conceive it necessary to determine where the fee in the soil of the supposed street is, whether it is in the adjacent property holders to the center of the street, or remains in the original owners until there shall be sufficient evidence of acceptance by the public. If appellee is entitled to have the street kept open for use, it will be sufficient. That appellant is, under the facts given, estopped from denying the existence of the street can hardly admit of controversy.

The principle applicable is well stated by the editors of Smith's Leading cases (7 Am. ed., vol. 2, 154), in a review of the authorities relating to the point.

And inasmuch as what is there said covers the entire ground in controversy, and meets with our approval, we shall content ourselves with transcribing it.

"If one owning land exhibit a map of it on which a street is defined, though not as yet opened, and building lot be sold by him with reference to a front or rear on that street, or lot be conveyed being described as by street, (Schenley *v.* Commonwealth, 26 Runa. St., 62 and Ed. 29), this is an immediate dedication of that street, and the purchasers of lots have a right to have that street thrown open forever (Wyman *v.* Mayor, etc., 11 Wendell, 487; Surugston *v.* Mayor, etc., 8th Id., 85; and see the matter of 29th and 39th streets, 1 Hill's N. Y., 189, 192), and this principle is not limited in its application to the single street on which such lots may be situated.

"If the owner of land lays out and establishes a town, and makes and exhibits a plan of the town, with various plats of spare ground, such as streets, alleys, quays, etc., and sells the lots with clear reference to that plan, the purchasers of the lots acquire, as appurtinant to their lots, every easement, privilege, and advantage which the plan represents as belonging to them as a part of the town, or to their owners as citizens of the town. And the right thus passing to the purchasers is not the mere right that such purchaser may use these streets or other public places, according to their appropriate purpose, but a right vesting in the purchasers, that all persons whatever, as their occasion may require or invite, may so use them; in other words, the sale and conveyance of lots in the town, and according to its plan, imply a grant or covenant to the purchasers, that the streets and other public places indicated as such upon the plan, shall be forever open to the use of the public, free from all claim or interference of the proprietors inconsistent with such use. Rowans ex. rel. *v.* Tow of Reatland, 8 B. Monroe, 232, 237; see also Bowlinggreen *v.* Hobson 3d Id., 478, 481; Huben et al. *v.* Gazley et al., 18th Ohio, 18; Dummen *v.* Den ex dem. Selectmen of Jersey City, Spencer, 86, 106; Wickliffe *v.* City of Lexington, 11 B. Monroe, 163."

Other authorities, cited in appellee's briefs, will, on examination, be found fully sustaining this quotation. Thus in Parker *v.* Smith, 17 Mass., 412, and in Thompson *v.* Roole, 7 Gray, 83, it is held that the general principle often recognized in that State is, "If land be conveyed, as bounded upon a way or street, this is not merely a description, but an implied covenant that there is such a way, and the grantor and his heirs are estopped to deny such a way as existing. So also a boundary on a passage way two rods wide, which is to be laid out between the premises and land of A., estops the grantor and those claiming under him to deny the existing of the passage way." Tufts *v.* Chovestown, 2nd Gray, 271.

To the same effect is Hawley *v.* The Mayor, 33 Md., 280. See also Smith *v.* Lock, 18 Mich., 56; Trustees et al. *v.* Walsh., 57 Ills., 368.

The principle is equally applicable to the portion of the street lying west as to that lying east of the railroad right of way. The description in the deed to Walenta expressly stating that the line of the property conveyed ran *north to a street 66 feet wide extending from State street to* Thompson street, and the conveyances to appellan tin clear and direct terms, *excepting* public streets *running upon or through said premises.*

What difficulties may be encountered in crossing the railroad right of way, or in opening up the street there, in no wise concerns appellant.

He has no right in the street laid out over the lot by his grantor, and appellee is entitled to have them as they were represented when his property was conveyed to Walenta.

The only remaining question relates to the jurisdiction of a court of equity, and upon this we entertain no doubt. The evidence shows a threatened nuisance tending to deprive appellee and others of the full and free use of this street, as he is entitled to have it used, and this is a well recognized ground for equitable interposition. 2 Story's Equity Jurisprudence, § 927; Horning *v.* Lourie, 6 Johnson, ch. 439; Rowen's Exrs. *v.* Town of Portland, 8 B. Monroe, 232; Mills *v.* Miller, 3 Paige, 254.

We see no cause to disturb the decree below, and it is therefore *affirmed.*

ROSENTHAL & PENCE for appellees.

WE are under obligations to GEORGE W. WALL, of the DuQuoin bar, for the following opinion:

SUPREME COURT OF ILLINOIS.

OPINION FILED OCT. 14, 1875.

ABRAM MITCHELL *v.* LEVI R. LYMAN et al.

RATE OF INTEREST—USURY—NOTE INCLUDING USURY—GIVING SECOND NOTE AND CANCELLING FIRST EFFECT OF.

1. RATE OF INTEREST.—That the statute limits the rate of interest to ten per cent. per annum, but is silent as to the time of payment of the interest whether at the end of the year or otherwise.

2. TAKING INTEREST IN ADVANCE.—That the taking the rate of interest, allowed by the statute, in advance, out of the principal, is not usurious.

3. WHEN USURY INCLUDED IN FIRST NOTE.—That although the usury in the first note should not effect the second one to the disallowing of the interest which it bears, yet the court is of the opinion that it should have effect to the extent that there should be a deduction from the second note of all payments of interest made before it was entered into upon the first note. The first note being usurious, no interest whatever was recoverable upon it.

4. USURIOUS INTEREST.—That usurious interest voluntarily paid cannot be recovered back, yet so long as any part of the debt remains unpaid, the debtor may insist upon a reduction of all usurious interest paid therefrom.—[ED. LEGAL NEWS.]

Opinion by SHELDON, J.

This was an action of assumpsit brought by appellant against appellees to recover upon a promissory note, of which the following is a copy:

"Centralia, Ill., December 20th, 1869.

$3,000.00.

On or before December 20th, 1870, we, or either of us, promise to pay to the order of A. Mitchell, the sum of three thousand dollars ($3,000.00) for value received, negotiable and payable without defalcation or discount, with interest at ten per cent. from date; payable annually.

{ $1.50 stamp. }

L. P. Lyman.
Alex. McClelland.
Jno. W. Reed.
Isaac McClelland.
John McClelland.
John Woods."

Upon the back whereof were the following credits:

"Received the sum of ($300) three hundred dollars on the within note this 24th day of December, 1870.

A. Mitchell.

Received on the within note the sum of thirteen hundred dollars ($1,300) this February 15, 1872. A. Mitchell.

March 19th, 1872, received as interest on the within note, the sum of $200."

The only defense set up was one of usury. The cause was tried and a verdict found on the 15th day of February, 1875, for the plaintiff for $658.40 from the judgment on which he brings this appeal.

The evidence as to the usury was conflicting, but taking that on the part of the defendants to the full extent of all that it tends to prove, it presents this state of facts. That on September 1, 1868, three of the defendants, L. P. Lyman, Alex. McClelland, and John Reed, being in the mill business at Sandoval, Ill., under the firm name of Lyman, McClelland & Co., borrowed from the plaintiff, A. Mitchell, the sum of $3,000 for one year, at fifteen per cent. interest, giving therefor their note as follows:

"$3,000.

Centralia, Ill., Sept. 1st., 1868.

One year after date, we jointly and severally promise to pay to the order of A. Mitchell three thousand dollars, with interest at ten per cent. per annum, value received.

Alex. McClelland,
Levi P. Lyman,
John W. Reed."

The extra five per cent. interest was retained out of the sum lent, Lyman, McClelland & Co. actually receiving at the time only $2850.

This note was secured by a mortgage on their mill. After the note became due, another agreement was entered into between the parties that Lyman, McClelland & Co. should pay up all the interest on the notes and have the money for another year at ten per cent. interest; that the note of Sept. 1, 1868, and the mortgage on the mill to secure it, should be given up and cancelled, and that a new note should be given for the principal money at ten per cent. interest only, with personal security. That arrangment was carried out, and in fulfillment of it, the note in suit was given and accepted with Isaac McClelland, John McClelland and John Woods as the personal security upon it.

In the court below, there was no interest whatever allowed upon the note sued on, and there was further deducted from it all the interest which had been paid upon the previous note of September 1, 1868.

We are of opinion that there was error in the disallowance of any interest upon the note in suit. The penalty under our statutes for contracting to receive a greater rate of interest than ten per cent. per annum, is a forfeiture of the whole of the interest so contracted to be received and only the principal sum is recoverable. The contract sued upon is unobjectionable, as being one to pay a greater rate of interest than ten per cent. per annum and no greater rate was paid under it. Nor do we perceive that it had mingled in it any usurious element. The contract was another and different one from that of Sept. 1, 1868. That was a contract on the part of three persons to pay three thousand dollars, with fifteen per cent. interest, with mortgage security on the mill property. The contract of December 20, 1869, was one on the part of six persons (three of them being additional) to pay the three thousand dollars with only ten per cent. interest, and that the first note and the mortgage security should be given up and cancelled, which was accordingly done.

The latter contract was made by different persons in part for the payment of a different and a legal rate of interest, and on the additional and further consideration of the cancellation of the mortgage on the mill property.

We cannot see that the last note is infected with usury, on the account that it was given for the sum of three thousand dollars, while the amount actually received by the borrowers in the first instance, on Sept 1, 1868, was only $2,850, and not $3,000. The extra five per cent. interest was paid in advance on Sept. 1, 1868, and so retained out of the sum of $3,000 borrowed and the note given for $3,000 with ten per cent. interest. Notwithstanding $2,850 only was actually received, $3,000 was the principal sum borrowed and was the principal sum due at the end of the year, and giving a new note for the principal sum of $3000 did not necessarily have embraced in it any element of usury. Had the loan of the money on Sept 1, 1868, been only at the legal rate of ten per cent. interest, and the interest paid in advance and retained out of the sum lent, and had the borrowers received but $2,700 and given their note for $3,000 payable in one year, with ten per cent. interest after maturity, the transaction would have been unexceptionable, as regards usury.

The statute limits the rate of interest to ten per cent. per annum, but is silent in regard to any time of the payment of the interest, whether at the end of the year or otherwise.

It was said by Blackstone, Justice, in Lloyd *v.* Williams, 2 W. Bl., 792, "that interest may as lawfully be received beforehand for forbearing, as after the term is expired for having forborne; and it shall not be reckoned as merely a loan of the balance."

The reservation of the statutory rate of interest and the taking of the same in advance out of the sum loaned is not usurious, as held by this court. This was expressly adjudged by this court in McGill et al. *v.* Ware, 4 Scam., 21. The legal rate of interest at that time was twelve per cent. per annum, and McGill, on the first day of June, 1833, borrowed of Ware $2,500 for five years at twelve per cent. interest per annum, payable in advance, for which he executed his note.

After deducting $300, the interest on $2500 for one year, at twelve per cent., Ware paid McGill $2200. McGill, on the same day, executed his four several promissory notes for $300 each, the yearly interest on $2500 at twelve per cent., payable severally one year in advance, to wit: on the 1st of June, 1834; 1st of June, 1835; 1st of June, 1836; and 1st of June, 1837. The defense of usury was there set up, but the transaction was sustained as free from the objection of usury.

There are many authorities to the point that although a contract be in its inception usurious, a subsequent agreement to free it from the illegal incident shall make it good. Barnes *v.* Healey, 2 Taunt., 184; Kilbourne *v.* Bradley, 3 Day, 356: DeWolf *v.* Johnson, 10 Wheat., 367; Postlethwait *v.* Garrett, 3 Monroe, 345; Fowler *v.* Garrett, 3 J. J. Marsh., 681; Chadbourne *v.* Watts, 10 Mass., 124, Clark *v.* Phelps, 6 Metc., 296; Blydenburg on Usury, 91.

But although the usury in the first note should not affect the second one to the disallowing of the interest which it bears, yet we are of opinion that it should have effect to the extent that there should be a deduction from the second note of all payments of interest made before it was entered into, upon the first note. The first note being usurious no interest whatever was recoverable upon it.

This court, while deciding that usurious interest voluntarily paid cannot be recovered back, holds still, that so long as any part of the debt remains unpaid, the debtor may insist upon a deduction of all usurious interest paid, therefrom. Hadden *v.* Quins, 24 Ill., 381; Farwell *v.* Meyer et al., 35 id., 42; Taylor *v.* Daniels, 37 id., 331.

We think that under these decisions, for the purpose of the allowance of a deduction of all payments of interest made upon the first note, the original loan of the three thousand dollars is not to be considered as so far settled and paid up as to exclude such deductions.

The views expressed sufficiently dispose of the instructions, which were not in harmony therewith.

The judgment will be reversed and the cause remanded.

Judgment reversed.

WALKER, J.—I am unable to concur in the reasoning or conclusion announced in this opinion.

We are under obligations to the law firm of JOHNSON & OSBORN, of Goshen, Indiana, for the following opinion:

SUPREME COURT OF INDIANA.

CALE et al. *v.* ALFRED P. WRIGHT et al.

Appeal from the Elkhart Circuit.

SPECIFIC PERFORMANCE—TENDER.

That a vendor cannot bring an action for the purchase money without having executed the conveyance, or offered to do so, unless the purchaser has discharged him from so doing, and on the other hand, a purchaser cannot maintain an action for a breach of contract without having tendered a conveyance for execution and the purchase money.—[ED. LEGAL NEWS.]

Opinion of the Court by DOWNEY, J.

The appellee, Wright, sued Samuel Cale and wife and William J. Church, alleging in his complaint the following facts: that Samuel Cale, in 1863, purchased by parol of one Benedict certain real estate in Elkhart county, Indiana and was put into possession thereof. The purchase money agreed upon was two thousand dollars, to be paid with interest from and after the purchase. Cale continued in possession and made lasting and valuable improvements. When the principal of the purchase money was to be paid is not alleged. In 1265 Benedict demanded payment of Cale, who agreed with Wright to pay the amount for him, with expenses and taxes, and that Wright should take and hold the title to the land as his security. Accordingly Wright paid Benedict, and he conveyed the land to Wright. It is alleged that this amount was to be paid in a reasonable time from July 1, 1863. It is averred that a reasonable time has elapsed, and that the amount has not been paid; that Cale failed to pay the taxes on the lands, which were paid by Wright, and the dates and amounts of the several payments are stated; that in May, 1868, Wright sold his interest in the land to Church, and in August, 1869, Church re-conveyed to Wright. Prayer for judgment against Cale for four thousand dollars; that the same be declared a lien on said real estate; that the court will foreclose the mortgage lien as against Cale and wife, and order the same sold, etc.

While Church claimed to own the land he sued Cale for the possession, and failed to recover, on the ground that the transaction between Cale and Wright was in the nature of a mortgage or security for money only, and did not therefore entitle him, as the purchaser from Wright, to the possession. See the case reported in 36 Ind., 34.

Following the suggestion of that opinion, the present action has been brought to enforce the lien of Wright.

The first question presented by the assignment of error, is as to the sufficiency of the complaint. A question is discussed under another assignment of error which is also applicable here, and that is whether any action can be maintained by the plaintiff to subject the land to sale until after a tender of a deed and demand of the money. The claim of Benedict, had he sued and sought to subject the land, would have been for specific performance of the contract of purchase made and partly performed by Cale, and for an enforcement of his vendor's lien. As he conveyed the fee in the land to Wright, and as he took the place of Benedict for all practical purposes, it seems to us that before Wright could sue for specific performance and to enforce his lien, it was necessary that he should have tendered performance on his part by offering to Cale a deed for the land, to be delivered upon payment of the purchase money, etc. There was no definite time fixed for the payment of the purchase money either in the contract between Benedict and Cale, or that between Wright and Cale. The acts were cleaaly intended to be concurrent and dependent acts, and neither party ought to sue without having tendered performance on his part. Sugden, in his work on Vendors, 162, 163, says: "A vendor cannot bring an action for the purchase money without having executed the conveyance, or offered to do so, unless the purchaser has discharged him from so doing. And on the other hand, a purchaser can not maintain an action for a breach of contract without having tendered a conveyance (for execution) and the purchase money." And see Mather *v.* Scales, 35 Ind., 1, and cases cited.

We need not examine the other questions made in the case.

The judgment is reversed, with costs, and the cause remanded, with instructions to sustain the demurrer to the complaint.

J. D. OSBORN, R. M. JOHNSON, attorneys for appellants.

J. H. BAKER, J. A. S. MITCHELL, attorneys for appellee.

SUPREME COURT OF TENNESSEE.

JOHN B. NORVELL *v.* JOHN BAKER AND WIFE.—*Knoxville, June* 19. 1875.

TITLE BOND—HUSBAND AND WIFE.—Upon bill filed against husband and wife by the purchaser of their real estate under a title bond executed by them, to enforce a specific execution of the contract, or for a rescission and a judgment against them for purchase money paid on the land; *Held*, that the title bond given by the husband and wife was a nullity, and specific performance of the contract was rightfully refused by the chancellor. But it was erroneous to render a decree against the wife for the purchase money and subject her interest in the land to its satisfaction.—[ED. *Commercial and Legal Reporter.*]

NICHOLSON, C. J.

Baker and wife sold to Norvell the undivided interest of Baker's wife in a tract of land of about 120 acres for $800, and executed to him a bond for title. The land had descended to the wives of Norvell and Baker as tenants in common. Norvell afterwards paid the purchase money, but got no deed. The parties agreed to cancel the trade, when Baker and wife paid to Norvell $200 and executed their three notes for $200 each, together with a written agreement whereby Norvell was to release his claim for a title under his bond upon the payment of the three notes.

Baker and wife failed to pay the three notes, when Norvell filed his bill for a specific execution of the original contract, and if that could not be done, he prayed for a judgment against Baker and wife for the purchase money paid by him, with a lien on the land for its satisfaction. Upon the hearing, the chancellor held the bond for title null and void, because of the coverture of Baker's wife, and therefore refused a specific performance of the contract, but he held that Norvell was entitled to a decree for the purchase money and interest against Baker and wife, and ordered the land to be sold for the satisfaction of the amount.

The land was accordingly sold, and bought by Norvell at $300, and title was vested in his wife at his request.

Baker and wife bring the case here by writ of error.

The decree is manifestly correct so far as it treats the bond for title as a nullity, and refuses to decree a specific performance. But we find no evidence of fraud on the part of Baker's wife in the transaction, nor is there any evidence that she received the purchase money paid by Norvell for the land.

We are therefore of opinion that it was erroneous to render a decree against her for the purchase money, and subject her interest in the land to its satisfaction. The case of Rhea *v.* Isley and others, decided at the September Term, 1871, at Knoxville, is conclusive of the present case. It follows that the decree is reversed, so far as it gives judgment against Baker and wife for the purchase money, and orders a sale of land. The decree setting aside the title bond as null and void is affirmed, and a decree will be rendered against Baker for the amount of the purchase money and interest.

The costs will be paid by Norvell with judgment over therefor against Baker.

ENGLISH HOUSE OF LORDS.

DAWKINS *v.* ROKEBY.

Error from the Court of Exchequer Chamber in England.

DEFAMATION—PRIVILEGE—WITNESS—MILITARY COURT OF INQUIRY.

The ordinary rule of law that a witness is absolutely privileged in what he says or writes in giving evidence before a court of justice, even if he has acted *mala fide*, and with express malice, extends to a witness before a military court of inquiry, called in pursuance of the regulations of the army to inquire into matters of military discipline, though the witness be not examined on oath before such court.

Judgment of the court below affirmed.

PER LORD PENZANCE.—It is inexpedient, on grounds of public policy, to remit such questions as the truth and *bona fides* of a witness to the judgment of a jury.

This was a proceeding in error from a judgment of the Exchequer Chamber (Kelly, C. B., Martin, Bramwell, Channell, Pigott, and Cleasby, BB.; and Byles, Keating, Brett, and Grove, JJ.), delivered Feb. 1st, 1873, upon a bill of exceptions to the ruling of Blackburn, J., in a case tried before him at Westminster, in Feb., 1871.

The case is reported below in L. Rep. 8 Q. B. 255, and 28 L. T. Rep. N. S. 134, where the facts are fully set out.

The plaintiff and defendant were both officers in the army, and the action was brought for an alleged libel and slander of the plaintiff by the defendant in certain evidence given by him before a military court of inquiry, assembled to investigate the conduct of the plaintiff as such officer. The learned judge ruled that as a matter of law the action would not lie even though the plaintiff should be able to prove that the defendant, in giving such evidence, had acted *mala fide*, and with actual malice, and without any reasonable and probable cause, and with a knowledge that the statements made by him were false; and directed a verdict for the defendant.

This ruling was upheld by the Exchequer Chamber, and hence the present appeal was brought to the House of Lords.

The judges were summoned, and Kelly, C. B., Blackburn, Mellor, Brett, and Grove, JJ., and Pollock, B., attended.

H. MATTHEWS, Q. C., and HOLL, for the appellant, relied on the same authorities, and urged the same arguments as in the court below (*ubi sup*).

BULWER, Q. C., BOWEN, and FITZMAURICE, who appeared for the respondent, were not called upon to argue.

At the conclusion of the arguments the following question was left by their lordships to the learned judges: "Whether the opinion and ruling of the learned judge, as stated in the bill of exceptions, were right in point of law?"

The opinion of the learned judges was delivered by—

KELLY, C. B.—We answer your lordships' question in the affirmative. A long series of decisions has settled that no action will lie against a witness for what he says or writes in giving evidence before a court of justice. This does not proceed on the ground that the occasion rebuts the *prima facie* presumption that words disparaging to another are maliciously spoken or written. If this were all, evidence of express malice would remove this ground; but the principle, we apprehend, is that public policy requires that witnesses should give their testimony free from any fear of being harassed by an action on an allegation, whether true or false, that they acted from malice. The authorities, as regards witnesses in the ordinary courts of justice, are numerous and uniform. In the present case, it appears in the Bill of Exceptions that the words and writings complained of were published by the defendant, a military man, bound to appear and give testimony before a court of inquiry. All he said and wrote had reference to that inquiry, and we can see no reason why public policy should not equally prevent an action being brought against such a witness as against one giving evidence in an ordinary court of justice.

The LORD CHANCELLOR (Cairns).—I am sure your Lordships all feel greatly indebted to the learned judges for the attention which they have paid to this case, and for the very clear and satisfactory opinion which they have given in answer to your Lordships' question. It is of importance that the House should bear in mind the precise expressions of the learned judge who tried the case, because I am sure that your lordships would not desire your decision to go further than the circumstances of this particular case would warrant. The leading facts which are put in prominence by the learned judge are these, that the statements were made by the defendant, who was a military man, and that the inquiry was a military inquiry; that the statements were made in relation to the conduct of the plaintiff as a military man, and were made with reference to the subject of that inquiry. I say this the more particularly, because an argument was addressed to your lordships to show that the inquiry in question was not to be considered in the light of a judicial inquiry, and that the evidence was not given by a witness on oath. That is quite true, but it is at the same time stated in the bill of exceptions that it was an inquiry connected with the discipline of the army, that it was an inquiry warranted by the Queen's orders and regulations for the army, that it was called by the Field-Marshal Commanding-in-Chief in pursuance of those regulations, and that the defendant in the action was called before the court of inquiry as a witness, as a person who was required to give evidence relevant to the inquiry which was then being conducted, and that it was in the course of that inquiry that the statements were made. Adopting the expressions of the learned judges with regard to what I take to be the settled law as to witnesses, and as to the protection of witnesses in judicial proceedings, I certainly am of opinion that upon all principles, and certainly upon all considerations of conscience and public policy, the same protection which is extended to a witness in a judicial proceeding, who has been examined on oath, should be extended, and must be extended to a military man who is called before a court of inquiry of this kind, for the purpose of testifying there upon a matter of military discipline connected with the army. It is not denied that the statements which he made, both those which were made *viva voce*, and those which were made in writing, were relevant to that inquiry. Under these circumstances I submit that the conclusion of the learned judges is in all respects one which we ought to adopt, and that your lordships will hold that statements made under these particular circumstances are statements which cannot become the foundation of an action at law. I therefore beg leave to move that the appeal be dismissed with costs.

Lords CHELMSFORD, HATHERLEY, O'HAGAN, and SELBORNE concurred in the judgment of the Lord Chancellor.

Lord PENZANCE.—My lords, I also agree in the view which has been stated, but I wish to say one word on the supposed hardship of the law which is brought into question by this appeal. It is said that a statement of fact of a libellous nature, which is palpably untrue, known to be untrue by him who made it, and dictated by malice, ought to be the subject of a civil remedy, though made in the course of a purely military inquiry. This mode of stating the question assumes the untruth, and assumes the malice. If by any process of demonstration free from the defects of human judgment the untruth and malice could be set above and beyond all question and doubt, there might be ground for contending that the law should give damages to the injured man. But this is not the state of things under which this question has to be determined. Whether the statements were in fact untrue, and whether they were dictated by malice are, and always will be, open questions upon which opinions may differ, and which can only be resolved by the exercise of human judgment. And the real question is whether it is proper on grounds of public policy to remit such questions to the judgment of a jury. The reasons against doing so are simple and obvious. A witness may be utterly free from malice, and yet in the eyes of a jury may be open to that imputation; or again, the witness may be cleared by the jury of the imputation, and yet may have had to encounter the expenses and distress of a harassing litigation. With such possibilities hanging over his head, a witness cannot be expected to speak with that free and open mind which the administration of justice demands. These considerations have long since led to the legal doctrine that a witness in the courts of law is free from any action; and I fail to perceive any reason why the same considerations should not be applied to an inquiry such as the present, and with the same result.

Judgment of the Court of Exchequer Chamber affirmed, and appeal dismissed with costs.

Attorneys for the plaintiff in error, GUSCOTTE, WADHAM, and DAW.

Attorney for the defendant in error, W. C. HALL.

A lady in England has lately been fined £5 for giving a false testimonial of character to a friend, named Helm. She said that Helm had lived with her for two years, and had proved an honest and sober servant; when, in fact, the two were merely on terms of calling acquaintance, and she, finding her friend in distressed circumstances, took this method of rendering a kindly service. If the law was enforced with equal severity in this country, the custom of men in office [and out of office, too] of signing their names to recommendations of people they do not know, would cease.—*Cent. Law Journal.*

CHICAGO LEGAL NEWS.

Lex vincit.

MYRA BRADWELL, Editor.

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We call attention to the following opinions, reported at length in this issue:

Bankruptcy—Judgment Before Justice—Lien.—The opinion of the United States District Court for the District of Indiana, by Gresham, J., where an execution was issued by a justice of the peace and levied on the property of the defendant on the 3d day of August, and afterwards, on the said day, the defendant filed his voluntary petition in bankruptcy and was adjudged a bankrupt, held that the lien of the execution was not displaced by the subsequent proceedings in bankruptcy.

Power of National Banks to Take Pledges.—The opinion of the United States Circuit Court for the District of Iowa, by Dillon, J., upon the power of National Banks to take pledges of chattels as security for money lent.

Removal of Cause for Prejudice on Account of Color.—The opinion of the United States Circuit Court, by Rives, J., holding that there is no law enabling a colored citizen when impeached by another citizen of the same State, to remove his cause because of local influence or prejudice; that this right is only given when sued by a citizen of another State.

Equity Jurisdiction — Removal of Cloud upon Title — Lost Deed — Secondary Evidence—Destroyed Records.—The opinion of the Supreme Court of this State, by Scott, J., as to the jurisdiction of a court of equity to remove clouds upon the title to real estate under the act of 1869, when the land is unimproved or unoccupied, and holding when the proof is uncertain and unsatisfactory that a court of equity will remit the complainant to a court of law. In this case, the record of the original deed and contract was destroyed by the great fire of 1871. The destruction of the original deed was not shown. If proper search had been made for it, it might perhaps have been found, and that, therefore, there was no foundation laid for the introduction of evidence of its contents. The court concludes by saying when complainant shall have established his identity as the grantee of Shimp, it will be appropriate, if the contract once of record but long since destroyed shall be construed to be a cloud upon his title to this property, to file a bill to have it removed. This he ought to do before coming into a court of equity.

When Deed describes land as fronting on street, grantor estopped from denying existence of street. — The opinion of the Supreme Court of this State, by Scholfield, J., holding that when the owner of land conveys lots and describes them in the deed as fronting on a street, he is estopped from afterwards denying the existence of such street, and that a court of equity has jurisdiction to prevent the purchaser or his grantees from being deprived of the use of such street.

Rate of Interest—Usury.—The opinion of the Supreme Court of this State by Sheldon, J., holding that the taking of the rate of interest, allowed by the statute, in advance, out of the principal, is not usurious; that usurious interest voluntarily paid cannot be recovered back. Yet so long as any part of the debt remains unpaid, the debtor may insist upon a reduction of all usurious interest paid therefrom, even when a former note in which the usurious interest was embraced had been cancelled by the giving of a second note.

Parol Evidence to Prove Lost Record.—The opinion of the Supreme Court of this State, by Walker, C. J., upon the competency of proving the contents of lost records by parol evidence. We have had this opinion in stereotype plate since June, but withheld its publication as there was a petition for a re-hearing filed. The application for a re-hearing has been refused, and the opinion now stands as the law of the State. The court also considers the effect of failing to appolnt a guardian *ad litem* in a proceeding to sell the real estate of a minor.

Specific Performance—Tender.—The opinion of the Supreme Court of Indiana, by Downey, J., holding that a vendor cannot bring an action for the purchase money without having executed the conveyance, or offered to do so, unless the purchaser has discharged him from so doing; and on the other hand, a purchaser can not maintain an action for a breach of contract without having tendered a conveyance for execution and the purchase money.

Defamation — Privilege—Witness.—The opinion of the English House of Lords holding that the ordinary rule of law that a witness is absolutely privileged in what he says or writes, in giving evidence before a court of justice, even if he has acted *mala fide*, and with express malice, extends to a witness before a military court of inquiry, called in pursuance of the regulations of the army to inquire into matters of military discipline, though the witness be not examined on oath before such court.

THE COLLEGE OF LAW.

The Union College of Law is entering on its third year with many flattering signs of the success we had predicted for it, from the time it was organized under the charge of the two Universities and with its present numerous and eminent faculty. One hundred and seventeen students have entered for the present year, and entries for the present college year will still be in order during the first half of the first term, or until Nov. 5th. After that, until the first Monday of January (the first day of the second term) students may enter the Junior class for the present school year, on passing a satisfactory examination in the studies pursued during the first term. After the fifth day of November in the Senior class, and the first Monday of January in the Junior class, students entering will be credited with a years's study only at the expiration of a full calendar year from the day they enter. The college is very liberally aided by the services of members of the Bar of Chicago, who are delivering lectures almost daily before the students, instead of on Saturday merely, as during last year.

The R. R. Tax Injunction Cases.—Attorney General Edsall has succeeded in getting the Railroad Tax Injunction Cases advanced in the Supreme Court of the United States. The Chief Justice announced the order to advance these cases on Monday.

Recent Publications.

United States Digest; a Digest of Decisions of the Various Courts within the United States. By Benjamin Vaughan Abbott. New series, Vol. V. Annual Digest for 1874. Boston: Little, Brown, and Company. 1875. Sold by Callaghan & Company, Law Book Publishers, Chicago.

Mr. Abbott has received an enviable reputation as a digester. His first New York Digest is a model. We can but think, however, that some of his later digests are not as concise and clear as his earlier volumes. This may be accounted for from the fact that it is impossible for any one man to do all the labor himself required to produce so many volumes. We would suggest a little more trimming down. This series is of great value to the profession, and no law office is complete without a full set of the United States Digest. We have often heard lawyers remark that they could find cases easier in the United States Digest than in the Digest of their own State. The ink used in printing this volume was of an inferior quality. The press work is carelessly done, and as a consequence, the pages present a dirty appearance, and are not as clear as they otherwise would be. A digest of all other law books should be printed in a skillful manner.

Hubbell's Legal Directory for Lawyers and Business Men, containing the Names of one or more of the Leading and Most Reliable Attorneys in nearly Three Thousand Cities and Towns in the United States and Canada; a Synopsis of the Collection Laws of each State, and Canada, with Instructions for Taking Depositions, the Execution and Acknowledgement of Deeds, Wills, etc., and a Concise Synopsis of the Bankrupt Law, with Registers in Bankruptcy; also, Times for Holding Courts throughout the United States and Territories, for the Year commencing July 1,1875,to which is added a List of Prominent Banks and Bankers throughout the U. S. J. H. Hubbell, Editor and Compiler. J. H. Hubbell & Co., New York.

Mr. Hubbell states accurately in the title page, which we give above, the contents of his Directory. Lawyers will find this volume useful in their practice and more carefully prepared than works of this character usually are. That portion of it relating to Illinois was prepared by the law firm of Carter, Becker & Dale, of this city. The publisher asks those discovering errors to inform him of them so that they may be corrected in future editions.

Cooley on Taxation.—We have been shown by the enterprising publishers, Messrs. Callaghan & Co., of this city, some of the advance sheets of Judge Cooley's work upon Taxation, now going through the press. We are satisfied from the examination we have been able to give them, that this work will occupy the same position with the American bar that the learned author's work on Constitutional Limitations now does—that is, second to none. We congratulate the author upon the selection of his publisher.

Has a widow right of dower in her husband's equity of redemption?—The Washington *Daily Critic* says:

This question, of vital interest to nearly every woman in the District of Columbia, recently came up in the Equity Court, Judge Olin presiding, in the case of Newbern *vs.* Washington *et al.* In this case Mary Newbern, widow of Matthias Newbern, filed her petition for the assignment of her dower in certain real estate, of which her said husband died seized, but upon which he had executed certain deeds of trust; and one to the amount of $125 had been signed by the plaintiff. The defense claimed that the signing of this deed conveyed away the legal title to the estate; and that dower would not therefore attach, although plaintiff offered to redeem by tendering in open court the amount of the deed of trust signed by her, with interest and costs. A case was cited from 12th Peters as bearing upon the subject. Counsel for plaintiff claimed that a deed of trust is not a *de facto* conveyance, but a collateral security for a debt, which may be redeemed at any time before foreclosure or sale, by the payment of the obligation by any party in interest, after which there can arise no question about the attaching of dower. It was further pleaded that under the English law, the law of Maryland, Massachusetts, Ohio, New York, and, in fact, that of nearly every State in the Union, dower attaches to the husband's equity of redemption, although the obligation be not discharged by his widow or heirs. The case was argued at some length. Belva A. Lockwood appearing for the petitioner, and George F. Appleby for the defense. Judge Olin, on the 15th, overruled the demurrer, with leave to answer in ten days, if advised. The ruling was certainly in accordance with what the law ought to be, and if the law thereon is not sufficiently clear, it is high time that there was some more explicit legislation on this subject, especially as three-fourths of the realty in this District is more or less encumbered.

SUPREME COURT OF INDIANA.

Abstract made from recent cases published in the Indianapolis Sentinel.

Recovery of possession of land—Pleading—Evidence.

3781. Lotz *v.* Briggs, Sullivan C. C. Worden, J.

Action by appellant against appellee to recover a strip of land, a part of a town lot described. General denial, and trial by jury, with verdict and judgment for defendant.

The bill of exceptions is properly in the record, being filed within the extended time fixed by the written agreement of the attorneys. The attorney has a right to bind his client under the statute 2 G. & H. 328 section 772.

The plaintiff moved for judgment in his favor on the answers to interrogatories, notwithstanding the general verdict, but the motion was overruled, which ruling is assigned as error. The answer to the interrogatories show that the plaintiff was the owner of the land sued for, but they do not show that the defendant unlawfully kept him out of possession, which is a necessary fact to be alleged in the complaint.

On the trial of the cause, the defendant gave in evidence the record of a former action between the same parties in the same court. As the jury were retiring, they requested permission to take the papers constituting the record to their room to determine the issues involved in that case. This was allowed by the court, though objected to by the plaintiff. This action of the court was erroneous, as was held in 39 Ind., 19; 35 Ind., 492. Reversed.

Subscription to articles of association—Construction of act.

4134.—Reed *v.* Richmond Street R. R. Co.—Wayne C. C.—Downey, J.

Action by appellee against appellant to recover the amount of a subscription to the capital stock of the company. The subscription was made to what purported to be articles of association, and containing also an agreement to pay for the shares subscribed.

The case presents the question as to the proper construction of the first section of 3 Ind. statutes, 422, on the subject of the organization of street railway companies. There was no corporation to whom the benefit of the subscription could inure until the steps prescribed in this section had been complied with, 46 Ind., 142; 47 Ind., 38.

This section, among other things, requires that articles of association shall be subscribed severally, in which, amongst other things, shall be set forth the number of directors and their names. If any one of the requirements of the section be held as merely directory, this court hardly knows where to stop. In this case the requirement just set out was not complied with, the number and the names of the directors not being in the instrument signed by appellant. Reversed.

We are indebted to DANIEL J. AVERY, of the law firm of RUNYAN, AVERY & COMSTOCK, of this city, for the following opinion:

SUPREME COURT OF ILLINOIS.

OPINION FILED JUNE 16, 1875.

ALONZO GAGE et al. *v.* JOHN SCHRODER.

Appeal from Lake.

PAROL EVIDENCE TO PROVE LOST RECORD —EFFECT OF FAILING TO APPOINT GUARDIAN AD LITEM.

1. PROVING LOST RECORD BY PAROL EVIDENCE.—That the court did not err in receiving parol evidence of the contents of the petition, printer's certificate and decree of court ordering a sale of the premises in controversy, which were proved to have been lost. This case is distinguished from that of Bennett *v.* Wolf, where it was held that parol evidence was not admissible to aid or explain a record. In this case the proof was not designed to aid or explain a record, but to prove what the record, as it existed, contained

2. EFFECT OF NOT APPOINTING A GUARDIAN AD LITEM.—That the decree in question in this case was not void, because the County Court failed to appoint a guardian *ad litem* for appellants, who were then minor defendants; that the filing of the petition, and the notice or service confers full jurisdiction to proceed to adjudicate; therefore, the failure of the court to appoint a guardian *ad litem*, or when appointed, his failure to file an answer, while it may be error, cannot be held to be jurisdictional.—[ED. LEGAL NEWS.]

Opinion of the court by WALKER, Ch. J.

It is first objected that the court below erred in receiving parol evidence of the contents of the petition, printer's certificate and decree of court ordering a sale of the premises in controversy, which were proved to have been lost. The case of Bennett *v.* Wolf (unreported,) is referred to in support of the proposition. There is scarcely any analogy between that and this case. In that the record remained full and unimpaired, whilst in this case the record has been lost or destroyed. In that case, the effort was to prove that the notice was sufficient, although, as it appeared on file, it was insufficient. There was, in that case, no question as to the proof of the contents of a lost or destroyed record. The questions are different and involve different rules. In the one case there was a notice on file, but insufficient, and the effort was made outside and independent of the record, to prove a sufficient service by publication. An effort to aid the record by parol, which was held to be inadmissible.

In this case, however, the proof was not designed to aid or explain a record, but to prove what the record, as it existed, contained. A record, when lost or destroyed, may be proved like any other writing, by secondary evidence; and its loss having been shown, no reason is perceived why witnesses, who know its contents, may not be called to prove them. If this was not permitted in cases of this character, where a complete record is not made by the clerk, the title acquired by the purchaser would be liable to be defeated by loss or destruction of the certificate of publication or the petition. It may be that there is some hazard in permitting titles to depend on the frail memory of witnesses, as to the contents of records, but the same objection applies to all verbal evidence of the contents of written instruments. If deemed to be uncertain, or liable to abuse, the General Assembly can readily remedy the evil by restoring the statute requiring the clerk, in such cases, to make a full record of all the proceedings in the case, which could be done with slight cost, and would give stability to such titles.

The evidence that there was a proper notice published and filed in this case, was ample, being proved by the county clerk and Cook, who had both seen the notice and certificate on file. They also testified, in a satisfactory manner, to having seen a petition on file for the sale of this land, by the executor of Gage. We would hardly expect more satisfactory evidence of the contents of a lost record. We regard it amply sufficient to warrant the finding that there had been a proper record of service by publication and a proper petition filed. This was followed by a decree approving of the sale appearing of record, and the executor's deed.

But it is assumed that the decree in this case is void, because the county court failed to appoint a guardian *ad litem* for appellants, who were then defendants. In the case of Peak *v.* Shasted, 21 Ill., 137, it was said that a minor could only appear and defend by guardian. It was also held to be error, in fact, for a minor to defend otherwise than by his guardian, as guardian *ad litem*. The rule was recognized in the case of Hall *v.* Davis, 44 Ill., 494, and in Quigly *v.* Roberts, ib., 503. It was held in Gibson *v.* Rall, 30 Ill., 179, that in cases of this character, the jurisdiction of the subject matter is acquired by filing the petition, and jurisdiction of the person by publication of the notice, and, it should have been said, or by service of the notice as provided by the statute; and the same doctrine was announced in the case of Goudy *v.* Hall, 36 Ill., 313, and other cases might be referred to in our reports announcing the same rule. And it has been said in numerous cases that whether the guardian *ad litem* answer or not, the evidence must be preserved in the record to support the decree. And in Goudy *v.* Hall, supra, it was held that the failure of the guardian to answer for one of the minors, defendants, did not take away the jurisdiction of the court.

If, as we have seen, the filing of the petition and the notice or service, confers full jurisdiction to proceed to adjudicate, then the failure of the court to appoint a guardian *ad litem*, or, when appointed, his failure to file an answer, whilst it may be error, cannot be held to be jurisdictional. Such a failure could not operate to deprive the court of jurisdiction previously acquired. When the infant is brought into court, it is necessary for the guardian to appear for the defendant, as an adult appears by an attorney. And that the infant may be properly defended, it is the duty of the court to appoint a guardian *ad litem*. This is required by the statute.

It then follows that the decree of the county court was valid and binding, the sale regular, and the title which Gage died seized of to this land, passed to the purchaser at the sale by the executor, and plaintiffs below were thus deprived of their title to the same. And having no title for the premises for which this suit was brought, they have shown no right to recover. From what has been said, it is apparent that it is unnecessary to discuss the other question raised and urged for a reversal. None of the instructions refused for appellants could have changed the result, even if they were legally correct. Nor did the court below err in giving appellee's instructions. We perceive no error in this record, and the judgment must be affirmed.

Judgment affirmed.

MCDAID, WILSON & PICHER for appellants.

RUNYAN, AVERY & COMSTOCK for appellee.

SUPREME COURT OF ILLINOIS.

ABSTRACT OF OPINIONS FILED AT SPRINGFIELD, OCTOBER 13TH, 1875.

8.—Henry P. Heazle *v.* I. B. & W. R. R. Co.—Appeal from Champaign.—Opinion by SCOTT, J.

RULE OF NEGLIGENCE AS TO R. R. COMPANIES.

STATEMENT.—Accident to appellant by broken rail throwing passenger cars from the track. Plaintiff was found insensible at the bottom of a culvert. An instruction was given on the trial, at the instance of plaintiff, that the throwing off of the train was *prima facie* evidence of negligence, and threw the burden of proof on the defendant to disprove negligence.

Held, That this was a stricter rule of liability than is warranted by the law.

[However, the defendant did disprove negligence; and the jury returned a special verdict that "plaintiff was guilty of greater negligence than the defendant." The greater part of the opinion is a review of the evidence.]

No. 18.—W. W. Chapman *v.* F G. Burt.—Appeal from Morgan.—Opinion by CRAIG, J.—6 pp.

NEWLY DISCOVERED EVIDENCE NOT MERELY CUMULATIVE—WHAT IS PAYMENT TO AN ATTORNEY—INTEREST ON MONEY COLLECTED BY AN ATTORNEY—DEMAND ON ATTORNEY FOR MONEY, WHEN NOT NECESSARY—WEIGHT OF EVIDENCE—EXPLANATION OF RECEIPT FOR MONEY.

STATEMENT.—Appellant, an attorney, received from appellee, for collection, a note executed by five makers—two named Gibson, and three named Bruces. After judgment thereon, the two Gibsons sold their interest in a mill to their partners, the Bruces, the purchasers agreeing to pay the indebtedness of the firm, including the judgment. Up to April, 1867, the Bruces had large dealings with the appellant after the said sale; and at that date (April 1) had a settlement with him, they giving their note for $550 balance. On the 21st one-fifth of the judgment was paid, and the Bruces testified that in this note of $550 was included a proportion of the judgment, amounting to three-fifths thereof; on which point there was a close conflict of evidence on the trial of the present case—the appellant denying such payment in the note, and this suit having been brought to recover the amount of the judgment, which had been collected by the appellant, as attorney for appellee. The verdict in this case was for four-fifths of the judgment and interest for the greater part of the time after April, 1867. In the conflict of testimony, or evidence, two receipts were introduced, one, reciting the payment by D. H. Gibson of his share of the judgment, and containing a clause indemnifying him from any farther payment thereon, and the other releasing two of the Bruces in like manner, except that no plaintiff was named herein, and the judgment was said to be in "The circuit court of Illinois," and bearing date April 1, 1867, the day of the above mentioned settlement. Motion for new trial overruled, the case having been submitted to two juries—the first disagreeing. It was also contended that, in any event, appellee ought not to recover because, even on his own showing, the appellant did not receive money, but only a credit on settlement in payment of the judgment. In support of the motion for a new trial, the fact of newly-discovered evidence was alleged, which, however, seems to have been only a clearer statement on the books than was given in the testimony on the trial. *Held*,

1. That such evidence was merely cumulative, and no ground for a new trial.

2. The appellant could not object that he had received something other than money on the judgment. The appellee could repudiate his act therein, or, otherwise, ratify it, and sue for money had to his use.

3. When money collected by an attorney has been held and not paid over within a reasonable time, the attorney may be held liable for interest thereon, as well as for the payment of the amount.

4. In such a case no demand is necessary, the holding an unreasonable time being virtually an appropriation of the money to the individual use of the attorney.

5. It belongs to the jury to weigh evidence, and the Supreme Court will not interfere unless it is clearly manifest that the jury mistook the evidence, or were governed by passion or prejudice. And the fact that two juries have passed upon a case—the one disagreeing, the other deciding—furnishes, of itself, a strong presumption that, at least, the verdict is not clearly wrong.

6. A receipt uncertain in its terms may be explained, and its meaning determined by testimony.

41.—Lewis W. Ross *v.* C. B. & Q. R. R. Co.—Appeal from Peoria.—Opinion by SCHOLFIELD, J. 16 pp.

AMENDMENT CHANGING ORIGINAL PURPOSE OF A STATUTE—EXTENSION OF ROUTE AND OF BRANCHES OF RAILROADS—TWO SUBJECTS IN TITLE OF ACT—CHANGE OF CHARTER AND ITS EFFECT ON SUBSCRIPTION—ESTOPPEL—TIME OF THE ESSENCE OF A CONTRACT OF SUBSCRIPTION.

STATEMENT.—Appellant sued appellee in ejectment, to recover a strip of ground in its possession; whereon the suit was enjoined by bill in chancery, and a decree rendered that appellant convey the land to appellee, which had derived title from the Peoria and Hannibal Railroad Company.

The first objection to the decree was that the P. & H. R. R. Co. had no valid charter, and consequently no existence, the charter being passed at a special session of the legislature convened by the governor, February 9th, 1854, and the passage of the charter not being specified in the proclamation as one of the purposes of calling the special session. This proclamation specified as one of the purposes, "to amend charters of towns, cities, railroads, etc., and to extend the same." The regular session of the legislature of 1853 chartered the original company, under the name of the "Macomb, Vermont and Bath R. R Co." and prescribed its route. The special session changed the name to P. & H. R. R. Co., and vacated a part of the proposed route, and repealed expressly several sections of the original charter.

Held, That, while the court will not undertake to say how far the original purpose of a statute may be changed by an enactment professing only to amend it, the legislative will cannot be disregarded unless it is clearly wrong.

The second objection was that the charter was unconstitutional in that it expressed more than one subject in its title, namely, the location and construction of more than one line of road—although only one company was created thereby.

But *held* that the additional extent of road authorized thereby was only an extension, and would form but one continuous line; and therefore, the charter is not objectionable on this ground. A railroad company may properly be authorized even to extend branches, and these will not be construed to be distinct and independent roads.

It was again objected that the written agreement of Ross to convey was not binding, because the road was not completed within eight years, as required by the amendatory act; and also because by a subsequent amendment, the company were allowed to divide the line of road into sections, and complete it in that way.

But *held*, 1. That Ross was estopped by the fact that the was a director of the road, and accepted the amendments to the charter; and actively participated in the doings of the company thereunder.

2. That, allowing the company to divide the road into sections for the purposes of construction, did not break the unity of the design; and therefore did not release subscribers from their obligations; the original corporation remained the same, and the design of the amendment was simply auxiliary to the main design of the corporation.

3. That Ross cannot be regarded as accepting an amendment as a stockholder and director, and then objecting as an individual. There is no basis for such distinction.

4. The charter did not irrevocably fix the time of completion, and it was competent for the legislature to extend it, or change it, by the consent of the company. The State alone could take advantage of a failure, on behalf of the company, in this respect. And while Ross might have made time of the essence of his contract by an express stipulation, yet, as he did not do so, it will not be so regarded, unless there had been an abandonment of the enterprise, which is not the case herein.

5. He was also estopped by allowing the company to take possession of the land without any notice that he intended to revoke the agreement. And so, in regard to route, if any limitations were to have been insisted upon, except the range of the charter itself, these should have been inserted in the written offer to convey.

Held, also, That, by a subsequent agreement, by which Ross was to dismiss two suits against appellee—one ejectment for the strip of land, the other trespass—in consideration of the construction of a cattle pass, which was mutually carried out, he was estopped to deny the right of the company to the possession of the land.

44.—Quincy Railroad Bridge Co. *v.* City of Quincy.—Error to Adams.—Opinion by SCOTT, J. 3 pp.

REVENUE CASES—APPEALS UNDER ACT OF 1873—ACT OF 1874 NOT RETRO-ACTIVE AS TO APPEALS AND WRITS OF ERROR.

STATEMENT.—In December, 1873, an appeal was prayed by the plaintiff in error from a judgment in the County Court for taxes. This was allowed, but the appeal was never perfected. After the act of 1874 had gone into effect, a writ of error was sued out, which was dismissed by the Supreme Court. *Held*,

1. That no writ of error would lie in revenue cases under the act of 1873, but only an appeal.

2. That, although the act of 1874 expressly provides for a writ of error, as well as an appeal, yet it cannot be construed as having a retro-active effect in the absence of any declaration therein, that it was so intended by the legislature.

65.—I. B. & W. R. R. Co. *v.* Michael J. Flannigan.—Appeal from Tazewell.—Opinion by SCOTT, J. 10 pp.

R. R. LIABILITIES TO EMPLOYEES—THIS CASE DISTINGUISHED FROM T. W. & W. R. R. CO.

V. FREDERICK, IN WHICH THE COMPANY WERE HELD LIABLE.

STATEMENT.—Appellee was a freight-conductor on the road of appellant and was injured in attempting to uncouple some freight-cars belonging to another company, so that an amputation of the arm became necessary. These cars—as is common with through-freight cars, but not with way-freight cars—had double "buffers" or "dead-wood." In setting off the cars he found it necessary to couple them with a car of the White Line company, previously standing on the track, and thus the accident occurred. It was contended that the company were liable on two grounds: 1st. That the draw-bar on the still car was not properly constructed, or was out of repair. 2d. That the cars were equipped with the double buffers. *Held*,

1. That even were the draw-bar out of repair, if it had suddenly become so, the company would not be liable therefor, unless attention had been called to the fact, or the company could have discovered it in the exercise of a high degree of care, and there had been opportunity of making repairs. The ground of liability is only negligence.

2. It being the case that, by general usage, the double-buffers are employed on through-freight cars, and these cars being mutually accepted to be drawn on the various roads as necessity requires, the company cannot be held liable for accidents resulting from their use, especially as in through freights. They are approved as beneficial throughout the country, and can, with due care, be safely operated.

3. An employee contracts with reference to all ordinary hazards, and his not having had previous experience in regard to particular appliances does not make the company liable for his injuries, and particularly as he can leave the service at any time when he discovers unexpected hazards connected with the employment.

4. The case of T. W. & W. R. R. Co. *v.* Fredericks (Jany. Term, 1874), is distinguished from this in that the defect, or vicious construction, in that case, was not peculiar to a class, but to a particular car, wherein the draw-bar was too short, and it appeared that otherwise the injury would not have occurred. One just entering the service could not be expected to discover the defect in that particular instance, and the company were besides held to have known of it.

5. There is no such rule of liability as that of a greater degree of negligence on the part of defendant.

78.—John T. McDavid et al *v.* Margaretta Adams.—Appeal from Montgomery.—Opinion by SCOTT, J.—1 p.

MARRIED WOMAN'S EARNINGS PRIOR TO ACT OF 1869.

STATEMENT.—Suit brought by appellee for services as housekeeper, rendered prior to 1864, while appellee's husband was in the army—the husband still living at this time. *Held*,

That the right of action was alone in him; as the act of 1869, giving a married woman the right to recover for her personal service, had no retro-active operation.

90.—James D. Kilgore *v.* A. B. Ferguson et al.—Appeal from Ford.—Opinion by SCHOLFIELD, J.—7 pp.

NON-ACCEPTANCE OF OFFICIAL BOND—WHAT MUST BE ALLEGED AND PROVED IN ACTION ON THE CASE THEREFOR.

STATEMENT.—Action on the case against the members of the Board of Supervisors for refusing to approve an official bond of plaintiff, as treasurer of the county, the bond being alleged by him sufficient. The sureties on a former bond had been released, and this was a second bond. Judgment for defendants or demurrer. *Held*,

That it was not sufficient for the declaration to aver that the bond was good and sufficient, but it must set out the facts specifically which made it good, and thus make it appear that the members of the board acted corruptly and wilfully in refusing it.

96.—Teutonia Life Insurance Co. *v.* John F. Anderson.—Appeal from St. Clair.—Opinion by SCOTT, J.—5 pp.

LIABILITY OF INSURANCE COMPANY WHERE PREMIUM NOT PAID AT DEATH, BUT NO FORFEITURE HAD PREVIOUSLY BEEN DECLARED ON THE DEFAULT.

STATEMENT.—The policy of insurance declared on in this case was taken on the life of Franklin Anderson, by the "Bismark Bund," and payable to appellee. The Bund was to pay the premiums, in consideration that the assured should pay his weekly dues to the Bund.

The defense to the action was that the Bund had refused to pay the last premium due, because the assured was in default with his weekly dues.

Held, That, in such case, the Bund could have had the policy cancelled for non-payment of the weekly dues. Or the company, on non-payment by the Bund, could have declared a forfeiture under the terms of the policy, in the lifetime of the assured. But as neither of these steps was taken, the company was liable; its neglect to declare the forfeiture being construed as an election to continue the risk notwithstanding the non-payment.

100.—I. B. & W. R. R. Co. *v.* Walker McLaughlin et al.—Appeal from Tazewell.—Opinion by SCHOLFIELD, J. 6 pp.

TRESPASS TO LANDS IN THE HANDS OF A TENANT—WHO MUST SUE.

STATEMENT.—Trespass quare, etc. Judgment $400, and appeal.

The lot belonged to the wife, who is joined with the husband in this suit. The trespass complained of was excavating a roadway for a few feet, and operating the road therein by the railroad company. After the road was completed, a dwelling house was erected on the lot, costing about $900, and used by plaintiffs as a residence for a time, and then let to tenants.

The question for decision is thus stated by the court, "Can the plaintiffs recover jointly, as well for a permanent injury to the realty, and injury to the possession, when the property was in the possession of tenants, as for injury to the possession when they actually occupied the property?" *Held*,

1. That where there is no evidence of a husband's right of reversion to real property, in that no birth of living issue is shown, he may join with his wife in suing for damages done to the actual possession of himself and wife jointly, but no farther.

2. The owner of land cannot sue for damages to possession where the land is in the possession of a tenant merely; but only for injuries affecting the reversion.

AGENCY; RATIFICATION: EXPRESS AND IMPLIED.

A ratification may be expressly made or it may be implied from circumstances. When one individual deliberately, whether with full knowledge, or without inquiry, ratifies the act or conduct of another, no question arises respecting the fact of ratification. When, on the other hand, there is no express ratification, it becomes important to consider what circumstances have been held sufficient in our courts of law to warrant the inference that a ratification may be implied from them. With respect to the general nature of the evidence that will be thought sufficient to establish a ratification, the remarks of the learned judges in *Fitzgerald* v. *Dressler* (7 C. B., N. S., 374) may be studied with advantage. To establish a case of authority by ratification there must be some substantive proof; it must not rest upon probability or conjecture (per Crowder, J. *ib.* at p. 397); certainly it would be very unsafe to say that because there is a strong probability of the existence of a state of things from which a prior authority or a subsequent ratification might be inferred, a jury would be warranted in acting upon it as if there were strict legal proof: (see per Williams, J., *ib.* 396). In the same case Willes, J. (at p. 398) points out that it is not competent to a jury, when dealing with the acts of a third party, to act upon probabilities, "there being no original authority in H." Said the same learned judge, "to make the promise, it was a thing done by him out of the ordinary scope of his duty; and though there was a moral duty cast upon him to communicate to his employer the fact of his having made the promise, it was nothing more than a moral duty, and the rule *Omnia præsumuntur rite esse acta donec probetur in contrarium* is never applied to such a duty as that."

The rule requiring substantial proof of a ratification is, with good reason, applied to cases of trespass. By the common law, if a principle agree to a trespass after it is done, he is no trespasser "unless the trespass was done to his use or for his benefit: (C. Inst. 4, 317.) Besides, it should not be forgotten in action for false imprisonment, that courts of law will take care that people are not put in peril for making complaint when a crime has been committed (per Pollock, C. B., in *Grinham* v. *Willey*, 4 H. & N. 496), and see the observations of Lord Cranworth and Alderson, B. in *Gosdon* v. *Elphick* (4 Ex. 445, 447). A plaintiff having been apprehended at the instance of the defendant's son, on a charge of obtaining money by false pretences, of which charge, after a remand, he was acquitted, brought an action for trespass and false imprisonment against the father. There was no proof that the son was authorized to make the charge; but there was evidence that after the remand the defendant, when told by his son that he had caused the plaintiff to be apprehended, said he would have nothing to do with it. The court held that there was no evidence of a ratification: (*Moon* v. *Towers*, 8 C. B., N. S., 611.) "No man," said Willes, J., "ought, as a general rule, to be responsible for acts not his own."

In questions of ratifications by railway companies of the unauthorized acts of their servants, it is manifestly material to consider whether the act complained of could be said to have been for the use or benefit of the company. For instance, it has been held that the assault and imprisonment of a passenger liable for the non-payment of his fare, is an act which might have been for the benefit of the company and hence might be ratified: (*Eastern Counties Railway Company* v. *Broom*, 6 Ex. 326, 327; *Rowe* v. *Birkenhead, Lancashire, and Cheshire Railway Company*, 7 Ex. 36.)

It is generally laid down in text books that a small matter will be evidence of such assent as will support a plea of ratification: (Paley on Agency, 171; Chitty Com. Law iii., 199; Story Agency, 252.) The cases cited in support of the statement contain nothing inconsistent with the above principle, for in all these there was evidence which did not rest merely upon probability or conjecture: (See *Ward* v. *Evans*, 6 Mod. 37; *Thorald* v. *Smith*, 11 Mod. 88; 2 Lord Raym. 93.) There are two rules respecting ratification which may be noticed here. The first is that if a principal ratifies and adopts the agent's acts, even for a moment, he is bound by them: (*Smith* v. *Cadogan*, 2 T. Rep. 189.) In other words, after ratification there is no *locus pœnitentiæ*. The second rule is that there can be no ratification of a part only of a transaction. In other words, the law does not allow one part of a transaction to be affirmed and the rest to be disavowed. No one shall "blow hot and cold." Hence, to treat a party as one's agent in respect to one part of a transaction, is equivalent to a ratification of the whole transaction: (*Wilson* v. *Poulter*, 2 Str. 859; *Hovil* v. *Pack*, 7 East, 164; *Small* v. *Attwood*, 6 Cl. & F. 232.) For instance, if a principal ratify a contract made by his agent, he incurs the same liabilities as if he had originally authorized it: (*Wilson* v. *Tummon*, 6 M. & Gr. 236; *Smethurst* v. *Taylor*, 12 M. & W. 554; *Doe* v. *Goldwin*, 2 Q. B. 143.) Again, an adoption of a contract by an undisclosed principal is an adoption *in omnibus*; hence, if the contract embodies an agreement that the defendant should set off a debt due him from the agent, the principal must take the contract subject to this agreement: (*Ramozetti* v. *Bowring*, 7 C. B., N. S., 851, per Erle, C. J.)

The following cases are selected as illustrative of the nature of the evidence necessary to prove a ratification:

In *Granby* v. *Allen*, (Ld. Raym, 224) trover was brought to recover money paid by the pfaintiff's wife for land conveyed to her by the defendant, and it was held by Holt, C. J., that the husband could recover money so laid out, unless he was either privy to the purchase or consented to it afterwards.

In *Howard* v. *Baillie*, (2 H. Bl. 618), it was held that if the agent of an executor accept a bill, and the executor admit that the bill accepted with his knowledge is for a just debt and ought to be paid, there is sufficient evidence of a ratification of the agent's act in accepting the bill.

In *Haseler* v. *Lemoyne* (5 C. B., N. S., 530). A. was the general agent to manage B's property. He signed a warrant to distrain the goods of C., a tenant, for arrears of rent. After the goods had been distrained B. said she should leave the matter in A.'s hands, and it was held that this amounted to a ratification of A.'s acts.

Benham v. *Batty* (12 L. T. Rep. N. S. 266) was an action to recover a deposit. The defendant employed an agent to sell the lease of a certain house. The latter exceeded his authority, and took a deposit for the conveyance of a longer term than he was authorized to dispose of. The defendant refusing to complete this agreement, the plaintiff applied to the agent for a return of his deposit. Before he would do so he required an order from the defendant, and it was held that the order so given was evidence of a ratification of a previous general authority, so as to make the defendant liable for the deposit.

Fitzmaurice v. *Bayley* (6 El. & Bl. 868), is an instance of a ratification without inquiry. An agent exceeded his authority in agreeing for the purchase of certain buildings. A dispute having arisen the plaintiff wrote respecting the agent's authority, "I left everything to him" (the agent) "desiring him to do the best he could. What he has done for me I know not; but of course I must support him in all he has done for me, except incivility." This was held to be a full ratification of the agent's agreement.

In *Hawley* v. *Sentance* (7 L. T. Rep. N. S. 745), an agent for the purchase of goods on credit paid for certain goods out of his own money. This fact was known to the principal, who directed the agent to clear the goods at the Custom House. In the usual course of business this would be done after payment of the price by the agent for the principal. This direction was held to be a ratification of the previous payment by the agent, so as to enable him to sue the principal for the price as money paid to his use at his request.

Under the following circumstances it was held that there was no ratification: A. sold, through D. and Co., brokers, a quantity of linseed to B., who afterwards sold it to C. at a higher rate through the same brokers. C. being in want of the linseed sent a clerk to D. and Co. for the delivery order, with instructions to follow up the matter. D. and Co. took the clerk to A., who gave the delivery order upon the clerk promising that B. would pay A. On the following day C. sent a cheque to D. and Co. for £900 on account of the linseed, the precise quantity not being known. Afterwards, when it was measured, A. was found on the contract with B. to be entitled to receive £971 15s. 6d. It was held that there was no evidence to warrant a jury in finding a ratification by C. of the contract which the clerk had so made, since it was not proved that the clerk had communicated to C. what had passed between him and the plaintiff when he obtained the order.

A ratification might also be implied from the form of action adopted for the enforcing of one's rights. In *Smith* v. *Hodson* (4 T. R. 211, and see *Ferguson* v. *Carrington*, 9 B. & C. 59) it was held that if a bankrupt on the eve of his bankruptcy deliver goods to one of his creditors, the assignees may disaffirm the contract and recover the value of the goods in trover, but if they bring assumpsit they affirm the contract. Hence the creditor might set off his debt in the latter case.

In conclusion, it may be laid down as a rule that a ratification may be inferred from acquiescence. But this acquiescence may itself be either express or it may be implied. It may be implied from an act, as in some of the above instances, or, in short, from any circumstances which clearly indicate an intention to adopt the unauthorized act or conduct of the agent. In all cases when the acquiesence has been implied from an act, it will be found that the principal has done something which assumes the authorization and validity of the act that awaited ratification, such, for instance, as bringing an action which postulates as a condition for its main tenance the adoption of a previously unauthorised act of the agent. (See the cases cited above.)—*The London Law Times.*

A NICE POINT IN NEWSPAPER COPYRIGHT.—An important question as to the law of copyright in newspaper telegrams has lately been debated in the Supreme Court, Melbourne. The proprietors of the *Argus* pay a large sum for the purpose of obtaining the latest telegrams

from Europe. Any newspaper proprietors who may wish to publish the telegrams so obtained can do so by paying a contribution towards the expenses incurred. The proprietor (Mr. Luke) of the *Gipps' Land Mercury*, a newspaper published at Sale, in Gipps' Land, had made an agreement to pay for the right of republishing the telegrams. This agreement was carried out for several months, when Mr. Luke cancelled it. The European telegrams received by the *Argus* were, however, republished in another form, as from a Melbourne correspondent of the *Mercury*, with the preliminary words, "It is reported," or "The news about town is—." This was considered a breach of the copyright which the proprietors of the *Argus* possessed in the telegrams, and, as there was another newspaper at Sale that did contribute towards the expenses of the receipt of the telegrams, a suit was instituted in the Equity Court to restrain Mr. Luke from republishing the telegrams. It was argued for the defendant that as the telegrams were matters of news, anyone could republish them without breach of the Copyright Act. Molesworth, J., held, however, that the plaintiffs had a property in the telegrams, and that no one could republish them without the permission of the persons to whom they had been sent in the first instance. An injunction was therefore granted to restrain the defendant from publishing the telegrams.—*The London Law Times.*

SUPREME COURT OF MICHIGAN.

NOTES OF DECISIONS OF THE OCTOBER TERM, 1875.

BY HENRY A. CHANEY, ATTORNEY AT LAW.

Home Insurance Company v. *Curtis.*—Error to Saginaw. Opinion by Marston, J. Affirmed with costs.

Where, in a suit on an insurance policy, the company, while pleading the general issue, relies on a failure to make good a representation, etc., not contained in the policy, but sets forth in some other instrument in the insurers' hands the notice attached to the plea must declare the instrument and indicate the breach. The defense is one that can be waived, and omission to give the notice implies a waiver of it. And this must be done whether evidence showing such breach is incidentally given by the opposite side or not.—[Circuit Court rule 10.]

If insurance agents advance to the company the money for a premium and take the note of the insured for the amount, and negotiate it, the condition of the policy that the premium shall be actually paid before the company becomes liable, is sufficiently complied with, and the company cannot cancel the policy without notifying the assured and refunding or offering to refund the unearned premium.

It is sufficient delivery of an insurance policy to leave it in the hands of the agents of the company, if they are willing to retain it, subject to the order of a third person, even though he does not call for it.

One cannot go to trial on the merits, voluntarily take his chances of the result, and then question the jurisdiction. The previous filing of a bond and petition for the removal of the case, without taking any further step, will not avail against such a manifest abandonment of the right to a removal.

Keator v. *People.*—Error to Ingham. Conviction affirmed. Opinion by CAMPBELL, J.

Where a witness had had no settled place of residence for any length of time, an impeaching witness was allowed to show what his reputation had been at a place where he had been living four years before the trial.

It is proper, on direct examination, to ask an impeaching witness if he would believe the impeached witness under oath.

As a court must have judicial knowledge of the position and action of those who act as its officers, no better evidence of their official character is needed than proof that they openly act in court in such capacity; this is so in a trial for perjury where it appears that the oath has been administered by a man acting as deputy clerk.

An information cannot be made better or worse for inserting or omitting a matter judicially noticed.

An information for perjury need not show the date at which the oath was taken; it is enough to identify the trial.

Where a full and correct charge was given, certain introductory phrases and cautionary comments on the mode employed in impeaching testimony, were held not prejudicial.

Ochsenkel v. *Jeffers.*—Error to Saginaw. Reversed with costs and new trial granted. Opinion by MARSTON, J.

The rule that parol evidence is inadmissible to vary a written contract does not apply to instruments fraudulently drawn with intent to deceive; otherwise it would shield the wrong-doer.

ENGLISH CUSTOM TO DEFER THE BURIAL OF A PERSON DYING IN DEBT.—No such disgraceful custom as deferring the burial of a person dying in debt ever prevailed in any of the American States, and even in England it would be denied that this custom ever had an existence there if it were not supported by as good an authority as LYNDWOOD. The London *Law Times* of October ninth says:

An application made by an undertaker named TITFORD, at the Clerkenwell Police Court a few days ago, serves to demonstrate to what a very great extent ancient customs remain, and are handed down by verbal tradition among the lower classes. It appears that some person had died owing £9 to his landlord, and that, although the relations wished to remove and to bury the body as soon as possible, yet that the landlord refused them permission to remove the corpse, because the debt had not been discharged. Mr. HANNAY, the sitting magistrate, very properly explained to the applicant that the landlord had no power to detain the corpse, hinting at the same time that if not given up at once, the sanitary authorities would interfere. How far the sanitary authorities might interfere with effect is very doubtful, the only statute, to our knowledge, conferring such power directly being restricted to the City of London (The City of London Sewers Act 1848), but there is no doubt whatever that, if not the sanitary authorities, certainly the relations, might remove the corpse without any payment whatsoever of the landlord's claim, and, moreover, that the landlord would be liable to an indictment should he attempt to oppose them. A case in the Common Bench, where a woman, who feared that the dead body of her son would be arrested for debt, was holden liable upon a promise to pay in consideration of forbearance, though she was neither executrix nor administratix, having been cited to Lord ELLENBOROUGH in *Jones* v. *Ashburnham* (4 East. 460), that learned Judge remarked that it is impossible to contend that this last forbearance could be a good consideration for an assumpsit, for to seize a dead body upon any such pretence would be *contra bonos mores* and an extortion upon the relatives. And the same was held in the case of *Reg.* v. *Fox* (2 Q. B. 246), where Lord DENMAN, being Chief Justice, a peremptory *mandamus* was awarded to deliver up a corpse detained for debt to the executors, and in the same matter an indictment was subsequently preferred against a person named SCOTT, who pleaded guilty to it. Yet, according to LYNDWOOD, who compiled the Provinciale, or constitutions of fourteen archbishops of Canterbury, there seems to have been once a custom in England to defer the burial of a person dying in debt. That such, however, is no longer the case the above quoted cases abundantly show; added to which, it was held in *Reg.* v. *Stewart* (12 A. & E. 779) that the individual under whose roof a poor person dies, is bound to carry the body decently covered to the place of burial. This is still the common law of England. The landlord, in the case before Mr. HANNAY, besides losing his £9, had, it seems, a supercumbent duty cast upon him.

UNITED STATES SUPREME COURT.

PROCEEDINGS OF.

Wednesday, Oct. 20, 1875.

On motion of J. Storrow, Benjamin F. Brooks, of Boston, was admitted.

No. 30. Enoch Piper v. George T. Moon et al. The argument of this cause was commenced by Causten Browne for appellant, and by George Gifford for the appellees, and concluded by Causten Brown for appellant.

No. 401. The Leavenworth, Lawrence and Galveston Railroad Co. v. The United States.

No. 471. The Missouri, Kansas and Texas Railway Company v. The United States.

The argument for these causes was commenced by P. Phillips for the appellants.

Adjourned until Thursday at 12 o'clock.

Thursday, Oct. 21.

On motion of P. Phillips, Rufus E. Lester, of Savannah Georgia, was admitted.

No. 401. The Leavenworth, Lawrence and Galveston Railroad Company, appellants, v. The United States.

No. 471. The Missouri, Kansas and Texas Railroad Company, appellants, v. The United States.

The argument of these causes was continued by P. Phillips of counsel for the appellants, by Solr. Gen. Phillips for the United States, and by William Lawrence and J. S. Black, in behalf of settlers claiming under the United States.

Adjourned until Friday at 12 o'clock.

Friday, Oct. 22.

On motion of S. U. Pinney, Harlow L. Comstock, of Canandaigua, N. Y., was admitted.

No. 401. The Leavenworth, Lawrence and Galveston Railroad Co. v. The United States.

No 471. Missouri, Kansas and Texas Railroad Company, appellants, v. The United States. The argument of this case was continued by J. S. Black in behalf of the settlers claiming under the United States, and concluded by George F. Edmunds for the appellants.

Adjourned until Monday at 12 o'clock.

Monday, Oct. 25.

On motion of M. H. Carpenter, L. S. Dixon, of Milwaukee, was admitted.

On motion of P. Phillips, Thomas L. Bayne, of New Orleans, La., was admitted.

On motion of W. H. Smith, Thomas Carrington Woodward, of Iowa, was admitted.

No. 25. Francis Dainese v. Charles Hale. In error to the Supreme Court of the District of Columbia. Bradley, J., delivered the opinion of the court, reversing the judgment of the Supreme Court, with costs, and remanding the cause, with directions to allow the defendant to amend his plea on payment of costs.

No. 10. Edwin Matthews v. Nelson McStea. In error to the Court of Common Pleas for the city and county of New York city. Strong, J., delivered the opinion of the court, affirming the judgment of the court of Common Pleas with costs.

No. 9. The Wilmington and Weldon Railroad Company v. Henry King executor, etc. In error to the Supreme Court of the State of North Carolina. Field, J., delivered the opinion of the court, reversing the judgment of the said Supreme Court, with costs, remanding the cause for further proceedings, in conformity with the opinion of this court.

Dissenting—Bradley, J.

No. 28. John D. M. Lemore v. The Louisiana State Bank. In error to the Circuit Court of the United States for the District of Louisiana. Davis, J., delivered the opinion of the court, affirming the judgment of the Circuit Court with costs.

No. 502. The Farmers and Mechanics National Bank of Buffalo v. Peter C. Dearing. In error to the Court of Appeals of the State of New York. Swayne, J., delivered the opinion of the court, reversing the judgment of the Court of Appeals with costs, and remanding the cause for further proceedings in conformity with the opinion.

No. 27. Thomas J. Semmes v. The United States. In error to the Circuit Court of the United States for the district of Louisiana. Clifford, J., delivered the opinion of the court, affirming the judgment of the said Circuit Court with costs.

No. 4. William J. McComb, surviving executor, v. The County Commissioners of Knox county. In error to the Court of Common Pleas for the county of Richmond, State of Ohio. Waite, C. J., announced the decision of the court, dismissing the writ of error in this cause with costs.

No. 26. Edward Burgess v. James C. Babbitt, assignee, etc. In error to the Circuit Court of the United States for the eastern district of Missouri. Waite, C. J., announced the decision of the court, affirming the judgment of the Circuit Court with costs.

No. 13. Peyton Grymes v. George S. Repplier et al. Waite, C. J., announced the order of the court granting the motion to make proper parties.

No. 12. George D. Snow, impleaded with P. B. Clark, executor, etc. v. George W. Chapman, executor. Waite, C. J., announced the decision of the court, granting the motion to revive this cause.

No. 609. Board of Liquidation of the State of Louisiana et al. v. Henry S. McComb. Waite, C. J., announced the decision of the court, granting the motion to advance this cause.

No. 701. H. B. Miller, collector, etc. et al. v. Morris K. Jessup, et al. No. 702. Isaac Taylor, collector, etc. et al. v. James F. Secor et al. No. 703. Herman Lieb et al. v. Henry P. Kidder et al. Waite, C. J., announced the order of the court, granting the motions to advance these causes.

No. 800 Baltimore and Ohio Railroad Company v. Oden Bowie. In error to the Supreme Court of the District of Columbia. On motion of R. T. Merrick, docketed and dismissed with costs.

No. 801. County of Lyon v. John R. Ford. No. 802. County of Lyon v. W. S. Gilman. No. 803. County of Lyon v. William W Phelps. Appeals from the Circuit Court of the United States for the district of Iowa. On motion of Thomas Wilson, docketed and dismissed with costs.

No. 804. Angelina Amory v. Samuel B. Amory et al, executors. Appeal from the Circuit Court of the United States for the eastern district of Wisconsin. On motion of S. U. Pinney, docketed and dismissed with costs.

No. 805. Francis L. Cardoza, State treasurer v. State of South Carolina et al., P. F. Frazer. In error to the Supreme Court of the State of South Carolina. On motion of P. Phillips, docketed and dismissed with costs.

No. 20. The Winona and St. Peter Railroad Company v. John D. Blake et al. The argument of this cause was commenced by B. C. Cook for plaintiffs, and continued by W. P. Clough for defendants.

Adjourned until Tuesday at 12 o'clock.

Tuesday, Oct. 26.

No. 20. The Winona and St. Peter Railroad Co. v. John D. Blake et al. The argument of this cause was continued by W. P. Clough of counsel for the defendant in error, and concluded by Judge C. B. Lawrence, of Chicago, Illinois, for the plaintiff in error.

Adjourned until Wednesday at 12 o'clock.

MASTERS' SALES.

BENJAMIN D. MAGRUDER,
Master, 154 LaSalle Street.

STATE OF ILLINOIS, COUNTY OF COOK, SS.—Superior court of Cook county. In chancery. Henry T. Curtiss, complainant, vs. Isaac N. Hardin, Gertrude H. Hardin, John Esaias Warren, Charlotte R. Warren, Thomas Lord, Peter K. Dederick, Henry S. Monroe, trustee, and Susan B. Ward, defendants.

[Foreclosure of Mortgages.]

Public notice is hereby given, that in pursuance of a decree entered in the above cause on the 20th day of October, A. D. 1875, I, Benjamin D. Magruder, master in chancery of said court, will, on Tuesday, the 23d day of November, A. D. 1875, at the hour of ten (10) o'clock in the forenoon of that day, at the west door of the north doors of the building used as a court house, situated on the southeast corner of Adams and LaSalle streets, in Chicago, Cook county, Illinois, sell at public vendue, for cash in hand, to the highest and best bidder, all the premises, situate in the county of Cook and State of Illinois, known and described as lots numbers 8, 9, and 10, in block number one (1), in Bowen and Smith's subdivision of that part of the north half of the northwest quarter of the northeast quarter of section number three (3), township 38 north, range 14, east of the third principal meridian, lying between Thirty-ninth street (otherwise Egan avenue) and Fortieth street (otherwise Union Stock Yard railroad) and between Kankakee and and Vincennes avenues, with the appurtenances thereunto belonging.

Dated October 30th, 1875.

BENJAMIN D. MAGRUDER,
Master in Chancery of the Superior Court of Cook County.

MATTOCKS & MASON, Complts. Solrs. 6-9

STATE OF ILLINOIS, COUNTY OF COOK, SS.—Superior court of Cook county. In chancery. Hiram Hyde, complainant, vs. Isaac N. Hardin, Gertrude H. Hardin, John Esaias Warren, Charlotte R. Warren, Thomas Lord, Peter K. Dederick, Henry S. Monroe, trustee, and Susan B. Ward, defendants.

[Foreclosure of Mortgages.]

Public notice is hereby given, that in pursuance of a decree entered in the above cause on the 20th day of October, A. D. 1875, I, Benjamin D. Magruder, master in chancery of said court, will, on Monday, the 22d day of November, A. D. 1875, at the hour of ten (10) o'clock in the forenoon of that day, at the west door of the north doors of the building used as a court house, situated on the southeast corner Adams and LaSalle streets, in Chicago, Cook county, Illinois, sell at public vendue, for cash in hand, to the highest and best bidder, all the premises, situated in the county of Cook and State of Illinois, known and described as lots number 11, 12, and 13, in block number one (1), in Bowen and Smith's subdivision of that part of the north half of the northwest quarter of the northeast quarter of section number three (3), township 38 north, range 14, east of the third principal meridian, lying between Thirty-ninth street (otherwise Egan avenue) and Fortieth street (otherwise Union Stock Yard railroad) and between Kankakee and Vincennes avenues, with the appurtenances thereunto belonging.

Dated October 30th, 1875.

BENJAMIN D. MAGRUDER,
Master in Chancery of the Superior Court of Cook County.

MATTOCKS & MASON, Complts. Solrs. 6-9

STATE OF ILLINOIS, COUNTY OF COOK, SS.—Superior court of Cook county. In chancery. Maria Beardsley, complainant, vs. Isaac N. Hardin, Gertrude H. Hardin, John Esaias Warren, Charlotte R. Warren, Thomas Lord, Peter K. Dederick, Henry S. Monroe, trustee, and Susan B. Ward, defendants.

[Foreclosure of Mortgages.]

Public notice is hereby given, that in pursuance of a decree entered in the above cause on the 20th day of October, A. D. 1875, I, Benjamin D. Magruder, a master in chancery of said court, will, on Tuesday, the 23d day of November, A. D. 1875, at the hour of two (2) o'clock in the afternoon of that day, at the west door of the north doors of the building used as a court house, situated on the southeast corner of Adams and LaSalle streets, in Chicago, Cook county, Illinois, sell at public vendue, for cash in hand, to the highest and best bidder, all the premises, situated in the county of Cook and State of Illinois, known and described as lots numbers 4, 5, 6, and 7, in block number one (1), in Bowen and Smith's subdivision of that part of the north half of the northwest quarter of the northeast quarter of section number three (3), township 38 north, range 14, east of the third principal meridian, lying between Thirty-ninth street (otherwise Egan avenue) and Fortieth street (otherwise Union Stock Yard railroad) and between Kankakee and Vincennes avenues, with the appurtenances thereunto belonging.

Dated October 30th, 1875.

BENJAMIN D. MAGRUDER,
Master in Chancery of the Superior court of Cook County.

MATTOCKS & MASON, Complts. Solrs. 6-9

STATE OF ILLINOIS, COUNTY OF COOK, SS.—Superior Court of Cook county. In chancery. Stephen Clement, complainant, vs. Isaac N. Hardin, Gertrude H. Hardin, John Esaias Warren, Charlotte R. Warren, Thomas Lord, Peter K. Dederick, John Mattocks, John DeKoven, Henry S. Monroe, trustee, South Park Commissioners, and Sarah B. Ward, defendants.

[Foreclosure of Trust Deed.]

Public notice is hereby given that in pursuance of a decree entered in the above cause on the 20th day of October, A. D. 1875, I, Benjamin D. Magruder, master in chancery of said court, will on Monday, the 22d day of November, A. D. 1875, at the hour of two (2) o'clock in the afternoon of that day, at the west door of the north doors of the building used as a court house, situated on the southeast corner of Adams and LaSalle streets, in Chicago, Cook county, Illinois, sell at public vendue, for cash in hand, to the highest and best bidder, the following described premises, to wit:

Lots numbers 36, 37, 38, 39, and 40, in block number one (1), in Bowen and Smith's subdivision of that part of the north half of the northwest quarter of the northeast quarter of section number three (3), township number 38, north range number 14, east of the third principal meridian, lying between Thirty-ninth street (otherwise Egan avenue) and Fortieth street (otherwise Union Stock Yard railroad) and between Kankakee and Vincennes avenue, with the appurtenances thereunto belonging, situated in Cook county, Illinois.

Dated October 30th, 1875.

BENJAMIN D. MAGRUDER,
Master in Chancery of the Superior court of Cook County.

MATTOCKS & MASON, Complts. Solrs. 6-9

Land Title Notice.

STATE OF ILLINOIS, COOK COUNTY, SS.—Circuit court of Cook county. Gilbert Hubbard, Jonathan Young Scammon, Anson Sperry, and all whom it may concern:

Take notice, that on the twenty-first day of October, A. D. 1875, a cross-petition (to the original petition of Gilbert Hubbard against Jonathan Young Scammon, Mark Skinner, John L. Thompson, Anson Sperry, and all whom it may concern), was filed by the undersigned in the Circuit court of Cook county, State of Illinois, to establish their title to the following described lands:

An undivided half of sub-lot one (1) in lot one (1) of Bronson's addition to Chicago, Cook county, State of Illinois.

Now, unless you appear at the December term, A. D. 1875, of said court, to be holden at the court house, in said city of Chicago, and show cause against said application, said cross-petition will be taken for confessed, and the title or interest of said cross-petitioners will be decreed and established, according to the prayer of said cross-petition, and you forever barred from disputing the same.

MARK SKINNER,
JOHN L. THOMPSON,
Petitioners in cross-petition.

WILLIAMS & THOMPSON, Solrs. for Petrs. 6-9

CHICAGO LEGAL NEWS.

SATURDAY, NOVEMBER 6, 1875.

The Courts.

U. S. CIR. COURT, N. D. OF ILLINOS.

CITY OF CHICAGO v. DAVID A. GAGE et al.

In Chancery.

REMOVAL OF CAUSE FROM STATE TO FEDERAL COURT—ACT OF 1875 CONSTRUED.

1. PARTIES TO THE CONTROVERSY.—The court states who are to be regarded as parties to the controversy, within the meaning of the act, so as to entitle the case to be removed from the State to the Federal court.

2. WHOLE CASE MUST BE REMOVED.—That a complicated chancery suit may almost necessarily involve, in some of its collateral issues, the rights and interests of citizens of different States, but unless the original controversy which the suit is brought to determine be between citizens of different States, or between such parties as give the Federal courts jurisdiction, it would not seem that Congress intended to provide for the removal thereof, inasmuch as the whole case must be removed instead of that collateral branch or part involving a controversy between citizens of different States.

3. THIS CASE.—That this is not such a case as was intended to be removed from the State to the Federal court.—[ED. LEGAL NEWS.]

BLODGETT, J.

This case was originally commenced in the Superior Court of Cook county, and removed to this court on the application of the defendant, Ayers. A motion is now made on behalf of the complainant to remand the case to the Superior Court, because of facts appearing upon the face of the record.

The record shows that, on the 27th day of December, 1873, David A. Gage, and his wife, of the city of Chicago, executed and delivered to George Taylor, also of said city, a deed conveying to said Taylor, in trust, certain property for the purpose of securing the city against loss of any indebtedness which might exist from Gage to the city, as late treasurer thereof, and for other purposes therein expressed. Said deed did not state what the amount of said indebtedness was, but declared that said conveyance was not to be, in any sense, a satisfaction of any part of said indebtedness. It included and conveyed to Taylor a large amount of real property, situated in Chicago and its suburbs, some portions of which were improved and yielding income. It empowered the trustee, during the period of eight months from the date of the deed, to enter, immediately, into the possession of said property, control and manage the same, receive and collect the rents, income and profits thereof, and out of the same pay the taxes, assessments and insurance; to sell and convey, under the direction and with the concurrance of the comptroller of the city, all or any part of said property, and out of the net proceeds of the said sales, rents, income and profits, to pay over to the city, from time to time, to apply on the indebtedness of Gage to the city, such sums as might be available for that purpose. At the expiration of eight months the comptroller was authorized to require the preemptory sale of so much of said property as should then remain unsold, for cash, and the said Taylor, as trustee, was required to comply with said request and apply the net proceeds of the sales so made to the satisfaction of the unpaid remainder of said indebtedness.

Taylor accepted the trust, entered upon the possession, control and management of the property, and made some sales thereof, and partial payments to the city within the eight months allowed for that purpose.

After the expiration of said eight months, a large portion of the indebtedness, claimed by the city, against Gage, as its late treasurer, still remaining unpaid, the comptroller ordered the trustee to sell the rest of the property on hand, for cash. Said trustee refused to comply with the order of the comptroller, alleging as the ground of said refusal, that said deed did not state the amount of said indebtedness; that he did not know the amount of it, himself, and that he was unwilling to sell and pay over the proceeds of such sale to the city, until a competent court had first found and decreed the balance due from Gage to the city. Thereupon the city filed the bill in this case, in the Superior Court of Cook county, setting out the said trust deed, and alleging that, at the time of the making thereof Gage was indebted to the city, as treasurer, for a balance of five hundred and seven thousand, seven hundred and three dollars and fifty-eight cents, for the security of which it was claimed that Taylor held the property, so conveyed to him by said trust deed; and prayed that the court would take an account and ascertain the amount due, and give a decree in favor of the city for the same, and order the said trustee to proceed and sell the trust property remaining unsold, and apply the proceeds of such sale to the satisfaction of the amount so found due. Gage and wife, and Taylor, were the only defendants to this bill.

Gage answered the bill, denying that he owed the city anything. Taylor also answered, stating his belief that the amount due by Gage to the city, was that stated in the bill, but alleging that he did not know what was the real amount of said indebtedness, and prayed that the court would find and decree the amount of said indebtedness, and order the sale, and declare the amount to be paid by him out of the proceeds.

In February last, William T. Ayres, a citizen of Alabama, acting as executor for Charles P. Gage, deceased, late of said State of Alabama, recovered a judgment in this court against said David A. Gage for three thousand and six dollars and ninety-two cents. Execution was issued on said judgment, and returned "no property."

Thereupon Ayres applied to the Superior Court to be made a party defendant to the bill in this case, which application having been granted, he answered the bill, and also, by leave of court, filed a cross-bill, in both of which he alleged in substance the recovery in this court of said judgment against Gage, the issue of his execution and return, and charged that said judgment was an equitable and prior lien upon the property so held in trust by said Taylor; alleging that no indebtedness, in fact, existed from Gage to the city; that by the action of the common council of the city, Gage had been permitted to loan the funds of the city, and to pay certain interest arising therefrom to the city; that by reason of certain advances which had been made from certain of the general funds to certain specific funds by Gage while acting as city treasurer, certain equitable considerations had arisen which ought to defeat, and did defeat any claim at law, or in equity, in favor of the city against Gage, praying it might be found and decreed that no indebtedness existed from Gage to the city, and that the property conveyed by Gage to Taylor, the trustee, was legally and equitably subjected to the lien of his judgment, as against the city, and asking the court to decree a satisfaction thereof out of the same.

After having filed his said answer and cross-bill, Ayres filed his petition in the Superior Court setting up that he was a citizen of the State of Alabama; that there was a coutroversy in said suit between himself and said Gage, who were citizens of the State of Illinois and of this district, and asking that said cause be removed from said Superior Court to this court for trial.

The Superior Court entertained said petition and ordered the removal of said cause to this court; and the question is: Does there enough appear on the face of the record to justify this court in holding jurisdiction of the case?

The fifth section of the act of March 3d, 1875 (Eighteenth Statutes At Large 472) provides—"That if, in any suit commenced in a State Court, or removed from the State Court to the Circuit Court of the United States, it shall appear to the satisfaction of said Circuit Court, at any time after such suit has been brought or removed thereto, that such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of said Circuit Court, or that the parties to said suit have been improperly or collusively made or joined, either as plaintiffs or defendants for the purpose of creating a case, cognizable or removable under this act, the said circuit court shall proceed no farther therein, but shall dismiss the suit, or remand it to the court from which it was removed, as justice may require."

The first question which suggests itself to my mind in discussing this motion, is—between whom is the controversy in this case?

The original suit was brought by the city of Chicago to determine the amount of indebtedness due to it from Gage, and to require the payment of that indebtedness out of the property held in trust by Taylor, for that purpose. In his answer, in that case, Gage denied any indebtedness between himself and the city. I think it unnecessary for the purposes of this inquiry to investigate the grounds upon which Gage based that denial; it is sufficient, for this motion, to say that by the bill, answer and replication in the case, as it stood at the time Ayers made himself a voluntary party thereto, the controversy in the case was between the city and Gage as to whether there was, in fact, an indebtedness, and the amount thereof, if any, from Gage to the city. The defendant, Ayres, does not raise any new controversy by his answer and cross-bill, but simply makes himself a party to that which already existed, alleging, perhaps, more in detail the grounds for denying any indebtedness from Gage to the city, but at the same time not changing in any degree, the issue in the case, or the character of the controversy. The main question still is, as the pleadings now stand, and as they stood before Ayres came into the case. -Does Gage owe the city anything which ought to be satisfied out of the proceeds of the property held in trust by Taylor, under the trust deed described in the complainant's bill? This being so, the controversy inaugurated in the suit is simply one between citizens of this State. True, Ayres, as a creditor of Gage, may be interested in the result of that controversy, because, if it terminates in favor of Gage it leaves the property now held by Taylor subject, equitably if not legally, to Ayres' debt, but that does not in any degree, in my estimation, involve a controversy between the city and Ayres, in the original suit.

As was intimated by the learned circuit judge of this circuit in the case of Osgood against the Chicago, Danville and Vincennes Railroad Company, (7 CHICAGO LEGAL NEWS, 241,) the statute of March 3d, 1875, clearly contemplates the removal of the *whole suit* from the State to the federal court, and not of such fragment or part thereof as may involve a controversy or question between two or more of the defendants. And we must look into the nature of the original controversy, which was the subject matter of the suit, to settle this question of right of removal.

A complicated chancery suit may, almost necessarily, involve in some of its collateral issues, the rights and interests of citizens of different States; but, unless the original controversy which the suit is brought to determine be between citizens of different States, or between such parties as give the Federal courts jurisdiction, it would hardly seem that Congress intended to provide for the removal thereof, inasmuch as the whole case must be removed instead of that collateral branch or part involving a controversy between citizens of different States.

Applying these suggestions to the case under consideration, it would seem that the controversy, as presented by the issues and pleadings is, as to whether or not Gage owes the city anything which should be paid out of this trust fund. That being determined, if determined against the city, the defendant, Ayres, may have a standing in court to claim his pay out of the trust property, but not until then. Notwithstanding Ayres' interpolation into the suit, the real questions still stand at issue between the city and Gage, and Ayres only has rights as he may be subrogated to those of Gage. It is nowhere intimated in this case that there is any collusion between Gage and the city or that the city suit is not prosecuted in entire good faith. If it had been made to appear that Gage had given the trust deed to Taylor for the purpose of defrauding Ayres, or that the conveyance was not bona fide, the parties to the controversy might be changed, and Ayres, or any creditor of Gage, might be the real party to the controversy with the city and trustee; but there is nothing of the kind in this case. It therefore seems clear to me that, upon the facts shown in the record, this suit is not such an one as was intended to be removed from the State to the Federal court.

T. L. DICKEY, Corporation Counsel, and CHARLES H. MORSE, for City.

M. W. FULLER for Wm. T. Ayres, of Alabama.

WE have received from M. MILLARD, of the East St. Louis bar, the following opinion:

SUPREME COURT OF ILLINOIS.

OPINION FILED OCT. 14, 1875.

F. C. COX v. C. CUNNINGHAM.

FORCIBLE ENTRY AND DETAINER—POWER OF TENANT TO EFFECT LANDLORD'S POSSESSION.

Having leased from Gallagher and entered under him, appellant had no power to so contract with appellee as to affect Gallagher's possession without first having surrendered the possession to his landlord.—[ED. LEGAL NEWS.]

WALKER, J.

This was an action of forcible entry and detainer brought in the St. Clair Circuit Court for the recovery of two lots, being a part of the subdivision of a lot in Cahokia Common, in St. Clair county in this State. The plaint charged that appellant unlawfully withheld the possession of the same from appellee. The defendant filed a plea of not guilty. A trial was had before the court and a jury resulting in a verdict in favor of plaintiff, and after overruling a motion for a new trial, the court rendered judgment on the verdict and awarded a writ of restitution, and from that judgment defendant appeals to this court.

We think that the evidence clearly shows that Gallagher leased the premises to appellant by a verbal lease. This, we think, cannot be successfully controverted, and it is equally clear that he entered into possession under that lease. It does not appear, nor is it claimed, that the lease was ever canceled or abandoned by the parties. Nor is it proved or claimed that appellant ever abandoned the premises, or that he disclaimed holding under the lease from Gallagher. But, it is claimed, that he attorned to or recognized appellee as his landlord, and hence became her tenant, and liable to her precisely as though he had not leased from Gallagher, but had from appellee before entering into possession in the first place.

Having leased from Gallagher and entered under him, had appellant the power to so contract with appellee as to affect Gallagher's possession without first having surrendered the possession to his landlord. All know that had appellant underlet, or put another in possession, that Gallagher could have maintained an action against such under-tenant and occupant, and recovered possession. Appellant could have conferred on no one any higher or better rights than he held. Any one entering under him could have held precisely as he did, and would be liable to be dispossessed by the landlord by forcible entry and detainer as would the tenant had he remained in possession until the expiration of the term. Ballance *v.* Fostier, 3 Gilm., 291.

Even if appellant did attorn to or receive a verbal lease from appellee, that would in no wise affect Gallagher's rights. His tenant could not give away or barter off his rights, or affect his interest by under-letting or receiving a lease from another until he fully restored possession to his landlord. But a tenant may, no doubt, complicate his own rights by taking leases for the same property for the same time from different persons. He may thereby estop himself from denying the title of either landlord. If, however, he were to take the lease for the shorter term from his second landlord, and was to be turned out by forcible detainer, according to the case of Ballance *v.* Fostier, supra, the first lessor could maintain such an action against his second landlord, who could not occupy a better position than the tenant of the person making the longer lease.

Did appellant after leasing from Gallagher receive a lease from appellee? The evidence is somewhat conflicting, but when fully considered we think it does not sustain the finding. The witness, Short, testified that appellant called on him to rent the premises, but he referred him to appellee. She says he did not see her, but she found him in possession and turned his horses out of the enclosure, and appellant swore that he rented the property of and entered under Gallagher. This then renders it manifest that appellant did not lease the premises, before he entered, from appellee, nor did he enter into possession under her; on this question there would seem to be no doubt.

Did then appellant, after he leased from Gallagher and had entered into possession, lease the premises of appellee, or did he attorn to her or do any act

that created the relation of landlord and tenant between them, or to render his possession hers? Short testified that afterwards, at his house, appellant offered to pay the rent to appellee, but she declined to receive it until it was settled who owned the title. Appellee says, when she ordered appellant to leave, when she first found him in possession, he refused to give her possession and refused to agree to pay her the rent, but said he would pay it to the person entitled to receive it. She further testified that afterwards, at Short's, appellant said to her, "I have found out that you are the right owner; the rent is ready for you at any time," but she declined to receive it until the title was settled. This appellant denies most positively.

But even conceding this to be true, it falls far short of constituting a lease or attornment that he should hold until the title was settled by the ejectment suit then pending. Nor does it appear that there was any agreement that he should hold under her or pay to her any future accruing rent. He says she told him not to pay the rent to Gallagher, and he had not paid it. He says it was agreed between him, her and Gallagher, that he was to pay the rent to the owner, and they were to wait until the suit was decided. This seems to be the most probable version of the matter.

But were all appellee's claims conceded, still it only amounts to an opinion on the part of appellant. When a tenant of one person is in possession, to create the relation of landlord and tenant between him and another person, the evidence should be at least reasonably satisfactory, not inferred from slight circumstances. It is wholly unlike a person in possession as an intruder or wrongdoer who admits another to be the owner and agrees to pay rent for the time occupied as the presumption in such a case is that the occupant is willing to act justly and pay rent. But not so with a person having a lease and bound to pay rent. There can be no presumption that he is willing to pay full rent to two different persons; on the contrary the presumption is the other way.

It is, however, urged that appellee had a prior possession. It appears that about two years before appellant went into possession, appellee put locks on the gate and barn door and locked them, and had the lot plowed and planted in corn, but Gallagher entered and had it with the weeds cut down. The brother of Gallagher testified that he rented the premises for his brother to a man from Clinton county, who occupied it for six months next preceding the time when appellant went into possession. This is not contradicted by any evidence in the record, and it appears that Gallagher had been in possession for about twenty years before this suit was brought. That this possession was uninterrupted, unless the locking the barn door and gate and the plowing up the lot and planting corn on it amounted to possession. They were acts of trespass, unless justified by title, but cannot be held under the circumstances to have been such possession as authorizes a recovery in forcible detainer against a person having such long, open, visible, notorious and uninterrupted possession as Gallagher has shown.

Even if this action can be maintained by a person who has previously sued in ejectment to recover the same land whilst that suit is pending, appellee has failed to make out a case, and the judgment of the court below is reversed.

Judgment reversed.

SUPREME COURT OF ILLINOIS.

OPINION FILED OCT. 11, 1875.

CYRUS F. MILLER et al. *v.* RICHARD D. KIRBY.

Appeal from Superior Court of Cook.

TRESPASS—TITLE—POSSESSION—RULE AS TO VINDICTIVE DAMAGES.

1. TRESPASS — TITLE — POSSESSION. — That the plaintiff, in such cases, must show that at the time when the injury was committed he had an actual or constructive possession of the property, and also a general or qualified title therein; that actual possession without the consent or even adverse to the real owner, is sufficient as against a wrong-doer, or one who can show no better title.

2. EQUITABLE INTEREST. — The court considers the right of a person having an equitable interest in the property to bring the action.

3. SALE — FRAUD. — The question of impeaching a sale for fraud is discussed.

4. RULE AS TO VINDICTIVE DAMAGES.—The rule is that vindictive or exemplary damages should not be awarded unless the injury complained of was done wantonly or wilfully. — [ED. LEGAL NEWS.]

Opinion by SCHOLFIELD, J.

About the first of June, 1873, Charles G. French being engaged in the sale of jewelry, etc., in Chicago, sold his stock in trade to appellee for $7,500, for which appellee paid in cash, at the time, $1,500, and gave his twelve promissory notes for $500, each payable the first one month thereafter, and the others, one for each consecutive month following, until the last note should become due, for the residue. To secure the payment of the notes he also executed, at the same time, a deed of trust to one Nichols. Appellee took possession of the stock, in conjunction with Nichols, the trustee, immediately after his purchase, and proceeded to sell the same as customers enabled him to do so, and also made some additional purchases to replenish and enlarge the stock.

On the 5th of July, 1873, the appellants, Henry Seans, Edmund B. Seans and Edward W. Beattie, recovered a judgment before a justice of the peace of Cook county, against Charles G. French, for $76.00, and costs of suit taxed at $5.95. Execution was issued on this judgment on the 11th of July, 1873, and placed in the hands of appellant, Swick, a constable, to execute. He, in company with appellant, Miller, an attorney at law, acting for the plaintiffs in the execution, thereupon went to the place of business of appellee, and levied the execution upon certain watches and "watch movements," which were included in the sale by French to appellee, and also upon one watch which had been left with appellee for repairs, and one watch which belonged to Nichols, for both of which, however, appellee seems to have been under obligation to, and did account to their respective owners. The action is *trespass de bonis asportatis*, and the appellant justify under the judgment and execution.

The jury, by their verdict, found appellants guilty, and assessed appellee's damages at $514.44. The court thereupon gave notice that he would grant a new trial unless appellee would remit all but $200 of the amount found by the verdict, which being done, judgment was then given for that amount.

Several errors have been assigned, which we will notice, in the order of their precedence, on the record.

It is objected that appellee does not show sufficient possession or right to possession, to enable him to maintain the action; that the possession is shown to have been in Nichols, under the deed of trust; and he alone, if any one, can bring trespass, under the proof.

The general doctrine is well settled, as claimed by counsel for appellant, that the plaintiff, in such cases, must show that, at the time when the injury was committed, he had an actual or constructive possession of the property and also a general or qualified title therein; but it is equally well settled, that actual possession, though without the consent, or even adverse to the real owner, will be sufficient as against a wrong-doer, or one who can show no better title.

Assuming the sale by French to appellee to have been valid, the question raised, upon which we shall pass for the present, appellee after executing the deed of trust still retained an equitable interest in the property which it was important to him should be protected. That he might do so it is expressly provided in the deed: "It is understood and agreed by and between said parties, that said Kirby (appellee) is to have, during the time said Nichols shall be trustee as aforesaid, full right, power and authority to carry on the business of said store in his own name; to have his signs out as such owner; to sell the goods therein contained, and in said schedule mentioned, to receive the proceeds of sales of said goods, and to have the management of said business in the same manner as a retail jewelry business is generally carried on. It surely cannot be insisted that this provision is inconsistent with the actual possession of the property by appellee. It is plainly impossible that it could be practically carried out without an actual possession. Whatever possession, then, it was designed Nichols should have, must have been simply constructive, the sole purpose of his appointment, and the extent of the authority vested in him being to see that appellee faithfully carried on his business and applied the proceeds of his sales to the payment of the notes

The evidence moreover shows that, in fact, Nichols never had the actual possession of the goods; but it was always held by appellee. We think the evidence ample, in this respect, to sustain the plaintiff's right of action.

The next question to which our attention is directed is, was the sale by French to appellee made in fraud of the rights of the creditors of French, and, therefore, as to them void, under the statute for the prevention of frauds and perjuries?

Appellant's counsel argue upon the assumed hypothesis that this was an assignment by French for the benefit of his creditors, and they cite authorities holding that where, in such an assignment, the trustee is authorized to sell upon a credit, the assignment, will, in equity, be set aside at the instance of a dissatisfied creditor. But as we understand the evidence, that is not this case, and these authorities therefore have no application.

French absolutely and unconditionally sold the property to appellee; and, although in providing for the payment of the balance over the $1500 paid down, he provided that it should be appropriated to the payment of his debts, this did not, in any degree, affect the validity or the regularity of the sale. The fact that French was indebted at the time of the sale; that it was on a credit, and that the notes were to be used in the payment of his debts, do not establish fraud. Nelson *v.* Smith, 28 Ills., 500. A party, though in debt, may sell his property to whom he pleases, if no heir exists to prevent it, and if the transaction be an honest one, made in good faith and for an adequate consideration, it matters not how many creditors may be thereby prevented from reaching the property, Hessing *v.* McCloskey, 37 Ill., 352.

In the light of these well settled principles, we are unable to discover, from the evidence, anything whereby the sale is successfully impeached. It is not even shown that French, at the time of the sale, was unable to pay his debts, nor is it shown that there was anything, designedly done by appellee, for the purpose of enabling him to defraud any creditor.

It is objected that in one of the instructions given at the instance of appellee, the jury were told, although they should find the conveyance by French was had, made, or contrived with the intent or purpose to delay his creditors, yet before they could find for the defendants, they must also believe "that the plaintiff also contrived the conveyance with malice, fraud covin, collusion or guile. We see no objection to this. It is in accordance with the principles laid down in Ewing *v.* Runkle, 20 Ills., 448, Herkelratte et al. *v.* Stoakey, 63 Id., 486, and Hessing *v.* McCloskey *supra.*

Objection is also taken to the action of the court in giving the 7th and 8th instructions asked by appellee, and in refusing the second instruction asked by appellant.

The objection to the 7th and 8th instructions of appellee, we conceive to be unimportant. The facts, the existence of which they assume, were not contested on the trial, and it is not possible that assuming their existence could, under the circumstances, have prejudiced appellants.

The same principal intended to be asserted in the appellant's second instruction, and which was refused, is declared in the fourth of their instructions, which was given, and it was entirely unnecessary to repeat it. The refusal to do so, is at least, no cause for reversal.

So far, we perceive no important error in the record. There remains, however, to be considered the question of damages. Notwithstanding the remittitur made at the instance of the court, the judgment still exceeds any actual damages proved. It is true, the question is for the jury to determine from the evidence whether there are such circumstances of aggravation as to justify vindictive damages; and when the evidence reasonably tends to sustain their finding in that respect, we will not reverse for the mere difference of opinion we may entertain as to the weight of the evidence; but the jury are no more at liberty on this question than on any other to act without evidence, and when it is clear to our minds they have done so, we have no alternative but to set their finding aside.

The rule recognized by our previous decisions is, that vindictive or exemplary damages should not be awarded unless the injury complained of was done wantonly, or willfully. Foot *v.* Nichols, 28 Ill., 486; Hawk at al. *v.* Ridgway, 33 Id., 475.

There is no evidence, not even that of appellee, that shows anything to have been done by appellants which can be reasonably construed as wanton or wilful. There was no violence, no unusual noise, or unnecessary demonstration. The fact that more property was taken than was actually necessary to satisfy the execution, was, under the circumstances, of no great significance. Appellee was requested to point out the property he had obtained from French, and to give the constable values. This he refused to do, as did also Nichols. Neither the constable nor the attorney with him were jewellers, and the value of the property levied upon was, at the highest selling estimate fixed by any witness, not more than double the amount called for by the execution. By the estimate of same witnesses it was much less than that. The fact that the constable proceeded with the levy after appellee notified him the property was his, is not a conclusive circumstance as to his knowledge that the property belonged to appellee. Appellant contested, and we cannot say in bad faith, the validity of appellee's title; and this was one mode by which it could be tested.

For the reasons last stated the judgment is reversed and the cause remanded.

Reversed and remanded.

SUPREME COURT OF ILLINOIS.

OPINION FILED OCT. 13, 1875.

LEWIS W. ROSS *v.* THE CHICAGO, BURLINGTON AND QUINCY R. R. CO.

Appeal from Peoria.

R. R. CHARTER—AMENDMENTS WHEN WITHIN SCOPE OF ORIGINAL ACT—CHANGING NAME OF CO.—LOCATION AND CONSTRUCTION OF MORE THAN ONE LINE—ACTS AS STOCKHOLDER AND DIRECTOR.

1. The appellant having commenced an action of ejectment against the appellees to recover possession of a strip of land occupied by it for its right of way across a certain tract of land owned by him in Lewiston. The present bill was filed to enjoin further proceedings in that suit, and to enforce the conveyance of the strip of ground in question by Ross to the company. The decree below was in accordance with the prayer of the bill.

2. CHANGING NAME.—The court considers the effect of the act of the legislature changing the name of the railroad company.

3. AMENDMENT WHEN WITHIN THE SCOPE OF ACT. —The court is not authorized to hold as a matter of law that the entire purpose and scope of the act of Feb. 24, 1854, is so foreign to the objects embraced by the act of Feb. 11, 1853, that it cannot be held to be an amendment of that act. The leading objects might all still be obtained under the charter as amended. Precisely how far the original purpose of the statute may or may not be changed by an enactment professing only to be an amendment the court will not undertake to say. The legislative determination in this respect cannot in any view be disregarded unless it is clearly wrong.

4. ACT EMBRACING MORE THAN ONE SUBJECT.— The court overruled the objection that the act and its amendments embraces more than one subject; that is the location and construction of more than one line of road.

5. BOUND BY ACT.—That the appellant was not only bound by implication as a stockholder to the acts of acceptance of the company, but also expressly by his own acts as a director in exercising the powers and privileges conferred by the act.

6. TIME FOR COMPLETION.—That the time for completion of the road specified in the fifth section of the act is not irrevocable. It was competent for the legislature and the company to change it at any time by mutual consent.

7. THE CONSTRUCTION OF THE LINE WITHIN LIMITS OF CHARTER.—That it is not important what line of road was in contemplation when the instrument was executed, the line as constructed is within the limits of the charter of the company, and as in regard to time, so in this respect. If other limitations were intended, they should have been distinctly specified in the instrument.—[ED. LEGAL NEWS.]

Opinion of the Court by SCHOLFIELD, J.

Lewis W. Ross having commenced an action of ejectment against the Chicago, Burlington and Quincy Railroad Company to recover possession of a strip of ground occupied by it for its right of way across a certain tract of land owned by him at Lewiston, in Fulton county. The present bill was filed to enjoin further proceedings in that suit and to enforce the conveyance of the strip of ground in question by Ross to the company. The decree of the court below was in conformity with the prayer of the bill.

The Chicago, Burlington and Quincy Railroad Company derives whatever rights it may have, in the right of way referred to by conveyance from the Peoria and Hannibal Railroad Company to Jay and from Jay to itself; and the first objection taken to the decree below is, that the Peoria and Hannibal Railroad Company never had any legal existence.

The objection is not as to the mere regularity of the corporation, but it is that what assume to be the charter of that company, was and is no law, because en-

acted at a special session of the General Assembly convened by the Governor, and not embraced in the purposes enumerated in his proclamation for which the special session was convened.

The act under which the "Peoria and Hannibal Railroad Company" claimed to be incorporated was enacted at the special session of the General Assembly, which convened Feb'y 9, 1854, and was approved on the 24th day of that month (Laws of 1854, p. 237). It was entitled "An Act to amend an act entitled 'An Act to incorporate the Macomb, Vermont and Bath Railroad Company,'" approved Feb'y 11, 1853. Among the purposes enumerated in the proclamation of the Governor for convening the General Assembly at the time, were the following: "To amend charters of towns, cities, railroads, ferries, dykes and plank roads and to extend the same." (Legislative Journal, 2d Session, 18 General Assembly, p. 18.)

The question is, therefore, was the act of Feb'y 24th, 1854, what, by its title, it professed to be?

By the first section of the act of Feb'y 11, 1853, the persons therein named were incorporated by the name and style of the "Macomb, Vermont and Bath Railroad Company" and empowered to locate, construct and maintain a railroad, etc., commencing at the town of Macomb in the county of McDonough, running from thence on the most eligible route to the town of Vermont in the county of Fulton, and from thence on the most eligible route to the town of Bath in the county of Mason. The seventeenth section of the same act also authorized the company to extend their railroad from Macomb to a point opposite or at the city of Burlington in the State of Iowa, on the most eligible route, and to also extend their railroad from Bath, in Mason county, to some point that might be agreed upon on the Petersburg and Springfield Railroad. (See Private Laws of 1853, p. 20, et seq.)

It was enacted by the first section of the Act of February 24, 1854, that the name of the "Macomb, Vermont & Bath Railroad Company be changed, and that hereafter said company be known and called by the name and style of the Peoria & Hannibal Railroad Company, and that said company be authorized and empowered to survey, locate, construct, and fully complete and operate an extension of their said railroad from the town of Vermont, in the county of Fulton, by way of Lewiston and Canton, in said county, to the terminus of the Peoria & Bureau Valley Railroad, at or in the city of Peoria, and from the town of Vermont aforesaid, by the way of Rushville, in Schuyler county, and Mount Sterling, in Brown county, to a point on the Mississippi river, as nearly as practicable, opposite the city of Hannibal, in the State of Missouri. By the fifth section it was provided that the company should not be required to construct the line of their road from the town of Macomb to the town of Bath; and that the work on said extended railroad should be commenced within five years and completed within eight years after the passage of the act.

The act of February 11, 1853, contained seventeen sections, and by the act of February 24, 1854, five of these—the 2d, 3d, 4th, 5th and 6th—were expressly repealed, but the remaining sections, except in so far as they were inconsistent with the provisions of that act, were left in full force.

We do not feel authorized to hold as a matter of law that the entire purpose and scope of the act of February 24, 1854, is so foreign to the objects embraced by the act of Feb. 11, 1853, that it cannot be held to be an amendment of that act. Its leading objects might all still be attained under the charter as amended—not necessarily, it is true, but possibly—and some of them were entirely unaffected by the amendment. Precisely how far the original purpose of a statute may or may not be changed by an enactment professing only to be an amendment, we will not undertake to say. The legislative determination in this respect cannot in any view be disregarded, unless it is clearly wrong, and that is not established to our satisfaction in the present instance.

A further objection to the constitutionality of the charter of the Peoria & Hannibal Railroad Company as constituted by the various amendatory statutes, insisted upon is, that it embraces more than one subject that is the location and construction, etc., of more than one line of road.

The same objection was argued in The Belleville, etc., R. R. Co. *v.* Gregory, 14 Ill., 28, and overruled, and what was there said on this point is equally applicable here. The court said: "The first inquiry here is, does this law embrace more than one subject? The subject of this law is the incorporation of a railroad company. No other subject is introduced into the law, and but one company was created by it. But it was urged that two roads were authorized to be constructed by the law, if this extension is sustained. Even admitting that this would make the law obnoxious to the constitutional objection, the fact does not sustain the objection. With the extension to Alton, there will be but one continuous road, and that on a much straighter line than many other roads in the State. If we are to look at the line of road authorized to be constructed, for the purpose of determining whether the bill embraces more than one subject, we shall find the law as free from objection as most others of a similar character, and much more than some others. Take, for instance, the Illinois Central Railroad Company providing for the construction of a main trunk and Chicago and Dubuque branches, the former of which projects from the main road over two hundred miles from its terminus at Chicago, presenting the same objection in a much higher degree. * * Should we hold this law to be unconstitutional for the reason urged, but few railroad charters in the State could survive the test." We can not now reconsider the rule of construction then announced. It has ever since been accepted and acted upon as the correct exposition of the clause of the constitution involved. See also City of Ottawa *v.* The People, ex. rel., 48 Ill., 233. It can not be claimed that, by the charter of the Peoria and Hannibal Railroad Company, the construction of two or more distinct and independent lines of road were contemplated; the authority was merely to construct, etc., one or more extensions of the principal line in different directions, as in the illustration given in the opinion from which we have just quoted.

The proof of acceptance of the various amendatory acts by user, etc., under them, is ample. Indeed, no question is raised in argument on this ground.

An instrument, of which the following is a copy, was executed and delivered to the railroad company by Ross:

"Know all men by these presents that I, Lewis W. Ross, of Lewiston, Fulton county, Illinois, in consideration of one dollar to me in hand paid by the Peoria and Hannibal Railroad Company, the receipt of which is hereby acknowledged, do hereby agree to release and convey unto said company, the right of way for said railroad over any land or town lots owned by me in Fulton county, Illinois, except those having buildings on the line, and to execute and deliver to said company a proper release and conveyance of the same as soon as the said road is located. In testimony whereof I have hereunto subscribed my name and affixed my seal this 26th day of June, A. D. 1854."

[SEAL.] LEWIS W. ROSS."

It is contended, because the road was not completed within eight years after the passage of the act of Feb. 24, 1854, as required by the 5th section of that act, and because, also, by a subsequent amendment to its charter, the company were allowed to divide the line of road into sections, and to complete it in that way, the promise contained in this instrument ceased to be obligatory.

An amendatory act entitled, "An act to amend an act entitled an act to incorporate the Macomb, Vermont and Bath Railroad Company," was enacted by the legislature and approved Feb. 14, 1857. By the fourth section of this act, it was provided that the Peoria and Hannibal Railroad Company should have the right by its directors, to divide the route of its road, running from Peoria to Hannibal, in divisions; to let, construct and operate any of such divisions, and also to call in installments on stock from stockholders interested, in or near the line of such divisions so to be constructed, and apply the same on such part so to be built and operated; and it was also thereby empowered to unite its road with any other road, now or hereafter constructed at its *termini*, or any point thereof where the same or any part thereof may come in contact with any such road; to issue bonds bearing any rate of interest, not exceeding ten per cent. per annum and to mortgage, sell or lease their said railroad and its equipments, rolling stock, station houses, or any portion or part thereof.

The sixth section is as follows: "This act shall not, in any respect, affect the subscriptions of stock voted or subscribed by any county, city, corporation or persons. The said company may commence the work on said road within three years; and if any division thereof be completed within eight years after the passage of this act, then this act to remain in full force and effect, together with the several acts to which this is an amendment. (Private Laws of 1857, 619.)

At, and long prior to, the date of this enactment, Ross was a stockholder in the Peoria & Hannibal Railroad Company. He was one of the commissioners named in the act of February 24, 1854 to solicit subscriptions to its capital stock, and he was active and zealous in this capacity in promoting the success of the company's undertaking.

It appears that the act of February 14, 1857, received his express approval, and from 1862, in April, he was, for the period of two years, one of the directors of the company, during which time he authorized and approved of acts done by, and on behalf of, the company, having their only legal sanction in the provisions of that act. He is, therefore, not only bound by implication as a stockholder, to the act of acceptance of the company, but also expressly by his own acts as a director, in exercising the powers and privileges conferred by the act.

Nor do we think the adoption of this admendment worked such a fundamental change in the charter of the company as could be held to release individuals from their obligations to it, upon the ground that it thereby became a new and essentially different corporation. The cases of Sprague v. Ill. R. R. Co. et al., 19 Ill., 177; Ill. R. R. Co. v. Zimmer, 20 Id., 657, are in point and sustain this view.

The case of Fulton county *v.* Marsh, 10th Wallace, 676, cited as holding differently is not analogous. There the subscription was made to a corporation which was subsequently divided and made into three corporations, one of which claimed the benefit of the subscription. Here the unity of the original corporation is not disturbed. It is merely allowed to construct its road by sections, and appropriate the proceeds arising from subscriptions to the payment of expenses incurred, according to the locality in which the subscriptions were made. This was doubtless designed to stimulate local aid. It was clearly auxiliary to the main design of the original organization, and therefore, whether it was the wisest policy that could have been adopted under the circumstances, it is unnecessary for us to inquire.

We do not comprehend the force of the distiction attempted to be drawn between the duties and liabilities of Ross as a stockholder and as an individual, when applied to the enquiry before us. We cannot understand how Ross, as a stockholder and director in the Peoria and Hannibal Railroad Company, can be regarded as accepting an amendment to its charter, and at the same time protesting against it as an individual. Having by his own personal acts accepted and assisted in fastening this amendment upon the company, to what principle of equity can he appeal for the purpose of his being relieved from his private obligations to the company on account of the change thus wrought in its charter? His mouth is closed. He can not be heard to say upon well-settled principles of equitable estoppel that the corporation has ceased to be that to which he became obligated.

The time specified for the completion of the road in the fifth section of the act of Feb. 24, 1854, was not irrevocable. It was competent for the legislature and the company to change it at any time by mutual consent. The State alone could take advantage of a failure in this respect on behalf of the company, and, if it should chose to waive its rights on that account, no one else could complain. While it may be said that the time within which the road was to be completed may be presumed to have been within the contemptation of the parties when this instrument was executed, it may, on the other hand, be said it may also be presumed to have been within their contemplation that this provision might be, subsequently, changed. So the only way to have made time certainly of the essence of the contract, was to have inserted a stipulation to that effect.

The case cited relating to common highways was governed by an express statutory provision, and on that account has no application here.

The cases holding parties relieved from like obligations with that of Ross, where the evidence shows there was a subsequent abandonment of the enterprise, would be in point if the evidence here supported that theory, but in our opinion it does not.

Work was done at different places along the line of the road, according to the evidence, commencing in 1854, in small quantities, every year until in 1862, when it was completed from Canton to Lewiston. Ross remained a director in the company until in 1864, and the organization was kept up until after 1869, when the road was completed from Lewiston to Rushville. After the completion of the road to Lewiston in 1862, work was for some time suspended, but there is not a particle of evidence showing an abandonment of the enterprise. On the contrary efforts were being made and renewed at different intervals, to secure additional means and enlist the aid of those whose influence would insure success. Work also seems to have been done occasionally. The line was run across the property of Ross substantially where the road is now built; estimates, profiles, etc., were made, and it seems to have been regarded by the president and engineer of the company that the road was located there, as we infer from the evidence, as early as in 1861 or 2. Ross himself may not have actually known of this location, but he does not pretend to have been ignorant of the fact that the organization of the company was kept up; that efforts were being made from time to time to complete the road to Rushville; that the hopes of its completion was not abandoned, and the probability that the road, if constructed, would run not far from where it was built, yet he made no effort to cancel the instrument he had executed obligating himself to convey the right of way, gave no notice that he did not intend to be bound by its terms, but permitted the company to retain this instrument and complete the construction of the road over his property before he made known a single one of the many objections now alleged against their rights under the instrument. Even if such time had elapsed as to authorize him to revoke the offers contained in the instrument, it was for him to determine whether he would do so or not, and it would seem, under the circumstances proved, that good faith would have required that he should have given notice to that effect, before the company had taken possession of his property, so that it might have adopted another location, or taken proceedings to condemn this property before rendering itself otherwise liable.

We do not consider the question important, what line of road was in contemplation when this instrument was executed. The line as constructed is within the limits of the charter of the company, and as in regard to time, so in this respect, if other limitations were intended, they should have been distinctly specified in the instrument. It was perfectly competent for him in that way to impose what restrictions or limitations he pleased.

There is one other circumstance to be noticed tending strongly in our opinion to show that Ross is not equitably entitled to recover the possession of the right of way, even if we could regard the question of his right to damages against the company, open.

Some short time subsequent to the completion of the road over his property, he commenced two suits against the Chicago, Burlington and Quincy Railroad Company which was then and still is in possession of the road. One in ejectment for the possession of this right of way, and the other trespass q. c. l. for damages to his real estate, sustained in the construction of the road. These suits were dismissed by him, pursuant to an understanding then had with those representing that company. Some

witnesses swear that the agreement was the company was to make a cattle pass for Ross on this ground, under the railroad and Ross was to dismiss the suits and make a deed of the right of way to the company.

Ross and other of the witnesses disagree with so much of this as relates to the making of the deed. That the suits were to be dismissed and the cattle pass to be made to the satisfaction of Ross, there is no controversy. Ross says his understanding was, the making of the cattle pass was to go in reduction of his claim of damages. Upon this hypothesis, was not this a distinct abandonment of any right which he might have had to the possession of the property, and an election to take his damages instead? The pass cost $800, was made for the sole accommodation and convenience of Ross, and, of course, upon the hypothesis that the right to the possession of the property, where it was made, was in the company. He induced the company to expend this money with the understanding it should have the benefit of it in his claim for damages. Shall he now be allowed to defeat this by taking the whole property? We think in equity this can not be allowed.

In every view we have been able to take of the case, we think the equities are in favor of the company.

We have not discussed the right of the Chicago, Burlington & Quincy Railroad Company as distinct from those of the Peoria & Hannibal Railroad Company, and no question is made in that respect. We have assumed that by the effect of the several conveyances the Chicago, Burlington & Quincy Railroad Company occupies the same position the Peoria & Hannibal Railroad would if no conveyance had been made.

The decree is affirmed.

J. S. WINTER, Att'y for Appellant.

JUDD & WHITEHOUSE, Att'ys for Appellee.

UNITED STATES SUPREME COURT.

No. 502—OCTOBER TERM, 1875.

THE FARMERS AND MECHANICS NATIONAL BANK, of Buffalo, plaintiff in error, *v.* PETER C. DEARING.

In error to the Court of Appeals of the State of New York.

RATE OF INTEREST CHARGEABLE BY NATIONAL BANKS.

1. The rate of interest chargeable by each bank is to be that allowed by the law of the State or territory where the bank is situated.

2. When by the laws of the State or territory a different rate is limited for banks of issue organized under the local laws, the rate so limited is allowed for the national banks.

3. Where no rate of interest is fixed by the laws of the State or territory, the national banks may charge at a rate not exceeding seven per cent. per annum.

4. Such interest may be reserved or taken in advance.

5 Knowingly reserving, receiving, or charging "a rate of interest *greater than aforesaid* shall be held and be adjudged a forfeiture of the interest which the note, bill, or other evidence of debt carries with it, or which has been agreed to be paid thereon."

6. If a greater rate has been paid, twice the amount so paid may be recovered back, provided suit be brought within two years from the time the usurious transaction occurred.

7. The purchase, discount, or sale of a bill of exchange, payable at another place, at not more than the current rate of exchange on sight drafts, in addition to the interest, shall not be considered as taking or reserving a greater rate of interest than that permitted.

8. ACT CONSTITUTIONAL. — That the national bank act is constitutional

9. TAKING MORE INTEREST THAN ALLOWED BY LAW.—The court construes the provisions of the act relating to the penalty for taking more than lawful interest, and holds that the plaintiff below was entitled to recover the principal of the note sued upon less the amount of the interest unlawfully reserved.—[ED. LEGAL NEWS.]

Mr. Justice SWAYNE delivered the opinion of the Court.

The question presented for our determination involves the construction of the provisions of the national bank act of Congress of the 3d of June, 1864, 13 Stat., 99, upon the subject of the interest to be taken by the institutions organized under that act.

The plaintiff in error is one of those institutions. The 30th section of the act declares "that every association may take, receive, reserve, and charge on any loan or discount made, or upon any note, bill of exchange, or other evidences of debt, interest at the rate allowed by the laws of the state or territory where the bank is located, and no more, except that where by the laws of any state a different rate is limited for banks of issue organized under state laws, the rates so limited shall be allowed for associations organized in any such state under this act. And when no rate is fixed by the laws of the state or territory the bank may take, receive, reserve, or charge a rate not exceeding seven per centum, and such interest may be taken in advance, reckoning the days for which the note, bill, or other evidence of debt has to run. And the knowingly taking, receiving, reserving, or charging a rate of interest *greater than aforesaid*, shall be held and adjudged a forfeiture of the entire interest which the note, bill, or other evidence of debt carries with it, or which has been agreed to be paid thereon. And in case a greater rate of interest has been paid the person or persons paying the same, or their legal representatives, may recover back, in any action of debt, twice the amount of interest thus paid from the association taking or receiving the same; Provided, That such action is commenced within two years from the time the usurious transaction occurred. But the purchase, discount, or sale of a bona fide bill of exchange, payable at another place than the place of such purchase, discount, or sale, at not more than the current rate of exchange for sight drafts, in addition to the interest, shall not be considered as taking or receiving a greater rate of interest."

The facts of the case are few and simple. On the 2d of September, 1874, it was agreed between the parties that Dearing should make his promissory note to one Deitman for $2,000, payable one month from date, and that the bank should discount the note for Dearing at the rate of interest of ten per cent. per annum. This agreement was carried out. The bank received the note and paid to Dearing the sum of $1,981.67, The discount reserved and taken was $18.33. The rate of interest which the bank was legally authorized to take was 7 per cent. per annum. The excess reserved over that rate was $5.50. Dearing failed to pay the note at maturity. The bank thereupon sued him in the Superior Court of Buffalo. He answered that the agreement touching the discount was usurious, corrupt and illegal; that it avoided the note, and that he was in no wise liable to the plaintiff. The court sustained this defense, and gave judgment for the defendant.

At a general term of that court, the judgment was affirmed and the judgment of affirmance was subsequently affirmed by the court of appeals.

No searching analysis is necessary to eliminate the several provisions of the section to be considered, to develop the true meaning of each, and to draw the proper conclusions from all of them taken together.

(1) The rate of interest chargeable by each bank is to be that allowed by the law of the State or territory where the bank is situated.

(2) When by the laws of the State or territory a different rate is limited for banks of issue organized under the local laws, the rate so limited is allowed for the national banks.

(3) Where no rate of interest is fixed by the laws of the State or territory, the national banks may charge at a rate not exceeding seven per cent. per annum.

(4) Such interest may be reserved or taken in advance.

(5) Knowingly reserving, receiving, or charging "a rate of interest *greater than aforesaid* shall be held and be adjudged a forfeiture of the interest which the note, bill, or other evidence of debt carries with it, or which has been agreed to be paid thereon."

(6) If a greater rate has been paid, twice the amount so paid may be recovered back, provided suit be brought within two years from the time the usurious transaction occurred.

(7) The purchase, discount, or sale of a bill of exchange, payable at another place, at not more than the current rate of exchange on sight drafts, in addition to the interest, shall not be considered as taking or reserving a greater rate of interest than that permitted.

These clauses, examined by their own light, seem to us too clear to admit of doubt as to anything to which they relate. They form a system of regulations. All the parts are in harmony with each other, and cover the entire subject.

But it is contended that the phrase, "a rate of interest grea er than aforesaid," as it stands in the context, has reference only to the preceding sentence, which relates to banks where no rate of interest is fixed by law, and that hence it leaves the consequences of usury, where such rate is fixed, to be governed wholly by the local law upon the subject. This, in the State of New York, would, in all such cases, render the contract a nullity, and forfeit the debt. Such the court of appeals held to be the law of this case, and adjudged accordingly.

Neither of these views can be maintained. The collocation of the terms in question does not gramatically require such a construction. Viewed in this light, the phrase is as much applicable to both the foregoing clauses as to the next preceding one. The point to be sought is the intent of the law-making power. The offense of usury under this section is as great, where the local law does not, as where it does define the rate of interest. The same considerations apply in both cases. Why should Congress punish in one class of cases, and, so far as its action is concerned, exempt in the other? Why such discrimination? The result would be that in Pennsylvania, where the contract would be void, only as to the unlawful excess, the bank would lose nothing but such excess, while in New York, under a contract precisely the same, except as to the identity of the lender, the entire debt would be lost to the bank. This would be contrary to the plainest principles of reason and justice.

A purpose to produce or permit such a state of things ought not to be imputed to Congress, unless the circumstances are so cogent as to render that result inevitable.

We find nothing within the scope of the subject of that character.

The second proposition—that the State law, including its penalties, would apply if the first proposition be sound—is equally untenable. If the construction contended for were correct the State law would have no bearing whatever upon the case.

The constitutionality of the act of 1864 is not questioned. It rests on the same principle as the act creating the second bank of the United states. The reasoning of Secretary Hamilton and of this court in McCulloch *v.* Maryland, (4 Wheat., 316,) and in Osborne *v.* The Bank of the United States, (9 Wheat., 708,) therefore applies. The national banks organized under the act are instruments designed to be used to aid the government in the administration of an important branch of the public service. They are means appropriate to that end. Of the degree of the necessity which existed for creating them Congress is the sole judge.

Being such means, brought into existence for this purpose, and intended to be so employed, the States can exercise no control over them, nor in any wise affect their operation, except in so far as Congress may see proper to permit. Anything beyond this is "an abuse, because it is the usurpation of power which a single State cannot give." Against the national will "The States have no power, by taxation or otherwise, to retard, impede, burthen or in any manner control the operation of the constitutional laws enacted by Congress to carry into execution the powers vested in the general government."—Bank of the U. S. *v.* McCullough, Supra; Weston and others *v.* Charleston, 2 Peters, 466; Brown *v.* Maryland, 12 Wheat., 419; Dobbins *v.* Erie county, 12 Wheat., 419.

The power to create carries with it the power to preserve. The latter is a corollary from the former.

The principle announced in the authorities cited is indispensable to the efficiency, the independence, and indeed to the beneficial existence of the general government. Otherwise it would be liable, in the discharge of its most important trusts, to be annoyed and thwarted by the will or caprice of every state in the Union. Infinite confusion would follow. The government would be reduced to a pitiable condition of weakness. The form might remain, but the vital essence would have departed. In the complex system of polity which obtains in this country, the powers of government may be divided into four classes:

Those which belong exclusively to the States.

Those which belong exclusively to the national government.

Those which may be exercised concurrently and independently by both.

And those which may be exercised by the States, but only with the consent, express or implied, of Congress.

Whenever the will of the nation intervenes exclusively in this class of cases, the authority of the state retires and lies in abeyance until a proper occasion for its exercise shall recur. Gilman *v.* Philadelphia, 3 Wall., 713; Ex-parte McNeil, 13 Wall., 240.

The power of the States to tax the existing national bank lies within the category last mentioned.

It must always be borne in mind that the Constitution of the United States, "and the laws which shall be made in pursuance thereof," are "the supreme law of the land," (Const., art. 6), and that this law is as much a part of the law of each State, and as binding upon its authorities and people, as its own local constitution and laws.

In any view that can be taken of the 30th section, the power to supplement it by State legislation is conferred neither expressly nor by implication. There is nothing which gives support to such a suggestion.

There was reason why the rate of interest should be governed by the law of the State where the bank is situated, but there is none why usury should be visited with the forfeiture of the entire debt in one State and with no penal consequence whatever in another. This, we think, would be unreason and contrary to the manifest intent of congress.

Where a statute prescribes a rate of interest, and simply forbids the taking of more and more is contracted for, the contract is good for what might be lawfully taken and void only as to the excess.—Burnhisel v. Wright, Assignee, 22 Wall., (now in press); German v. Calvert, 12 Sarg. & R., 46. Forfeitures are not favored in the law. Courts always incline against them.—Marshall v. Vicksburg, 15 Wall., 156. When either of two constructions can be given to a statute, and one of them involves a forfeiture, the other is to be preferred.—Vattel, 29th Rule of Construction.

Where a statute creates a new offense, and denounces the penalty, or gives a new right and declares the remedy, the punishment or the remedy can be only that which the statute prescribes.—Stafford v. Ingersoll, 3 Hill, 38; First Nat. Bk. of Whitehall v. Lamb, 57 Barb., 429.

The 30th section is remedial as well as penal, and is to be liberally construed to effect the object which Congress had in view in enacting it.—Gray v. Bennet, 3 Met., 539.

The 46th section of the banking act of February 25, 1863, 12 Stat., 679, declared that reserving or taking more than the interest allowed should "be held and adjudged a forfeiture of the debt or demand." In the act of 1864 the forfeiture of the debt is omitted, and there is substituted for it the forfeiture of the interest stipulated for, if it had only been reserved, and the recovery of twice the amount where the interest had been actually paid.

In the Revised Statutes of the United States of the 22d of June, 1874, 1011, the provisions of the 30th section of the act of 1864 are divided into two sections, and the language is so changed as to render impossible in that case the same construction as that of the 30th section contended for by the counsel of the defendant in error in this case.

In the "act to amend the usury laws of the District of Columbia," of the 22d of April, 1870, (16 Stat., 91,) it is provided that six per cent. per annum shall be the lawful rate of interest, but that parties may contract for ten per cent.. and that if more than ten per cent. be contracted for, the entire interest shall be forfeited, and that only the principal debt shall be recoverable. It is further declared that if the unlawful interest has been paid it may be recovered back, provided it be sued for within a year.

It is declared in the last section that this act shall not affect the banking act of 1864.

This later legislation shows the spirit by which Congress was animated in passing the 30th section of the act here under consideration, and is not without value as affording light whereby to ascertain the true meaning of that section, if there could otherwise be any doubt upon the subject.

This section has been elaborately considered by the highest court of Massachusetts, of Pennsylvania, of Ohio, and of Indiana. Davis, Receiver, *v.* Randall, 115 Mass., 547; Central Nat. Bk. *v.* Pratt, Id., 539; Second Nat. Bank of Erie *v.* Brown, 72 Penn. Rep., 209; First Nat.

[Continued on page 56.]

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Lex vincit.

MYRA BRADWELL, Editor.

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Single Copies, TEN CENTS.

WE call attention to the following opinions, reported at length in this issue:

REMOVAL OF CAUSE FROM STATE TO FEDERAL COURT.—The opinion of the United States Circuit Court for the Northern District of Illinois, by BLODGETT, J., construing the act of 1875, providing for the removal of cases from State to Federal courts. The learned judge held, in the case before the court, that it was improperly removed from the State to the Federal court, and remanded the case to the Superior Court of Cook county, from whence it came. This opinion will commend itself to the profession.

LANDLORD—TENANT—POSSESSION.—The opinion of the Supreme Court of this State, by WALKER, J., as to the power of a tenant to contract to effect the possession of his landlord without having first surrendered the possession to him.

TRESPASS — POSSESSION — DAMAGES. — The opinion of the Supreme Court of this State, by SCHOLFIELD, J., as to what right a plaintiff must have in personal property in order to maintain an action of trespass to recover damages for its injury, and stating when vindictive or exemplary damages should not be allowed.

R. R. CHARTER—AMENDMENTS—CHANGING NAME—CONSTRUCTION OF MORE THAN ONE LINE.—The opinion of the Supreme Court of this State, by SCHOLFIELD, J., settling several interesting questions relating to special acts, amending the charters of railroad companies, defining the powers of such companies and their authority to locate and construct more than one line.

WHAT INTEREST A NATIONAL BANK MAY TAKE.—The opinion of the Supreme Court of the United States by Swayne J., construing the sections of the act of Congress relating to interest and stating what interest a national bank may take. This opinion is of more than usual interest and arriving too late to appear in the place allotted for the opinions of the Supreme Court of the United States we insert it elsewhere.

GOODRICH, THE DIVORCE LAWYER.—The Supreme Court adjourned without having passed upon the application of the committee of the bar association to strike the name of A. Goodrich, the divorce lawyer, from the roll of attorneys for unprofessional conduct. We suppose an opinion may be filed in the case at any time during vacation.

THE RULE ON MR. WILBANKS.—Our readers will be pleased to learn that the Supreme Court not only discharged the rule against Mr. Wilbanks for alleged unprofessional conduct, but found that his conduct was strictly professional and honorable.

ILLINOIS REPORTS.—Mr. Freeman is pushing the publication of his reports with all possible dispatch. We have received from Mr. Freeman advance sheets of the 68 and 76 volumes of Illinois Reports, which are now being run through the press and will soon make their appearance.

HOMESTEAD AND DOWER.—The homestead laws of 1851 and 1857 exempted the homestead in favor of the widow and family from sale, for the payment of debts of the deceased owner, but did not exempt it to the widow as against the heirs. She took as against those only her dower in the land. By R. S., 1874, § 1, title "Exemptions," the homestead is further exempted "from the laws of descent and devise." In proceedings by the personal representative to sell lands for the payment of debts of the deceased, and in proceedings for partition, where both dower and homestead rights exist in one of the parties, serious questions present themselves. For example:

1. Is the widow entitled to dower and homestead rights, or is her right to both conditional? (See § 36, title "Dower.")

2. If the former, should the dower be first allotted to the widow, and then the homestead set off out of the remainder, giving her as dower the use of one-third of all the real estate for dower and the use of one thousand dollars' worth of the remainder. Or, should the homestead be set off first, and dower equal in a part equal to one-third of the remainder be allotted.

I would like to have the opinion of the NEWS upon these questions. And the joint committee on revision appointed in 1873 might also arise and explain the meaning of § 36 above referred to.

* *.

Will some member of the joint committee give our correspondent the desired information through the columns of the LEGAL NEWS?

THE CHICAGO LAW INSTITUTE.

ANNUAL MEETING.

The annual meeting was held on Monday last, at the rooms of the Institute, in the City Hall building. In the absence of the President and Vice-Presidents, Secretary J. J. KNICKERBOCKER called the meeting to order, and nominated JOSEPH E. SMITH as chairman pro tem.

Reports were made by J. P. WILSON, treasurer, JULIUS ROSENTHAL, librarian, and J. J. KNICKERBOCKER, secretary, as follows:

TREASURER WILSON'S REPORTS.

To the Members of the Chicago Law Institute.

Gentlemen: The undersigned, your Treasurer, respectfully reports the receipt and disbursements for the fiscal year ending this day as follows:

RECEIPTS.

Cash on hand at commencement of year	$3,035.03
One-half of fines received	1,355.82½
Cash received from members for assessments and stock instalments	6,765.00
Total receipts belonging to Institute	$11,155.85½

DISBURSEMENTS.

Cash paid as per Secretary's Vouchers	8,220.77
Cash in Treasurer's hands belonging to Institute	$ 2,935.08½
Bills against the Institute unpaid, estimated	$ 1,000.00

The present insurance upon the property of the Institute is $25,000, which the Executive Committee, by resolution passed Oct. 30, '75, has directed to be increased to $35,000.

Respectfully submitted.

JOHN P. WILSON, *Treasurer.*

LIBRARIAN ROSENTHAL'S REPORT.

To the President and members of the Chicago Law Institute:

Since my last yearly report there were added to our library 1,250 volumes, consisting principally of American text-books, 101 vols.; English text-books, 97 vols.; American Reports, 197 vols.; English Reports, 139 vols.; Irish Reports, 81 vols. In all 417 volumes of reports.

English Statutes, 7 vols.; American Statutes, 31 vols.; Session Laws, 42 vols.; American Digests, 30 vols.; English Periodicals, 164 vols.; American Periodicals, 61 vols.; American Constitutional Law, 11 vols.; Leading Cases and Trials, 22 vols.; Civil Law, 13 vols.; Legal Biography (Eng. and Am.), 23 vols.

All the current volumes of English and American Reports and the latest text books, English and American, were added as soon as found in the market. Our very full department of legal periodicals was regularly kept up.

The total number of volumes now in our library is nearly 7,300. All purchases have been made for cash, at the best discounts we could obtain, of our city booksellers as well as of outside firms. A duplicate set of Illinois reports was added and a full set of the Law Journal reports, the English Jurist, and the Weekly Reporter, will be found on our shelves.

The board considered it in the interest of the members of the Institute that a copy of Peltzer's Atlas be acquired, and the same was purchased. Books have been presented by the Hon. J. D. Ward, the Hon. B. G. Caulfield and George S. Williams, and Messrs. Goudy and Chandler and M. D. Ewell, a copy of the council proceedings of 1873-4, by J. K. C. Forrest, city clerk; the Illinois Laws by the Hon. Judge Moore; the Public Laws of Rhode Island by the Secretary of State of that State, and several volumes by the undersigned.

The thanks of the Institute are due to all these donors. I must especially acknowledge the kindness of N. L. Freeman, Esq., in presenting us regularly with the volumes of his reports and transmitting to us unpublished volumes in advance sheets. The 76 volume of Illinois Reports is now found complete on our table, in advance. We obtained from George S. Williams, Esq., librarian of the Supreme Court Library at Ottawa, a box of briefs and arguments selected from those which had accumulated in the Supreme Court building during the years 1872-3-4, and some briefs and arguments have been contributed by our members, but not as many as it is desirable to have. Our members are herewith respectfully requested to transmit to us copies of their briefs and arguments, which are now the more valuable, as our current volumes of Illinois Reports do not give (except in exceptional cases) the points and references, and arguments of counsel.

The following volumes of American Reports are still wanting to complete our set:

The 16th and 17th of Howard, the 1st of Wallace, Jr., 1 to 5 inclusive, Gill and Johnson Maryland, 1 to 5 inclusive, 7 and 13 and 2 vols. of Aiken's Vermont, and the 4th volume of Rhode Island, in all 18 vols.

These volumes have become very scarce, and I take this occasion to call upon the members of the Institute to notify the librarian whenever they may know of a chance to buy any of these volumes.

We have lost a few books during the year. I would particularly mention Sharswood's Blackstone, 2 vols.; Blackwell on Tax Titles, 1 vol.; Dillon on Munic. Corp., 2 vols., 2d ed.; Burrel's Practice, 2 vol.; L. R. 14 Eq. Cases, 1 vol.

For the purpose of a catalogue, we use an interleaved copy of the very valuable New York law library catalogue, entering the new books whenever they come in under the proper heads.

Our department of English Reports is still very defective. Some of them have become so scarce that it has become exceedingly difficult to obtain them, and then only at exorbitant prices. Others we have in abridged, mutilated and condensed American publications, and ought to be replaced by full, original editions. Still more defective is our department of American Statutes, and Session Laws. An assessment of $15 on each share of stock for the ensuing year, to defray the current expenses and fill up the gaps of our library, is probably all that is needed, and I would recommend the same.

Respectfully, JULIUS ROSENTHAL, *Librarian.*

SECRETARY KNICKERBOCKER'S REPORT.

To the President and members of the Institute:

GENTLEMEN: Your secretary would respectfully beg leave to submit herewith his annual report for the past year.

During the year just closed there have been twenty-eight additions to the memberships of the Institute, by new subscriptions, and thirty-four certificates of stock have been issued.

There have been no forfeitures of stock during the year, and the actual membership of the Institute, at this date is three hundred and fifty (350). During the past fiscal year your secretary has drawn upon the treasurer eighty-two (82) orders numbered from 160 to 241 inclusive, for the payment of obligations incurred by the Institute. The corresponding vouchers for which are herewith submitted. These orders amount in the aggregate to $8,204.57, of which amount $6,036.13 has been expended for books, the remainder $2,168.44 being for miscellaneous expenses, such as salary of assistant librarian, insurance, binding of books, shelving, etc., etc. Schedule A, annexed to this report, presents a detailed statement of these disbursments, with the names of the different persons in whose favor orders have been drawn, together with dates and amounts.

Respectfully submitted.

JOHN J. KNICKERBOCKER, *Secretary.*

OFFICERS.

J. H. Bissell, J. S. Cooper, J. L. High, D. J. Schuyler, and D. L. Shorey were appointed a Committee to nominate officers for the ensuing year.

The persons reported by the Committee were elected as follows:

President—Thomas Dent.
First Vice-President—Ed. A. Small.
Second Vice-President—W. I. Culver.
Secretary—E. B. Sherman.
Treasurer—William H. Holden.
Librarian—Julius Rosenthal.
Managers—D. L. Shorey, George Gardner, H. K. Whiton, Joseph E. Smith, William A. Barnum, Franklin Denison, E. A. Otis, William R. Page, and Thomas S. McClellan.

On motion of J. J. Knickerbocker, it was voted that an assessment of $15 be levied on each share of stock to defray the expenses of the ensuing year.

On motion of Josiah H. Bissell, the following resolution was passed:

Resolved, That the Librarian and Executive Committee be instructed to procure, as far as practicable, copies of the briefs in the reported cases in our Supreme Court, and arrange them for convenient reference, and also to make arrangements to procure copies of all briefs on file in the Supreme Court hereafter.

On motion of W. B. Blanke, it was ordered that the incoming Board of Managers be instructed to appoint a committee of five to confer with the Board of County Commissioners with a view to securing proper quarters for the Institute in the county buildings about to be erected.

WHAT IS A GAMBLING HOUSE.—We take the following abstract of an opinion of the Supreme Court of Iowa, from the *Times*, of Dubuque, Iowa:

"The Supreme Court, yesterday morning, rendered a decision in regard to gambling houses that will be of interest to a large number of readers in all parts of the State, and will create something of a commotion among the proprietors of billiard halls, pool-tables and the like.

In the case of the State *v.* Peter Book, from Shelby District, the court affirmed the decision of the court below. Several indictments were filed against Book, but one of which was sustained, and that was that he kept a pool and billiard table; on this count he was found guilty and sentenced. He took an appeal to the Supreme Court, believing that court would reverse the decision, which makes billiard playing, where the losing party pays for the game, and also pool playing, gambling. This may now be fully understood to be the meaning of the law, and those interested must govern themselves accordingly."

REFERENCE INDEX TO THE REVISED STATUTES OF THE UNITED STATES—FROM STATUTES TO SECTIONS. By Darius Lyman, of the office of the Secretary of the Treasury. Boston: Little, Brown & Co. 1875.

This reference index will be a great aid to any one using the Revised Statutes of the United States, as it will enable him to find from what part of the statutes at large any section, or part of a section of the revision, was taken.

SUPREME COURT OF ILLINOIS.

ABSTRACT OF OPINIONS FILED AT SPRINGFIELD, OCTOBER 13TH, 1875.

Teutonio Life Insurance Co. *v.* Mary Mueller et al.—Appeal from Tazewell.—Opinion by SCOTT, J. 4 pp.

SUBSTITUTION OF PARTIES UNDER PRACTICE ACT—OBJECTIONS TO AMENDMENTS MUST BE URGED BELOW—ESTOPPEL BY RECITALS IN A POLICY.

STATEMENT.—Policy of insurance by the "Bismark Bund," on the life of appellee's husband. On the death of the insured, suit was brought by the administrator. During the progress thereof, the administrator was dismissed from the suit, and the widow and heirs substituted as plaintiffs. *Held*,

1. That this substitution was allowable under the practice act.

2. An objection that an amendment was made to a declaration by interlineation cannot be urged, for the first time, in the Supreme Court; but must be made in the court below.

3, Where a policy recites the payment of the first premium, a company cannot be allowed to disprove the recital.

[The other points are the same as in 96, supra.]

108.—Samuel D. Porter *v.* James McNabney et al.—Appeal from St. Clair.—Opinion by SCOTT, J. 11 pp.

INNOCENT PURCHASERS WITHOUT NOTICE—SUPERIOR EQUITY MUST PREVAIL.

STATEMENT—Bills brought by the parties, mutually, to clear title to land, originally belonging to James McNabney, patentee, who conveyed it to Wilson; and Wilson to Carter. Carter gave a deed of trust on it, immediately, to his brother, to secure the payment of $4,000 due to Wilson—all these conveyances being duly recorded. It is claimed that Wilson and the trustee canceled the deed of trust by writing across its face "canceled in full." It was then returned to the grantor, Carter, who conveyed the land to Wilson, who afterward obtained a deed of release from the trustee, Carter, and then conveyed to appellees; all these instruments being duly recorded. It is charged that afterwards Porter (appellant) surreptitiously obtained the deed of trust so canceled, and had the land sold under it; he bidding it in at the sale, and afterwards obtaining a deed from the sheriff of St. Louis, who sold it as trustee—this deed being also recorded.

The defense was that the trustee, Carter, gave into the hands of Porter the deed of trust and the notes secured thereby, indorsed by Wilson, the payee, as security for a loan of money, which he sold the land to obtain payment of—the sheriff acting in the absence of Carter, trustee, in selling the land under the trust deed so deposited in Porter's hands.

In the suit, Porter filed his cross-bill to clear title, in which cross-bill it is charged that the conveyance by Carter (grantor) to Wilson, and the release by Carter (trustee) was in fraud of Porter's rights. The evidence was very contradictory and obscure. *Held*,

1. That the appellees were innocent purchasers, and therefore entitled to protection. The record showed the power in the deed of trust had been revoked by the deed of release to Wilson from Carter (trustee); and they were not under obligation to look further, and see whether there had been a subsequent sale or not, under the canceled trust deed.

2. That the sheriff had no power, at any rate, to sell after the trustee had released his claim. While the release remained in force, no authority could exist in a successor to sell the land; and so the sheriff's deed was no more effectual to pass the title than that of a mere stranger. Porter should have asserted his rights in the courts of this State, before proceeding to sell the land. He having notice in apt time of all the principal facts, and lying by until superior equities had intervened, these equities must prevail.

111.—Wm. H. Broadwell *v.* Wm. P. Howard et al.—Appeal from Morgan.—Opinion by SCHOLFIELD, J. 5 pp.

WAREHOUSE RECEIPTS AS EVIDENCE OF DELIVERY OF PERSONAL PROPERTY.

STATEMENT.—Appellant levied an execution on grain stored in the warehouse of one Fox; who, with money of the appellees, had bought the grain, and sent them warehouse receipts therefor.

Held, That while, in general, there must be an actual delivery of personal property to constitute ownership, yet there are exceptions to this rule, and a warehouse receipt, in accordance with the usage of trade, as to public warehouses, is a sufficient delivery and proof of ownership, and carries the title to the property.

115.—Richard Clark et al. *v.* Samuel Marfield.—Error to Champaign.—Opinion by SCOTT, J. 5 pp.

DISCRETION OF THE COURT AS TO THE ORDER OF HEARING CAUSES—IMPLIED WAIVER OF RIGHTS BY COUNSEL—SERVICE BY PUBLICATION—CO-PARTIES IN WRIT OF ERROR CANNOT ASSIGN ERRORS FOR ONE WHO HAS NOT JOINED.

STATEMENT.—Suit to clear title from a cloud arising from a forged deed purporting to have been executed by the complainant. No defense was made on the trial; and it was objected that the trial was had in advance of the day for which the hearing had been set by the clerk, according to the statute. *Held*,

1. That the statute places it within the discretion of the court to change the order assigned by the clerk for "good and sufficient cause"; and this discretion is not reviewable by the Supreme Court, unless there is manifest abuse in its exercise. Nor was there any necessity to reduce the change of order to writing as a rule of court.

2. If counsel are really surprised by having the hearing brought on sooner than the day set, they should be permitted to show cause against it; as that they had used due diligence, but were unprepared. But counsel cannot be allowed capriciously to refuse to show cause, and then assign the proceeding as error.

3. Where service is by publication as to one of the parties in a cause, who does not join in a writ of error, co-parties cannot assign errors on his behalf that only affect him. And unimportant errors will not vitiate a published notice.

138. — George Chandler etc. *v.* Joshua Brown.—Appeal from McLean.—Opinion by SCHOLFIELD, J. 4 pp.

PARTIES TO DECREE APPOINTING RECEIVER FOR FAILING CORPORATIONS—POWERS OF RECEIVER HOW LIMITED.

STATEMENT.—Suit by appellant as receiver of the Lamar Insurance Company against appellee, to recover balance unpaid on his subscription, appellant acting by virtue of a decree of the Superior Court of Chicago.

The points decided were,

1. That this action could not be maintained, because the appellee was not made a party to the said decree.

2. The decree was, besides, objectionable in conferring upon the receiver discretionary powers to compromise with the stockholders with regard to the payment of each subscription, since each stockholder has a vested right in all the subscriptions, and a court of equity can not give any one a discretionary right to release it; and particularly, this cannot be done unless all the stockholders are made parties to the decree.

145.—Louis Reinback *v.* John C. Crabtree et al.—Appeal from Morgan.—Opinion by SCHOLFIELD, J. 9 pp.

INSTRUCTIONS—APPLICABILITY—STANDARDS OF MONEY VALUE—USURY RULE THEREIN—TIME—USURIOUS CONTRACT A QUESTION OF FACT.

STATEMENT.—Action of assumpsit on promissory note; in which the defense was that the principal in the note had paid usurious interest enough to pay the balance due on the note. Judgment on verdict for defendants.

Held, 1. That all instructions must be applicable to the evidence; and if an instruction is a correct expression of the law upon a state of facts, which the evidence tends to prove, it is sufficient; and it is not proper to state exceptions to the rule when there is no evidence to make such statement applicable to the case at bar.

2. Neither the Supreme Court of the United States, nor of Illinois, recognizes two legal standards of value. A dollar is a dollar, whether payable in gold or in national currency; and ten per cent. interest, payable in gold, may be lawfully paid, dollar for dollar, in any currency which the general government has declared to be a legal tender, in the payment of debts. And any excess in the payment of interest beyond the rate allowed by law, would not be relieved of the objection of usury, because of the contract under which it was paid having provided for payment in gold, and the payment having been made in currency.

3. Although usurious interest once voluntarily paid cannot be recovered back, yet this rule does not apply where the transaction has not been settled, and suit is brought for an alleged balance. In such case the debtor may defend by claiming a credit for whatever usurious interest he has paid in the same transaction.

4. In pleading, the statement of the precise time is not necessary, even in criminal cases, unless it constitutes a material part of the contract.

5. The taking of usurious interest is *prima facie* evidence of a usurious contract; and whether a contract is usurious or not is a question of fact for the jury.

146.—Alfred Andras et al. *v.* I. J. Ketchum.—Appeal from Morgan.—Opinion by CRAIG, J. 5 pp.

JUDGE'S OPINION ON CONTROVERTED FACT—LIMITATION OF PROOFS.

STATEMENT.—Suit to recover $89 for a map of Morgan county, with views of appellee's residence. Motion for new trial overruled, and judgment for defendant. In reversing, it was

Held, 1. That there is no rule of law or practice which allows a presiding judge to give the jury his opinion on a controverted question of fact. And so, after the evidence was submitted, in this case, it was fatal error to ask the court, "Would your honor know the view to be the residence of defendant, were defendant's name taken from the view?" and the court to reply in the negative, [or affirmative]; since this was likely to bias the jury as to a fact to be established alone by the evidence; and it is always impossible to know whether such opinion actually influenced the verdict or not.

2. It would have been proper to show that the map was incorrect, but not to show that a business card was incorrect, which was inserted, but not authorized by the prior agreement of the parties.

149.—Edwin S. Fowler *v.* Edward R. Perkins.—Appeal from Sangamon.—Opinion by SCOTT, J. 4 pp.

EFFECT OF REPEALING PRACTICE ACT—INTERPRETATION OF "MAY" AND "SHALL" IN STATUTES.

STATEMENT.—A revenue case was pending in the Circuit Court on appeal from the County Court, when the act of 1874, giving to the county courts direct appeals, etc., to the Supreme Court, took effect; whereupon the Circuit Court dismissed the appeal.

Held, 1. That jurisdiction having already attached, the Circuit Court should have proceeded to judgment.

2. The words "may" or "shall," in a statute may be used interchangeably, as will best express the legislative intention. The word "may" means "must" or "shall" only in cases where public interests and rights are concerned, and the public, or third persons, have a claim *de jure*, that the power shall be exercised. And, on the other hand, the word "shall" is presumed to have been used in reference to any right or benefit which may have accrued to any one; but where no such right or benefit depends on its imperative sense, it may be held directory merely.

152.—William Yokem et al. *v.* Jesse Yokem et al.—Appeal from Sangamon.—Opinion by SCHOLFIELD, J. 9 pp.

PRESUMPTION OF INTENTION IN A VOLUNTARY CONVEYANCE OF LAND TO CHILDREN.

STATEMENT.—Appellant being old, conveyed his lands to his children, with the intention that he should reserve to himself, either in the deed or by a separate lease, the possession for his lifetime, which, by a misunderstanding of the attorney drawing the conveyance, was not done. Evidence of intention is a large part of the case and opinion.

Held, That the facts that complainants were old, infirm and ignorant, and therefore easily persuaded, do not, in themselves, show that undue influence was employed to obtain the execution of the deed. Yet, it is so manifestly against the interest of an old, helpless man to surrender the present means of a comfortable support, and accept, in lieu thereof, mere individual obligations to maintain him, even if the obligors are his own children, that a court of equity should never act on the assumption that it has been done, unless the proof to that effect is clear and convincing, which is not the case here.

[Case remanded, with instructions to the court to require immediate possession to be given to the complainant, of the lands, for his life. WALKER, J., dissenting]

153.—Peter Larisson et al. *v.* P. A. & D. R. R. Co.—Appeal from Logan.—Opinion by WALKER, Ch. J. 16 pp.

PLEADING BY CORPORATIONS BROUGHT IN AS NOMINAL PARTIES—BY MUNICIPAL CORPORATIONS—IMPEACHMENT OF A STATUTE.

STATEMENT.—Bill in chancery by appellants to restrain the collection of a tax against appellees, the tax having been levied to aid in the construction of appellees' road. Payment was resisted on the grounds that the special act of incorporation of the company was unconstitutional, and that the company conducted fraudulently and never intended to finish their road, but held out false inducements therein; that the officers still hold the bonds for their own use, although they have sold the franchises of the company, and abandoned the construction of the road. Bill dismissed on hearing. *Held*,

1. That where, as in this case, there are several defendants, one (or more) a corporation or corporations, a cause will not be reversed because the answer of the corporation was not under seal, if it was but a nominal party, and the injunction would have been dissolved even if it had been defaulted.

2. A municipal corporation may answer in its own name, without the signature of its officers besides.

[3. The constitutional objection was a mere formal one, maintaining that the charter was not passed in the way, and by the steps in legislation, prescribed by the constitution. The court decides that, as a matter of fact, the proper steps were observed.]

4. Evidence to impeach a law must be clear, and not merely sufficient to raise a doubt.

[The charge of fraud was not specifically passed upon; but the judgment below against appellant was affirmed.]

156.—Samuel A. Murphy *v.* Victor Larson.—Appeal from Ford.—Opinion by SCOTT, J. 8 pp.

MALICIOUS PROSECUTION — ACTING UNDER ADVICE—EXEMPLARY DAMAGES.

STATEMENT.—Suit for malicious prosecution. Verdict for plaintiff.

1. It was held that, while the advice of an attorney duly licensed will justify one in instituting a criminal prosecution in good faith, yet, where, (as in this case,) advice is taken of one who is not licensed although he holds himself out as a lawyer, this will constitute no excuse; since the adviser is not an officer of court.

2. Nevertheless, such unauthorized advice may be admitted in evidence, in mitigation of exemplary damages, since it tends to show want of actual malice.

173.—Board of Supervisors of Jackson Co. *v.* Samuel T. Bush et al.—Appeal from Jackson.—Opinion by SCOTT, J. 8 pp.

RAILROAD SUBSCRIPTIONS—ISSUING OF STOCK BY COUNTIES—AUTHORITY THEREFOR BY VOTE OF THE PEOPLE—BURDEN OF PROOF UNDER THE PROHIBITORY PROVISION AND SAVING CLAUSE OF THE NEW CONSTITUTION—COUNTY "TRUSTEES"—VALIDITY OF BONDS.

STATEMENT.—Bill for injunction, and decree that 200 undated bonds, each for $1,000, prepared under an order of the County Court of Jackson county, and delivered to John M. Hanson, Hugh Crawford and John Ford, in trust for the Cairo and St. Louis R. R. Co., be surrendered up to the corporate authorities of the county, and that the orders of said County Court, made in 1871, authorizing and directing that two subscriptions, each for $100,000, be made to the capital stock of the said company, be declared null and void, as having been made without authority of law. One hundred of these bonds, it was claimed, were issued

under a subscription voted at an election held June 9, 1868, and the others under election of July 24, 1869. Injunction dissolved as to the first series of bonds, and made perpetual as to the others. Appeal by both parties.

The first series of bonds were ordered by the County Court to be issued on the conditions submitted to vote at the first election, viz: to run 20 years at the option of the county; to bear interest at 8 per cent.; no part to be delivered to the R. R. Co. until the road was finished to Murphysboro, and then one half of them to be executed and delivered—the other half to be, in like manner, delivered on the completion of the entire road, and cars being run thereon. None bearing interest until so delivered. The clerk of the court was required to prepare the bonds, omitting the date, and deliver them undated into the custody of the trustees named above, who had power by the order of the court to date and deliver them to the company as prescribed, signed by the members of the court, upon compliance with the conditions contained in the propositions voted upon as follows: $50,000 when the road should be finished to Murphysboro, and $50,000 when it should be finally completed. They were also authorized, on such compliance and delivery, to take in return certificates of stock equal to the amount of the bonds issued.

A similar order was made with regard to the second series.

In November, 1871, the county adopted township organization, so that the board of supervisors have succeeded the old County Court; which board are complainants herein. *Held*,

1. That those undated bonds should be surrendered to the corporate authorities of the county. There is no authority for placing them in the hands of such trustees, to judge of the compliance with conditions, and then issue the bonds, even if the subscriptions had been duly authorized by the vote of the people. The regularly constituted authorities of the county cannot delegate their official trust; and more especially without the express consent of the people.

[2. Without expressly deciding the point whether, when a vote on subscription was taken without anything said in the submission as to the gauge of the road to be built, the company can construct a "narrow gauge" instead of the usual and customary gauge, the court say, it is a very important question in determining whether this is the enterprise authorized by the vote.]

3. The folly of the County Court in the matter is apparent in that one of these trustees having died, some of the undated bonds came into the possession of his personal administrator, who could have no authority to control them in any wise. Nor, in such case, have the surviving trustees any rights of survivorship as such, since the board has no existence in law.

4. Such trustees could commit irreparable injury by improperly dating and delivering such bonds, they being in no sense county officers, and owing no obligation to the county for their proper performance of the trust.

5. Where, on a vote prior to the adoption of the Constitution of 1870, a subscription is afterwards made, subsequently to such adoption, the burden of proof is on the railroad company to show affirmatively that the subscription is within the saving clause of that provision of the Constitution which prohibits subscriptions to the capital stock of corporations by municipalities.

[6. The court do not decide the point whether the elections were in conformity with the enabling act or not, but intimate that the burden of proof rests on the company as to this question.]

7. The questions raised as to the validity of the bonds can be better determined should the corporation sue out a writ of mandamus to compel the county to date and deliver the bonds.

Whole decree reversed.

LV. NEW HAMPSHIRE REPORTS.

Through the courtesy of Hon. JOHN M. SHIRLEY, we have received the advance sheets of the LV. Volume of his Reports, from which we take the following head-notes:

Cummings v. *The Cheshire County M. F. Ins. Co.* p. 457.

INSURANCE—ASSIGNMENT OF POLICY.

Insurance is a contract of indemnity appertaining to the person or party to the contract, rather than to the property subjected to the risk against which its owner is protected.

The assent of the insurer to an assignment of a policy of insurance, upon a sale of the property named therein, constitutes a new and original promise to the assignee to indemnify him in like manner as the original insured was indemnified; and the exemption of the insurer from further liability to the vendor, and the premium already paid for insurance for a term not yet expired, are a good consideration for such promise, and constitute a new and valid contract between the insurer and the assignee.

A mutual fire insurance company insured A, "his heirs, executors, administrators, and assigns," on his dwelling-house a certain sum, and "on furniture and clothing therein," a certain other sum. During the life of the policy, A sold the real estate to B, and assigned the policy to him, with the consent of the insurers. A did not sell his furniture and clothing to B, but removed it. B took possession of the house, and placed therein his own furniture and clothing, of equal character and value, and it was burned with the house.

Held, B may recover of the insurers the amount of the original insurance upon the furniture and clothing of A.

Harriman v. *Park*, p. 471.

DEED-POLL—RESERVATION—ACCEPTANCE.

Where land is conveyed by deed-poll, with a reservation that the grantee shall maintain suitable fences upon the lines of the premises, and the grantee accepts the deed, he is bound to perform the service.

H conveyed by deed-poll a tract of land to P and D. The deed contained the following clause: "And the said grantees agree to build and keep in repair a suitable fence, on the westerly and southerly sides of said last described premises, at their own expense." P and D subsequently conveyed the land to third parties, after which H died. His executrix brought assumpsit against P and D to recover damages which accrued by reason of the fence being out of repair, as well after as before the death of the grantor.

Held, that the executrix could maintain assumpsit to recover the damages that accrued prior to the death of her testatator.

Held, also, that P and D could not defeat her right to recover by conveying the premises to a third party.

SUPREME COURT OF MICHIGAN.

NOTES OF DECISIONS OF THE OCTOBER TERM, 1875.

BY HENRY A. CHANEY, ATTORNEY AT LAW.

Harvey v. *McAdams.*—Error to Saginaw. Affirmed with costs. Opinion by COOLEY, J.

Declarations in trover need not set forth the the precise nature or evidences of the plaintiff's title.

What either partner does in the collection of a firm debt is presumptively done with the other's sanction.

Whoever selects a person not qualified as a regular officer, to serve a process, should be held responsible for his behavior in the discharge of the duty.

Where mortgaged goods are levied on under an execution against the mortgagor, it is not illegal, when necessary, to take possession of distinct articles separately, but this would not justify selling them separately.

Any parol understanding between the mortgagors and mortgagees of property regarding its possession is ended when the property is converted by a third person.

In a case resulting in an execution and a levy upon goods the time of entering judgment is within the court's discretion; the judgment is only provisional, and does not deprive a party of the right to move for a new trial.

Wells v. *Martin.*—Error to Ottawa. Reversed with costs and new trial granted. Opinion by CAMPBELL, J.

A railroad sub-contractor, whose relation to the contractor is declared by an express provision in the contract between them to be that only of a disbursing agent, has no authority to obtain supplies on the contractor's credit.

Iron Company v. *Auditor General.*—Appeal from Marquette. Reversed; cause remanded with directions to overrule the demurrer. Opinion by COOLEY, J.

A specific tax obliging mining companies to pay more upon mineral obtained in the State, and exported before it is smelted, than on that which is smelted within the State, is a tax on inter-State and foreign commerce, and is an application of the doctrine of protection.

Doty v. *Martin.*—Appeal from Clinton. Affirmed with costs. Opinion by MARSTON, J.

Instruments of conveyance embodying the terms of a contract may sometimes be executed and delivered in full performance of an oral agreement, and may even vary it, and then the oral agreement is considered as merged in the written.

Where papers are executed and delivered in performance of part only of an oral agreement, leaving some distinct portion untouched and unperformed, so much of the oral agreement as is left unperformed is not merged in the written agreement, and parol evidence to show what the actual agreement was is not then excluded.

An executed oral agreement for the sale of the good will of one's professional practice is not void under the Statute of Frauds as one not to be performed within a year. When the practice is transferred, paid for, and entered upon, the parties have done what they could to make the transaction complete, even if the purchaser does not, within the year, reap all the benefits he expects from it.

Churchill v. *Burt.*—Error to Calhoun. Writ dismissed. PER CURIAM.

A decision of the Circuit Court affirming an order of the Probate Court to extend the time of a commission and pass upon a claim, is not a common-law final order or judgment, and not reversible on writ of error.

G. R. & I. R. R. Co. v. *Wright.*—Error to Kent. Reversed, PER CURIAM.

One who appeals from a justice's judgment is entitled to the whole of the day on which the return is filed to pay the entry fee, and his right of appeal does not depend on the payment of a fee to the opposing attorney in addition to the entry fee.

Scott v. *Bingham Township Board.*—Mandamus. Writ refused with costs against relator. PER CURIAM.

The costs and expenses of one who proceeds by information on his own account, and not by direction of the township, to establish his right to the office of supervisor, are a personal debt, and the township is under no legal liability to defray them or reimburse him with the amount.

Ligare v. *Semple et al.*—Appeal from Delta. Reversed, and new decree entered in the Supreme Court with costs of both courts to complainant; case remanded for farther proceedings. Opinion by GRAVES, C. J.

Where a wife is non-resident when her husband makes an absolute conveyance, divesting himself entirely of his seizin and estate, she has no right of dower left.

In a foreclosure suit, the right of dower of a third person cannot be litigated, nor the woman made a party.

Thayer v. *Arnold.*

Appeal from Washtenaw. Opinion by GRAVES, C. J. Affirmed with costs.

The omission of claimants of land to put into a case an instrument which tended to qualify the estate they claimed, and which the other side ought properly to have produced and had construed, was not held as helping to estop them from urging their claim to the lands.

Where one conveyed land in trust, and the trustees, with his knowledge, and by virtue of the stipulations of the trust to which certain events had given effect, deeded to a third person, and the first owner thereon relinquished possession upon being required to, and never reclaimed it, but disposed of his property as if he did not consider this land as belonging to him, his title was regarded as extinguished.

Kidder v. *Merryhew.*—Case made from Kent. Reversed and judgment entered for defendants with costs of all courts. Opinion per curiam.

Where a replevin suit is abated in consequence of the removal of the magistrate before whom it was begun, the plaintiff ought not to be held responsible on the replevin bonds.

UNITED STATES SUPREME COURT.

PROCEEDINGS OF.

Wednesday, Oct. 27, 1875.

On motion of E. W. Stoughton, Edwin Thayer, of Buffalo, New York, was admitted.

On motion of J. H. Ashton, Thomas G. Barry, of New York city, was admitted.

No. 571. The United States v. The Union Pacific Railroad Company. This cause was argued by Atty. Gen. Pierrepont for the appellants, and by E. W. Stoughton and S. Bartlett for the appellee.

No. 3. Argued. The State of Florida v. E. C. Anderson et al. The petition of John Darby in this cause was argued by E. M. L'Engle in support of the same.

Adjourned until Thursday at 12 o clock.

Thursday, Oct. 28.

No. 3. Argued, The State of Florida, complainant, v. E. C. Anderson, Jr. et al. The argument of this cause was commenced by H. Bisbee, Jr. for the complainant, and continued by H. R. Jackson for Anderson, Jr. et. al.

Adjourned until Friday at 12 o'clock.

Friday, Oct. 29.

On motion of Matt H. Carpenter, Francis J. Lippitt, of Washington, D. C., was admitted.

No. 3. Argued. The State of Florida, complainants, v. E. C. Anderson, Jr. et al. The argument of this cause was continued by Matt H. Carpenter of counsel for D. P. Holland, one of the respondents, and by W. W. Boyce for Anderson et al., and concluded by H. Bisbee, Jr. for complainant.

No. 214. William F. Pick et al. v. The Chicago and Northwestern Railroad Company et al.

No. 235. DeWitt C. Lawrence et al. v. George H. Paul et al.

No. 587. The Chicago, Milwaukee and St. Paul Railway Company v. H. M. Ackley.

No. 589. L. D. Stone v. State of Wisconsin.

The argument of these causes was commenced by B. C. Cook, and continued by Judge C. B. Lawrence, of Chicago, for the appellants, in cases Nos. 214 and 235.

Adjourned until Monday at 11 o'clock.

Monday, Nov. 1.

LIABILITY OF A STOCKHOLDER ON A CONDITIONAL SUBSCRIPTION—DISPOSITION OF A BILL OF LADING AFTER ACCEPTANCE OF A DRAFT.

No. 482. Upton *v.* Trebilcock. Error to the Circuit Court of Iowa. This was an action by the assignee in bankruptcy to recover an unpaid subscription by the plaintiff in error to the stock of the insolvent Great Western Insurance Company, to which the defense was that the subscription had been obtained by the fraudulent representations of the agent of the company to the effect that eighty per cent. of the amount not paid in was non-assessable and would be paid by the profits, etc. It was also alleged as a defense that the agent represented that the note given for the twenty per cent. paid would not be parted with by the company, but would be leniently held, to suit the convenience of the subscriber, and that afterward the note was transferred to a bank for collection, and that thereupon the subscriber had repudiated the subscription, and asked to have the contract rescinded.

The court holds that the defense will not avail to relieve the subscriber from his contract; that he became a stockholder under a certificate entitling him to the shares of stock named therein, and that the words "not assessable," stamped across the face of the certificate did not import more at most than that he would not be liable to assessment after he had paid the full amount of the subscription, and could not in any event destroy the contract. It was said in this connection that the idea that the capital of a corporation is to be treated like a football, to be thrown into the market for purposes of speculation, that its value may be elevated or depressed to advance the interest of its managers, is a modern and wicked invention which will not be tolerated by the courts. Upon the question of the alleged recession of the contract in consequence of the violation of the agreement as to the note, it is held that it was not before the jury; that the only question of fraud submitted was that in reference to the eighty per cent. of unpaid subscription, and that could not avail by reason of the want of diligence in the subscriber in not ascertaining his liability respecting it under the regulations of the company, until it was demanded. Reversed. HUNT. J., delivered the opinion; dessenting, MILLER, J., with whom concurred the Chief Justice and BRADLEY, J.

BILL OF LADING—TIME DRAFT—AGENT—INSTRUCTIONS.

No. 15. National Bank of Commerce of Boston *v.* The Merchants Bank of Memphis.—Error to the Circuit Court for Massachusetts. This case presents the question whether a bill of lading of merchandise, made deliverable to order,

when attached to a time draft and forwarded with the draft to an agent for collection, without any special instructions, may be surrendered to the drawee upon his acceptance of the draft, or whether the agent's duty is to hold the bill of lading after the acceptance, for the payment of the draft, and the court hold that the agent can be held liable to the owners of the draft for a breach of duty in surrendering the bills of lading on acceptance of the draft only, after special instructions to retain the bills until payment of the acceptances. Justice STRONG delivered the opinion.

No. 29. James Brown et al. v. Enoch Piper. Appeal from the Circuit Court of the United States for the District of Massachusetts. Swayne, J., delivered the opinion of the court, reversing the decree of the said Circuit Court with costs, and remanding the cause with directions to dismiss the bill.

No. 30. Enoch Piper v. George T. Moon et al. Appeal from the Circuit Court of the United States for the southern district of New York. Swayne, J., delivered the opinion of the court, affirming the decree of the said Circuit Court with costs.

No. 819. The 420 Mining Company v. The Bullion Mining Company. In error to the Supreme Court of the State of Nevada. On motion of M. Blair, docketed and dismissed with costs.

No. 820. M. T. Slaughter et al. v. James M. Glenn et al. Appeal from the Circuit Court of the United States for the western district of Texas. On motion of Quinton Corwine, docketed and dismissed with costs.

No. 821. Antoine Pitot v. The Citizens Bank of Louisiana. In error to the Superior District Court for the parish of New Orleans, Louisiana. On motion of Armand Pitot, docketed and dismissed with costs.

No. 6. The State of Wisconsin v. The City of Duluth and the Northern Pacific Railroad Company. Waite, C. J., announced the decision of the court, granting the motion for leave to file application and for an order to take testimony, also for a decree pro confesso against the Northern Pacific Railroad Company.

RESIGNATION OF MR. J. W. WALLACE.

John William Wallace, having resigned the office of reporter of the decisions of this court, and his resignation having been accepted, to take effect upon the completion and publication of the twenty-second volume of his reports, William T Otto is appointed to take his place when the vacancy occurs. Mr. Otto will report all the decisions of the present term, and such decisions of the preceding terms as shall not have been reported when he takes the office.

No. 214. William F. Piek et al. v. The Chicago and Northwestern Railroad Company et al. No. 235. De Witt C. Lawrence et al. v. George H. Paul et al. No. 587. The Chicago, Milwaukee and St. Paul Railroad Company v. H. M. Ackley et al. No. 589. L. D. Stone v. The State of Wisconsin. The argument of these causes was continued by L. S. Dixon for the appellees.

Adjourned until Tuesday at 12 o'clock.

Tuesday, Nov. 2.

On motion of William M. Evarts, Salem Dutcher, of Augusta, Georgia, was admitted.

No. 214. William F. Piek et al. v. The Chicago and Northwestern Railroad et al. No. 235. De Witt C. Lawrence et al. v. George H. Paul et al. No. 587. The Chicago, Milwaukee and St. Paul Railway Company v. H. M. Ackley et al. No. 589 L. D. Stone v. The State of Wisconsin.

The argument of these causes was continued by C. B. Lawrence, of the counsel for the appellants in Nos. 214 and 235, and by J. W. Cary for appellants, and by J. C. Sloan for the appellees.

Adjourned until Wednesday at 12 o clock.

Wednesday, Nov. 3.

No. 214. William F. Piek et al v. The Chicago and Northwestern Railroad Company.

No. 235. DeWitt C. Lawrence et al. v. George H. Paul et al.

No. 587. The Chicago, Milwaukee and St. Paul Railroad Company v. H. M. Ackley et al.

No. 589. L. D. Stone v. The State of Wisconsin.

The argument of these cases was continued by J. C. Sloan for the appellees, and by E. W. Stoughton for appellants.

Adjourned until Thursday at 12 o'clock.

JUSTIN BUTTERFIELD'S DEFENSE OF JOE SMITH.—Hon. E. M. HAINES is publishing a series of original anecdotes of the members of the bar of the early day in this State in his LEGAL ADVISER. We take the following from the November number:

In 1842, Gov. Carlin, of Illinois, caused a warrant to be issued for the arrest of the Mormon prophet, Joseph Smith, as a fugitive from justice from Missouri, where he had been indicted for a capital offense; but the arrest was delayed until the following winter of 1843, when the Mormons insisted on having the question involved legally tested in the Federal court, upon which Joe Smith surrendered himself, as a prisoner, to the sheriff of Sangamon county, who held the warrant for his arrest. A writ of habeas corpus was obtained from Judge Pope, of the United States court at Springfield. Smith had made great preparation for his defense, and had employed Justin Butterfield, of Chicago, then conceded one of the ablest lawyers in the northwest. The court-room was crowded with spectators, which included a large number of ladies, who were accorded seats upon the platform upon either side of Judge Pope. The career of Smith had excited great attention among the people, especially in Illinois and Missouri; consequently the present occasion, which was to decide the fate of the Mormon prophet, was looked to with intense interest. Mr. Butterfield, fully appreciating the importance of the case, and the necessity of maintaining his reputation as a lawyer, which had been rapidly established, had made a thorough preparation of the case. He was a man of powerful logic, and seldom indulged in illustrations or allusions not of the most serious and weighty import. His manner was of the Websterian style. When he arose to address the court, all eyes were upon him, and as he involuntarily, for a moment, surveyed the assemblage, he was forcibly struck with the peculiarity of the circumstances, which instantly flashed over his vision, and, without the least thought in advance of such an illustration, he proceeded: "May it please your honor: I appear in the presence of the Pope, surrounded by angels, to defend the prophet of the Lord." There was something in the suggestion so ludicrous, and yet so apt, that it secured for Mr. Butterfield a most attentive listening to his powerful argument which followed. Joseph Smith was discharged, and all seemed pleased with the result.

INDORSEMENT AND PAYMENT OF DRAFTS.

Secretary New has issued the following instructions: Treasury or Post Office drafts must not be paid until the indorsements conform to the following regulations:

1. The name of the payee, as indorsed, must correspond in spelling with that on the face of the draft; no gaurantee of an indorsement, imperfect in itself, can be accepted. If the name of a payee as written on the face of a draft is spelled incorrectly, the draft should be returned to the Treasurer of the United States for correction.

2. Indorsements by mark (✕) must be certified by two witnesses.

3. Indorsements by executors or administrators must be accompanied by certified copies, under seal, of letters testamentary or letters of administration, as the case may be.

4. Payees and indorsees must indorse by their own hands: officials, officially with full title; firms, the usual signature by a member of the firm, not by a clerk or other person for the firm.

5. Every indorsement must be by the proper written (not printed) signature of the person whose indorsement is required.

6. Powers of attorney for the indorsement of drafts in payment of claims must be dated subsequently to the drafts, must be witnessed by two persons, and must be acknowledged by the constituent before the Treasurer of the United States or an Assistant Treasurer; a judge or clerk of a District Court of the United States; a collector of customs; a notary public, under his seal, or a justice of the peace or commissioner of deeds, if before either of the two latter, the certificate and seal of the county clerk as to the official character and signature of the justice or commissioner is required. If executed in a foreign country, the acknowledgment must be made before a notary public, with his seal attached, or a United States consul or Minister. The official taking the acknowledgment must certify that the said letter of attorney was read and fully explained to the said constituent at the time of acknowledgment.—(See section 3477, Revised Statutes.)

7. Evidence of authority to indorse for incorporated or unincorporated companies must accompany drawn drafts or indorsed to the order of such companies or associations. Such evidence should be in the form of an extract from the by-laws or records of the company or association, showing the authority of the officer to indorse, receive moneys, etc., for the company, and giving his name and the date of his election or appointment, which extract should be certified to by the secretary or president of the company, and its seal be affixed. If the company has no seal, the extract should be certified as correct by a notary public, or other competent officer, under his seal.

[Continued from page 52.]

Bk. of Columbus *v.* Gurlinghouse, 22 Ohio St. Rep., 492; Wiley *v.* Starbuck, 44 Black's Rep., 198. In all these cases views were expressed in conflict with those maintained in the First Nat. Bk. of Whitehall *v.* Lamb et al., 50 New York Rep., 100. This adjudication controlled the result of the litigation between these parties.

Upon reason and authority we have no hesitation in coming to the conclusion that there is error in the case before us.

The plaintiff below was entitled to recover the principal of the note sued upon, less the amount of the interest unlawfully reserved. Whether he was entitled to recover interest upon the amount of the principal so reduced, after the maturity of the note is a point which has not been argued, and upon which we express no opinion.

The judgment of the court of appeals is reversed, and the case will be remanded with directions to proceed in conformity with this opinion.

SUPREME COURT OF INDIANA.

MARION, C. C. C.

KEPPE *v.* KLINGENSMITH et al.

ATTORNEY—ILLEGALLY RETAINING MONEY—DISBURSING.

DOWNEY, J.

This is a continuance of the case between the same parties in 41 Ind., 341. On return of the case to the Circuit Court an amended complaint was filed, to which Klingensmith filed a demurrer, which was sustained, and this ruling is the alleged error.

The object of this action is not to recover a judgment against Klingensmith, or Burns & Klingensmith, for the money collected by them as attorneys. That judgment was rendered before the first appeal in this case. From so much of the judgment in the first case (41 Ind., 341.) as suspended Klingensmith from practicing law, was appealed, and that portion was reversed on the ground that he should not be suspended for the illegal appropriation of the money by his partner. The object of this complaint is to compel Klingensmith to account for the sums collected due him and his partner as attorneys, and which, by agreement, he was to appropriate to payment of plaintiff's claim, and to disbar Klingensmith, etc.

The court is of opinion that the facts in the amended complaint, now before it, does not warrant the suspension of Klingensmith from practice. The money collected by him on the claims due to the firm is not the money of their client. (See 2, G. & H., 329, section 778 req.) If there is any remedy against Klingensmith on account of the claims alleged to have been left in his hands for collection, it must be sought in another form. Affirmed.—*Indianapolis Sentinel.*

The Canada *Law Journal* for August says: "This is the season humorously called the 'long vacation.' A few officials of the courts, a few counsel whose life is untroubled by solicitors' labors, a fortunate judge or two, may enjoy a 'long vacation'; but to the majority of the profession the term is a cruel mockery. With appeal courts, election courts, and the incessant treadmill of solicitors' practice, the long vacation, in which we should be laying in stores of health and vigor for the struggle of the rest of the year, is sadly shorn of its proportion. Those on whose shoulders the editing of a legal journal falls are touching objects of sympathy. To think of a 'subject,' to examine it when discovered, to ponder over it, to write about it with the thermometer at its present altitude, is 'utter weariness and sore distress.' If it were justifiable to introduce into these columns dissertations on matters which at this season have some sort of interest for readers, we should feel more hopeful. No doubt picnics, boating parties, and tours by land and water, are the origin of petitions which are often summarily dismissed, of appeals, of rehearings, of reversals of judgment, of contracts leading sometimes to partnership and sometimes to breach of trust; but these matters are of too delicate a nature to admit of treatment in a purely legal tone. On the whole, we must satisfy ourselves with the reflection that people are as unwiling to read in this weather as we are to write."

CHICAGO LEGAL NEWS.

SATURDAY, NOVEMBER 13, 1875.

The Courts.

UNITED STATES SUPREME COURT.

No. 28.—OCTOBER TERM, 1875.

JOHN D. MCLEMORE, plaintiff in error, *v.* THE LOUISIANA STATE BANK.

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

WAR OF THE REBELLION—BANK—LIABILITY OF FOR PLEDGE WHEN BANK PUT IN MILITARY LIQUIDATION—BANK NOT LIABLE FOR LOSS OCCASIONED IN CONSEQUENCE OF MILITARY ORDER.

Mr. Justice DAVIS delivered the opinion of the Court.

It is unnecessary to consider whether in all respects the charge of the Circuit Court to the jury was correct, because the record shows the case of the plaintiff to be so fatally defective, that the judgment below would not be reversed for instructions, however erroneous. (Brobst *v.* Brock, 10 Wallace, 519; Decatur Bank *v.* St. Louis Bank. 21 Wallace, 301.) The case is this: The plaintiff was the owner of certain promissory notes and acceptances, in possession of the commercial firm in New Orleans of which he was a member, which were pledged by the firm, in 1861 and 1862, to the bank, as security for money loaned to them. This paper was not met at maturity, and with the collaterals pledged for its repayment remained in possession of the bank until the 11th June, 1863, when the bank was put in liquidation by order of Major General Banks, and its effects transferred to military commissioners, appointed to close it up. The officers of the bank, while submitting to this order, because they had no power to resist it, deemed it unjust and oppressive, and entered a protest against it, on their minutes. During the administration of the affairs of the bank by these commissioners, the pledged paper was sold for less than its face. In January, 1866, the military liquidation ceased, by order of Major General Canby, and the effects of the bank which were unadministered were restored to the corporators. The plaintiff, on the theory that the securities were parted with illegally, seeks to make the bank responsible for the proceedings of the commissioners, but this he cannot do. Certainly no act was done, or omitted to be done by the bank, inconsistent with its duty, for it was only bound to take that care of the pledge which a careful man bestows on his own property.

It is true it was the duty of bank to return the pledge, or show a good reason why it could not be returned. This it has done by proof, that without any fault on its part, and against its protest, the pledge was taken from it by superior force, and where this is the case, the common law as well as the civil law holds that the duty of the pledgee is discharged. (2 Kent, 579; Story on Bailments, section 339; Commercial Bank *v.* Martin, 1 Annual, 344.) That the proceedings of General Banks and the liquidators appointed by him constituted "superior force," which no prudent administrator of the affairs of a corporation could either resist or prevent, is too plain for controversy. It was in the midst of war that the order was made, and with an army at hand to enforce it, there was nothing left but submission under protest. Any other course of action, under the circumstances, instead of benefiting, would have injured every one who had dealings with the bank. It has turned out that the plaintiff has suffered injury, but not through the fault of the officers of the bank, for they retained the notes and bills long after the paper for which they were given as security had matured, and until they were dispossessed of them by military force. Under such circumstances they have discharged every duty which they owed to the plaintiff, and if loss has been occasioned in consequence of the military order in question the bank is not responsible for it.

The judgment is affirmed.

U. S. DIST. COURT, D. OF INDIANA.

OPINION NOV. 4, 1875.

UNITED STATES *v.* DISTILLERY NO. 28, AND OTHER PROPERTY.

DISTILLERIES MAY BE COMPELLED TO BRING THEIR BOOKS INTO COURT.

1. ACT OF JUNE, 1874.—That the act of June 24, 1874, does not apply exclusively to cases arising under the custom revenue laws, but applies as well to cases arising under the internal revenue laws.

2. DESCRIPTION OF BOOKS.—That the books and papers ordered to be produced are described with sufficient particularity.

3. CONSTITUTIONALITY OF ACT.—That the fifth section of the act of June 22, 1874, is constitutional, and does not violate articles 4, 5 and 7 of the amendments to the Constitution.

4. PROCEEDING AGAINST DISTILLERY.—That this is a proceeding against the distillery and not against the claimants; that any statements made by them as witnesses in the proceeding against the distillery could not be used against them in any subsequent criminal prosecution.

5. PRODUCTION OF BOOKS.—That the court had the power to make the order requiring the production of the books and papers, and to enforce it.

6. JURY TRIAL.—That when the issues are made up, the claimants will have the constitutional right to demand a jury trial.

7. THE PENALTY.—That the penalty for not complying with the order is that the allegations in the motion shall be taken as confessed.

8. EX POST FACTO LAW.—The court considers the objection that the act of 1874 is an ex post facto law.—[ED. LEGAL NEWS.]

Opinion by GRESHAM, J.

Informations were filed in two cases under the internal revenue laws against Distillery No. 28, and certain rectifying houses and other property.

Gordon B. and John W. Bingham intervened as claimants, and the causes were consolidated.

Subsequently, upon the written motion of the district attorney, under the 5th section of the act of June 22d, 1874, an order was entered against the claimants to produce in court certain business books and papers relating to their business as distillers, rectifiers and wholesale liquor dealers, on a day and hour certain, subject to the examination of the district attorney, under the direction of the court. On the day named claimants appear by counsel, and moved that this order be vacated for the following reasons:

First. That the act of June 22d, 1874, applies exclusively to cases arising under the custom revenue laws, and not at all to proceedings under the internal revenue laws.

Second. That the books and papers ordered to be produced are not described with sufficient particularity.

Third. That the fifth section of the act of June 22, 1874, is unconstitutional in this, that it violates articles 4, 5 and 7 of the amendments to the Constitution.

The section under which the order was entered against the claimants reads as follows: "That in all suits and proceedings other than criminal, arising under any of the revenue laws of the United States, the attorney representing the government, whenever in his belief any business book, invoice or paper belonging to or under the control of the defendant or claimant will tend to prove any allegation made by the United States, may make a written motion particularly describing such book, invoice, or paper, and setting forth the allegation which he expects to prove; and thereupon the court in which suit or proceeding is pending may, at its discretion, issue a notice to the defendant or claimant to produce such book, invoice or paper in court, at a day and hour to be specified in said notice, which, together with a copy of said motion, shall be served formally on the defendant or claimant by the United States Marshal by delivering to him a certified copy thereof, or otherwise serving the same as original notices of suit in the same court are served; and if the defendant or claimant shall fail or refuse to produce such book, invoice, or paper in obedience to such notice, the allegations stated in said motion shall be taken as confessed unless his failure or refusal to produce the same shall be explained to the satisfaction of the court. And if produced, the said attorney shall be permitted, under the direction of the court, to make examination (at which examination the defendant or claimant, or his agent, may be present) of such entries in said book, invoice or papers as relate to or tend to prove the allegation aforesaid, and may offer the same in evidence on behalf of the United States. But the owner of said books and papers, his agent or attorney, shall have, subject to the order of the court, the custody of them, except pending their examination in court as aforesaid."

Language more general could hardly have been employed. It provides for the production of books, papers, etc., "in all suits and proceedings other than criminal, arising under *any of the revenue laws of the United States.*"

It is true the act entitled "An act to amend the customs-revenue laws and to repeal moieties," and that, with the exception of the fifth section, its provisions relate solely to the customs-revenue. But it also appears that the provisions of former acts repealed by the act of 1874 also related exclusively to customs-revenue. Why, then, did not Congress expressly limit the operation of this act providing for the production of business books and papers to cases arising under the customs-revenue laws, as it did the provisions of the several acts referred to in this act and repealed by it? Clearly for the reason that in *all* suits, other than criminal, arising under *any of the revenue laws* of the United States, Congress designed that the court might require the production of any business book and paper belonging to or under the control of the defendant or claimaint.

Besides, it is seldom that the title of an act of Congress is resorted to as an aid in its construction. The title neither extends nor restrains any positive provisions contained in the body of the act. It is well known that Congress often embodies in a single act incongruous provisions, having no reference to the matters specified in the title. Haddon *v.* Collector, etc., 5 Wall., 107.

The second objection made to producing the business books, papers, etc., is that the same were not described with sufficient particularity.

The act must receive a reasonable construction. Such a degree of particularity as was insisted upon by counsel for claimants would render the fifth section practically nugatory. The district attorney cannot be required in his motion to describe the business books as journal A or B, or ledger A or B, for he may not know what particular books the claimants have.

The description of the books and papers in the written motion and the order of the court is, substantially: certain day-books, journals, cash-books, ledgers, blotter-books, blotters, invoices, dray-tickets, etc., kept, received, and taken by the claimants in their business as distillers, rectifiers, and wholesale liquor dealers, between certain dates named and since the 22d day of June, 1874, showing the amount of spirits produced, received, removed, and sold by them during the time named. The claimants were sufficiently advised by this description what books and papers were meant. No greater certainty of description was required to satisfy the statute. U. S. *v.* 3 Tons of Coal, 21 Int. R. R., 215. Myer *v.* Becker, 21 Int. R. R, 244.

In considering the constitutionality of the fifth section of the act of June 22, 1874, it is necessary to determine the real character of the case at bar.

The charges made in the libel are against the property, and not against the claimants. It is the distillery and other property proceeded against that are treated as the offenders. The claimants, strictly speaking, are not parties to the proceeding. They are here of their own motion, and not on the process of the court. The judgment must be for or against the property libeled, not for or against the claimants. A forfeiture of the property does not convict the claimants. This proceeding is entirely independent of any criminal prosecutions which have been commenced, or which may hereafter be commenced, against them. The books and papers, which may or may not, when produced, inculpate the property, can only be used in evidence in this action. After being thus used they go back into the possession of the claimants.

The question, therefore, of compelling a person to accuse himself or to testify against himself, in a criminal case is not before the court. Even if the act of 1874 were not in existence, the claimants might be compelled by a subpœna *duces tecum* to bring in the books and papers called for in the order of the court: and I can see no reason why they might not also be compelled to testify concerning all the allegations of the libel. Any statements thus made by them as witnesses in the proceeding against the distillery and other property could not be used against them in any subsequent criminal prosecution.

The act of February 25, 1868, (sec. 868, R. S.) provides that "no discovery or evidence obtained from the party, or witness, by reason of a judicial proceeding * * * shall be given in evidence, or in any manner used against him, or his property or estate, in any court of the United States, in any criminal proceeding, or for the enforcement of any penalty or forfeiture."

It was said in argument that under this statute the books and papers, even if produced, could not be used in evidence on the trial of this cause.

The act of 1874 expressly provides that the books and papers may be thus used in evidence. This is the last expression of the legislative will. So far as the two acts are inconsistent or repugnant, the act of 1868 is repealed. The claimants are not justified by Article V. of the amendments to the constitution in refusing to produce their books and papers to be used in evidence. U. S. *v.* Parker Mason, 21 Int. R. R., 215; U. S. *v.* 3 Tons of Coal, *supra.*

The claimants next attempted to shelter themselves under that provision in Article IV. of the amendments to the Constitution which secures the people in their persons, papers and effects, against unreasonable searches and seizures.

Congress is empowered by the Constitution "to levy and collect taxes, imports and excises," provided the laws are uniform to their operation. The mode and manner of exercising this power is left to the discretion of Congress. Under the exercise of that power Congress has provided the internal revenue system. By that system the government raises the principal portion of its revenue. The tax on the production and sale of spirits exceeds all other sources of revenue. The government has, therefore, practically assumed control of the manufacture and sale of spirits. It has adopted regulations for the government of distillers, rectifiers, and wholesale dealers, with fines, penalties, and forfeitures for their violation. They are required to keep books in which they are to enter daily all their business transactions with the utmost particularity. These books are at all times open to the inspection of the proper revenue officers, and are popularly known as government books. If properly kept, they will show the exact amount of spirits produced, received, and removed on any given day. If so kept, they will correspond with their business books, and this correspondence ought to exist. No one can engage in the manufacture and sale of spirits without the consent of the government. That consent is obtained on certain terms and conditions. No one can be allowed to say, that as a distiller, rectifier, or wholesale liquor dealer, he has kept a private record of his transactions. His books and entries are *quasi* public books and entries. The government has a right to see any record kept by him of his business. This right has been exercised by the government since its organization. The first and subsequent Congresses have enacted such laws. It is too late to question the validity of such statutes. Experience has shown that without severe and even inquisitorial regulations the government can not successfully collect the tax levied upon the production and sale of spirits, and the necessities of the government justify the existence and rigid enforcement of such regulations.

The order of the court complained of by the claimants authorizes neither search nor seizure. It calls on the claimants to produce certain books and papers relating to their business as distillers, rectifiers and wholesale liquor dealers. If their business books and papers are not produced, the allegations of the libel are taken as confessed.

The claimants were equally unsuccessful in invoking the protection of article 7 of the amendments to the Constitution. That article provides that "in suits at common law, when the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved." And it has been settled that a proceeding *in rem* under the internal revenue laws is a suit at common law within the meaning of that article. The Sarah, 8 Wheat., 391.

It is clear, then, that when the issues in this proceeding are made, and the case is ready for trial, the claimants will have a constitutional right to demand a jury.

But they must first submit to, and comply with, all reasonable and proper rules and orders of the court entered against them in making up the issues and preparing the case for final trial.

As already stated, the books and records kept by the claimants are *quasi* public records. If their government books were kept as the law required them to be kept, their business books will make the same showing as the government books. And if this correspondence exists, the production of their business books and papers will not harm the claimants. If their government books were not so kept, and their business books and papers contain evidence which will tend to prove the allegations in the libel, there is justice in the demand of the government for their production.

The act of 1874 authorized the court to make the order in controversy. That act, and others of the same nature, have not only been held constitutional, but reasonable and proper, in view of the object sought to be accomplished. The statute authorizing the order for the production of the books and papers also fixes the penalty for disobedience of that order—*the allegations in the motion shall be taken as confessed.*

If Congress had not seen proper to prescribe the penalty or punishment for disobedience of the order, it can hardly be doubted that the courts, in the exercise of a sound discretion, would have been authorized to enforce compliance either by fine or imprisonment, or both. In this case the statute has fixed the penalty, and the court can inflict no other. If the claimants refuse to comply with the order of the court, they are in contempt of its authority. That question is not triable by a jury. The contempt can be purged only by a compliance with the court's order. The constitutional right of the claimants to a trial by jury will not shield them from punishment for disobedience of the order of the court.

Whenever in the progress of a proceeding a party acts contumaciously by disobeying a lawful order entered against him, that proceeding, so far as he can claim any advantage under it, is at once arrested, and goes no further until the contempt is purged.

Where the United States courts are not limited by statute, their power to enforce obedience to their orders by punishing for contempt is discretionary.

The object to be accomplished by the exercise of this power may be punitive in its character, or it may be at once punitive and remedial, according to the given case.

In the case of Texas *v.* White, in the Supreme Court of the United States, not yet reported, Justice Miller used this language:

"The exercise of this power has a two-fold aspect, namely: First, the proper punishment of the guilty party for his disrespect of the authority of the court, or its order; and second, to compel his performance of some act or duty required of him by the court, which he refuses to perform. Stimpson *v.* Putnam, 41 Vt., 238. In the former case the court must judge for itself the nature and extent of the punishment with reference to the gravity of the offense. In the latter case the party refusing to obey should be fined and imprisoned until he performs the act required of him or shows that it is not in his power to do it."

Also see Bishop's Cr. Law, sections 232 to 259 inclusive, 3d ed.

The first ten articles of the amendments to the Constitution were proposed by the first Congress of the United States at its first session on the 25th day of September, 1789. At the same session, and about the same time, the act commonly called the Judiciary Act was passed. Section 15 of that act (sec. 724, R. S., 137) is as follows:

"That all the said courts of the United States shall have power, in the trial of actions at law, on motion and due notice thereof being given, to require the parties to produce books or writings in their possession or power, which contain evidence pertinent to the issue, in cases and under circumstances where they might be compelled to produce the same by the ordinary rules of proceeding in chancery; and if a plaintiff shall fail to comply with such order, to produce books or writings, it shall be lawful for the courts respectively, on motion, to give the like judgment for the defendant as in cases of non suit; and if a defendant shall fail to comply with such order to produce books or writings, it shall be lawful for the courts respectively, on motion as aforesaid, to give judgment against him or her by default."

In the case of the U. S. *v.* 28 Packages Pins, Gilp. R., 306, it was held that this statute did not apply to proceedings in rem. The contrary, however, was held by Judge Treat of the Eastern District of Missouri, in the case of the U. S. *v.* 469 Barrels of Spirits, 10 Int. R. R., 205, in which ruling he says he is supported by the circuit judge in a well-considered opinion. This section of the judiciary act is important as a legislative construction of the seventh article of the amendments to the Constitution. The very act organizing the Federal courts is contemporaneous with the articles of the amendments to the Constitution, whose protection was relied on by the counsel for the claimants with such seeming confidence. The act is still in force. It authorizes the courts to order the production of the books and writings of a party, and to enforce such order by summary judgment against the party failing or refusing it. The motion in the case at bar was made under the act of 1874, and not under that of 1789; but the argument by which the former statute is sustained necessarily establishes the validity of the latter. The further point was made by counsel for the claimaints that the fifth section of the act of June 22, 1874, was ex post facto, and, therefore, null and void. In support of that position the case of the U. S. *v.* Hughes, 2 N. S. Am. L. T. R., 300, was cited.

That was a case pending before the passage of the act of 1874. It was a suit to recover penalties for an alleged violation of the revenue laws, committed prior to the enactment of the law of 1874. The motion in the case involved the production of books and papers of the defendants used and kept by him prior to the act of 1874. Judge Blatchford held that, as applied to that case the act of 1874 was ex post facto, in that it altered the legal rules of evidence which applied prior thereto and at the time of the alleged violation. This case is expressly limited to the books, papers, etc., of the claimants relating to their business since the act of June 22, 1874. Whether or not a statute is ex post facto depends upon the facts of the particular case.

The court has been aided in the consideration of these questions by the labors of the counsel upon both sides, and especially by those of Mr. Holstein, the assistant district attorney.

The motion of counsel for claimants is overruled, and the order of the court requiring the production of the business books, papers, etc., will stand.

NELSON TRUSLER, district attorney, assisted by CHARLES L. HOLSTEIN and THOMAS M. BROWNE, for the United States.

JAMES M. SHACKLEFORD and CHARLES DENBY for claimants

THROUGH the kindness of R. W. TOWNSHEND, of the Shawneetown bar, we have received the following opinion:

SUPREME COURT OF ILLINOIS.

OPINION FILED OCT. 14, 1875.

H. G. MASON et al. *v.* CITY OF SHAWNEETOWN.

POWER OF CITY TO ISSUE BONDS—CONSTITUTIONAL PROVISION—VOTE OF PEOPLE.

1. POWER TO ISSUE BONDS—CONSTITUTION OF 1870.—*Held*, That the ordinance of the city of Shawneetown submitting the question whether $50,000 of bonds of the city should be issued for the purpose of constructing a levee was a law within the meaning of the Constitution, and that the bonds which were subsequently issued and sold were issued in compliance with a vote of the people of the municipality in pursuance of law providing therefor.

2. MEANING OF "IN PURSUANCE OF ANY LAW."—The court construes the provision of the Constitution authorizing bonds to be issued in compliance with a vote, etc., "in pursuance of any law," and holds that when an incorporated town or city has been invested with power to pass an ordinance by the legislature for the government of the municipality, an ordinance enacted by the legislative branch of the corporation in pursuance of the act creating the corporation, has the same force and effect of a law passed by the legislature, and can not be regarded otherwise than a law of and within the incorporation.

3. EXERCISE OF POWER.—The court states the proper manner of exercising the power.

4. INJUNCTION—DAMAGES.—The court committed no error in assessing the damages on the dissolution of the injunction.—[ED. LEGAL NEWS.]

Opinion by CRAIG, J.

This was a bill in equity brought by Hezekiah G. Mason and Willard Mason in the Circuit Court of Gallatin county against the City of Shawneetown and others, to enjoin the city and its officers from levying and collecting any taxes for the payment of either interest on or principal of certain levee bonds issued by the city of Shawneetown.

The venue of the cause was changed to Saline county, where a hearing was had upon bill, answer, replications and proofs, and a decree was entered dissolving the injunction and dismissing the bill, to reverse which the complainants bring the record here by appeal.

In the act incorporating the city of Shawneetown, Private Laws of 1861, page 272, sec. 2 of Article 9, declares:

§ 2. It shall be the duty of the city council as soon as practicable after the passage and adoption of this act to proceed and make arrangements for the construction of a levee that will so far surround the city, of a sufficient height and breadth, as to entirely prevent the future inundation or overflow of said city, or any part of it, from the waters of the Ohio or Wabash rivers; and they are hereby authorized and empowered to borrow money, at not exceeding one per cent. a month interest, and to pledge the revenue of the city, together with the revenue and taxes mentioned in the first section of this article, for the payment of said money and interest thereon, and they shall issue bonds to secure the payment of said money, with full specifications, signed by the mayor and attested by the city clerk under the seal of the said city.

Section 3 authorizes the city council to make contracts for the construction of the levee, to appoint a surveyor to lay off the grounds upon which the levee shall be constructed, and authorizes such repairs and alterations to be made as shall be deemed proper.

Section 2 of Article 6 gives the city power to borrow money and pledge the revenue of the city for the payment thereof, provided that no sum or sums of money shall be borrowed at a greater interest than ten per cent. per annum for ordinary purposes.

Sec. 19, Article 10, provides that no money shall ever be borrowed by the city council unless the ordinance therefor shall first be submitted and voted for by a majority of the voters voting at an election for that purpose, except for constructing or repairing a levee.

Section 22 of Article 6 declares: The city council shall have power to make all ordinances which shall be necessary and proper for carrying into execution the powers specified in the act, so that such ordinances be not repugnant to nor inconsistent with the Constitution of the United States or of this State.

In pursuance of a petition presented, of the property holders of the city of Shawneetown at the regular May meeting, 1870, of the city council, an ordinance was enacted as follows:

Be it ordered by the city council of Shawneetown, That at the city election to be held on the 6th day of June, 1870, there shall be submitted to the legal voters of the city, the following proposition: Shall the city of Shawneetown issue bonds to an amount not exceeding fifty thousand dollars to be due and payable in twenty years, reserving the right to the city to pay the same at any time after five years, with interest payable semi-annually at the rate of not more than ten per cent, to be applied solely to the construction of a levee that will surround the city, of a sufficient height and breadth to entirely protect the city from further inundation and overflow at all times; the work on said levee to be given to the lowest responsible bidder for the same, after ample publication of the time and place of letting the contract. All legal voters of the city voting on this proposition shall deposit a ballot on which shall be written or printed "for levee," or "against levee."

Under this law of the city an election was held, which resulted in favor of the proposition by a large majority of the legal voters of the city.

In pursuance of the vote of the people of the city, and under the authority of the charter, the city, in March and April, 1872, issued and sold fifty of its bonds, known as levee bonds, of the denomination of $1,000 each.

It was also shown on the trial of the cause, that on the 1st day of January, 1872, the city delivered its bonds to the Saint Louis and Southeastern Railroad Co. to the amount of $25,000.

The assessed value of property in the city for State and county taxes for the year 1871 was $808,060.

It is insisted by appellants that in 1872 the city could not, under Article 19, Section 12 of the Constitution, become indebted for any purpose in any amount exceeding five per cent. of its taxable property as assessed for State and county taxes, and that all bonds issued in excess of $40,403 were void.

The section of the Constitution upon which appellants rely, declares: No county, city, township, school district or other municipal corporation, shall be allowed to become indebted in any manner or for any purpose, to an amount, including existing indebtedness, in the aggregate exceeding five per centum on the value of the taxable property therein, to be ascertained by the last assessment for State and county taxes, previous to the incurring of such indebtedness.

The section, however, contains a proviso which is as follows:

This section shall not be construed to prevent any county, city, township, school district, or other municipal corporation from issuing their bonds in compliance with any vote of the people which may have been had prior to the adoption of this Constitution, in pursuance of any law providing therefor.

The question to be determined is, whether the levee bonds were issued in compliance with a vote of the people of the municipal corporation in pursuance of a law providing therefor.

It will be observed that the provision of the Constitution which authorizes bonds to be issued in compliance with a vote, does not require that the vote shall be had solely under an act of the legislature of the State; the language used in the organic act is "in pursuance of any law."

When an incorporated town or city has been invested with power to pass an ordinance, by the legislature, for the government or welfare of the municipality, an ordinance enacted by the legislative branch of the corporation in pursuance of the act creating the corporation, has the same force and effect of a law passed by the legislature, and cannot be regarded otherwise than a law of and within the incorporation.

An ordinance is the law of the inhabitants of the municipality.

By Section 2 of Article 9 of the charter of the city, the city council was empowered to borrow money and issue bonds to secure the payment for the construction of the levee, but the charter is silent in regard to the manner in which the power given to the city to act in this particular shall be exercised; but by Sec. 22 of Article 6 to the city council is given power to make all ordinances necessary to carry out the various provisions of the charter.

While the charter nowhere directly requires a vote of the people to authorize an issue of bonds, yet, where the manner in which the power is to be exercised is left in the discretion of the city council with general power to act by and through ordinances, we are aware of no better or more judicious manner in which the city council could proceed to exercise the powers given them by the charter than to enact an ordinance submitting the question to a vote of the people of the incorporation for their adoption or rejection, neither the ordinance or the vote under it was in conflict with the charter of the city.

The city council did not assume to act under the authority given in the charter, without a vote of the people of the incorporation. The bonds issued show upon their face that they were issued in pursuance of a majority of the votes cast at an election legally held in the city pursuant to law on the 6th day of June, 1870.

We are therefore of opinion, that the ordinance adopted submitting the question, whether $50,000 of bonds of the city should be issued for the purpose of constructing a levee, was a law within the meaning of the Constitution, and that the bonds which were subsequently issued and sold were issued in compliance with a vote of the people of the municipality in pursuance of law providing therefor.

The court, in dissolving the injunction, assessed the damages sustained by the city at $200. In this we perceive no error. It appears from the testimony that the city employed Mr. Townshend, an attorney, to assist the city attorney in defending the suit. The evidence further shows that his services were worth from $200 to $500. The amount assessed by the court was reasonable.

If it be true, as insisted by appellants,

that the attorney was personally interested in some of the bonds, that fact could not deprive the city of the right to be compensated in damages under the statute for the wrongful issue of the injunction by appellants.

The decree of the Circuit Court will be affirmed.

Affirmed.

R. W. TOWNSHEND, Shawneetown, Ill., attorney for appellee.

F. M. YOUNGBLOOD, Benton, Ill., attorney for appellant.

SUPREME COURT OF ILLINOIS.

OPINION FILED NOV. 4, 1875.

THE C. B. & Q. RAILROAD CO. *v.* THE PEOPLE.

EXTORTION AND UNJUST DISCRIMINATION IN THE RATES CHARGED FOR THE TRANSPORTATION OF PASSENGERS AND FREIGHT —THE CONSTITUTIONALITY OF THE R. R. LAW.

1. CHARGE OF THE OFFENSE.—The court discusses how the offense should be charged in the declaration.
2. REASONABLE RATES.—The court states how reasonable rates are to be ascertained under the law.
3. DISREGARD OF SCHEDULE RATES.—That a disregard of the schedule of rates to be prepared by the railroad and warehouse commissioners a necessary element of the offense against which the statute is directed, is the charging more than the maximum rates fixed by the said commissioners, which makes the company guilty of extortion under the statute within its true intent and meaning.
4. WHEN RATES NOT FIXED—OFFENSE.—The court cannot think that until this schedule of rates was made by the board of commissioners there would, under the statute, be incurred a liability for unreasonable and extortionate charges nor that when made that for taking the rate fixed by the schedules, or less rates than the statutory penalties would be incurred even though proof might be made that the rates so taken were just and reasonable rates.
5. THE DECLARATION DEFECTIVE.—That the declaration was defective in not averring that a schedule of rates had been established by the board of commissioners, and that the defendant had received compensation in excess of those rates.—[ED LEGAL NEWS.]

Opinion of the Court by SHELDON, J.

This was an action of debt brought to recover penalties under the act to prevent extortion and unjust discrimination in the rates charged for the transportation of passengers and freight on railroads in this State, etc., approved May 2, 1873. The suit was commenced May 21, 1874. The declaration contained twenty counts, the first nineteen of which are for extortion, and the twentieth one for unjust discrimination. The defendant pleaded three special pleas, to which a demurrer was sustained, and the defendant electing to abide by the pleas, the court, a jury being waived, heard the evidence and fixed the penalty for a violation of the statute at $1,000, and gave judgment therefor, from which defendant brings this appeal. It is urged that the court below erred in not carrying back the demurrer and sustaining it to the declaration. Appellant insists that the declaration is defective in not averring that a schedule of reasonable rates of charges for the transportation of passengers and freight had been established as provided for by the eighth section of the act, and that the defendant had demanded and received compensation in excess thereof. The statute provides in Sec. 1, that if any railroad corporation in this State shall charge, collect, demand, or receive more than a fair and reasonable rate of toll or compensation for the transportation of passengers or freight, etc., the same shall be deemed guilty of extortion, and upon conviction thereof shall be dealt with as thereinafter provided; and in Sec. 2, that if any such railroad corporation shall make any unjust discrimination in its rates or charges of toll or compensation for the transportation of passengers or freight, etc., the same shall be deemed guilty of having violated the provisions of the act, and, upon conviction, shall be treated as thereinafter provided.

Section 4 provides that any such railroad corporation guilty of extortion, or of making any unjust discrimination as to passenger or freight rates, etc., shall, upon conviction thereof, be fined in any sum not less than $1,000 nor more than $5,000 for the first offense, and for the second offense not less than $5,000 nor more than $10,000, and for the third offense not less than $10,000 nor more than $20,000, and for every subsequent offense and conviction thereof shall be liable to a fine of $25,000.

Sec. 8 directs the railroad and warehouse commissioners "to make for each of the railroad corporations doing business in this State, as soon as practicable, a schedule of reasonable maximum rates of charges for the transportation of passengers, and freights and cars, on each of said railroads; said schedules shall in all suits brought against any such railroad corporations, wherein is involved in any way the charges of any such corporation for the transportation of any passenger, or freight, or cars, or unjust discrimination in relation thereto, be deemed and taken in all courts of this State as *prima facie* evidence that the rates therein fixed are reasonable maximum rates of charges for the transportation of passengers, and freight, and cars, upon the railroads for which said schedules may have been respectively prepared. Said Commissioners shall from time to time, as often as circumstances may require, change and revise said schedules. When any schedule shall have been made or revised as aforesaid, it shall be the duty of said Commissioners to cause publication thereof to be made for three successive weeks in some public newspaper published in the city of Springfield, in this State; *provided*, that the schedules thus prepared shall not be taken as *prima facie* evidence as herein provided until schedules shall have been prepared and published as aforesaid, for all the railroad companies now organized under the laws of this State, and until the 15th day of January, A. D. 1874, or until ten days after the meeting of the next session of this General Assembly, provided a session of the General Assembly shall be held previous to the 15th day of January aforesaid," etc.

The charge of the offenses in the declaration is in general form the language in one of the counts, which in this respect is a fair specimen of all, being that the sum charged "exceeded a fair and reasonable rate of toll and compensation for the carriage of the goods in the sum of $1.91, and was then and there unjust, unfair, unreasonable, and extortionate, contrary to the form of the statute," etc. Looking merely at the first section of the statute, the declaration would seem to describe the statutory offense. That section by itself makes the offense to consist in taking more than a fair and reasonable rate of toll and compensation, without reference to any standard of what is fair and reasonable. In such case, it may be seen, different persons would have different opinions as to what is a fair and ressonable rate. Courts and juries, too, would differ, and at one time or place a defendant might be convicted and fined in a large amount for the same act, which in another place or at another time would be held to be no breach of the law, and what might be thought a fair and reasonable rate on one road might be considered otherwise upon another road. There would be no certainty of being able to comply with the law. A railroad corporation, with purpose of conforming to the law, might fix its rates at what it believed to be reasonable, and yet be subjected to the heavy penalties here prescribed. The statute furnishes evidence that it did not intend to leave the railroad companies in this state of uncertainty and danger, and exposed to such seeming injustice. We must look to the entire statute, and to every part and provision of it, to learn in what the offense is really made to consist. The eighth section provides how reasonable rates shall be ascertained, what they shall be; that the railroad and warehouse commissioners should make, for each of the railroad corporations in the State, a schedule of reasonable maximum rates, thus providing a uniform rule for the guidance of the railroad companies. When that is done there will be a standard of what is fair and reasonable, and the statute can be conformed to and obeyed. The careful provision made by statute for the publication in a public newspaper for a length of time of the schedules when made, and that until so published they should not be such *prima facie* evidence, indicates, as we may suppose, the legislative intention that the railroad companies should have fair notice of the schedule of rates, and so have the opportunity afforded to them of being able to conform thereto. The provision, too, that the schedule of rates is to be made for each of the railroad corporations in the State, is another indication in the same direction.

We are of opinion, from an examination of all the provisions of the statute taken together, that a disregard of the schedule of rates to be prepared by the railroad and warehouse commissioners, is a necessary element of the offense against which the statute is directed, that it is the charging more than the maximum rates fixed by said board of commissioners which makes the company guilty of extortion under the statute within its true intent and meaning. We cannot think that until this schedule of rates was made by the board of commissioners there would, under the statute, be incurred a liability for unreasonable and extortionate charges, nor that when made, that for taking the rates fixed by the schedule or less rates, that the statutory penaly would be incurred, even though proof might be made that the rates so taken were more than fair and reasonable rates; yet in such last case, according to the terms of the first section of the statute, and the interpretation put upon the act by appellee, there would have been a commission of the statutory offense, as there would have been the taking of more than fair and reasonable rates. The evident purpose was to regulate and fix, so far as the legislature might, the rates of railroad charges, and to punish the taking in excess of the fixed rates; and the form of the provision making the schedule of fixed rates *prima facie* evidence of what were reasonable maximum rates was doubtless to avoid the objection indicated in the opinion in the Chicago & Alton Railroad Company *v.* The People (67 Illinois, 13) to the legislature making any fixed rates conclusive of what was reasonable, and to follow what was inferable from that opinion that they should be made but *prima facie* evidence. It is true that the taking of higher rates than those fixed by the commissioners' schedule of rates is not the exact form of the statutory offense, and the taking of such higher rates might not subject to the penalties of the statute upon the making of proof that they were fair and reasonable. Still, as we view it, to constitute the offense really designed and intended by the statute, regarding it in its whole scope and purpose, the rates taken must have been in excess of the schedule rates. It was not enough then, we think, to bring the case fully within the provisions of the statute, that the rates charged were simply unreasonable and extortionate, but they should have been so according to the rule of reasonableness to be prescribed under the statute, and we are of opinion that the declaration in this respect was defective in not averring that a schedule of rates had been established by the board of commissioners, and that the defendant had received compensation in excess of those rates.

We think what has already been said sufficiently meets the position taken by appellee, that the statutory offense consists simply in receiving more than a fair and reasonable rate of compensation, and that the schedule of rates is but *prima facie* evidence of what is reasonable, and that it is not necessary for a party to plead evidence. In the view taken, the schedule of rates is something more than evidence, it is a fact upon which the action rests.

Under the constitutional provision the statute would go into effect July 1, 1873, and so from that date the first and fourth sections, prohibiting and imposing penalties for extortion, be in force; but the eighth section provided that the schedules of rates could not be used as *prima facie* evidence until the 15th day of January, 1874, and appellee's counsel make a point upon this as evidencing that the existence of the schedules of rates was not essential to the commission of the offense of extortion under the act. But we can view this as but an accidental incongruity in the respect named, not entitled to such serious regard as to be of controlling force in determining the true construction of the statute.

But it is insisted on the part of the appellee that there is at least one good count—the twentieth—that which declares unjust discrimination.

The charge in the count is that defendant made an unjust discrimination in its rates and charges of toll and compensation of freight from Quincy to Macomb in this, that defendant on the 11th (day) of April, 1874, transported for James T. Applegate and Samuel Dodd, from Quincy to Macomb, one car load of horses, commonly called ponies, a distance of 59 miles, charging therefor the sum of $28.34, being at the rate of 48 cents per mile; and that said defendant on the 30th of March, 1874, transported from Macomb to Chicago, a distance of 204 miles, for Robert Smithers and James Robinson, one car load of horses, charging therefor only the sum of $55.20, being at the rate of 27 cents per mile for the carriage of said car-load of horses, contrary to the form of the statute, etc.

The statute defines in section 3, in respect to unjust discrimination, as it provides in section 8, in respect to reasonable rates, what shall be deemed and taken as *prima facie* evidence of the unjust discrimination prohibited by the act. The language of the section in respect to freight is charging a greater amount of compensation for any distance than is at the same time charged for the transportation in the same direction of any passenger or like quantity of freight of the same class over a greater distance of the same railroad."

This count, we think, does not present a state of facts which shows a violation of the statute in that there is no averment as to the respective freight being of "like quantity of the same class," or that in respect of *such freight* that was a higher charge for a less than for a greater distance.

There is no averment whatever upon this head either in respect of numbers of the respective animals, or their weight or the size or class of the cars containing them, or otherwise.

The section itself recognized the fact of there being railroad cars of different classes and numbers, for in defining unjust discrimination in respect to cars, it provides that they be of the "same class or number."

The description of the respective freights merely as one car-load of ponies and one car-load of horses, does not in our view sufficiently show them to be like "quantities of freight of the same class."

The rules applicable to the enforcement of the penal statutes requires that it should be made clearly to appear, that the precise statutory offense has been committed.

Being of opinion that the demurrer should have been carried back and sustained to the declaration instead of to the pleas, the judgment will be reversed.

Judgment reversed.

WALKER, C. J., and SCHOLFIELD, J., dissenting.

We hold that the first, second and third sections of the act create complete offenses, independent of the eighth section. That the fourth section imposes penalties for their violation. That the eighth section only prescribes a rule of evidence on the trial for the recovery of the penalty.

Whether that section is valid and has changed the rule, does not, as we think, arise on the pleadings, and can only be presented for decision when the schedules provided for by it shall be offered in evidence,

We hold that the averments contained in the twentieth count show a violation of the second and third sections of the act, and that it is good. These sections define the offense of unjust discrimination, aad the averments show that the offense was committed.

The pleas fail to present a defense to the charge of unjust discrimination for the use of the cars; and the statute has declared that the facts stated in this count, *prima facie*, constitute an unjust discrimination, and the statute is warranted under the decision in the case of the Chicago and Alton Railroad Co. *v.* the People, 67 Ill., 11; where it was held that the General Assembly have the power to declare that the facts averred in this count should be held *prima facie* evidence of unjust discrimination, leaving the company to overcome the presumption.

In this case there was no evidence to rebut the presumption, but, on the contrary, the demurrer admits the facts and we think the judgment should be affirmed under the twentieth count in the declaration. But we refrain from the expression of any opinion as to what, if any, change of the rules of evidence has been made by the eighth section of the act, as that question does not arise on this record.

The want of time prevents us from presenting our views in a more extended form.

SCOTT and MCALLISTER, J.J., dissenting.

We concur in reversing the judgment in this cause, but dissent from the reasoning of the opinion of the majority of the court, especially so far as it may be

said to assume the constitutionality of the act under discussion.

As the majority of the court have avoided any discussion of the real merits of the case, we do not deem it necessary to express our views at length.

We are indebted to D. S. PRIDE, of the Chicago bar, for the following opinion:

CIRCUIT COURT OF COOK CO., ILL.

OPINION Nov. 10, 1875.

ENOCH WOODS *v.* OBADIAH SANDS.

USE OF NAME AS TRADE-MARK MAY BE ASSIGNED.

1. A man who uses a name under which he does business has an exclusive right to the use of such name, and having obtained such exclusive right, other persons are not at liberty to interfere by "sailing under his flag" and thus deceive the people.

2. Having acquired such exclusive right to use such name, called in a general way a "trade-mark," he has the right to assign such word or trade-mark to another, and the law will protect the assignee in an exclusive right to use the same in carrying on the same business in the same building.

3. There may be some doubt, however, about such assignee having an exclusive right to carry on such business in a different place from that where the assignor conducted the same.

4 W. had obtained the exclusive right to the use of the name of "Wood's Hotel," assigned his lease of the hotel, together with furniture, good-will and name to C., and agreed not to engage in hotel business until 1879; shortly after said hotel was destroyed by fire. A few months after the fire, S. opened a hotel under the name of "Wood's Hotel," W. and C. not assenting, but objecting thereto. Afterwards C. becomes proprietor of the "Gault House," and W. purchased from C. a release of his agreement not to open a hotel, and immediately opens a hotel under the old name of "Wood's Hotel." On bill filed by W. to enjoin S. from using the name of "Wood's Hotel": *Held*, that there had been no abandonment by W. and C. of their right to said name or trade-mark, and the injunction was granted as prayed.

Opinion of the Court by FARWELL, C.J.

This was a case to enjoin Mr. Sands from keeping a hotel under the name of "Wood's Hotel," and there was a cross-bill by Sands to enjoin Wood from keeping a hotel by the name of "Wood's Hotel," which was kept by him some time ago.

After a careful examination of the law touching this question, and in view of the evidence given in this case, showing what the facts are, I am on the whole—not without some hesitation—but on the whole I am inclined, and so decide, that the complainant in the original bill is entitled to the relief which he prays for; that he is entitled to have Mr. Sands enjoined from keeping his hotel with this name.

In brief, the reasons for my conclusion are these: Wood, several years since, leased a building on the corner of State street and Hubbard Court, I think, which he first opened as a boarding house, but finally converted into a hotel, and which he kept for a number of years by that name, and for several years was known by that name, and became well known, and had a reasonable amount of custom-patronage. He renewed the lease he first had of five years, afterwards for five years more, which, if I recollect right, was to expire in 1879, and not a great while after this renewal, he transferred his lease,—his hotel, with a large part or all of his furniture and things pertaining to it, unto a man by the name of Cummings—the good will of the business, the use of his name; and agreed that he would not himself, during the remainder of the term of five years, the time for which this lease was to run, keep a hotel here, and the assignee took possession and kept a hotel under the same name and in the same way. A month or two afterwards, that is, in July, 1874, a fire came and burned off the entire concern—hotel, furniture and everything seems to have been all destroyed by the fire. The keeper of the hotel, the assignee of the lease, Mr. Cummings, seems pretty soon to have gone into a house called the "Gault House," on the west side, in some capacity, and that same season, early in the fall, I think, the testimony shows, or the same season, Sands, the defendant, opened a house on Washington street, belonging to a man by the name of Wood, and which they concluded, after some consultation, under the circumstances, to call "Wood's Hotel," the same name precisely that the other house was known by. They did call it so, and have continued to keep that house ever since by that name. The evidence shows that Cummings never assented to this, that Wood never assented to this use of his name by Sands. On the contrary, it appears that objections were made by one, or both of them, to this house being opened and kept by this name, they claiming still to have some interest in what that name belonged to, and manifested some intention to continue to carry on a hotel by that name, and some negotiations seem to have been made or talked between them with reference to consenting to have Sands carry on his house under that name, which consent, however, never was obtained. No new hotel seems to have been erected on the ground where the old hotel was burned down, or if so, these parties don't seem to have any interest in it, or at least never attempted to carry on a hotel again on that ground. In July of this year, Wood takes from Cummings a release of his claim under this agreement which had been made, leaving him no longer bound by any agreement not to keep a hotel, etc., and leaving him at liberty to keep a hotel himself with such name as he might choose, as far as he and Cummings were concerned. After obtaining that release or an agreement from Cummings, Wood then opens on Fifth Avenue a house having the same name which he formerly had used—that is, "Wood's Hotel," and he then files this bill asking that Sands may be enjoined from longer carrying on this business under this old name, "Wood's Hotel," which the complainant alleges belongs really to him.

Now, the law, as I understand it, is this, as applicable to a question of this kind: A man who uses a name under which he does business, which does not infringe upon the rights of anybody else, and which within the rules governing such subjects, it is well enough for him to use to designate his hotel, or other business which he carries on; has a right to the use of that name to the exclusion of others for the purpose of carrying on such business. He pre-occupies the ground; he gets a sort of exclusive right to the value of this name—if there is any value to it—by which custom is obtained and men are induced to do business with him; and where he has obtained such exclusive right, others are not at liberty to interfere by sailing under his flag or wearing his clothes in deceiving people, for that is the effect of the action. They are not at liberty to step in and by what amounts to false pretenses, although it may not be so intended by the party, obtain that which belongs to the man who has acquired this sort of proprietary right in the use of the name. Now, when Wood sold out to Cummings, Wood, as the evidence shows, had acquired this right. He had run a hotel that he named by his own name, called it by his own name, and he had a right to the exclusive use of that name as against any body that might attempt to use it afterwards here for this purpose. The law allows a party having any business of this kind, and having a name which is a sort of protection—which is called in a general way a trade-mark—he has a right to assign over, to transfer to others any rights which he may thus have, so that the other parties step in his shoes, provided there is nothing objectionable about it in the eye of the law. I think that, in this case, Mr. Wood had a right to transfer to Mr. Cummings the right to carry on that hotel for the remainder of the term, under the name which it had borne, "Wood's Hotel," and that Mr. Cummings, before the destruction of this hotel by fire, had a right to say that no one shall carry on the hotel as long as he is carrying this one on. No one else should carry on another one under the same name because it is liable to take away what belonged to him—custom. Whether Wood could transfer to Cummings the right to carry on any other hotel than this old hotel under the name of "Wood's Hotel," there may be some doubt because there comes in the question whether he had a right to do it so that the courts would protect him in the right, because there comes in a question whether the parties are at liberty to adopt a name which shall be a fraud on the public. If a man adopt the name of Irving House, Revere House, Sherman House, Pacific Hotel, or anything of that kind, that does not necessarily imply that Irving keeps it, or Sherman keeps, or anybody in particular keeps it; that it is any particular man's hotel; it is a mere name to a hotel. But when a man calls a hotel by his own name, I think he has a right to transfer to another man the right to keep that hotel under the same name, because it is not only known as the hotel of the man, but as a hotel having that name. It is not only a hotel kept by Wood, but it is Wood's Hotel; so that there would seem to be no impropriety in it so far; but whether a man who calls his hotel by his own name, calls it "Wood's Hotel," not *The* Wood's Hotel but "Wood's Hotel," has a right to transfer his interest so that his assignee could go off from that ground, go into another building and call his hotel "Wood's Hotel" or not, is another question. I have serious doubts about it. I have great doubts, whether a court would protect the party so that he should have the exclusive right to any such name, because my impression is, that that is a sort of fraud; that it is an attempt to have the public understand that this hotel is kept by a man that does not keep it, and no court will help that, or assist it rather. But in this case that was not attempted. No hotel was put up, at least, by Cummings to be kept by this name. The question then arises, What are Mr. Wood's rights, the original owner?

Now, if after the fire the defendant, Sands, had been told by these people that they should do nothing more, that he could do what he pleased, that would have been an abandonment. If they took a course which gave him a right to say, without doubt, they had abandoned it—if they had taken a course so distinctly and plainly that they would ever be estopped from saying that they had not abandoned it, then they would not have the right to talk about it afterwards, if Sands did appropriate this name. But I think it was not for Mr. Sands to jump in too quick in this matter. Men who are burned out must have time. Mr. Cummings was burned out, and the hotel and furniture and everything were destroyed, and he was left houseless, homeless, and without business, and he and Mr. Wood must have a reasonable time in which to decide what they can do, what they wish to do, what they will do. They are not to be hurried to conclusions at the peril of losing everything they have of value of this kind. They must have a reasonable time. It might be that the owner of the property would rebuild it and give them the lease again; it might be that some arrangements would be made by which Mr. Wood would be enabled to rebuild there or elsewhere, and carry on the business in his own name. They must have time for these things.

Now, it appears that there was no abandonment. There was nothing said by these people to Mr. Sands, that they did not intend to do anything, so that he could go ahead and use any name he chose. On the contrary, they claim they did intend to hold on to this name, to the use of it, and insist that it was theirs, and therefore there is no claim of that kind. The question is whether there was such an abandonment as gave Sands the right to go on. Now, I don't think there was—I think Cummings and Wood did as much as they probably could be expected to do. Mr. Wood did not feel at liberty to open a hotel, himself, until he was released from this claim to Cummings—not to go somewhere else and keep a hotel of this name. I suppose from the evidence he felt it his duty, and that it was necessary for him to make some arrangement about this exclusive right before it was proper for him to venture to open one on his own account in his own name; and after a while he effected that, in July following—got a release, a paper which enabled him to go on. Now, Mr. Wood does not want to lose this trade-mark—this valuable name which he has acquired—this custom and patronage of the public. He deems that of value, and he wants to retain that for himself. I think he has a right to do it. I don't think there has been such delay, such negligence or such acts or language, on the part of these people, as should prevent Mr. Wood from enjoying the benefit of this good name—if such is the fact—which he has acquired, an ability to draw custom to his house from the experience of the past. I think he is entitled to that.

Now in this case perhaps it is not very important, but yet it is not to be disregarded, (in order to show where the parties stand) what they intended. It is evident from the advertisements that were put in the paper by Mr. Sands about "Wood's Hotel" being opened, that it was his expectation—it may be presumed, no matter what he says about it—that there is nothing here that shows that Mr. Sands intended to perpetrate any fraud in his own mind, he didn't suppose that he was doing anything but what he had a right to do, but he puts an advertisement in the paper soon after the fire, when he got his house ready in the fall, which would give the public to understand that this was the same Wood's Hotel. The public not knowing anything particularly about it, would draw that inference, would come to that conclusion that this was the same establishment, in the same form, or in the hands of the same person that they had been acquainted with.

"Wood's Hotel" is supposed from the pleadings here to have acquired a good name. Now he puts in an advertisement that this is re-opened—Wood's Hotel is reopened and ready to receive boarders, etc. He in that way expects to get the benefit of the old reputation. The old reputation did not belong to Mr. Sands at all. It is nothing that he made; it is nothing that he built up; he has given no value to it. There was value given to it by Mr. Wood, and Mr. Wood is entitled to that unless he in some way abandoned it. I have had considerable doubt about this because it is rather a close case, but on the whole I think that justice, equity and fair-dealing is best secured under the circumstances in giving to Mr. Wood the right to carry on his business under the name under which he carried it on before. I therefore shall allow a decree in favor of the complainant, enjoining the defendant from using the name.

DAVID S. PRIDE, for complainant.
MONROE, BISBEE & BALL, for defendant.

XXV. OHIO REPORTS.

We take the following head-notes from numbers of the 25th volume of Ohio State Reports, furnished us by Robert Clarke & Co., the publishers:

Emery's Sons v. *Irving National Bank*, p. 360.

DELIVERY—BILL OF LADING.

1. By the rules of commercial law, a bill of lading is regarded as the symbol of the property therein described; and in case the shipper reserves to himself the *jus disponendi*, he can transfer the title, at any time before the property is delivered by the carrier to the consignee, as effectually by the delivery of the bill of lading as by the delivery of the property itself.

CONSIGNMENT—VENDOR—VENDEE.

2. If the consignment be made by a vendor to a vendee, the question whether the consignor reserved the *jus disponendi* is one of intention, to be gathered from all the facts and circumstances of the transaction.

3. If the right to control the property be reserved by the shipper, the carrier must be regarded as his agent; if not, then as the agent of the consignee.

4. On such question of intention, the terms of the bill of lading are to be taken as admissions of the consignor, and are entitled to great weight, but are not conclusive.

SPECIAL RATES—DELIVERY.

5. Nor is the fact, that the consignee had contracted with the carrier for special rates of freight, conclusive that the goods were delivered by the consignor to such carrier as the agent of the consignee

6. Where the vendor of goods consigns them to the purchaser, taking a bill of lading from the carrier, and intending to reserve the right of control over them, at the same time draws upon the purchaser for the price, and delivers the bill of exchange, with the bill of lading attached, to an indorsee, for a valuable consideration, the consignee, upon receipt of the goods, takes them subject to the right of the holder of the bill of lading to demand payment of the bill of exchange, and can not retain the price of the goods on account of a debt due to him from the consignor.

JUDGMENT ON REVERSAL.

7. Where a judgment is reversed for error in overruling a motion for a new trial, on the ground that the judgment was contrary to the evidence, it is error for the reviewing court to remand the case, with instructions to render judgment in favor of the plaintiff in error, he not being entitled to judgment on the pleadings, and there being no agreed statement or finding of facts, and the case being one in which either party had a right to a jury trial.

CHICAGO LEGAL NEWS.

Lex vincit.

MYRA BRADWELL, Editor.

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We call attention to the following opinions, reported at length in this issue:

Bank—Loss—Military Liquidation—The opinion of the Supreme Court of the United States by Davis, J., holding that a bank was not liable to the owner for a pledge lost by the bank, occasioned by the bank being put into military liquidation.

Production of the Books of a Distillery.—The opinion of the United States District Court for the district of Indiana, by Gresham, J., holding upon an information filed under the Internal Revenue laws against a distillery, that the court has the power to compel the claimants to produce their books and papers, relating to the management of the distillery, in court.

Power of City to Issue Bonds—Constitution of 1870—Vote of People.—The opinion of the Supreme Court of this State by Craig, J., holding where the city of Shawneetown was incorporated before the adoption of the present Constitution, and power given the city council to provide for the issue of bonds, that the ordinance of the city passed after the adoption of the Constitution, submitting the question whether $50,000 of bonds of the city should be issued for the purpose of constructing a levee, was a law within the meaning of the Constitution, and that the bonds which were subsequently issued and sold were issued in compliance with a vote of the people of the municipality in pursuance of law providing therefor, within the meaning of the Constitution. The construction of this provision of the Constitution will be of unusual interest to those interested in city bonds.

Railroad Rates—Unjust Discrimination and Extortion.—The opinion of the Supreme Court of this State, by Sheldon, J., in a case brought under what is known as the Granger's Railroad Law, to recover penalties for extortion and unjust discrimination in rates charged for transportation. The majority of the court after passing upon several questions raised under the law, hold that the declaration was defective in not averring that a schedule of rates had been established by the board of commissioners, and that the defendant had received compensation in excess of those rates. The judges do not agree in the construction to be given the law or the constitutionality of portions of it, as will be seen by the different opinions filed in the case.

Use of Name as Trade-mark may be Assigned.—The opinion of the Circuit Court of Cook county by Farwell, C J., holding that a man who uses a name under which he does business has an exclusive right to the use of such name, and having such exclusive right he has the right to assign such word or trade-mark to another, and the law will protect the assignee in the exclusive right to use the name in carrying on the same business at the same building.

Expense of the Burial of the Dead Occurring on Railroads.—The opinion of the Supreme Court of this State by Breese, J., holding that the law requiring every railroad company running cars within this State shall be liable for all the expenses of the coroner and his inquest and the burial of all persons who may die on the cars, or who may be killed by collision or other accident occurring on such cars, may be considered in the light of a special tax for which there is no sanction in the Constitution. The only wonder is that such a law should not have been declared unconstitutional long ago.

Our Judicial Election.—Judge McAllister has been taken from the bench of the Supreme Court, and unanimously elected Judge of the Circuit Court in place of Judge Tree, resigned. When a judge of distinguished ability, like Judge McAllister, resigns a position upon the bench of the highest Court in the State, to accept one in the Circuit Court, the people, and especially the law-makers should study the circumstances that could bring about such a result. The judges of the Supreme Court receive about two thousand dollars per annum less than the judges of the Circuit Court of Cook county, and in addition to this drawback they have to pay their travelling expenses and hotel bills for more than six months in the year, and endure the inconvenience of being away from their families. Judge Thornton, one of the ablest jurists that ever adorned the bench in Illinois, was driven back to practice by the small salary that was paid the judges of the Supreme Court, the great amount of labor required, and his dislike of being away from home so much. The question arises, who is to take Judge McAllister's place? It should be a man of unquestioned integrity, legal ability and experience, with enough common sense to keep him from riding hobbies, punishing enemies or rewarding friends. We fear this great commercial city of the West may not soon have as able a representative from this district as Judge McAllister was.

The Bar of this county are to be congratulated on the unanimous re-election of Judge Gary. An able and faithful judicial officer has been retained in the service of the people.

Recent Publications.

Cases Argued and Determined in the Circuit Courts of the United States for the Fifth Judicial Circuit. Reported by William B. Woods, the Circuit Judge. Vol. I. Chicago: Callaghan & Co. 1875.

This is the first volume of a new series of reports. In mechanical execution it is equal to any volume of American reports ever published. Few circuits present as many important legal questions of general interest as the fifth. Its judges, Bradley and Woods, are among the ablest of the federal judiciary. The present volume contains 119 cases, embracing questions in Admiralty, Bankruptcy, Revenue, Criminal Law, Patent Law, Carriers, the Powers and Duties of Receivers and Masters, as well as cases arising out of the late war involving the validity of the recent Amendments to the Federal Constitution, the Enforcement and Confiscation Acts. Of these cases, 38 are decided by Bradley, J., of the Supreme Court of the United States, a few by the District Judges of the Circuit, and the remainder by Woods, J. the whole presenting a variety of legal adjudications seldom found in a single volume of law reports. Among the most notable are what are known as the Slaughter-House Cases; the Myra Clark Gaines Cases; the Confiscation Cases; in which the opinions were delivered by Bradley, J., involving some of the most important constitutional questions ever passed upon by any court. This volume is a valuable addition to the reports of the decisions of the Federal courts, and should find a ready place among those reports in every lawyer's library. It may be had of the publishers, Callaghan & Co., of this city, upon receipt of the price, $7.50.

Reports of Selected Civil and Criminal Cases Decided in the Court of Appeals of Kentucky. By W. P. D. Bush, Reporter. Volume X. Containing cases decided at Winter Term, 1873, and Summer and Winter Terms, 1874. Louisville, Ky.: Published by John P. Morton and Company. 1875.

The style of this volume in some respects, is peculiar. After the head-notes the names of the attorneys for the appellants are given, followed, first by reference to the text-books cited, and then to the reports arranged in columns. Then, after the names of the attorneys for the appellees, references to the text-books and reports cited by them are given in the same order. This plan has its advantages. It enables any one to have at his command all the authorities cited by the counsel on both sides in any given case. It also shows what authorities the court had before it in preparing the opinion. In Burkett v. McCarty, 758, it is held that whether a citizen has been guilty of an offense involving the forfeiture of his right to vote, is a judicial question which can be constitutionally decided by the judiciary on a full and fair trial on an indictment, but cannot be rightfully adjudged collaterally or incidentally by the officers of the election; nor can a test oath be constitutionally required in such a case; nor can the refusal to take such an oath be deemed a judicial trial and conviction of the imputed offense; that a legislative act cannot make voluntary rebellion expatriation.

The Law of Homestead and Exemptions. By John H. Smith. San Francisco: Sumner, Whitney & Co. 1875.

This is a volume of 467 pages, and was issued from the press last month. The author in his preface says he has attempted to collect all the cases, giving a general rule of law, where it was possible to do so, and to state the rule in each State where variation of statutes, or conflict of decisions, made it necessary. This volume contains a greater number of references to authorities upon the subjects treated than can be found in any other work. The authorities might, however, have been brought down to a later date. We notice that several recent important cases upon the question of homestead exemption are not referred to.

Removal of Causes—Costs.—It would seem that the Federal judges in Indiana are of the opinion that parties who remove their causes from the State court into the Federal court should pay the costs. The following rule was entered in the United States Circuit Court last week:

The clerk shall require a bond for costs from the party, whether plaintiff or defendant, who files a record on the removal of a cause from a State court. And the opposite party, on appearing to such cause, shall file a cost bond on his part.

This week we received from Stevens & Sons, of London, a cable dispatch to send The Legal News from April last. We sent the required numbers by Tuesday's mail.

THE CHICAGO BAR ASSOCIATION.

At the meeting of the Chicago Bar Association held on Saturday the special committee to prepare a draft of a bill to be presented to Congress to provide for appeals and writs of error from judgments of the United States Circuit Court when held by the District Judge, made the following report, the consideration of which was postponed until the meeting of December 4th:

To the President and Members of the Chicago Bar Association:

The special committee to whom was referred the matter of the preparation of a draft for a bill, to be presented to Congress, to provide for appeals and writs of error from judgments, orders, and decrees of the Circuit Court held by the district judge of the district sitting alone, under the resolution adopted by the Association on Feb. 13, 1875, beg leave to report that they have prepared a draft of a bill for the purpose contemplated by the resolution, which they herewith respectfully submit to the Association for its consideration and action.

W. P. Black.
J. L. High.
Obadiah Jackson.

Chicago, Nov. 6, 1875. *Committee.*

Section 1. Be it enacted by the Senate and House of Representatives of the United States, in Congress assembled—

That from all final decrees in cases of equity rendered in any Circuit Court, held by the district judge of the district sitting alone, where the matter in dispute exceeds the sum or value of $500, exclusive of costs, and where no appeal to the Supreme Court of the United States is provided by law, an appeal shall be allowed to the circuit judge of said district, and such circuit judge is required to receive, hear and determine such appeal.

Sec. 2. In case of an appeal as provided by the preceding section, the judge and parties shall use the original papers and proofs in the cause, or such of them as may be necessary on the hearing of the appeal.

Sec. 3. Final judgments of a Circuit Court held by the district judge of the district sitting alone, in civil actions, where the matter in dispute exceeds the sum or value of $500, exclusive of costs, and where no writ of error is provided by law from the Supreme Court of the United States, may be re-examined, and reversed or affirmed by the circuit judge of said District, upon a writ of error, which shall be tested by the circuit judge.

Sec. 4. In any of the cases of appeal or writ of errors from any final order or decree in any cause provided for in this act, the circuit judge may affirm, modify, or reverse any judgment, decree, or order of the Circuit Court held by a district judge sitting alone, brought before him for review; or may direct such judgment, decree, or order to be rendered, or such further proceedings to be had, as the justice of the case may require.

Sec. 5. No judgment, decree or order of a Circuit Court held by the district judge of the district sitting alone, shall be reviewed by a circuit judge as herein provided, on writ of error or appeal, unless the writ of error is sued out or the appeal is taken within six months after the entry of such judgment, decree, or order: Provided, that when a party entitled to prosecute such writ of error, or take such appeal, is an infant, *non compos mentis*, or imprisoned, such writ of error may be prosecuted, or such appeal may be taken, within six months after the entry of the judgment, decree, or order, exclusive of the time of such disability.

Sec. 6. When upon a writ of error or appeal to the circuit judge as herein provided, the judgment, order, or decree is affirmed by the circuit judge, there shall be adjudged to the respondents in error or appellees just damage for the delay, and single or double costs, at the discretion of said circuit judge.

Sec. 7. From all interlocutory orders or decrees made in the Circuit Court by the district judge of the district sitting alone, which affect a substantial right of either party to the cause, including the granting and dissolution of injunctions, and the appointment and removal of receivers, appeals shall be to the circuit judge in the same manner as hereinbefore provided for appeals from final judgments or decrees.

THROUGH the kindness of C. A. BEECHER, of the St. Louis bar, we have received the following opinion:

SUPREME COURT OF ILLINOIS.

OPINION FILED OCT. 14, 1875.

OHIO & MISS. R. W. CO. *v.* LACKEY.

EXPENSE OF THE BURIAL OF THE DEAD OCCURRING ON RAILROADS — UNCONSTITUTIONAL LAW.

The law requiring that every railroad company running cars within this State shall be liable for all the expenses of the coroner and his inquest, and the burial of all persons who may die on the cars, or who may be killed by collision, or other accident occurring to such cars, or otherwise, may be considered in the light of a special tax for which there is no sanction in the Constitution.—[ED. LEGAL NEWS,]

Opinion by BREESE, J.

This was an appeal from the judgment of the Marion Circuit Court, rendered at the October term, 1870, upon the following agreed state of facts.

It was agreed in this case that during the year 1869, three persons were run over and killed by trains on the railroad of appellants in Marion county, and the appellee being coroner of said county at the time held an inquest in each case, the expenses of which, together with the cost of burial, amount in the aggregate to $91.15, that if appellant was in law liable to appellee, upon the facts stated, for the above amount, then judgment should be rendered in favor of appellee therefor, and if not so liable, then judgment should be for appellant, with right to either party to appeal.

In 1855 the general assembly of this State passed an act entitled "an act to provide for the burial of the dead occurring on railroads, and in and by vehicles carrying passengers," in the second section of which it is provided "that every railroad company running cars within this State shall be liable for all the expense of the coroner and his inquest, and the burial of all persons who may die on the cars, or who may be killed by collision, or other accident occurring to such cars, or otherwise.

And any coroner, city, town or person who shall take charge of and decently inter any such body or corpse, or cause an inquest to be held over such corpse, shall have cause of action against such company before any court having competent jurisdiction." Sess. Laws, 1855, p. 170; Scates' Comp., 423.

It is insisted by appellants that this statute is not within the constitutional competency of the general assembly to enact, as it places the burden of these expenses upon the railroad companies, which, in other cases of like nature, is placed upon the estate of the deceased, or upon the county in which the accident may occur.

This is the general law. R. S. 1845, ch. 99, title "Sheriffs and Coroners," § 23; R. S. 1874, § 21, title "Coroners."

It may, very pertinently, be asked, why this distinction? On what principle is it that railroad corporations, without any fault on their part, shall be compelled to pay charges which in other cases are borne by the property of the deceased, or, in default thereof, by the county in which the accident occurred?

An examination of the section will show, that no default or negligence of any kind need be established against the railroad company, but they are mulcted in heavy charges, if, notwithstanding all their care and caution, a death should occur on one of their cars, no matter how caused, even if by the party's own hand. Running of trains by these corporations is lawful and of great public benefit. It is not claimed that the liability attaches for a violation of any law, the omission of any duty, or the want of proper care and skill in running their trains; the penalty is not aimed at anything of this kind. We say penalty, for it is in the nature of a penalty, and there is a Constitutional prohibition against imposing penalties when no law has been violated or duty neglected. Neither is pretended in this case, nor are they in the contemplation of the statute. A passenger on the train dies from sickness—he is a man of wealth. Why should his burial expenses be charged to the railroad company? There is neither reason nor justice in it. And if he be poor, having not the means for a decent burial, the general law makes ample provision for such cases. As argued by counsel for appellant, the law attempts to place what is properly a public burden upon these corporations, which should be borne by all alike, and discharged out of public funds raised by equal and uniform taxation.

This may be considered in the light of a special tax, for which there is no sanction in the Constitution. We have not been furnished with any brief, points or argument for the appellee. The views presented by appellant satisfy us the law in question cannot be sustained as a constitutional enactment.

In 1874 the general assembly repealed this statute by chap. 31, title "Statutes," R. S. 1022, but at the same session re-enacted it substantially, giving the power to sue, not to the coroner as here, but to the county. Ib., title "Coroner," 283, § 22.

For the reasons given the judgment is reversed.

H. P. BUXTON for Appellant.

THE LIMITS TO THE JURISDICTION OF COURTS.

LECTURE BY A. M. PENCE, ESQ., BEFORE THE UNION COLLEGE OF LAW.

Gentlemen of the Union College of Law, of the City of Chicago:

* * * * * * *

I wish to speak, to-day, of but a single branch of the manifold acquirements of the true lawyer, viz: the proper use and understanding of the machinery of the courts, or rather the limits and powers of the courts.

I can only throw out a few hints, and leave you to fill in the great detail. I will not attempt to exhaust the subject, nor to express myself in abstract propositions, but rather to fix in your minds, by illustrations, a few valuable principles. Law in the abstract you may find in the books.

The judicial department of every constitutional government is the true bulwark and protection of the citizen, sometimes interposing to prevent the encroachment of the executive upon the rights of the individual; and as often interposing to prevent the encroachment of the legislative department.

The popular power, that which comes from the people, can be as tyrannical as the prerogative of the king.

It has been the glory of the English government that its judges, with a few exceptions, have maintained the rights and privileges of the subject against both the king and the commons.

In doing this, the courts have often been called upon to define their jurisdiction, and to force the executive and legislative departments to recognize and obey their mandates.

The judges did much, during the great formative period of the English constitution to thwart the prerogative of the king, and to define the jurisdiction of the executive.

And Sir Edward Coke, when removed by the king from the office of chief justice, on account of his opposition to the king, who attempted, by virtue of his prerogative, to pass laws by proclamation, was not prevented, however, from carrying on his war against the king's assumed jurisdiction; for being returned to parliament he became the leader of the House of Commons, and carried the celebrated *petition of right* in which the king's jurisdiction was definitely defined, although not at first submitted to.

Lord Chief Justice Holt, at one time came in conflict with the House of Lords, and at another time with the House of Commons; and in both instances maintained the jurisdiction of his court against those powerful bodies.

The most interesting case was that wherein the House of Commons attempted to intimidate the chief justice.

In a certain borough the whigs had a majority of legal voters; but through the corruption of the judges of election, they were prevented from voting, and a tory member was returned.

The men whose votes were refused brought actions in the Court of Queen's Bench for damages.

The first case brought on for trial was that of Ashley, which was carried before the House of Lords on writ of error, and the right of action was maintained.

The House of Commons claimed that their privilege was infringed of determining who were legally elected, and so furious did they become toward Chief Justice Holt and the House of Lords that the queen was compelled to dissolve the parliament.

Upon a new election the tories were still in the majority in the House of Commons, and forthwith they arrested the other parties whose cases had not yet been decided for prosecuting their actions in contempt of the house. They were imprisoned at Newgate.

The house even threatened to arrest and imprison Chief Justice Holt for entertaining jurisdiction. It is reported that the speaker of the house in his robes and full bottom wig, attended by many of the high privilege members appeared before the chief justice and said: "Sir John Holt, Knight Chief Justice of her Majesty's Court of Queen's Bench, in the name of the Commons of England, and by their authority I summon you forthwith to appear at the bar of the house to answer the charge there brought against you for divers contempts by you committed in derogation of their ancient and undoubted privileges."

His lordship calmly replied, "Go back to your chair, Mr. Speaker, within these five minutes, or you may depend upon it I will lay you by the heels in Newgate. You speak of your authority, but I tell you that I sit here as an interpreter of the laws and a distributor of justice, and if the whole House of Commons were in your belly, I would not stir one foot."

So high did the matter run that the queen again dissolved parliament, and at the next election the whigs had a majority in the house.

Strange as it may seem, a similar question again arose within the reign of Queen Victoria, 140 years afterward, when Lord Denman was chief justice, in the case of Stockdale *v.* Hansard. See 9 Ad. & Ellis, page 1, and 11 Ad. & Ellis, page 273.

During the progress of the case the House of Commons imprisoned for contempt the plaintiff, the attorney, the attorney's son, his clerk, and the two sheriffs of London.

Lord Denman, who was a whig, maintained his ground, and the house was compelled to recede.

Stockdale, the plaintiff, sued the Hansards, printers of the parliamentary reports, on account of a report made to the House of Commons, and by them printed, which was libelous upon the plaintiff.

The house claimed it was a breach of their privilege to sue their printer, and without there being any law to protect their printer, they claimed the privilege to publish the libelous document without a law to that effect. Upon a passage of a law afterwards, the Duke of Wellington, in the House of Lords, remarked that such a law "would make the House of Commons the only authorized libellers in the country."

I will refer to this case again hereafter.

But it is not my intention to dwell upon the conflict of jurisdiction between the courts and the legislative or executive departments; nor the concurrent, and sometimes apparent conflicting jurisdiction of the State and Federal courts.

You will experience no difficulty in your practice in determining whether you should apply to the State or the Federal Courts. This is a very easy matter.

The Federal courts have indeed a very limited jurisdiction, and for all practical purposes it is sufficient to know and understand the powers of the State courts.

This is, indeed, a wide and interesting field of inquiry. You will meet at the very threshold of your practice the question of jurisdiction.

You cannot proceed a single step without a knowledge of this subject. It enters into every department of your practice. You cannot bring a suit, you cannot defend a suit, you cannot examine a title to real estate without a full knowledge of the jurisdiction of the courts, general and special. You will not have much difficulty in determining the distinction between the juristiction in chancery and at law, nor as to what kind of an action at law you must bring, whether assumpsit or trespass, and the like.

I do not appreciate the complaint which we often hear made, especially by laymen, that under our common law system of pleading and practice no one can feel sure whether he has brought his action or suit in the right way or in the proper forum. A very little scientific study of the matter will be sufficient to prevent mistakes in this regard. It is not here that difficulties arise or mistakes occur. If you study well the principles of the law, you will not mistake the remedy or the forum. To understand the rights of the parties is difficult. This requires constant study. To know the remedy after you understand the rights of your client, is easy indeed. Of course, if you do not know your client's rights, you cannot choose the proper remedy.

But inasmuch as all lawyers are not intelligent, are not industrious, you will find the same defects in their works that you will find in the works of other persons professing skill.

You will find much work done by pretended lawyers ("men whom God Almighty never intended to be lawyers") that is absolutely vicious.

Many of our profession have really a genius for mistakes.

In any other business, if a man has no talent for it, he is compelled to abandon it. He cannot continue to be a cabinet maker, or a machinist, or a newspaper editor if he possesses no talent for the vocation.

But you will find men continuing in the law though they be not fit for a country schoolmaster. They can conceal their defects from ordinary laymen, and thus go on year after year and be known only to the profession—as ignorant workmen, unskilled laborers. Hence, when you are called upon to defend a case, the first thing you ought to do is to examine the principles involved, and determine whether the cause is properly brought—whether the court has jurisdiction.

And this question of jurisdiction involves two inquiries:

1st. Whether the court has jurisdiction of the person.

2d. Whether the court has jurisdiction of the subject-matter in controversy.

If the defendant resides in the State, you look first to the return of the sheriff indorsed upon the writ. Upon that return the court acts.

If it be returned according to the provisions of the statute, the court has authority to act, and you must put in the defense.

And then the question arises, Has the court jurisdiction of the subject-matter?

As to the Superior Courts, that is, the Circuit Courts of the State, and the Superior Court of Cook county, in this State—they have common law and chancery jurisdiction as it existed in the Superior Courts of England, prior to 4th year of King James I., and such other jurisdiction as has been given them by the statutes of this State.

You inquire, then, if the court in which the suit is brought has a general jurisdiction of that class of subjects. For instance, if it be a bill for a specific performance of a contract, on the chancery side, or a declaration to recover for a sum of money due, on the law side, you at once determine that the court has jurisdiction of that class of cases in that form of action.

But suppose it were a bill, not for specific performance, but a bill or petition by an administrator asking the court to sell the real estate belonging to the heirs of a deceased person, for the purpose of paying the debts of decedent's estate, you would say at once that the Superior Courts did not have power, by bill, to sell the real estate of heirs for such purpose, because it is not in accordance with the course of common law. The courts at Westminster Hall could not do it. And then you must turn to the statutes of your State, and you will there see that such a right exists, but the remedy given is in the County Court; that the right is entirely statutory, and therefore the remedy can only be sought in that court where the statute directs.

And should the proceeding continue in the Circuit or Superior courts, not a particle of title would be obtained by the purchaser if a decree should be entered in such court.

What would you do if the heirs of such deceased party should call upon you to defend such a proceeding in the Circuit Court? You would do one of two things. You would demur to the bill and the court would dismiss it for want of jurisdiction; or, if you thought the suit was without merit, but that you would be unable to make a sufficient defense upon the merits, what would you do? Suppose, for instance, that the foundation of the suit was upon a promissory note given by your client's ancestor, which you were morally convinced had been paid in his lifetime; but, for some reason, by accident or otherwise, not taken up by him, yet you could not prove that it had been paid. What would you do?

I would advise you, in such a case to

do nothing, because, if the administrator or executor should proceed and obtain a decree and sell your client's land, the purchaser would obtain no title thereby, because the court would have no jurisdiction in the case.

The proceeding would be a nullity, but his debt would be extinguished by the sale *pro tanto*, or perhaps by the time the mistake was discovered, the note would be outlawed as against the heirs.

Let me tell you, gentlemen, when you have a case to defend, when you have doubt as to the goodness of your defense, be in no hurry about the matter. If the plaintiff does not move in the matter, you keep silent. Time will come to your rescue by and by.

I know of a suit which has been on hand for five years. There is no defense to the cause. Whenever it shall be brought on to a hearing the complainant will obtain such a decree as he asks. The defendant bought the property and paid full price, yet obtained no title, for certain reasons. That case will not be ended for two or three years yet. And after complainant has obtained his decree, it will do him no good, for he has misconceived the effect of his action. And by that time the defendant will have a complete bar to the right of action by lapse of time.

In the case last mentioned the court has jurisdiction of the subject-matter, but the relief prayed for is inadequate, and the defendant could in the first instance have demurred to the bill, and it would have been dismissed, not for the reason that the court did not have jurisdiction, but for the reason that the court should not have exercised jurisdiction on that particular case in opposition to defendant's objection.

Good cases to illustrate the difference between the want of jurisdiction and the improper and erroneous exercise of jurisdiction, are the first two that I mentioned—*one* where a bill is brought in the Circuit Court to sell real estate of heirs to pay debts of decedent, and the case of a bill in the Circuit Court to enforce a specific performance of a contract for the sale of real estate.

In the latter case, the court has jurisdiction of that class of subjects, viz.: specific performance, but the bill in that case does not show that complainant ever offered to perform, or that he is ready and willing to perform, on his part. And it also shows that the contract was made fifteen years ago, and complainant does not set up any reason why he did not bring his bill sooner. Of course, if a demurrer were interposed, in that case the court would dismiss the bill for want of equity—not for the reason that the court did not have jurisdiction, but for the reason that it would not be equitable for the court to assist any one who has lain by for so long a period while the property was increasing in value. It would refuse to exercise its jurisdiction.

But, instead of interposing a demurrer, suppose the defendant made no defense. Then, if the court entered a decree and caused its master to make a deed of conveyance of the premises to the complainant, the title would be good, and the defendant could never recover the land, so long as the decree remained unreversed.

But the decree in the latter case is erroneous, and if taken to the Supreme Court, within proper time, it would be reversed. The decree in that case is simply voidable and not void.

And I desire that you should clearly understand the distinction between a decree that is voidable and one that is absolutely void. You will find the courts using language that misleads, and many lawyers are unable to discriminate—and hence claim that a certain decision supports their views, when it does nothing of the kind.

The courts will call a void decree erroneous. They will also call a voidable decree erroneous. And so they both are. But you will see at once that all erroneous decrees are not void, because the word is used as applicable to both voidable and void decrees.

[TO BE CONTINUED.]

SUPREME COURT OF ILLINOIS.

ABSTRACT OF OPINIONS FILED AT SPRINGFIELD, OCTOBER 13TH, 1875.

179.—Gilman, Clinton & Springfield R. R. Co. *v.* Joseph J. Kelley et al.—Appeal from McLean.—Opinion by SCOTT, J. 17 pp.

PUBLIC AND PRIVATE TRUSTEES—THEIR OBLIGATIONS AND RESPONSIBILITIES—RATIFICATION BY STOCKHOLDERS—APPOINTMENT OF RECEIVERS.

STATEMENT.—Bill by appellee in behalf of himself and other stockholders of appellants. Afterwards certain townships were also made party complainants. Appellant was organized by act of Assembly in 1867, and this act was amended in 1869. A large amount of local municipal subscriptions ($600,000) was obtained along the line of the proposed road for capital stock, but the bonds were really and necessarily to construct the road. With this municipal aid, a contract was effected with the "Morgan Improvement Company," a company organized in the interest of the Pennsylvania Central R. R. Co., to which railroad company appellant had proposed terms for aid in constructing and equipping its road; which proposal was the basis of the arrangement with the Morgan Improvement Company. To the Pennsylvania Central the road was to be leased, when completed, for 99 years, at one dollar per year, provided the lease could be made without prejudice to the rights of parties holding the company's bonds.

The appellant was also bound to issue certificates of stock for the remainder of the capital stock, not taken; to be delivered to the P. C. R. R. Co. as an escrow; and to be delivered to the Morgan Improvement Company; and also the company were to execute mortgage bonds. The contract was not to be binding on the Morgan Improvement Company, if the directors should make any change without its consent or approval. The contract was adopted by the directors, June 7, 1870; and afterwards approved by a meeting of the stockholders.

In September, 1870, Mr. Melvin, a director, and the president of the G. S. & L. R. R. Co., Mr. Black, another director, and Mr. Williams, afterwards appointed director by the governor, all became members of the Morgan Improvement Company. This, it is charged, invalidated the construction contract, and caused a misappropriation of the funds of the R. R. Co. for the personal benefit of these individuals, and also a wrongful issue of the majority of the stock so as to place the control of the affairs of the company in the hands of the Improvement Company. The bill further alleged that the directors were about to lease the road to the P. C. R. R. Co. for 999 years, on condition that the lessee would secure certain bonds, and pay a large debt owing to the Morgan Improvement Co., by the G. C. & S. R. R. Co.

The prayer of the bill was that it should be decreed that the construction contract was fraudulent; that the directors should refund profits under the contract to the railroad company; that the bonds issued to the Improvement Company should be canceled; that certain income bonds about to be issued by the railroad company should be declared void; and that the lease prepared by the directors and submitted to the P. C. R. R. Co. be declared void; and that the latter company be enjoined from claiming any rights thereunder.

Prayer substantially granted, and appeal. However, previously, the directors had been advised that they could not, under the charter, make the contemplated lease, and had thereon abandoned the intention. *Held*,

1. That as the contract sought to be avoided had been performed before the filing of the bill, and the securities probably passed into the hands of innocent holders for value, these holders could not be affected by this litigation.

2. Complainants were entitled to an account from the participating directors, of any profits received by them. [The court, however, remark that the evidence shows positive loss instead of profits.]

3. No director of the railroad company could lawfully become a member of the Improvement Company, with whom the contract of construction was made, with a view to share in the profits. If any gains were realized by the act, they would belong to the railroad company, upon the equitable principle which forbids a trustee, or any person acting in a fiduciary capacity, from speculating out of the subject of the trust. In this case, the interests of the two companies in the contract must be opposite, and the same person could not properly represent both sides, or be a stockholder in both corporations.

4. The directors of a railroad company are trustees for the stockholders, and it would be a breach of duty to transfer that trust to assume obligations inconsistent with that relation—to place themselves in opposition to the interests of the stockholders, or in such positions as that their own individual interests would prevent them from acting for the best interests of those they represent. The rule is, that all persons holding a fiduciary relation must observe the utmost fidelity to the interests of the *cestui que trust*, and this rule embraces every relation in which there may, by any possibility, arise a conflict between the duty to the person with whom the trustee is dealing, or on whose account he is acting, and his own individual interest. The rule acts, not on the possibility that in some cases the sense of that duty may prevail over the motives of self-interest, but it provides against the probability in many cases, and the danger in all cases, that the dictates of self-interest will exercise a predominant influence and supersede that of duty. So strictly is this rule adhered to, that no question is allowed to be raised as to the fairness of any contract made contrariwise. The law absolutely inhibits the agent, or trustee, from placing himself in a position where his private interests would naturally tend to make him neglectful of his obligations to his principal, or where his position would afford him an opportunity to speculate in the trust property. So that it is not indispensable there should be actual injury resulting before the act of the trustee will be declared void as interdicted by the law. The *cestui que trust* has his election to ratify the act of the trustee, and insist on all its advantages, or disaffirm it *in toto*, as shall be most to his interest. And this whether it be a public or private trust.

5. Issuing the majority of the stock to the Improvement Company, in order to give it the control of the road, was illegal. If a railroad company gratuitously give away its stock, or if the stock is given for the fraudulent purpose of depriving the stockholders of dividends, or of destroying the value of their shares, or to prevent them from exercising their legal power of control over the road in the election of directors, or otherwise equity will afford relief. Nor does it matter that the stock is really of no value. The principle is not affected by any such consideration. The untaken stock is trust property in the hands of the directors, and they have no authority to bestow it gratuitously upon themselves or others, with the design of depriving *bona fide* stockholders of their just influence in the management of the affairs of the company.

6. Nor does the original ratification of the contract, by the meeting of stockholders, change the application of the principles above stated, to the case at bar—the acts complained of not being included in the ratification. No ratification will estop a principal unless he has been made aware of all the facts having a material bearing in the matter.

[The court say they see no necessity for the appointment of a receiver in this case, and then *held*,]

7. Courts should hesitate to take the management of railways out of the hands of the directors elected by the stockholders, and proceed with great caution in such matters.

[The court below is directed to discharge the receiver.]

Henry Wickenkamp *v.* Willian Wickenkamp.—Appeal from Adams.—Opinion by CRAIG, J. 6 pp.

DISCRETION OF COURT IN ADMITTING EVIDENCE IN REBUTTAL—OBJECTIONS TO EVIDENCE — WAIVER — INSTRUCTIONS TO EXCLUDE EVIDENCE.

STATEMENT.—Assumpsit for labor for 8½ years. Verdict for $753.35. The plaintiff is a son of defendant. Three years of the time was on account merely, the prior time on note, to which an offset was pleaded, which was allowed. *Held*,

1. That the admission of evidence in rebuttal is discretionary; and the exercise of that discretion cannot be assigned for error.

2. When specific objections are made to the admission of evidence, which objections are not tenable, other objections which might properly have been made, must be regarded as waived, and the mere fact that improper testimony was allowed to go to the jury without objection, cannot be assigned as error. But a party may ask an instruction to the jury to disregard improper testimony given in, and a refusal of such instruction may be error.

185.—T. W. & W. R. R. Co. *v.* Edward Williams.—Appeal from Morgan.—Opinion by SCHOLFIELD, J. 6 pp.

STATEMENT.—Appellee, while awaiting the departure of a train after purchasing a ticket, was forcibly assaulted by an employee and ordered out of the ladies' room in Quincy station-house. *Held*,

1. That a suit could be maintained, under the law in force, as well in Morgan county for the injury complained of, as in Adams county where it occurred, if the company did not object in the court below to the venue.

2. Where a declaration names the servant of the company alleged to have committed a trespass, the name may be considered as surplusage, and needs not be proved; the gist of the action being the injury by a servant of the company merely.

3. A railroad company has a right to set apart a room for ladies, and exclude therefrom all gentlemen unaccompanied by ladies, and that, too, even if there are not proper accommodations for the gentlemen so excluded—whose remedy in such case would be against the company directly for neglect to provide such accommodations.

James Milliken *v.* Edward A. Jones.—Appeal from Macon. — Opinion by SCHOLFIELD, J.

FILING PLEADINGS—PRACTICE THEREIN.

1. *Held*, That an additional plea filed after issue joined, and without leave of the court, may properly be stricken from the files. Parties are not allowed to adopt a course of practice in pleading which may tend to injure the opposite party, by presenting, at the last moment and when he may be unprepared to meet it, a new and unexpected issue, or to trifle with the time of the court by making up portions of their issues at different times, when it can be reasonably avoided.

207.—Henry Bell, admr. *v.* Parker Gardner et al.—Appeal from DeWitt.—Opinion by SCOTT, J. 3 pp.

SURPRISE BY EVIDENCE ON TRIAL OF A CAUSE — EQUITY RELIEF — NEWLY DISCOVERED EVIDENCE.

STATEMENT.—Bill to obtain a new trial, in a common law case, on the ground of being surprised by evidence on the trial. *Held*,

1. That the complainant, having been plaintiff in the case, could have avoided jeopardizing the interests involved by taking a non-suit, if surprised by unexpected evidence and unable to rebut it. The law will not permit a party to experiment with the chances of a favorable verdict, and then, if unsuccessful, seek relief in equity.

2. Newly discovered evidence must not be merely cumulative.

209.—Leander Smith *v.* George A. Crawford.—Appeal from Cook.—Opinion by SCHOLFIELD, J. 6 pp.

DESCRIPTION OF LANDS VOID FOR UNCERTAINTY.

STATEMENT.—Bill to establish title to land under the burnt record act of 1872. *Held*,

1. That the description "an undivided ten acres of land in the east half of section two," etc., is void for uncertainty; although, in some States, the rule is different. Such a tract cannot be found or located so as to give possession thereof. [Confirmed by a series of Illinois cases.]

220.—Edward Wilson *v.* Wm. S. Kellogg.—Appeal from McLean.—Opinion by CRAIG, J. 7 pp.

FRAUDULENT SALES—EQUITY JURISDICTION.

STATEMENT.—Bill to set aside administrator's sale of lands for debts of the estate on the ground that there was a fraudulent collusion to prevent bidding. Decree for complainant, and appeal by defendant. *Held*,

1. That a contract among bidders to prevent bidding, or stifle competition, will vitiate the sale; and a court of equity will not allow a party to retain the results of such fraudulent bidding. But a court of equity will not allow a judicial sale to be set aside without clear and satisfactory proof. If sales are set aside on slight causes, purchasers will be deterred from bidding, and thus lands be sacrificed at forced sales.

LV. NEW HAMPSHIRE REPORTS.

We have received from JOHN M. SHIRLEY, reporter, advance sheets of the LV. New Hampshire Reports, from which we take the following head-notes:

Heywood v. *Hartshorn*, p. 484.

INDEMNITY AGAINST NOTE LOST—INTEREST.

The payee of a negotiable promissory note, secured by a mortgage to him of land situate in this State, moved beyond the State, taking with him the note and mortgage, and afterwards died a citizen of another State. *Held*, that his administrator, upon furnishing suitable indemnity to the mortgagor against any claim on account of said note and mortgage by any *bona fide* holder thereof, might maintain a bill in equity to foreclose said mortgage, although the note and mortgage had been lost and could not be found.

An offer by the maker of a promissory note to pay the sum due thereon, upon a reasonable condition which the holder refuses or is not in a situation to fulfill, is sufficient to stop the running of interest.

Flanders v. *George*, p. 487.

WILL—LICENSE TO SELL LAND FOR PAYMENT OF DEBTS—NOTICE.

Provisions of a will *held* to impose upon the executor, who was also residuary legatee and accepted the will, the burden of paying the debts of the deceased, without calling in specific devices of land for that purpose.

A decree of the Probate court, granting license to sell land for the payment of debts, will be reversed on appeal by this court, when it appears that parties interested in the land by the provisions of the will were not notified of the petition according to the order of the probate court.

Moore v. *Kidder*, p. 488.

ATTACHMENT IN EQUITY PROCEEDINGS—UNRECORDED DEED.

A writ of attachment, ordered by a single justice in the Supreme Judicial Court, in an equity suit, under the General Statutes, ch. 190, sec. 7, and Laws of 1869, ch. 15, was made returnable at a general term of the whole court at Concord. *Held*, no error.

A return by an officer, that he has attached all the real estate owned by the defendant in the town of K., constitutes a valid attachment of all lands which come within that description, and it makes no difference that at the time of the attachment the defendant had conveyed away all his lands in the town of K. by a deed which had not then been recorded.

A bill in equity, in aid of the remedy at law, may be sustained against one summoned as trustee, when it appears that he is fraudulently putting his property beyond the reach of legal process in order to prevent the collection of the judgment which he anticipates may be rendered against him as such trustee.

State v. *Roberts*, p. 483.

SPIRITUOUS LIQUORS—SALE—AGENCY—EVIDENCE.

Upon the trial of an indictment for unlawfully selling spirituous liquors, evidence having been introduced by the State of a sale by the respondent's wife —*Held*, that it was competent for the State to prove sales by the respondent himself other than those specified in the indictment, at the same place and about the same time, because such sales by him tended to show that the illegal traffic was his business, and that the sale of liquor by his wife was an act done by her as his agent and by his authority.

One of the selectmen of the town in which the respondent resided, testified, subject to the respondent's exception, that he never joined in any appointment of the respondent as an agent for the sale of spirituous liquor. The respondent himself, on cross-examination, but without interposing any objection to the inquiry on that subject, testified that he had never received any appointment as such agent.

The court instructed the jury that they might consider the evidence given by the selectman as withdrawn, and that they might also consider the respondent's statement aforesaid as evidence that he was not such agent. *Held*, the instructions were correct, and the respondent was not prejudiced by the withdrawal of the testimony of the selectman from the consideration of the jury.

UNITED STATES SUPREME COURT.

PROCEEDINGS OF.

Thursday, Nov. 4, 1875.

No. 214. William F. Pick et al v. The Chicago and Northwestern Railroad Company et al.

No. 235. DeWitt C. Lawrence et al. v. George H. Paul et al.

No. 587. The Chicago, Milwaukee and St. Paul Railway Company v. Hill, Ackley & Co.

No. 589. L. D. Stone v. The State of Wisconsin.

The argument of these causes was continued by E. W. Stoughton, and concluded by William M. Evarts for the appellants.

No. 31. H. N. Farwell v. James W. Converse et al.

No. 32. G. W. Long and John C. Watson v. James W. Converse et al.

The argument of these causes was commenced by B. F. Butler for the appellants.

Adjourned until Friday at 12 o'clock.

Friday, Nov. 5.

On motion of B. F. Butler, Charles M. Osborn of Rock Island, Illinois, and John C. Lee, of Toledo, Ohio, were admitted.

No. 31. H. A. Farwell v. James W. Converse et al.

No. 32. G. W. Long and John C. Watson v. James W. Converse et al.

The argument of these causes was continued by B. F. Butler for the plaintiffs, continued by J. J. Storrow and B. F. Brooks for the defendants, and concluded by Butler for plaintiffs.

No. 33. William H. Scudder v. The Union National Bank of Chicago. The argument of this cause was commencedby John H. Thompson for the plaintiff.

Adjourned until Monday at 12 o'clock.

Monday, Nov. 8.

On motion of L. H. Boutell, of Chicago, Frederick A. Mitchell, of Kansas City, Missouri, was admitted.

No. 830. William J. DeTreville v. Robert Smalls. In error to the Circuit Court of the United States for the district of South Carolina. On motion of Assist. Atty. Gen. Smith, docketed and dismissed with costs.

No. 831. A. T. Stewart et al. v. Meyer Sonneborn. In error to the Circuit Court of the United States for the middle district of Alabama. On motion of P. Phillips, docketed and dismissed with costs.

No. 832. Alonzo S. and John Gear v. J. P. Grosvenor et al. Appeal from the Circuit Court of the United States for the district of Massachusetts. On motion of B. F. Butler, docketed and dismissed with costs.

No. 7. Original. Ex parte Ira G. French, petitioner. The motion for mandamus in this cause was submitted on printed arguments by S. O. Houghton and John Reynolds of counsel for the petitioner, and argued by George F. Edmonds, and submitted by J. H. McKeene in opposition to the motion.

No. 466 The Lancashire Insurance Company v. John J. Haley et al. No. 467. The Franklin Fire Insurance Company v. John J. Haley et al. No. 468. The Bangor Insurance Company v. John J. Haley et al. No. 469. The Insurance Company of the State of Pennsylvania v. John J. Haley et al. On motion of J. H. Ashton, dismissed without costs to either party.

No. 33, Wm. H. Scudder v. Union National Bank of Chicago. The argument of this cause was concluded by J. H. Thompson, of Chicago, for the plaintiff in error, and submitted on printed arguments by M. W. Fuller, of Chicago, for defendant.

Case 34. Carver v. Upton. Error to the Circuit Court for the northern district of Illinois. This is another action by Upton as assignee in bankruptcy of the Great Western Insurance Company to recover of Carver money claimed to be due from him as a stockholder, and as an unpaid balance on capital stock. The defense was that there had never been any call made by the company for the unpaid balance, and that the certificate itself provided that this balance was subject to the call of the directors as they may be instructed by the majority of the stockholders represented at any regular meeting. Upon this it was urged that the certificate was not admissible to show any grounds for recovery, as it showed only a special contract in full force without proof of a call of the directors, as specified therein. There was a recovery below, and it is here urged that the company could not have recovered in any other way than specified in the certificate, and that the assignee in bankruptcy took the property and rights of the bankrupt in the same condition as the bankrupt possessed them, with the single qualification that he can impeach a fraudulent conveyance or transaction of the bankrupt as a creditor might. The money was payable upon a contingency which had not happened, and it cannot be recovered in an action of law.

No. 35. Sanger v. Upton, assignee, etc. Error to the Circuit Court for the northern district of Illinois. This is also an action against Sanger as a stockholder of the Great Western Insurance Company for an unpaid balance on stock. The same defense is set up as in No. 34, preceding, that the unpaid balance was to be paid upon call of the directors, and that body has not called it in, hence there is no authority for the call. The court below, however, held that upon the insolvency of the company its corporate powers, so far as was necessary for the winding up of its affairs, were transferred to the Bankruptcy court; that the functions of its directors were at an end, and its unpaid capital stock became a trust fund for the benefit of its creditors, which it was the duty of the Bankruptcy court to collect and administer. This ruling is assigned as error here, the plaintiff in error insisting that the stockholders are not bound by the order of the Bankruptcy court, because they were not parties nor privies in the proceeding. These causes were argued by J. H. Thompson, of Chicago, of counsel for plaintiff in error in No. 34, by George H. Williams for plaintiff in error in No. 35, and L. H. Boutell, of Chicago, for the defendants.

Chicago cases and attorneys were well represented in court to-day.

Adjourned until Tuesday at 12 o'clock.

Tuesday, Nov. 9.

No. 36. The Steamboat Eliza Hancock, etc., appellees v, Charles S. Langdon. The argument of this case was commenced by E. C. Benedict for appellee, and continued by W. U. Garrard for the appellee.

Adjourned until Wednesday at 12 o'clock.

NISSEN & BARNUM,
Attorneys, 195 South Clark Street.

ESTATE OF JOHAN W. BROCKSCHMIDT, DECEASED.—Notice is hereby given to all persons having claims and demands against the estate of Johan W. Brockschmidt, deceased, to present the same for adjudication and settlement at a regular term of the County court of Cook county, to be holden at the court house, in the city of Chicago, on the third Monday of December, A. D. 1875, being the 20th day thereof.

Chicago, October 20th, A. D. 1875.

DIEDRICH H. R. BROCKSCHMIDT, Executor.

NISSEN & BARNUM, Attys. 5-10a

ESTATE OF JOHANNA JENNEKE, DECEASED. Notice is hereby given to all persons having claims and demands against the estate of Johanna Jenneke, deceased, to present the same for adjudication and settlement at a regular term of the County court of Cook county, to be holden at the court house, in the city of Chicago, on the the third Monday of December, A. D. 1875, being the 20th day thereof.

Chicago, October 20th, A. D. 1875.

THERESA REISER, Executrix.

NISSEN & BARNUM, Attys. 5-10a

TRUSTEE'S SALE.—WHEREAS, JAMES CUDmore (a bachelor), did, on the 24th day of August, 1869, make, execute, and deliver to the undersigned, Levi D. Boone, as trustee, his trust deed, dated on the same day, conveying to him the property therein and hereinafter described, for the purpose of securing the payment of a certain promissory note, made by the said James Cudmore, of the same date, and payable to the order of the Union Mutual Life Insurance Company of Maine, for the principal sum of twenty-seven hundred dollars, with interest at eight per cent. per annum, payable semi-annually, said note being payable three years after the date thereof—which trust deed was recorded in the office of the recorder of deeds of Cook county, Illinois, on the 1st day of September, 1869, in book 566, page 7, of deeds.

And whereas, default has been made in the payment of said principal sum of money, and the amount of principal and interest now claimed to be due thereon is about $3,800.

Now, therefore, I, the said Levi D. Boone, trustee, at the request of the said Union Mutual Life Insurance Company, the holder of said note, do hereby give notice that I will, on Saturday, the 27th day of November, 1875, at the hour of two o'clock P.M., on the said premises, sell to the highest and best bidder, for cash, the following described premises, to wit:

The north one hundred and thirty (N. 130) feet of lot numbered one hundred and ninety-six (196), in Bronson's addition to Chicago, in the county of Cook and State of Illinois, said lot being sixty-six (66) feet front on the south side of Granger street by 130 feet deep, together with all the right, title, claim and equity of redemption of the said James Cudmore, his heirs or assigns therein, for the purpose of raising money for the payment of said indebtedness and the expenses of said sale.

LEVI D. BOONE, Trustee.

November 3d, 1875. 7-9

THEO. & T. H. SCHINTZ,
Attorneys, No. 78 Dearborn Street.

ESTATE OF JOHN F. WILD, DECEASED.—NOtice is hereby given to all persons having claims and demands against the estate of John F. Wild, deceased, to present the same for adjudication and settlement at a regular term of the County court of Cook county, to be holden at the court house, in the city of Chicago, on the third Monday of December, A. D. 1875, being the 20th day thereof.

Chicago, October 21st, A. D. 1875.

EMMA WILD, Administratrix.

THEO. & T. H. SCHINTZ, Attys. 5-10a

ROSENTHAL & PENCE,
Attorneys.

KNOW ALL MEN BY THESE PRESENTS, THAT the undersigned, Otto Wasmansdorff and William Heinemann, of the city of Chicago, Cook county, Illinois, and Adolph Oppenheim, of Rudersdorf, near Berlin, in Prussia, have this day formed a limited partnership, pursuant to the laws of the State of Illinois:

1. The name or firm under which the partnership is to be conducted is "Wasmansdorff and Heinemann."

2. The nature of the business transacted by said firm is that of a general exchange, passage, loan and real estate brokerage business, to be conducted in the city of Chicago, in said State.

3. The names of the general partners are Otto Wasmansdorff and William Heinemann, both residing in said city of Chicago; the name of the special partner is Adolph Oppenheim, residing in Rudersdorf, near Berlin, in Prussia.

4. Said special partner has contributed to the common stock the sum of twelve thousand dollars currency.

5. Said partnership shall commence on the first day of November, 1875, and shall terminate on the first day of January, 1881.

6. The death of a general or special partner shall not work a dissolution of the firm, and the partnership may be dissolved prior to the expiration of the time stated hereinbefore, upon six months notice in writing, which said special partner may give to the other.

In witness whereof, said parties have hereunto set their hands and affixed their seals, this first day of November, A. D. 1875.

OTTO WASMANSDORFF. [SEAL.]
WM HEINEMANN. [SEAL.]
ADOLPH OPPENHEIM, [SEAL.]
By Robert Adolph Oppenheim.

STATE OF ILLINOIS, COUNTY OF COOK, CITY OF CHICAGO, ss.—I, Julius Rosenthal, a notary public in and for said city of Chicago, in the county and State aforesaid, do hereby certify, that Otto Wasmansdorff, William Heinemann, and Robert Adolph Oppenheim, as attorney in fact of Adolph Oppenheim, personally known to me to be the same persons whose names are subscribed to the foregoing instrument as having executed the same, appeared before me this day in person, and acknowledged that they signed, sealed, and delivered the same as their free and voluntary acts, the said Robert Adolph Oppenheim acknowledging the same to be the free and voluntary act of his principal, the said Adolph Oppenheim, for the uses and purposes therein set forth.

Witness my hand and notarial seal this second day of November, A. D. 1875.

[L. S.] JULIUS ROSENTHAL, Notary Public.

STATE OF ILLINOIS, COUNTY OF COOK, ss.—Otto Wasmansdorff, being first duly sworn, deposes and says that he is one of the general partners in the firm of Wasmansdorff and Heinemann; that Adolph Oppenheim, the special partner in said firm, has actually and in good faith contributed and applied to the common stock of said firm the sum of twelve thousand dollars currency, in cash, the first day of November, 1875; and further said deponent says not.

OTTO WASMANSDORFF.

Subscribed and sworn to before me this fifth day of November, 1875.

[L. S.] JULIUS ROSENTHAL, Notary Public.

STATE OF ILLINOIS, COUNTY OF COOK, ss.—I, Hermann Lieb, clerk of the County court of Cook county, in the State aforesaid, do hereby certify that the foregoing is a true and correct copy of the articles of limited co-partnership between Wasmansdorff and Heinemann, all of which appears from the records and files of my office.

In witness whereof, I have hereunto set my hand and affixed the seal of said County court, at my office, in the city of Chicago, in said county, this sixth day of November, A. D. 1875.

{SEAL OF COUNTY COURT.} HERMANN LIEB, Clerk of the County Court.

ROSENTHAL & PENCE, Attys. 7-12

WHEREAS THOMAS HEALY AND MARGARET Healy, his wife, by their certain deed of trust, bearing date the nineteenth day of February, A. D. 1874, and recorded in the office of the recorder of deeds of the county of Cook and State of Illinois, on the twenty-first day of February, A. D. 1874, in book 171 of records, page 242, did convey to the undersigned as trustee the premises hereinafter described, to secure the payment of two promissory notes, given by Thomas Healy, bearing date as follows: one note dated April 21st, A. D. 1873, for the sum of two thousand dollars, payable one year after date, bearing interest at the rate of ten per cent. per annum, also one note bearing date February fourteenth, A. D. 1874, for the sum of nine hundred dollars, payable on demand, and bearing interest at the rate of ten per cent. per annum, both of said notes being payable to Joseph Riley, of the city of Chicago.

And whereas, it is provided in said trust deed that in case of default in the payment of said promissory notes, or either of them, then, on the application of the legal holder of said notes, or either of them, it shall and may be lawful for the undersigned to sell and dispose of the said premises, and all the right, title, benefit and equity of redemption of said Thomas Healy and Margaret Healy, their heirs or assigns therein, at public auction, on the said premises, for the highest and best price the same will bring in cash, at least one public notice having been previously given of the time and place of such sale by advertisement in one of the newspapers at that time published in the said city of Chicago, and to make, execute and deliver to the purchaser or purchasers at such sale good and sufficient deed or deeds of conveyance for the premises sold.

And whereas, default has been made in the payment of said notes, both principal and interest, and the same still remains due and unpaid; and whereas Joseph Riley, the legal holder of said notes, has applied to the undersigned to sell said premises under the provisions of said trust deed to pay said notes and the interest thereon.

Now, therefore, I, the undersigned, as trustee, do hereby give public notice that under and by virtue of the power conferred on me by said trust deed, I shall, on Thursday, the 9th day of December, A. D. 1875, at the hour of ten o'clock in the forenoon, upon the said premises, sell at public auction to the highest and best bidder, for cash, pursuant to the terms of said trust deed, the following described lot, piece or parcel of land, situate and being in the city of Chicago and State of Illinois, viz: Lot numbered ten (10), in block one hundred and four (104), School Section Addition to the city of Chicago, and all the right, title, benefit and equity of redemption of said Thomas Healy and Margaret Healy, their heirs or assigns therein, for the purpose of paying the amount due on said notes, together with interest and costs.

7-10 MARTIN BEEM, Trustee.

HAMILTON K. WHEELER,
Attorney, 144 Dearborn Street.

PUBLICATION NOTICE IN ATTACHMENT.—State of Illinois, county of Cook, ss. Superior court of Cook county. December term, A. D. 1875. William H. Stewart vs. William B. Williams.—Attachment.

Public notice is hereby given to the said William B. Williams, that a writ of attachment issued out of the office of the clerk of the Superior court of Cook county, dated the 21st day of October, A. D. 1875, at the suit of the said William H. Stewart, and against the estate of William B. Williams, for the sum of six hundred and two (602) dollars and forty cents, directed to the sheriff of Cook county to execute.

Now, therefore, unless you the said William B. Williams shall personally be and appear before the said Superior court of Cook county, on or before the first day of the next term thereof, to be holden at the court house in the city of Chicago, on the first Monday of December, A. D. 1875, give special bail and plead to the said plaintiff's action, judgment will be entered against you, and in favor of the said William H. Stewart, and so much of the estate attached as may be sufficient to satisfy the said judgment and costs, will be sold to satisfy the same.

ALEXANDER F. STEVENSON, Clerk.

H. K. WHEELER, Atty. 7-9

CHICAGO LEGAL NEWS.

SATURDAY, NOVEMBER 20, 1875.

The Courts.

UNITED STATES SUPREME COURT.

No. 482.—OCTOBER TERM, 1875.

C. W. UPTON, assignee of the GREAT WESTERN INS. CO., a bankrupt, *v.* J. D. TRIBILCOCK.

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

LIABILITY OF A STOCKHOLDER ON A CONDITIONAL SUBSCRIPTION.

This was an action by the assignee in bankruptcy to recover an unpaid subscription by the plaintiff in error to the stock of the insolvent Great Western Insurance Company, to which the defense was that the subscription had been obtained by the fraudulent representations of the agent of the company to the effect that eighty per cent of the amount not paid in was non-assessable and would be paid by the profits, etc. It was also alleged as a defense that the agent represented that the note given for the twenty per cent. paid would not be parted with by the company, but would be leniently held, to suit the convenience of the subscriber, and that afterward the note was transferred to a bank for collection, and that thereupon the subscriber had repudiated the subscription, and asked to have the contract rescinded.

Held, that the defense will not avail to relieve the subscriber from his contract: that he became a stockholder under a certificate entitling him to the shares of stock named therein, and that the words "not assessable," stamped across the face of the certificate did not import more at most than that he would not be liable to assessment after he had paid the full amount of the subscription, and could not in any event destroy the contract. It was said in this connection that the idea that the capital of a corporation is to be treated like a football, to be thrown into the market for purposes of speculation, that its value may be elevated or depressed to advance the interests of its managers, is a modern and wicked invention which will not be tolerated by the courts. Upon the question of the alleged rescission of the contract in consequence of the violation of the agreement as to the note, it is held that it was not before the jury; that the only question of fraud submitted was that in reference to the eighty per cent. of unpaid subscription, and that could not avail by reason of the want of diligence in the subscriber in not ascertaining his liability respecting it under the regulations of the company, until it was demanded.—[ED. LEGAL NEWS.]

Mr. Justice HUNT delivered the opinion of the court.

Two points are presented in this case. Upon the first point, the facts are as follows:

The plaintiff, as assignee of the Great Western Insurance Company, a bankrupt corporation, organized under the statute of the State of Illinois, brought his action against the defendant, alleging that he was a stockholder of said corporation to the amount of ten thousand dollars; that twenty per cent. only had been paid upon his stock; alleging, also, the bankruptcy of the company. the appointment of the plaintiff as assignee, and the demand of the amount claimed; and seeking to recover the eight thousand dollars remaining unpaid. The complaint averred that the defendant did verbally agree to become such stockholder, and, with intent to become such, did accept a certificate for the same, whereby he became bound to pay the full amount thereof, as follows: five per cent. upon delivery of the certificates; five per cent. in three months; five per cent. in six months; five per cent. in nine months, and the residue whenever called for by the company, according to the charter of the company and the laws of the State of Illinois.

The defense is, that the subscription was obtained by the fraudulent representations of the agent of the company, to the effect that the defendant would only be responsible for twenty per cent. of the subscription made by him; that afterwards he executed his promissory note for the 20 per cent., and secured the same by a mortgage of real estate, "and that thereupon (in the language of the answer), and pursuant to agreement, said subscription contract was surrendered and delivered up to defendant;" and also, in the language of the answer, "that said note was a full payment and discharge of all obligations and personal liabilities of all kinds whatsoever, by reason of his contract so made, and the relations created by the delivery to him of said certificate, and said note was received in full payment."

In his third amended answer the defendant avers that he did subscribe for stock, on the conditions mentioned; that after that contract was made, and before a certificate was delivered to him, and before executing his note, an agreement was made with Overton, on behalf of the company, to the effect before stated, and thereupon he made and delivered the note and mortgage, which was received by Overton in full discharge and payment of the amount due on his said subscription.

The evidence contained in the bill of exceptions leaves the case substantially as is averred in the pleadings. The defendant offered evidence tending to prove representations that 20 per cent. only was required to be paid; that 80 per cent. was unassessable and created no personal liability; that the agent, Overton, exhibited a blank form of certificate with the words "nonassessable" printed across the face, "being a copy similar to that subsequently filled up and delivered to defendant by Overton." It appears that before the defendant made his subscription, a copy of the charter and by-laws had been furnished to him by Overton, and that in returns made by the company to the auditor of the State of Illinois of the amount of "unpaid subscribed capital for which the subscribers were liable," the amount of the defendant's note was included.

The case standing in this position upon the pleadings and the evidence, the plaintiff requested the court to charge the jury as follows:

2d. That any contract between the company or its agents and the stockholders, limiting their liability as to unpaid installments of stock, is void as to creditors of the company and as to the rights of the assignee, who represents the creditors in this action.

3rd. That if the jury find from the evidence that defendant, J. D. Tribilcock, became a stockholder of the Great Western Insurance Company in the month of August, 1870, and that he continued to own and hold said stock until after the insolvency of the company in February, 1873, that any representation by any agent of the company, at the time defendant became such stockholder, as to the matter of his liability for 80 per cent. of the stock, or any indorsement on the stock of the words "non-assessable," are wholly immaterial and constitute no defense to this action.

This request was refused.

It is hardly necessary to argue the proposition that if the defendant became a holder of shares of the capital of this Insurance Company, to the amount of $10,000, and had paid but twenty per cent. thereof, its creditors were entitled to require of him the payment of the eighty per cent. remaining unpaid. The acceptance and holding of a certificate of shares in an incorporation, makes the holder liable to the responsibilities of a shareholder. (Brigham *v.* Mead, 10 Allen R., 245; Buff City R. R. Co., *v.* Douglass, 14 N. Y. R., 336; Seymour *v.* Sturgess, 26 N. Y. R., 134). The capital stock of a moneyed corporation is a fund for the payment of its debts. It is a trust fund of which the directors are the trustees. It is a trust to be managed for the benefit of its shareholders during its life, and for the benefit of its creditors in the event of its dissolution. This duty is a sacred one, and cannot be disregarded. Its violation will not be undertaken by any just-minded man, and will not be permitted by the courts. The idea that the capital of a corporation is a foot-ball to be thrown into the market for the purposes of speculation, that its value may be elevated or depressed to advance the interest of its managers, is a modern and wicked invention. Equally unsound is the opinion that the obligation of the subscriber to pay his subscription may be released or surrendered to him by the trustees of the company. This has been often attempted, but never successfully. The capital paid in and promised to be paid in is a fund which the trustees cannot squander or give away. They are bound to call in what is unpaid and carefully to husband it when received. (Sawyer *v.* Hoag, 17 Wall., 610; Tuckerman *v.* Brown, 33 N. Y. 297; Ogilvie *v.* Knox Ins. Co., 22 How. R., 380; Osgood *v.* Taylin, 3 Keys, 521; 37 How. Pr. R., 63 affg, 48 Barb., 463; Gross Ill. Stat., P. 356, sec. 16). We are of the opinion that the alleged representation of the non-assessability of the stock held by him was quite immaterial. It was so held in Ogilvie *v.* Knox Ins. Co., 22 How., 380.

Again, if full effect is given to the evidence of the defendant, and to his claim in this respect, it shows this and nothing more: He became a stockholder under a certificate signed by the president and secretary, that he was entitled to one hundred shares of the stock of $100 each, payable five per cent. on receipt of the certificate; five per cent. in three months; five per cent. in six months; five per cent. in nine months from date; the time or manner of the payment of the residue not being specified. Upon the face of this certificate was stamped, in red ink, the figures $100, and in another place were stamped the words "non-assessable." This certificate he held until the insolvency of the company, in 1873, was known to him.

The legal effect of this instrument was to make the remaining eighty per cent. payable upon the demand of the company. We see no qualification of this result in the words "non-assessable." Assuming them to be incorporated into and to form a part of the contract, it is quite extravagant to allege that these words operate as a waiver of the obligation created by the acceptance and holding of a certificate to pay the amount due upon his shares. A promise to take shares of stock imports a promise to pay for them. (Palmer *v.* Lawrence, 3 Sand. S. C. R., 761; Bigham *v.* Mead, 10 Allen, 245). An acceptance and holding of a certificate has the same effect. (Auth. supra). At the most, the legal effect of the words in question is a stipulation against liability to further taxation or assessment after the holder shall have fulfilled his contract to pay the one hundred per cent. in the manner and at the times indicated. We cannot give to them the consequence of destroying the legal effect of the certificate.

Still again, the representations relied upon as a defense, it will be noticed, were as to the legal effect of the defendant's subscription and certificate. It is alleged that the agent represented that by the laws of the State of Illinois and by the charter of this company, the defendant might become a subscriber to the amount of $10,000, and by means of a certificate to be given to him like that exhibited, he would really be liable only to the extent of one-fifth of his said subscription, and that good lawyers had given their advice to that effect.

There was here no error, mistake or misrepresentation of any fact. The defendant made the subscription he intended to make, and received the certificate he had stipulated for, and as there is no evidence to the contrary, it is to be presumed the good lawyers advised as was stated; but in law the defendant incurred a larger liability than he anticipated. (Leavitt *v.* Palmer, 3 N. Y., 19.)

He had received, several days before this time, a copy of the charter and by-laws of the company, and then had them in his possession. The 25th section of the by-laws was as follows; "Every person who shall subscribe for $10,000 of stock and pay 20 per cent. thereof shall be constituted a director of this company, and shall continue such director so long as he shall retain of such stock an amount equal to $10,000; but such $10,000 shall not be reckoned in the election of other directors." It was under this section and the succeeding one, authorizing the establishment of a branch in any place where such subscription was made, and by which the defendant became a director, and might be president thereof, that the transaction took place.

The defendant did not read the charter and by-laws, if such were the fact, was his own fault. It will not do for a man to enter into a contract, and when called upon to respond to its obligations, to say that he did not read it when he signed it, or did not know what it contained. If this were permitted, contracts would not be worth the paper on which they are written. But such is not the law. A contractor must stand by the words of his contract, and if he will not read what he signs, he alone is responsible for his omission. (Jackson *v.* Croy, 12 John R., 427; Leis *v.* Stubbs, 6 Watt, 48; Farly *v.* Bryant, 32 Me., 474; Cuffing *v.* Taylor, 16 Ill., 457; Slafyton *v.* Scott, 13 Ves., 427; Alvanly *v.* Kinnaid, 2 MacG., 7; 29 Beavan, 490.) That a misrepresentation or misunderstanding of the law will not vitiate a contract, where there is no misunderstanding of the facts, is well settled.

In Fish *v.* Clelland (33 Ill., 243,) the principle is expressed in these words: "A representation of what the law will or will not permit to be done, is one on which the party to whom it is made has no right to rely, and if he does so it is his folly, and he cannot ask the law to relieve him from the consequences. The truth or falsehood of such a representation can be tested by ordinary vigilance and attention. It is an opinion in regard to the law, and is always understood as such." (See Starr *v.* Bennett, 5 Hill, 303; Lewis *v.* Jones, 4 B. & C., 506; Rashall *v.* Ford, Law Rep., 2 Eq., 750.) The law is presumed to be equally within the knowledge of all parties. That a stockholder may relieve himself from his liability by proof that he was misinformed as to the effect of his contract when he made it, would be a disastrous doctrine.

That a defendant who would not by contract lawfully relieve himself from liability as a stockholder, can accomplish that result by proof that it was fraudulently represented to him that he could so relieve himself, would be strange indeed. (Ogilvie *v.* Knox Ins. Co., 22 How., 380.) The rule that a mistake of law does not avail prevails in equity as well as at common law. (Bank of U. S: *v.* Daniel, 12 Pet. R., 32; Hunt *v.* Rensman, 1 Pet., 1; 8 Wheat., 174; Mellock *v.* Robertson, 25 Vt. R., 603; Lant *v.* Palmer, 3 Com., 19.)

"If ignorance of law was admitted as a ground of exemption, the court would be involved in questions which it were scarcely possible to solve, and which would render the administration of justice next to impossible, for in almost every case ignorance of law would be alleged, and the court would, for the purpose of determining this point, be often compelled to enter upon questions of fact insolvable and interminable." (Austin's Jour., Vol. 2, p. 172; Kerr, 397.)

A statement that the insurance company had consulted with good lawyers, and that their opinion was as stated, should have been clear proof to the defendant that a representation of law was a matter of opinion only. We think the judge erred in not charging as was requested.

The facts upon which the second point arise are these: Assuming that fraudulent representations had been made to the defendant respecting his non-liability for the 80 per cent., and that they were of a character that might relieve him from his contract, it was objected that he had not used proper diligence in discovering the fraud and in repudiating his contract. The transaction took place in August, 1870, and the defendant himself gave evidence "that he never suspected any liability, as to said 80 per cent., or that the said representation as to the laws of Illinois were false, until the agent of the assignee made a demand upon him for the 80 per cent., in the year 1873; and that as no claim had been made upon him, he never made any investigation as to the truth of such representations until after said demand in 1873." In February, 1871, the defendant did ask for a rescission of his contract, on the untenable ground that it had been fraudulently represented to him; that his note should be retained, and held in Bloomfield, Iowa, which representation had been violated by a sale of the same, and a removal thereof to the city of Chicago. The defendant is explicit and emphatic in his evidence that this attempted repudiation "was based wholly on what was represented" as to the intended disposition of the notes and mortgage.

The plaintiff thereupon requested the court to charge the jury as follows:

"7. That if the defendant offered to surrender his stock to the officers of the company, but not upon the ground that he had been induced to subscribe for the stock upon a fraudulent representation as to his liability for the 80 per cent., but upon another ground, to wit: that the company had sold and assigned his note and mortgages, then the evidence of such offer is immaterial, and the evidence of fraud as to such misrepresentation as to his liability for the 80 per cent. cannot be made available in this suit, and constitute no defense to this action.

"12. That if defendant was induced, in August, 1870, to become a stockholder of the Great Western Insurance Company by a representation of the agent of the company that 80 per cent. of the stock was non-assessable, and that the laws of the State of Illinois allowed the company to make such a contract with those who took stock, then it was the duty of the defendant to use reasonable diligence to ascertain the truth of such representations, and to ascertain what the law of Illinois was on that subject;

that if he did not do so within a reasonable time, and did not ascertain the truth of said matter until after the insolvency of the company in 1873, then he cannot, as to the creditors of the company, maintain any defense by reason of such representations. The court instructs you, as matter of law, that the defendant could have ascertained the truth of such representations within a few months from the time they were made, and that not doing so is negligence on the part of the defendant that bars such defense as to the assignee."

The defense arising from the alleged promissory representations that the note and mortgage of the defendant should not be removed from Bloomfield, but should be retained in charge of the branch of the company at that place, was frivolous, and was practically abandoned on the trial. The case was submitted to the jury solely on the question arising upon the representation of the non-assessability of the 80 per cent. The attempted rescission on account of the representation as to non-removal and its violation was, however, unfortunately introduced into the charge, in a manner that prejudiced the right of plaintiff.

The requests, as above stated, were declined, but the judge charged the jury as follows: "That as respects creditors, the law requires of one who has been drawn by fraud into the purchase of stock, that he shall be guilty of no negligence or want of reasonable care in discovering the fraud, and in discovering it, promptly repudiating the purchase. If you find, from the evidence, that within a few months after receiving the stock certificate the defendant, discovering that he had been deceived in *some respects*, procured the agent who had obtained his certificate to go to Chicago, delivering to such agent his stock certificate, aud instructed the agent to surrender up the stock and demand back the note for 20 per cent; and if the agent accordingly went to Chicago and offered to the company to surrender up the stock and rescind the contract, which the company refused, and if you find that the defendant never afterwards acquiesced in being a member of the company; that in September, 1871, he brought an action in replevin for the note, based on the ground of fraud; and if all this took place before bankruptcy or insolvency of the company, I instruct that in point of law this is a sufficient repudiation of the contract to become a stockholder, to enable defendant living in another State, to resist an action for the payment of the 80 per cent., provided that you find defendant was induced to become a stockholder by fraud, as before explained; and also further find, in view of all the circumstances, that defendant was not unreasonably negligent in discovering the fraud, and was guilty of no want of reasonable diligence in taking steps to repudiate the transaction." To this charge the plaintiff excepted. The general principles set forth in this charge are no doubt sound.

If the alleged promissory representation as to the non-removal of the note had been available, and had been the question submitted to the jury, the charge would have been well enough. But that question was not before them. The questions submitted to them related exclusively to the representations that the 80 per cent. should not be required to be paid. That was the fraud before the jury, and the question involved in the 7th and 12th requests was this: Assuming that representation to be a fraud which would avoid the contract, had the defendant discharged his duty in discovering that fraud and in repudiating the contract on account of that fraud, and not on account of another fraud not now in question, we think the defendant was entitled to the opinion of the juryon that precise question. The charge refused him this right. The jury were charged that if within a few months after receiving the certificate, the defendant, discovering that he had been deceived, in some respects, sent an agent to Chicago, to surrender his certificate and demand his note, if he never afterwards acquiesced in being a member of the company; if he brought an action of replevin for the note, and if he refused to receive a dividend, this was sufficient evidence of repudiation. This was well enough as to the abandoned fraud, which was not before the jury, but was entirely inapplicable to the fraud that was before them. As to that fraud, the defendant testified that he had no knowldge or suspicion of its existence until after the demand made upon him in 1873, by the assignee, and that he never made any investigation as to the truth of the representation as to the 80 per cent. liability until after said demand, in 1873. On this point this was no contradictory evidence. It should have been ruled as a question of law. (Pettibone *v.* Stevens, 15 Cm.R., 19; Beers *v.* Bottsford, 13 St., 146.) The submission should have been made, if not held as a question of law, on these facts only, as requested, and the failure to do so and the introduction of the facts tending to show a repudiation on the ground of another fraud, could not fail to confuse the jury, and was error on the part of the judge. Wright's case (Law Rep. Eq. 12, 1871, p. 331-351,) is an authority on this point. It was there held, 1st. That under the English act a surrender and cancellation of shares did not relieve the holder from his liability to creditors of the bank; and 2nd, that a surrender by Wright of his shares in November, on the ground of an apprehended difficulty in the affairs of the bank, did not enable him to claim a rescission of his subscription on account of a fraudulent representation in the prospectus of the company, which fraud was then unknown to him. (Henderson *v.* Royal British Bank, 7 E & B., 356; Parris *v.* Harding, 1 C. B. N. S., 533; Oates *v.* Turquand, L.R. 2 Ap. Cases, 325.)

The principle laid down in the charge of the judge, that one who claims to have been drawn into a fraudulent purchase must exercise care and vigilance to discover the fraud, and must be prompt in repudiating his contract on the ground of such fraud, is a sound one. (Thomas *v.* Baxton, 48 N. Y. R., 193.)

The defendant sought to become a member of a corporation of the State of Illinois, and to obtain the benefits and advantages of its special privileges. If he is not held to be bound to know and accept all the consequences of this connection, he certainly is bound to use care and attention to ascertain his position and promptly to make his choice of retaining it with its advantages and responsibilities, or of abandoning it. To subscribe for stock in a corporation in August, 1870, to rest quietly until the year 1873, never making any investigation as to the position in which he stood until that time, and until after the assignee in bankruptcy had made a demand upon him, falls very short of what the law requires. Especially is this the case when it is shown that he lived in an adjoining State, that he had sent an agent to Chicago, and himself went to that city in 1871 to obtain his note and mortgage from that very company for an alleged misconduct in another respect. It was his plain duty to have inquired and to have ascertained his position long before he did. "A party must use reasonable diligence to ascertain the facts." (Buford *v.* Brown, 6 B. Monroe, 553.)

Mere lapse of time, where a party has not asserted his claim with reasonable diligence, is a bar to relief. Relief is not given to those who sleep on their rights. (Beckford *v.* Wall, 19 Ves., 87-97; Jones *v.* Taberville, 2 Ves. Jr., 11.)

Equity will not assist a man whose condition is attributable only to that want of diligence which he fairly expected from a reasonable person. (Duke of Beaufort *v.* Wall, 2 C. & Y., 248-286.)

Parties who are shareholders, and claim to be relieved on the ground of fraud, must act with the utmost diligence and promptitude. (Smith's case, L. R., 2 Ch. Ap., 613; Denton *v.* MacNeil L. R., 2 Eq., 532; Peels' case, L. R., 2 Ch. Ap., 684.)

The judgment must be reversed, and a new trial had.

Mr. Justice MILLER.

I am of the opinion that where an agent of an existing corporation procures a subscription of additional stock in it by fraudulent representations, the fraud can be relied on as a defense to a suit for the unpaid installments, when suit is brought by the corporation: and that if the stockholder has, in reasonable time, repudiated the contract and offered to rescind before the insolvency or bankruptcy of the corporation, the defense is valid against the assignee of the corporation.

I also think there was evidence of such fraud in this case, and that the question of reasonable diligence in the offer to rescind was fairly put to the jury by the Circuit Court.

I am authorized to say that the CHIEF JUSTICE and Mr. Justice BRADLEY concur in what I have here said.

D. W. MIDDLETON,
C. S. C. U. S.

UNITED STATES SUPREME COURT

No. 15.—OCTOBER TERM, 1875.

THE NATIONAL BANK OF COMMERCE, of Boston, State of Massachusetts, plaintiff in error,
v.
THE MERCHANTS' NATIONAL BANK, of Memphis, State of Tennessee.

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

BILL OF LADING ATTACHED TO TIME DRAFT FORWARDED TO AGENT—ACCEPTANCE OF —DELIVERY OF BILL OF LADING.

That a bill of lading of merchandise deliverable to order, when attached to a time draft, and forwarded with the draft to an agent for collection, without any special instructions, may be surrendered to the drawee on his acceptance of the draft, and the agent's duty is not to hold the bill of lading, after the acceptance, for the payment.—[ED. LEGAL NEWS.]

Mr. Justice STRONG delivered the opinion of the Court.

The fundamental question in this case is whether a bill of lading of merchandise deliverable to order, when attached to a time draft, and forwarded with the draft to an agent for collection, without any special instructions, may be surrendered to the drawee on his acceptance of the draft, or whether the agent's duty is to hold the bill of lading after the acceptance, for the payment. It is true there are other questions growing out of portions of the evidence, as well as one of the findings of the jury, but they are questions of secondary importance. The bills of exchange were drawn by cotton brokers residing in Memphis, Tennessee, on Green & Travis, merchants residing in Boston. They were drawn on account of cotton shipped by the brokers to Boston, invoices of which were sent to Green & Travis, and bills of lading were taken by the shippers, marked, in case of two of the shipments, "to order," and in case of the third shipment marked "for Green & Travis, Boston, Mass." There was an agreement between the shippers and the drawees that the bill of lading should be surrendered on acceptance of the bills of exchange, but the existence of this agreement was not known by the bank of Memphis when that bank discounted the drafts and took with them the bills of lading indorsed by the shippers. We do not propose to inquire now whether the agreement, under these circumstances, ought to have any effect upon the decision of the case. Conceding that bills of lading are negotiable, and that their indorsement and delivery pass the title of the shippers to the property specified in them, and, therefore, that the plaintiffs when they discounted the drafts and took the indorsed railroad receipts or bills of lading, became the owners of the cotton; it is still true they sent the bills with the drafts to their correspondents in New York, the Metropolitan Bank, with no instructions to hold them after acceptance. And the Metropolitan Bank transmitted them to the defendants in Boston, with no other instruction than that the bills were sent "for collection." What, then, was the duty of the defendants? Obviously it was first to obtain the acceptance of the bills of exchange. But Green & Travis were not bound to accept, even though they had ordered the cotton, unless the bills of lading were delivered to them contemporaneously with their acceptance. Their agreement with their vendors, the shippers, secured them against such an obligation. Moreover, independent of this agreement, the drafts upon their face showed that they had been drawn upon the cotton covered by the bills of lading. Both the plaintiffs and their agents, the defendants, were thus informed that the bills were not drawn upon any funds of the drawers in the hands of Green & Travis, and that they were expected to be paid out of the proceeds of the cotton. But how could they be paid out of the proceeds of the cotton if the bills of lading were withheld? Withholding them therefore, would defeat alike the expectation and the intent of the drawers of the bills. Hence, were there nothing more, it would seem that a drawer's agent to collect a time bill, without further instructions, would not be justified in refusing to surrender the property against which the bill was drawn, after its acceptance, and thus disable the acceptor from making payment out of the property designated for that purpose.

But it seems to be a natural inference, indeed a necessary implication, from a time draft accompanied by a bill of lading indorsed in blank, that the merchandise (which in this case was cotton) specified in the bill, was sold on credit, to be paid for by the accepted draft, or that the draft is a demand for an advance on the shipment, or that the transaction is a consignment to be sold by the drawee on account of the shipper. It is difficult to conceive of any other meaning the instruments can have. If so, in the absence of any express arrangement to the contrary, the acceptor, if a purchaser, is clearly entitled to the possession of the goods on his accepting the bill and thus giving the vendor a completed contract for payment. This would not be doubted if, instead of an acceptance, he had given a promissory note for the goods, payable at the expiration of the stipulated credit. In such a case it is clear the vendor could not retain possession of the subject of the sale after receiving the note for the price. The idea of a sale on credit is that the vendee is to have the thing sold, on his assumption to pay, and before actual payment. The consideration of the sale is the note. But an acceptor of a bill of exchange stands in the same position as the maker of a promissory note. If he has purchased on credit and is denied possesson until he shall make payment, the transaction ceases to be what it was intended, and is converted into a cash sale. Everybody understands that a sale on credit entitles the purchaser to immediate possession of the property sold, unless there be a special agreement that it may be retained by the vendor, and such is the well-recognized doctrine of the law. The reason for this is that very often, and with merchants generally, the thing purchased is needed to provide means for the deferred payment of the price. Hence, it is justly inferred that the thing is intended to pass at once within the control of the purchaser. It is admitted that a different arrangement may be stipulated for. Even in a credit sale it may be agreed by the parties that the vendor shall retain the subject until the expiration of the credit, as a security for the payment of the sum stipulated. But if so, the agreement is special, something superadded to an ordinary contract of sale on credit, the existence of which is not to be presumed. Therefore, in a case where the drawing of a time draft against a consignment raises the implication that the goods consigned have been sold on credit, the agent to whom the draft to be accepted and the bill of lading to be delivered have been entrusted cannot reasonably be required to know, without instruction, that the transaction is not what it purports to be. He has no right to assume and act on the assumption that the vendee's term of credit must expire before he can have the goods, and that he is bound to accept the draft, thus making himself absolutely responsible for the sum named therein, and relying upon the vendor's engagement to deliver at a future time. This would be treating a sale on credit as a mere executory contract to sell at a subsequent date.

And, if the inference to be drawn from a time draft accompanied by a bill of lading is not that it evidences a credit sale, but a request for advances on the credit of the consignment, the consequence is the same. Perhaps it is even more apparent. It plainly is that the acceptance is not asked on the credit of the drawer of the draft, but on the faith of the consignment. The drawee is not asked to accept on the mere assurance that the drawer will at a future day deliver the goods to reimburse the advances. He is asked to accept in reliance on a security in hand. To refuse to him that security is to deny him the basis of his requested acceptance. It is remitting him to the personal credit of the drawer alone. An agent for collection having the draft and attached bill of lading, cannot be permitted, by declining to surrender the bill of lading on the acceptance of the bill, to disappoint the obvious intentions of the parties, and deny to the acceptor a substantial right which by his contract is assured to him. The same remarks are applicable to the case of an implication that the merchan-

dise was shipped to be sold on account of the shipper.

Nor can it make any difference that the draft with the bill of lading has been sent to an agent (as in this case) "for collection." That instruction means simply to rebut the inference from the indorsement that the agent is the owner of the draft. It indicates an agency. (Sweeney *v.* Easter, 1 Wallace, 166). It does not conflict with the plain inference from the draft and accompanying bill of lading that the former was a request for a promise to pay at a future time for goods sold on credit, or a request to make advances on the faith of the described consignment, or a request to sell on account of the shipper. By such a transmission to the agent he is instructed to collect the money mentioned in the drafts, not to collect the bill of lading. And the first step in the collection is procuring acceptance of the draft. The agent is, therefore, authorized to do all which is necessary to obtaining such acceptance. If the drawee is not bound to accept without the surrender to him of the consigned property or of the bill of lading, it is the duty of the agent to make that surrender, and if he fails to perform this duty, and in consequence thereof acceptance be refused, the drawer and indorsers of the draft are discharged. (Mason *v.* Hunt, 1 Douglas, 297).

The opinions we have suggested are supported by other very rational considerations. In the absence of special agreement, what is the consideration for acceptance of a time draft drawn against merchandise consigned? Is it the merchandise, or is it the promise of the consignor to deliver? If the latter, the consignor may be wholly irresponsible. If the bill of lading be to his order, he may, after acceptance of the draft, indorse it to a stranger, and thus wholly withdraw the goods from any possibility of their ever coming to the hands of the acceptor. Is, then, the acceptance a mere purchase of the promise of the drawer? If so, why are the goods forwarded before the time designated for payment? They are as much after shipment under the control of the drawer as they were before. Why incur the expense of storage and of insurance? And if the draft with the goods or with the bill of lading be sent to a bank for collection, as in the case before us, can it be incumbent upon the bank to take and maintain custody of the property sent during the interval between the acceptance and the time fixed for payment? (The shipments in this case were hundreds of bales of cotton). Meanwhile, though it be a twelve-month, and no matter what the fluctuations in the market value of the goods may be, are the goods to be withheld from sale or use? Is the drawee to run the risk of falling prices, with no ability to sell till the draft is due? If the consignment be of perishable articles, such as peaches, fish, butter, eggs, et cet., are they to remain in a warehouse until the term of credit shall expire? And who is to pay the warehouse charges? Certainly not the drawees. If they are to be paid by the vendor, or one who has succeeded to the place of the vendor by indorsement of the draft and bill of lading, he fails to obtain the price for which the goods were sold.

That the holder of a bill of lading, who has become such by indorsement, and by discounting the draft drawn against the consigned property, succeeds to the situation of the shipper, is not to be doubted. He has the same right to demand acceptance of the accompanying bill, and no more. If the shipper cannot require acceptance of the draft without surrendering the bill of lading, neither can the holder. Bills of lading, though transferable by indorsement, are only *quasi* negotiable. (1 Parsons on Shipping, 192; Blanchard *v.* Page, 8 Gray, 297, *a*). The indorser does not acquire a right to change the agreement between the shipper and his vendee. He cannot impose obligations or deny advantages to the drawee of the bill of exchange drawn against the shipment which were not in the power of the drawer and consignor. But were this not so, in the case we have now in hand, the agents for collection of the drafts were not informed, either by the drafts themselves or by any instructions they received, or in any other way, that the ownership of the drafts and bills of lading was not still in the consignors of the cotton. On the contrary, as the drafts were sent "for collection," they might well conclude that the collection was to be made for the drawers of the bills. We do not, therefore, perceive any force in the argument pressed upon us that the bank of Memphis was the purchaser of the drafts drawn upon Green and Travis, and the holder of the bills of lading by indorsement of the shippers.

It is urged that the bills of lading were contracts collateral to the bills of exchange which the bank discounted, and that when transferred they became a security for the principal obligation, namely, the contract evidenced by the bills of exchange; for the *whole* contract, and not a part of it, and that the whole contract required not only the acceptance, but the payment of the bills. The argument assumes the very thing to be proved, to wit: that the transfer of the bills of lading were made to secure the payment of the drafts. The opposite of this, as we have seen, is to be inferred from the bills of lading and the time drafts drawn against the consignments, unexplained by express stipulations. The bank, when discounting the drafts, was bound to know that the drawers on their acceptance were entitled to the cotton, and, of course, to the evidences of title to it. If so, they knew that the bills of lading could not be a security for the ultimate payment of the drafts. Payment of the drafts by the drawees was no part of the contract when the discounts were made. The bills of exchange were then incomplete. They needed acceptance. They were discounted in the expectation that they would be accepted, and that thus the bank would obtain additional promissors. The whole purpose of the transfers of the bills of lading to the bank may, therefore, well have been satisfied when the additional names were secured by acceptance, and when the drafts thereby became completed bills of exchange. We have already seen that whether the drafts and accompanying bills of lading evidenced sales on credit, or requests for advancements on the cotton consigned, or bailments to be sold on the consignor's account, the drawees were entitled to the possession of the cotton before they could be required to accept, and that if they had declined to accept because possession was denied to them concurrently with their acceptance, the effect would have been to discharge the drawers and indorsers of the drafts. The demand of acceptance, coupled with a claim to retain the bills of lading, would have been an insufficient demand. Surely, the purpose of putting the bills of lading into the hands of the bank was to secure the completion of the drafts by obtaining additional names upon them, and not to discharge the drawers and indorsers, leaving the bank only a resort to the cotton pledged.

It is said that if the plaintiffs were not entitled to retain the bills of lading as a security for the payment of the drafts after their acceptance, their only security for payment was the undertaking of the drawees, who were without means, and the promise of the acceptors, of whose standing and credit they knew nothing. This may be true, though they did know that the acceptors had previously promptly met their acceptances, which were numerous and large in amount. But if they did not choose to rely solely on the responsibility of the acceptors and drawers, they had it in their power to instruct their agents not to deliver the cotton until the drafts were paid. Such instructions are not infrequently given in case of time drafts against consignments, and the fact that they are given tends to show that in the commercial community it is understood, without them, agents for collection would be obliged to give over the bills of lading on acceptance of the draft. Such instructions would be wholly unnecessary, if it is the duty of such agents to hold the bills of lading as securities for the ultimate payment.

Thus far we have considered the question without reference to any other authority than that of reason. In addition to this, we think, the decisions of the courts and the language of many eminent judges accord with the opinions we avow. In the case of Lanfear *v.* Blossom, 1 Louis. An. Reps., 148, the very point was decided, after an elaborate argument both by the counsel and by the court. It was held that "where a bill of exchange drawn on a shipment, and payable a certain number of days after sight, is sold, with the bill of lading appended to it, the holder of the bill of exchange cannot, in the absence of proof of any local usage to the contrary, or of the imminent insolvency of the drawee, require the latter to accept the bill of exchange, except on the delivery of the bill of lading; and when, in consequence of the refusal of the holder to deliver the bill of lading, acceptance is refused and the bill protested, the protest will be considered as made without cause, the drawee not having been in default, and the drawer will be discharged." This decision is not to be distinguished in its essential features from the opinions we have expressed. A judgment in the same case to the same effect was given in the Commercial Court of New Orleans, by Judge Watts, who supported it by a very convincing opinion. (14 Hunt's Merchants' Magazine, 264). These decisions were made in 1845 and 1846. In other courts, also, the question has arisen, what is the duty of a collecting bank to which time drafts, with bills of lading attached, have been sent for collection? and the decisions have been that the agent is bound to deliver the bills of lading to the acceptor on his acceptance. In the case The Wisconsin Marine and Fire Insurance Company *v.* The Bank of British North America, 21 Upper Canada Queen's Bench Reps., 284, decided in 1861, where it appeared that the plaintiff, a bank at Milwaukee, Wisconsin, had sent to the defendants, a bank at Toronto, for collection, a bill drawn by A., at Milwaukee, on B., at Toronto, payable forty-five days after date, together with a bill of lading, indorsed by A., for certain wheat sent from Milwaukee to Toronto, it was held that, in the absence of any instructions to the contrary, the defendants were not bound to retain the bill of lading until payment of the draft by B., but were right in giving it up to him on obtaining his acceptance. This case was reviewed, in 1863, in the court of error and appeals, and the judgment affirmed. (2 Upper Canada Error and Appeals Reps., 282. See, also, Goodenough *v.* The City Bank, 10 Up. Canada Com. Pleas, 51; Clark *v.* The Bank of Montreal, 13 Grant's Cha., 211.)

There are also many expressions of opinion by the most respectable courts, which though not judgments, and, therefore, not authorities, are of weight in determining what are the implications of such a state of facts as this case exhibits. In Shepherd *v.* Harrison, Law Rep., Q. B., vol. 4, p. 493, Lord Cockburn said: "The authorities are equally good to show, when the consignor sends the bill of lading to an agent in this country, to be by him handed over to the consignee, and accompanies that with bills of exchange to be accepted by the consignee," that that "indicates an intention *that the handing over of the bill of lading and the acceptance of the bill or bills of exchange, should be concurrent parts of one and the same transaction.*" The case subsequently went to the House of Lords, 5 H. L., 133, when Lord Cairns said: "If they (the drawees) accept the cargo and bill of lading, and accept the bill of exchange drawn against the cargo, the object of those who shipped the goods is obtained. They have got the bill of exchange in return for the cargo; they discount, or use it as they think proper, and they are virtually paid for the goods." In Coventry *v.* Gladstone, 4 Law Rep, Eq., 493, it was declared by the vice-chancellor that "the parties shipping the goods from Calcutta, in the absence of any stipulation to the contrary, did give their agents in England full authority, if they thought fit, to pass over the bill of lading to the person who had accepted the bill of exchange" drawn against the goods and attached to the bill of lading, and it was ruled that an alleged custom of trade to retain the bill of lading until payment of the accompanying draft on account of the consignment was exceptional, and was not established as being the usual course of business. In Schuhart et al. *v.* Hall et al., 39 Maryland, 590, which was a case of a time draft, accompanied by a bill of lading, hypothecated by the drawer, both for the acceptance and payment of the draft, and when the drawers had been authorized to draw against the cargo shipped, it was said by the court, "under their contract with the defendants the latter were authorized to draw only against the cargo of wheat to be shipped by the Ocean Belle, and they (the drawees) were, therefore, not bound to accept without the delivery to them of the bill of lading." See, also, the language of the judges in Gurney *v.* Behrend, 3 E. and Bl., 622; Marine Bank *v.* Wright, 48 N. Y., —; Cayuga Bank *v.* Daniels, 47 N. Y., 631.

We have been unable to discover a single decision of any court holding the opposite doctrines. Those to which we have been referred as directly in point, determine nothing of the kind. Gilbert *v.* Guignon, Law Reps., 8 Cha., 16, was a contest between two holders of several bills of lading of the same shipment. The question was which had priority. It was not at all whether the drawee of a time draft against a consignment has not a right to the bill of lading when he accepts. The drawer had accepted without requiring the surrender of the first indorsed bill of lading, and the lord chancellor, while suggesting a query whether he might not have declined to accept unless the bills of lading were at the same time delivered up to him, remarked, "if he was content they should remain in the hands of the holder, it was exactly the same thing as if he had previously and originally authorized that course of proceeding, and that (according to the chancellor's view) was actually what had happened in the case." Nothing, therefore, was decided respecting the rights of the holder of a time draft, to which a bill of lading is attached, as against the drawee. The contest was wholly inter alios partes.

Seymour *v.* Newton, 105 Mass., 272, was the case of an acceptance of the draft, without the presentation of the bill of lading. In that respect it was like Gilbert *v.* Guignon. No question, however, was made in regard to this. The acceptor became insolvent before the arrival of the goods, and all that was decided was that, under the circumstances, the jury would be authorized to find that the lien of the shippers had not been discharged. It was a case of stoppage in transitu. It is true that in delivering the opinion of the court Chief Justice Chapman said "the obvious purpose was that there should be no delivery to the vendee till the draft should be paid." But the remark was purely obiter, uncalled for by anything in the case. Newcomb *v.* The Boston and Lowell Railroad Corporation, 115 Mass., 230, was also the case of acceptance of sight drafts without requiring the delivery of the attached bills of lading, and the contest was not between the holder of the drafts and the acceptor. It was between the holder of the drafts with the bills of lading, and the carrier. We do not perceive that the case has any applicability to the question we have now under consideration. True, there as in the case of Seymour *v.* Newton, it was remarked by the judge who delivered the opinion, "the railroad receipts were manifestly intended to be held by the collecting bank as security for the acceptance and payment of the drafts." Intended by whom? Evidently the court meant by the drawees and the bank, for it is immediately added: "They continued to be held by the bank after the drafts had been accepted by Chandler & Co. (the drawees), and until, at Chandler & Co.'s request, they were paid by the plaintiff, and the receipts with the drafts still attached were indorsed and delivered by Chandler & Co. to the plaintiff." In Stollenwork et al *v.* Thatcher et al., 115 Mass., 224, (the only other case cited by the defendants in error as in point on this question), there were instructions to the agent to deliver the bill of lading only on payment of the draft, and it was held that the special agent thus instructed, could not bind his principal by a delivery of the bill without such payment. Nothing was decided that is pertinent to the present case. In Bank *v.* Bayley, reported in the same volume, 228, where the instructions given to the collecting agent were, so far as it appears, only that the drafts and bills of lading were remitted for collection, and where acceptance was refused, Chief Justice Grey said "the drawees of the draft attached to each of the bills of lading were not entitled to the bill of lading or the property described therein, except upon *acceptance* of the draft." It is but just to say, however, that this remark as well as those made by the same judge in the other Massachusetts cases cited, was aside from the decision of the court.

After this review of the authorities cited, as in point, in the very elaborate argument for the defendants in error, we feel justified in saying that, in our opinion, no respectable case can be

found in which it has been decided that when a time draft has been drawn against a consignment to order, and has been forwarded to an agent for collection with the bill of lading attached, without any further instructions, the agent is not justified in delivering over the bill of lading on the acceptance of the draft.

If this, however, were doubtful, the doubt ought to be resolved favorably to the agent. In the case in hand, the Bank of Commerce having accepted the agency to collect, was bound only to reasonable care and diligence in the discharge of its assumed duties. (Warren *v.* The Suffolk Bank, 10 Cushing, 582.) In a case of doubt, its best judgment was all the principal had a right to require. If the absence of specific instructions left it uncertain what was to be done further than to procure acceptances of the drafts, and to receive payment when they fell due, it was the fault of the principal. If the consequence was a loss, it would be most unjust to cast the loss on the agent.

Applying what we have said to the instruction given by the learned judge of the circuit court to the jury, it is evident that he was in error. Without discussing in detail the several assignments of error, it is sufficient for the necessities of this case, to say it was a mistake to charge the jury as they were charged, that "in the absence of any consent of the owner of a bill of exchange, other than such as may be implied from the mere fact of sending 'for collection' a bill of exchange with a bill of lading pasted or attached to a bill of exchange, the bank so receiving the two papers for collection would not be authorized to separate the bill of lading from the bill of exchange and surrender it before the bill of exchange was paid." And again, there was error in the following portion of the charge: "But if the Metropolitan Bank merely sent to the defendant bank the bills of exchange with the bills of lading attached for collection, with no other instructions, either expressed or implied from the past relations of the parties, they would not be so justified in surrendering (the bills of lading) on acceptance only." The Bank of Commerce can be held liable to the owners of the drafts for a breach of duty in surrendering the bills of lading on acceptance of the drafts only after special instructions to retain the bills until payment of the acceptances. The drafts were all time drafts. One, it is true, was drawn at sight, but in Massachusetts, such drafts are entitled to grace.

What we have said renders it unnecessary to notice the other assignments of error.

The judgment of the circuit court is reversed and the record is remitted with directions to award a new trial.

SUPREME COURT OF TENNESSEE.

KNOXVILLE, JUNE 19, 1875.

CHRISTOPHER GRAVES *v.* SUSAN FITZGERALD.

SOLDIER—LIABILITY OF, FOR TAKING FORAGE.—If the soldiers were foraging for supplies, the defendant, being a soldier, would be strictly in the line of his duty as such, in causing or advising the soldiers to procure corn from the plaintiff's farm, if corn was a necessary article of supply, and for so doing he would not be liable.—[ED. *Commercial and Legal Reporter.*]

NICHOLSON, C. J.

This cause was before the court at its last term, when the judgment was reversed because the proof failed to sustain the verdict as to the mules and horse alleged to have been taken by Graves. As to the corn alleged to have been taken, the court expressly waived the expression of any opinion as to whether there was proof enough to sustain the verdict. The cause has again been tried in the court below, as to the liability of Graves for the corn, and it appears that the same evidence was submitted to the jury as on the former trial, and the jury have found against Graves. He appealed.

It appears from the proof that if Graves is liable it is not for having taken the corn, but for having induced Confederate soldiers engaged in foraging to take it. The evidence is weak as to his having procured Confederate soldiers to take it. But under the settled rule on this subject, we could not disturb the verdict, unless we find in the charge of the court some error which may have misled the jury. It appears that Graves was a Confederate soldier, and lived a close neighbor to the plaintiff. The Confederate forces were encamped in the neighborhood, and obtained their supplies from most of the farmers, including those of plaintiff and defendant. The defence was relied on, that as the corn was taken by the Confederate soldiers for supplies, even if defendant was cognizant of the taking and concerned in it, that he would not be liable. On this branch of the case the judge charged the jury that "if the defendant was a soldier and in the line of his duty as such, and the corn was taken by him or his command when foraging upon the country, or under orders, he may avail himself of this defence under the plea of not guilty, and he would not be liable; but if he was not in the line of his duty, the fact that he was a soldier would not protect him in taking the corn or causing it to be taken."

It appears that after having retired, the jury returned and asked for further instructions, when, among other things, the court told them that "if soldiers were in the neighborhood, defendant would not make himself liable by giving them information that plaintiff had corn, unless he caused them to take it, or advised them to do so." After this additional charge was given, the jury found for plaintiff. The inference is that they so found under the charge that if the defendant caused the soldiers to take the corn or advised them to do so, he would be liable. This was virtually telling the jury that defendant would not be in the line of his duty, if he caused the soldiers or advised them to take the corn. If the soldiers were foraging for supplies, the defendant being a soldier, would be strictly in the line of his duty as such soldier in causing or advising the soldiers to procure corn from plaintiff's farm, if corn was a necessary article of supply, and for so doing he would not be liable.

We are, therefore, of opinion that the last instruction given to the jury was erroneous, and may have misled them. We are also of opinion that the court erred in refusing to instruct the jury when so requested, that "if the corn was taken by the Confederate soldiers for supplies for the Confederate army, that Graves, the defendant, would not be civilly liable, if he recommended said soldiers to take the corn for necessary supplies for their army as forage."

For the errors indicated, the judgment is reversed.

SUPREME COURT OF TENNESSEE.

ISAAC S. DAVIDSON et al. *v.* MATTHEW SHEARON Administrator de bonis non of the estate of JAMES A. GAUT, deceased.

LIEN OF JUDGMENT—NOT EXTENDED BY REVIVOR.—The levy of an execution being made more than twelve months from the date of the judgment, and the execution being issued in the name of the administrator of the creditor, it is held that a revivor in the name of the administrator was not for this purpose a new judgment, and the lien did not extend from the date of the revivor. The lien is only given by statute, and cannot be extended by construction.

MCFARLAND, J.—On the 8th day of December, 1859, James A. Gaut recovered a judgment against Benj. Mosely in the Circuit court of Bedford county. During the year 1860, the complainants severally purchased tracts of land from Mosely and took deeds, and had them duly presented and noted for registration, and, as we suppose, registered.

This bill was filed by the complainants to enjoin a sale of their several tracts of land under an execution issued upon said judgment, and levied in January, 1861, more than twelve months from the date of the judgment, and after the execution and registration of their deeds.

The question is, whether the lien of the judgment was lost before the levy; the levy being more than twelve months from the date of the judgment. It was certainly lost unless there be something else in the case.

The record shows that James A. Gaut died in March, 1860, and that the execution that issued in January, 1861, was in the name of Robert Cannon, administrator of his estate. It is argued that this had the effect to extend the lien, or that a revivor in the name of the administrator was a new judgment, and that the lien extended from that time; but we think this position cannot be maintained. The lien is only given by statute, and cannot be extended by construction, and there is no such exception as to the limit of its duration. If it were a statute of limitation, which it is not, the death of the plaintiff would not effect it. The revivor is not for this purpose a new judgment.

It is said, as to one of the tracts of land, Mosely only acquired title after the judgment and within the twelve months, and as to this the lien was still in force, but the record does not establish this fact.

The decree of the Chancellor must be affirmed with costs.—*The Commercial and Legal Reporter.*

SUPREME COURT OF ILLINOIS.

ABSTRACT OF OPINIONS FILED AT SPRINGFIELD, OCTOBER 13TH, 1875.

231.—Village of Princeville *v.* Peter Austen et al.—Error to Peoria.—Opinion by SCOTT, J. 7 pp.

PRESUMPTION IN REGARD TO DEDICATION OF LAND TO A VILLAGE—PAROL EVIDENCE.

STATEMENT.—Bill to enjoin the removal, by the village trustees, of the town hall to a vacant square in the village plat, which had not been divided into lots, and which was not explained on the plat, or accompanying certificates, as to what purpose was intended in its dedication to the public. The question is, what should the design of the square be presumed to be—whether for a park or a place for municipal buildings, or other purpose? *Held*,

1. That there is no usage by which this question can be determined conclusively; but the village not being a county town, the more reasonable presumption is that the vacant square was designed by the dedicator as a public park, and especially as the town hall and calaboose had been erected elsewhere, and an attempt formerly to locate the school house on the square had been defeated by the citizens.

2. The privilege of building houses of any kind on the square could only exist by a grant, or an act of the donor equivlent to a grant; and any citizen interested can object successfully to such appropriation otherwise.

3. Parol evidence is available, in such case, to show the object of the dedication.

244.—Samuel Wing et al. *v.* Edward Sherrer.—Appeal from Superior Court of Cook county.—Opinion by SCOTT, J. 7 pp.

BILL TO QUIET TITLE TO LANDS—EQUITY JURISDICTION—TITLE OF COMPLAINANT.

Held, 1. That, under the act of 1869, a court of equity will entertain a bill to quiet title where lands in controversy are unimproved, or unoccupied. This branch of equity jurisprudence is in the sound discretion of the court, as is the rescission of contracts, specific performance, etc.

2. In all cases arising out of fraud, equity has concurrent jurisdiction with courts of law; but parties will be referred to that forum where justice can be more effectually administered, and the right most satisfactorily established. In all cases of a doubtful character, it is better the parties should be remitted to their remedy at law, although equity might entertain jurisdiction.

3. In all cases for clearing title, the complainant must prove his title clearly.

264.—Alexander R. Chesnut *v.* Emily Chesnut. — Appeal from Morgan. — Opinion by SCOTT, J. 6 pp.

STATEMENT.—Proceedings by *scire facias* on a record; husband and wife; dismissal of bill for divorce; effect thereof.

Held, 1. That, strictly speaking, no evidence can be heard on such scire facias other than the record declared on, unless as to the question of amount.

[The record herein was an order for temporary alimony in a divorce case brought by the husband and afterwards dismissed.]

2 The dismissal of a bill for divorce discharges an order for temporary alimony.

3. Where scire facias is brought on a record to enforce the payment of money, the money must be certain, or capable of being made certain, by mere computation.

4. Scire facias will not lie upon an order for temporary alimony, in any event.

5. A married woman cannot sue her husband in an action at law, unless in regard to her separate property.

200.—Otis L. Wheelock *v.* Elias Kast et al.—Appeal from Macon.—Opinion by SCOTT, J., WALKER, C. J., dissenting.

OSTENSIBLE STOCKHOLDERS IN A BANK—LIABILITY—ESTOPPEL.

STATEMENT.—Bill against stockholders of a bank to compel them to pay a judgment against it, the bank being insolvent. Appellant, for mere accommodation and the credit of the bank, as is said, stood as a stockholder on its books; but he held the stock as collateral security for loans to the bank and indemnity against his accommodation note given the bank. This he set up in defense; and also the illegal organization of the bank.

Held, 1. That where shares in a bank are hypothecated, and placed in the name of a transferee, he will be subjected to all the liabilities of ordinary owners, because the legal ownership appears to be in him.

2. Whether a bank has been regularly organized is not a defense that can be used by a stockholder, as against a *bona fide* creditor, if it appears there was an organization *de facto*, and that such stockholder participated in its transactions.

THE CHICAGO RIFLE CLUB.

There will be a spirited contest on the range of the Chicago Rifle Club to-day for the Root prize, consisting of some rare old books. The following racy letter of Mr. Root, accompanying the prize, explains the nature of the contest:

CHICAGO, *Nov.* 19.—HON. JAMES B. BRADWELL, President Chicago Rifle Club—*Dear Sir:* I take great pleasure in sending you the books which constitute the prize to be contested for by the club tomorrow. They are valuable because of their antiquity, and because they contain a true and ably written account of poetry, customs, art, religion, history, geography, manners, as understood at that time. In those days writers and travelers had not learned to lie, and the word "sensational" was unused. I have examined these volumes in vain to find any account of a rifle club. There were then no Remingtons, Maynard, or Sharps. A thousand-yard target was rather too much for "Queen Ann's arms."

Shooting has contributed very much to the literature of the world. Without the illustrations afforded by shooting, our poets, divines, authors, and lawyers, would fall far short of the mark of expressing their ideas clearly and with force.

How often a story is told, or a character described by a single quotation from some remarks made by a sagacious coon in Kentucky: "If that's you, Capt. Scott, don't shoot, I'll come down."

The poets seem to have traveled around with the score of the Chicago Rifle Club in their pockets, for have they not exclaimed, written, and promulgated their high appreciation of the worthy art?

Aimest thou at princes?—Pope.
Each at the head leveled his deadly aim.—Milton.
Beware the secret snake that shoots a sting.—Dryden.
She shoots the Stygian sound.—Dryden.
To teach the young idea how to shoot.—Thompson.

(This Thompson is the one that shot in Michigan.)

These preachers make
His head to shoot and ache.—Herbert.

Probably because he was bullet headed.

All boys are advised to "aim high," clearly showing that the author of this was a marksman, and was conversant with the effect of gravitation on the bullet. The advice, however, does not go far enough, merely "aiming high" is not sufficient. It should read, "aim high and watch the wind."

Napoleon, on one occasion, sent a dispatch to the English, informing them they were thrashed, whereupon some gentleman, having a true appreciation of the noble art, responded:

We thank you for your bullet in,
Great emperor, king and elf;
But we would be better pleased
With a bullet in yourself.

"Hit him in the eye," "Let drive," "Draw a bead," "Centre shot," "Bang away," "Knocked the spots off," are all well turned and *elegant* expressions in daily use to express all sorts of ideas, but all borrowed from the nomenclature of the rifle club.

Science has, indeed, attained a wonderful attainment, when, by a slight movement of a finger a leaden messenger speeds away a third of a mile to its work of destruction. Let science be utilized in the defense of our flag, the destruction of many squirrels, and the winning of many prizes. Yours truly,

JAMES P. ROOT.

CHICAGO LEGAL NEWS.

Lex vincit.

MYRA BRADWELL, Editor.

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WE call attention to the following opinions, reported at length in this issue:

LIABILITY OF A STOCKHOLDER ON A CONDITIONAL SUBSCRIPTION.—The opinion of the Supreme Court of the United States, by HUNT, J.. as to the liability of a stockholder on a conditional subscription to an insurance company on an action brought by the assignee in bankruptcy of the insurance company, as to what constitutes fraudulent representations in obtaining subscriptions to stock, and whether such representations can be relied on as a defense to a suit for the unpaid installments. MILLER, J., files a dissenting opinion, in which WAITE, C. J., and BRADLEY, J., concur. This case has attracted much attention throughout the country. Senator UPTON of this city, the assignee of the Great Western Insurance Company, is entitled to the thanks of the creditors interested in the fund for the able manner in which he has prosecuted the stockholders, who sought to throw off their legal liability.

BILL OF LADING ATTACHED TO TIME DRAFT FORWARDED TO AGENT—ACCEPTANCE OF—DELIVERY OF BILL OF LADING ON ACCEPTANCE.—The opinion of the Supreme Court of the United States, by STRONG, J., holding that a bill of lading of merchandise, deliverable to order when attached to a time draft and forwarded, with the draft, to an agent for collection, without any special instructions, may be surrendered to the drawee on his acceptance of the draft, and the agent's duty does not require him to hold the bill of lading, after the acceptance, for the payment. This is an exceedingly important opinion to commercial men and bankers.

LIEN OF JUDGMENT NOT EXTENDED BY REVIVOR.—The opinion of the Supreme Court of Tennessee, by MCFARLAND, J., *held*, where the levy of an execution was made more than twelve months from the date of the judgment, and the execution was issued in the name of the administrator of the creditor, that a revivor of the judgment in the name of the administrator was not for this purpose a new judgment, and the lien did not extend from the date of revivor.

SOLDIER.—LIABILITY FOR TAKING FORAGE.—The opinion of the Supreme Court of Tennessee, by Nicholson C. J. Holding, that a person who had his corn taken by a party of Confederate soldiers for forage could not, in a civil action against a party advising the soldiers to take it, recover its value.

NOTES TO RECENT CASES.

ENROLLMENT AND LICENSE OF CANAL BOATS.

United States Attorney General PIERREPONT has given an opinion that under the act of April 18, 1874, Revised Statutes, 4371, canal boats employed on navigable waters of the United States, not provided with sails or propelling machinery of their own, adapted to lake or coastwise navigation, and not employed in trade with the Canadas, are exempt from the law requiring them to be enrolled as vessels of the United States, as well where, in the trade in which they are engaged, they may never enter a canal of any State, as where their voyages are partly on such navigable waters and partly on a State canal; that there is no restriction as to the *locality* of the navigable waters on which they may be employed; that the rule as to exemption from enrollment and license is not limited in its operation to waters within the interior of each State, but extends generally to any waters coming under the denomination of navigable waters of the United States, irrespective of their geographical location.

JUDGE McALLISTER.

RESIGNATION OF HIS SEAT ON THE SUPREME BENCH.

On the 16th instant, Judge MCALLISTER tendered his resignation as Associate Justice of the Supreme Court, in the following letter:

CHICAGO, *Nov.* 16, 1875.

The Hon. John L. Beveridge, Governor of the State of Illinois.

SIR: I hereby tender my resignation of the office of Judge of the Supreme Court of this State, to take effect at the time your commission to me as Circuit Judge of Cook County.

As the above indicates the nature of the step I am about to take, its seeming singularity demands a word of explanation, not so much on account of my own personal interest, but because the circumstances which have compelled me to take it arise chiefly from defects in the constitutional scheme respecting the Supreme Court itself, resulting in inequality of labors, duties, and responsibilities among its members. The State is divided into seven districts, from each of which a judge is elected. The Constitution requires each judge to reside in the district in which he is elected. The purpose of this, as construed by the Court, was the convenience of suitors and attorneys in respect to all business to be done by a single judge in vacation. Hence, there has come into force an unwritten rule that it belongs to each judge to attend to all such business as may arise in his district.

The division of the State into districts was evidently made upon the basis of population — numbers — without reference to the probable extent of judicial business.

This, as the practical working of the system clearly demonstrates, was a serious mistake. The business of the Court has steadily increased until it has reached upwards of 700 cases a year, requiring opinions to be written. That is, over 100 opinions for each judge, when the terms themselves take five months of the year, at which but few opinions can be written.

The bulk of the work has to be done in vacation. Now, it is an indisputable fact that upwards of one half of all this work comes from the city of Chicago alone. This great mass of business from Chicago has its multifarious incidents of which no man without actual experience can scarcely conceive. Applications for supersedeas in cases both civil and criminal; to continue injunctions after appeals; for stay-orders, on petition for rehearing. The city of Chicago being in my district, no sooner do I return home from a term than I am beset with these applications. I have had from thirty to forty of them every vacation, while my brethren will none of them have half-a-dozen in a year, and some of them not over two or three. It has been the determination of a majority of the Court to keep up with the business, excessive as it has become. Cases are divided among the judges by lot, all taking an equal share, to write opinions in; so each one knows just what he has got to do. Notwithstanding the great inequality of situation, I have taken my equal share with the others. But it has been utterly impossible, on account of the numerous interruptions to which I have referred, to do my work satisfactorily, or to keep up with it. In spite of all effort, it would accumulate and oppress me like a nightmare. In February, 1874, I was taken sick, and was disabled from work for two months. By this the ground was irrevocably lost, though a vigorous effort was made to recover it during the summer and fall vacation of that year. In February, 1875, being in good health I resolved to clear off the remnants of three terms, comprising some sixty cases, before the June term. I fought off the lawyers with their applications for orders, and by the 5th of May had fifty-three cases done; but there came a worse visitor, paralysis of the optic nerve of one eye, with indications that the other would soon go in the same way. That calamity made it necessary for me to stop all continuous writing. But I could not cease writing and stay in the Court, neither was I in a condition to resume the practice of law. From this serious dilemma, the Bar of Chicago, with more than brotherly kindness, and the electors of Cook county, with unexampled magnanimity, have relieved me by transferring me to another field of labor, where, though the duties will be arduous, they will not require that kind of application which outraged Nature has so sternly inhibited.

In point of theoretical dignity, the transition is a step downwards; in life's higher hopes it is a blight, and disappointed ambition might excusably cause a tear. But then the hand which helps me down, though so powerful, has been so gently given, that when I think of the slavery from which I have escaped, the descent is made with but few pangs of mortification. Aside from my duty to my family, I have now two prominent objects of life; one to fulfill my obligations of gratitude to the city of Chicago and cook County: the other to pity my successor in the Supreme Court. If the Court continue in its determination to keep up with the business, and the law remains as it is now, he must struggle alone with burdens which ought to be shared by three at least. If more than half of the business of the State arises from Chicago, which is an indisputable fact, then it follows that at least three of the judges should have been located here, and not have all the incidents of that business thrown upon one as it has been upon me. Yours, etc.,

W. K. MCALLISTER.

NUMBERING BALLOTS.

Last year D. HARRY HAMMER, a member of the bar of this city, handed his ballot to the judges of election with the request that they should not number it. The judges disregarded his request and numbered his ticket. He brought suit against the judges in the Circuit Court of this county, and the case was tried before Judge ROGERS, without a jury. He found the defendants guilty, and assessed the damages at ten dollars. The defendants appealed to the Supreme Court. The case is now pending in that tribunal, having been submitted at the last June term. We published the opinion of Judge ROGERS in 7 CHICAGO LEGAL NEWS, 167, holding the law requiring the ballots to be numbered to be unconstitutional.

At the last election in this city some of the judges refused to number the ballots. Last week an attempt was made to get them indicted by the grand jury of the Criminal Court of this county. State's Attorney REED addressed a letter of inquiry to Judge JAMESON, who is holding the Criminal Court this month, as to the constitutionality of the law. Judge JAMESON, who is the author of a work upon constitutional conventions, and has spent a large portion of his life in the examination of constitutional questions, after a very careful examination, in response to the letter of Mr. REED, holds that so much of the law as requires the ballots to be numbered, is unconstitutional. The letter of Mr. REED and the opinion of Judge JAMESON are given below.

THE STATE'S ATTORNEY'S INQUIRY.

The Hon. John A. Jameson, Judge of the Criminal Court of Cook County:

OFFICE OF STATE'S ATTORNEY, CHICAGO, Nov. 10, 1875.—I desire, for use of the Grand Jury now in session, your opinion whether or not Sec. 55, page 459, of the Revised Statutes, is constitutional. That section requires judges of election to number each ballot, by indorsing on the ballot the number corresponding with the number of the voter on the poll-books. His Honor Judge Rogers, in an opinion in the case of Hammer *v.* Swift et al., published in the LEGAL NEWS, Feb. 15, 1875, held that section unconstitutional. He referred to the case of Williams *v.* Stein, 33 Indiana, p. 89, where a similar law was declared unconstitutional by the Supreme Court of Indiana.

If your honor agrees with Judge Rogers, then it will be useless for the Grand Jury to present indictments against the judges of election for a violation of said Sec. 55. Yours, etc.,

CHARLES H. REED,
State's Attorney.

JUDGE JAMESON'S OPINION.

The Hon. C. H. Reed, State's Attorney, Cook County, Illinois:

CHICAGO, Nov. 15.—You ask my opinion "whether or not Sec. 55, page 459, of the Revised Statutes, is constitutional." That section requires the judges of election to number each ballot, by indorsing on the same the number corresponding with the number of the voter on the poll-books. The facts are, that the judges of election, at the election in November, in one or more of the wards, neglected or refused to number certain ballots as required by the statute referred to, and for this supposed offense they have been complained of to the Grand Jury.

The Constitution of the State (1870) provides, Art. VII., Sec. 2, that "all votes shall be by ballot."

The Revised Statutes of 1874, page 458 and following, contain a construction of the word "ballot" as understood by the Legislature. Thus, Sec. 52 of Art. 46, on elections, after repeating the constitutional provision given above, continues as follows: "The ballot shall be folded by the voter and delivered to one of the judges of election, and if the judges be satisfied that the person offering the vote is a legal voter, the clerks of election shall enter the name of the voter and his number under the proper heading in the poll-books, and the judges shall indorse on the back of the ticket offered the number corresponding with the number of the voter on the poll-books, and shall immediately put the ticket into the ballot-box." Sec. 59 provides further, that the ballots shall be sealed up and sent to the proper officer—the county clerk—"who shall carefully preserve said ballots for six months, and at the expiration of that time shall destroy them by burning, without the package being opened; provided, in case of contested election, the same shall not be destroyed till such ontest is finally determined; but the parties contesting the same shall have the right to have the said package of ballots opened, and said ballots referred to by witnesses for the purpose of such contest." Upon these quotations two questions arise:

First—Whether by the term "ballot," in the Constitution, is meant an absolutely secret vote; and,

Second—Whether, if that is so, the sections quoted from the Law of Elections infringe the Constitution by making the ballot an open vote.

First—As to the meaning of the term ballot. We must presume, in the absence of decisive indications to the contrary, that the word is employed here as it has been at all times in other countries, particularly that from which we sprang, England.

The term ballot, from the Spanish word "balota," or the French word "balote," both meaning a little ball, is accordingly defined by Worcester to mean: (1) "A little ball, a slip of paper, or anything which is used in giving a secret vote; (2) a secret method of voting at elections." It is evident there are no tokens by which he who casts a ball of a particular color secretly into a box can be ascertained except by his own revelation. The same idea of secrecy is contained in the definition of "ballot," found in the Penny Cyclopædia; "ballot," "a word," it says, "used to designate a mode of voting employed upon

occasions where it is considered desirable to preserve secrecy in regard to the opinion of each voter." (Penny Cyclopædia, title "Ballot.')

The same definition has for a century and a half been given to the word ballot in England, during which time a contest has been going on between those favoring and those opposing the ballot at elections. Hallam's Const. His. Eng.. p. 602 (note); May's Const. His. Eng., Vol. I., pp. 330, 352; Vol. II., pp. 235, 537. The advocates of the ballot declared that the landlords in the counties and wealthy customers in towns, coerced the free-will of the electors, and forced them to vote against their opinions and consciences. As a protection against such practices the necessity of secret voting by ballot was contended for. (May's Const. His. Eng. ubi supra.)

The following citations will indicate that their authors gave the same definition to the term. Filangieri (died at Naples in 1788) was opposed to the introduction of the ballot in place of the public vote, on the ground that "when the vote was public, questions for deliberation were more fully discussed, and that the people would have the benefit of the sentiments of the principal citizens." Here the contrast between the public vote and the ballot indicates the author's opinion as to the secrecy of the latter. (Heron, History of Jurisprudence, pp. 609-610.)

McCrary, in his work on the American Law of Elections, says: "The chief reason for the general adoption of the ballot in this country is that it affords the voter the means of preserving the secrecy of his vote; and this enables him to vote independently and freely, without being subject to be overawed, intimidated, or in any manner controlled by others, or to any ill-will or persecution on account of his vote. The secret ballot is justly regarded as an important and valuable safeguard for the protection of the voter, and particularly the humble citizen against the influence which wealth and station may be supposed to exercise. And it is for this reason that the privacy is held not to be limited to the moment of depositing the ballot, but is sacredly guarded by the law for all time, unless the voter himself shall voluntary divulge it." Citing People *v.* Pease, 27 N. Y., 81.

Judge Cooley, also, in his excellent work on Constitutional Limitations, says: "Public policy requires that the veil of secrecy should be impenetrable unless the voter himself voluntarily determines to lift it. His ballot is absolutely privileged, and to allow evidence of its contents, when he has not waived the privilege, is to encourage treachery and fraud, and it would in effect establish this remarkable anomaly, that, while the law, from motives of public policy, establishes the secret ballot, with a view to conceal the elector's action, it, at the same time, encourages a system of espionage, by means of which the veil of secrecy may be penetrated, and the voter's action disclosed to the public.' Pp. 506-7.

I will now refer to certain decisions of courts, involving a construction of the term ballot. I cite, first, Hartt *v.* Harney, 32 Barb., 55. The court say: "The rule, therefore, is, that the moment the ballot is deposited all control over it, and all power to inquire as to its legality, by the officers of the election, is ended."

The next case is Commonwealth *v.* Read, 2 Ashmead (Pa.), 261. The syllabus will state the case:

"If a quorum of the proper body" (meaning of a county board to which had been given the power to choose the county treasurer) "be present, and a majority of them either refuse to vote or vote in a manner different from that prescribed by law, a minority composed even of a single member is sufficient to make a valid election. If the law require the vote to be by ballot, and the majority vote viva voce, a single ballot, if given and received as such, is sufficient." In this case, the law under which the board were acting required them to elect certain officers by ballot. As the entire board, save one member, failed to vote thus, it was held that the vote of but that one was valid.

One of the most important cases is that of Williams *v.* Stein, 38 Ind., 89, of which, also, I shall read only the syllabus, which is as follows: "The second section of the acts of the Indiana legislature, approved May 13, 1869 (3 Ind. Stat., 235), requiring the inspector of any election on receiving the ballot of any voter to have the same numbered with figures on the outside or back thereof, to correspond with the number placed opposite the name of such voter on the poll-lists, is void, it being in conflict with Sec. 13 of Art. 2 of the Constitution of this State, which declares that 'all elections by the people shall be by ballot.' By the ballot the Constitution secures to the voter the protection and immunity of secresy. The ballot implies absolute and inviolable secresy." It will be seen that the language of the Indiana and Illinois Constitutions, as well as that of their several legislatures, is in substance identical. In that case the action was brought by a voter who had directed the inspector of elections not to number his ballot, but the latter did so, and it was held, on demurrer, that the numbering of the vote was illegal.

The next case is that of Temple *v.* Mead, 4 Vt., 535. The court, after stating that there are two common modes of voting, viva voce and by ballot, says: "The principal object of the last mode is to enable the elector to express his opinion secretly, without being subject to be overawed, or to any ill-will or persecution on account of his vote for either of the candidates who may be before the public."

To this I add the well-considered case of Hammer *v.* Swift et al. 7 Chicago Legal News, 167, decided by his Honor Judge Rogers, of the Circuit Court of this county. This case is identical with that cited from the 38th Indiana. It was held that the vote, which, against the protest of the voter, was numbered as required by the Illinois statute above cited, was void, and the statute so far unconstitutional.

Finally it appears, even from our statute, that the Legislature well knew that the ballot was and ought to be secret. Sec. 52 of the chapter on elections prescribes as follows: "The manner of voting shall be ballot. The ballot shall be printed or written, or partly printed and partly written, upon plain paper. * * * When the ballot is printed, the same shall be printed upon plain paper in plain type," etc.

Sec. 55 provides that "the ballot shall be folded by the voter and delivered to one of the judges of election, * * and immediately be put into the ballot box."

By Sec. 59 the ballots are to be strung on a thread and sealed up by the judges, and delivered to the County clerk, who shall keep them six months, and then burn them, without the package being previously opened, except in case of a contested election. But by the following section, in such a case they can only be examined and referred to in the presence of the officer having the custody thereof.

The purport of these provisions is that regularly the ballot should be kept perfectly secret; that the voter should be protected from the prying or interested curiosity of his employers, his enemies, or the official managers of the election. If the paper constituting the ballot be colored or mottled, so as to distinguish the voters of one or of both parties, for be lelt unfolded, or be carelessly or loosely kept, or be examined without the presence of the County clerk when desired in a contested election, it would no longer be a ballot, but a mere open vote.

From these provisions of the election law it was evidently, in legal effect, the intention of the Legislature to violate, but to violate as little as possible, the secrecy of the ballot; to violate it perhaps as often to enable party managers by fraudulent manifestation of votes to count in one who was not elected as fairly and honestly to count out one unlawfully declared elected.

Second—The second question is, have they done what in legal effect they must be held to have intended. I shall read but few words to show that they have. In the face of the Constitution, our law authorizes the numbering of the ballot of the voter so that by accident or design, and whether for a good or an evil purpose, the secret may be revealed. All that is needful is a corrupt or a careless County Clerk, or an unfaithful assistant clerk, or perhaps a sham contest of some election, and the vote of any voter may be known. The Legislature have no right to subject any citizen to the risk of injury by provisions such as those quoted. A contest may be carried on as to the validity of an election without resorting to such means, even were it within the power of the Legislature to employ them. How easily the secrecy of the ballot may be violated will appear from the fact that no affidavit or certificate from any officer or court declaring the purpose of examining the ballot is lawful, or that it is necessary to do so is required; and from the fact also that no penalty is imposed upon any officer in case he should violate the provisions in regard to keeping the packages of ballots secret. All the protection the voter has is the honesty of the officer and his oath of office. If he is honest, his oath may not be needed; if dishonest, it would be of no avail whatever. Considering the fact that there is no penalty, and that there is an oath, the security is nearly worthless. To a man in office money is much, but an oath too generally nothing at all. What security a voter would obtain from a mere oath of office one may guess who has been a few years in a position to hear the perjury so freely dispensed by witnesses in our courts of justice and by other persons outside of them.

I am constrained, therefore, to advise you, that the law concerning elections, so far as the point stated is concerned, is unconstitutional, and that, in refusing to place a number upon the ballots in question before the Grand Jury, the judges of election did but obey the Constitution, which is the supreme law, rather than the act of the General Assembly, which is in direct violation of it, and is the inferior law. Respectfully yours,

JOHN A. JAMESON,
Ex-Officio Judge Criminal Court.

THE LIMITS TO THE JURISDICTION OF COURTS.

LECTURE BY A. M. PENCE, ESQ., BEFORE THE UNION COLLEGE OF LAW.

[Continued from page 63.]

Hence, you should be careful to read a decision with reference to the particular case before the court. You will find a very interesting discussion of this question—the distinction between void and voidable decrees—the difference between a want of power and a want of equity—by Lawrence, C. J., in Thompson *v.* Morris, 57 Ill., 333.

Also in Curtiss *v.* Brown, 29 Ill., 231; Davis *v.* The Mayor, 1 Duer., 451; Bangs *v.* Duckinfield, 18 N. Y., 595; People *v.* Sturtevant, 9 N. Y., 273.

You may have a perfectly good defense to an action which may be raised by demurrer to the bill or declaration, or otherwise, on the ground that the court should not exercise jurisdiction; but if your defense should be disregarded, and a decree rendered against you, the decree would be binding for all time to come, unless you should take the case to the Supreme Court for review, either by appeal or writ of error; and this, too, although it should be perfectly manifest, from an inspection of the record, that the decree is erroneous and should never have been entered.

It can never, in any collateral suit, be impeached or called in question.

Of course, I say this upon the supposition that the court had jurisdiction of the person of the defendant, by proper notice or by an appearance entered; and also that it had jurisdiction of that class of subjects attempted to be brought before the court in the particular case.

The point made is simply this: That the court having jurisdiction of the person and of that class of subjects generally, to which the litigation relates, that the decree or judgment can never again be called in question in any other suit, although grossly erroneous and improper.

The only remedy in such a case is by appeal or writ of error, when the court of appeals would set aside the judgment, and order you to try it over.

And it is upon the principle that it is for the interest of all that there should be an end to litigation.

This question is clearly brought out and demonstrated in the following cases: Donlin *v.* Hettinger, 57 Ill., 348; Kelly *v.* Donlin, 6 Chi. Leg. News, 254.

In the first case, it appears from the record that the decree was manifestly erroneous, and should never have been entered; that the court should not have acted; that the decree in the case transferred the title of two of the defendants to the complainant without right. The case, several years afterward, was taken by writ of error to the Supreme court by the two defendants. But one of the defendants had waited too long. The statute barred her right to a writ of error on account of delay.

The writ was dismissed by her before the Supreme Court considered the case. As to the other defendant, he was in time and the court reversed the decree of the court below as to him, after which the suit was dismissed as to him, but the decree remained in full force as to the other defendant.

The decision in the first case showed that both defendants were entitled to have the decree reversed had they both applied in apt time.

That is, the court below should not have exercised jurisdiction, although it had jurisdiction over that class of cases.

You will find in the second case, that of Kelly *v.* Donlin, that the defendant in the first case, as to whom the decree still stood, on account of delay in bringing the writ of error, undertook to attack the decree collaterally in another suit, but the Supreme Court held, that in the former suit the court below had jurisdiction, both of the person and of the subject matter.

And although that decree was grossly erroneous and should have been reversed had the party applied in apt time, yet there must be faith given to the adjudications of courts in all collateral proceedings—and that she had no remedy.

If you will study those two cases well, you will fully understand this branch of the question.

Young lawyers are greatly embarrassed oftentimes when they are through with a case, upon discovering that other facts and reasons existed upon which they might have succeeded for the plaintiff, or have made a successful defense, but which were not brought forward by them. Now, what can they do? Nothing. A case cannot be tried piecemeal.

In that class of cases, where the court has jurisdiction, but where the right to exercise it has been disputed, the objection can be raised in the first instance by demurrer, or by plea. I have spoken of that class of cases where a demurrer should be interposed. It must sometimes be raised by plea when the facts do not appear in the record. As when the party is sued in the wrong county, or where a suit is already pending about the same thing. These are called dilatory pleas, and the question must be raised at the first step. A party cannot submit himself to the jurisdiction of the court, by answering to the merits, and afterward insist upon such a dilatory plea.

But there are other pleas which go to the exercise of jurisdiction in the particular case, and are called pleas in bar, such as a plea of a former adjudication on the same issues, or the same subject matter between the same parties or their privies. If such a defense, by way of a plea or as evidence, is introduced, it is called an estoppel by the record, and in such case it is that your knowledge of what constitutes jurisdictional facts must be ample and complete. That is, you must determine whether the judgment of the court in that former case is binding in this.

And in order to determine that question you must inquire whether the court, in that case had jurisdiction to render the judgment it did render.

I have before stated that, in such case, you must look to the writ and the return upon it. The common law method of serving a writ is by reading, and if the method is not fixed by statute, it must be by reading. The form of the return in such case is of the greatest consequence, and you should remember this fact, that the return upon the writ must show *upon whom* the writ was served, the *time when* it was served, and *the manner* in which it was served. Botsford *v.* O'Connor, 57 Ill., 72.

You must not presume the returns made upon writs by the sheriff or his deputies to be correct, but must always examine them, for the presumption is, not that the return is properly made, but that it is improperly made, and especially is that so with the cases of deputies who come into office as the result of service done in the election of their chief. You will find that new deputies of the sheriff know nothing of the duties or responsibilities of their office, and often are exceedingly illiterate. The liter-

ary composition of an ordinary deputy, as it appears in the return made by him upon the back of a writ, both as to its orthography and grammar is a continual insult to 100,000,000 English-speaking people. There are exceptions.

But there is no duty more incumbent upon the lawyer than to examine the return upon his writ of summons, and he should be absolutely sure that it is in due form before he takes a default against the defendant.

Of course, if the defendant appears and defends, no exception can afterward be taken to the return, except in case of infants. As to them, no appearance by themselves nor by their guardian, or guardian *ad litem* will help an imperfect return of the officer. Infants must be served and the return upon the writ must show a proper service.

When you have practiced law for ten years, you will recognize the importance of this matter. Not only is it important to the attorney of the plaintiff who brings suit, because the record of the case in the future will stand or fall on account of it, but it is of the first importance in the trial of real estate cases and the examination of titles.

I can point you to many cases where parties, relying upon a judicial record for their title, have lost the same on account of a defect in the sheriff's return.

I refer you to but one case, because I am familiar with it, and it is enough—Botsford *v.* O'Connor, 57 Ill., 72.

Supposing, however, that where such a record is offered in evidence against you, upon examination, you find that there is no writ of summons or sheriff's return in the case, but that the defendant was defaulted. What would you do? It may have been lost from the files, or it may never have existed.

You should next inquire into the nature of the proceeding, the record of which is offered.

You must inquire whether it is an ordinary common law or chancery proceeding, conducted in accordance with the principles of the common law, or whether it is a proceeding where jurisdiction is given by virtue of some statute of the State, as, for instance, a suit by foreign attachment, or a proceeding to sell real estate of heirs to pay debts of their ancestor.

These are statutory proceedings, and are unknown to the common law, as it has come down to us in the State of Illinois.

This will now lead us into a discussion of the distinction between what is known as the common law jurisdiction of courts and the statutory jurisdiction of courts, and the jurisdiction of courts of limited or inferior power.

The distinction which I am about to mention must be constantly remembered, or you will be constantly beset with dangers, or plagued by doubts.

The rule of jurisdiction is, that "nothing shall be intended to be *out* of the jurisdiction of a *Superior* Court but that which especially appears to be so; nothing shall be intended to be *within* the jurisdiction of an *inferior* court but that which is especially alleged." Peacock *v.* Bell, 1 Saund., 74.

This rule, after much discussion and illustration, has been adopted by nearly all the courts, and in the State of Illinois it has been fully accepted and acted upon.

And the rule is carried still further and is applied to all courts of limited jurisdiction, such as our county or probate courts, and also to all cases which arise in our superior courts under some statute—that is, when the suit is not in accordance with the common law, when the court does not obtain its jurisdiction from the principles of the common law, but from statutory enactments.

I wish you to understand this. You know what courts are courts of superior jurisdiction. Our circuit courts, and superior court of Cook county, and all such courts as have power under the Constitution or statute to hear pleas on all kinds of subjects—that is, on all subjects that the courts at Westminster Hall had the power to entertain at the period of time at which the common law was adopted in the various States.

Justice of the peace are inferior courts.

The courts of probate are courts, not inferior, but limited in their jurisdiction.

And the superior courts are limited when they obtain jurisdiction solely from statutory enactments, such actions as foreign attachments, and formerly a proceeding to sell a dead man's real estate to pay debts in this State. The latter jurisdiction is now transferred wholly to the county courts of this State by a recent statute; although I notice that a recent writer on probate law contends that such jurisdiction cannot be taken away from the superior courts.

The Constitution does confer upon circuit courts "original jurisdiction of all cases in law or equity," but a proceeding under the statute to sell real estate of decedents is not a proceeding at law or in equity. It was not known at common law, and without the statute no power would exist anywhere for such purpose. The statute points out the court, and no other court can assume the power.

Now, as to superior courts following the course of the common law. You need not care whether such court in its decree or judgment finds that it had jurisdiction over the person of the defendant.

If there be no summons returned, or if the record be entirely silent as to jurisdiction over the person, the presumption will be entertained that the court had jurisdiction; for otherwise it would not have acted. Such is the presumption as to a superior court. That is, that nothing will be intended to be out of the jurisdiction of a superior court but that which especially appears to be so.

But as to the county court, or courts of limited or statutory jurisdiction. If there be no finding in the judgment or decree that the court had jurisdiction of the person of the defendant, and if the record be silent as to jurisdiction over the defendant, if there be neither return of sheriff nor finding in the decree, then the presumption is that the court did not have jurisdiction of the person. To give you an illustration:

Suppose you brought an action of ejectment to recover a certain lot, and upon the trial the defendant produces a judgment obtained in the circuit court against your plaintiff in an action of assumpsit, the execution issued therein, the levy, and sheriff's deed, although the judgment in that case was by default, and although the record is silent as to the jurisdiction of the court, there being no summons or return by sheriff, and no finding in the judgment, yet the presumption of law is, that the court had jurisdiction of the person in that case, and the record is a complete bar to your action of ejectment, you can proceed no further.

But suppose in the same action of ejectment brought by you, a judgment against the plaintiff in an action commenced by foreign attachment was introduced, the special execution levy and sheriff's deed. There is a default also in that case.

The record is silent about the jurisdiction of the court over the person.

No service of the attachment writ upon the defendant, no publication of notice as provided by the statute on file.

What would you do in this latter case? You have applied the same test as in the former suit. The record is silent in both cases as to the question of jurisdiction over the person of the defendant.

The court obtains jurisdiction in the latter case, only by virtue of a statute. It is not according to the course of the common law, and hence the jurisdiction of the person should affirmatively appear. And because it does not so appear the record and deed made thereunder would be no bar, and the plaintiff would be entitled to a judgment. The judgment in the former case would be a nullity.

The same rule would apply if the defense had interposed a decree, sale and deed under a proceeding against the plaintiff as heir of a deceased party—for the sale of the real estate descended to him from his ancestor. It must in such a case appear upon the face of the record that the court had jurisdiction of the person of the defendant, or it will be presumed that the court did not have such jurisdiction.

Having now seen the distinction and the presumptions indulged in favor of an action in one court, and against an action in another court, we will go a little further, and inquire whether these presumptions are conclusive or subject to explanations;—whether you can ever help out a record, or overthrow a record by outside evidence.

The finding of the court in favor of its jurisdiction over the defendant, is not conclusive, but may be disputed. Not, however, by any outside testimony, nor by anything outside of the record, but the whole record will be taken and construed together, and if there be anything in the record which contradicts the finding of the decree or judgment, then the jurisdiction will fail. As, for instance, a summons appears in the record the return upon which shows that the defendant was not properly served. If it appears to have been served by leaving a copy when it should have been served by reading, or if the manner of service is wholly omitted from the return, and if it appears on inspection that no other summons has been served than the one on file, and if no other summons could have been issued in the cause, then in such case the return shows that the court did not have jurisdiction, and that the finding of the court was not justified by the return. In other words, that the court acted without having the defendant before it. And such return contradicts the finding of the court, and the jurisdiction fails.

This is true both of proceedings in courts of inferior and limited jurisdiction and in courts of superior jurisdiction.

I refer you, for full information upon this most important branch of legal knowledge, to the cases of Fell *v.* Young, 63 Ill., 106; Firebaugh *v.* Hall, 63 Ill., 83; Heywood *v.* Collins, 60 Ill., 333; Botsford *v.* O'Connor, 57 Ill., 72; Donlin *v.* Hettinger, 57 Ill., 348; Clark *v.* Thompson, 47 Ill., 25.

The Supreme Court of Illinois, in Swearengen *v.* Gulick, 67 Ill., 208, seems to have crossed its track, and in that case it holds, that because the statutory proceeding was had in a *superior* court, that jurisdiction of the person will be presumed where the record is silent. This decision is in opposition to the cases above referred to.

The Supreme Court of the United States has heretofore disagreed with the Supreme Court of Illinois, and with almost all the other States of the Union, with reference to the necessity of jurisdiction over the person of a defendant appearing affirmatively where the proceeding was in a court of limited or statutory jurisdiction; and has held that jurisdiction over the person will be presumed although the record be silent upon the question. See Grignon's Lessee *v.* Astor, 2 How., 319; Florentine *v.* Barton, 2 Wall.

But that high court has recently receded from the above position in Galpin *v.* Page, 18 Wall., 350. Although it does not admit its former mistakes—a practice not uncommon with other courts.

You will scarcely be able to examine a single title to real estate, if you do not understand these questions.

It is very rarely, indeed, that a title has not passed through the courts, and if you do not know the rules with reference to the subject, you cannot go a single step toward a position in the profession, which I know you all intend to take.

You would be surprised to know what proportion of the litigation in the courts pertains to real estate questions, and how many of them grow out of this question of jurisdiction. It is the easiest thing in the world to make a mistake, and you may take it for granted that human nature is much the same inside and outside the profession of the law.

Some men blunder always.

I once examined a title where an estate had been sold under the direction of an attorney, by virtue of a law that had been repealed for ten years, and when I pointed it out to him he was greatly surprised and admitted that he had blundered.

What do you think his clients, who purchased the property and paid their money, had to say of his blunder?

He relied upon a book called a Probate Manual.

Now, you must not fail to understand that I have been discussing this question of jurisdiction over the person when it arises collaterally.

What might be a perfectly good title when it is called in question collaterally, might be erroneous, and would be reversed on appeal or writ of error. You understand that collaterally means in another suit, not brought for the purpose of impeaching the record of a former suit.

When the question arises, in another suit, whether the court in the former suit had jurisdiction, that is a collateral attack, and if it, the record in the former suit, be not a nullity, it cannot be called in question collaterally. If it be simply erroneous and not void, then no advantage can be taken in another suit, of any such error.

On appeal, or writ of error, in an action of assumpsit, in case of default, if the summons and return of the sheriff do not appear in the record, the supreme court would reverse the case and send it back, for no finding of the court will be sustained in a direct proceeding unless there be evidence to that end, and there would be no evidence in such a record that the defendant had been brought before the court. And no one can be bound unless an opportunity be given to defend.

But when the want of summons, or return in such a case, in such a court, is called in question collaterally, the presumption in favor of jurisdiction will prevail.

If you will remember the distinction, and will examine the decisions of the courts upon this question, by first inquiring whether the question arose in a direct suit on appeal, or writ of error, or whether it arose in a collateral action, you will be saved much trouble and confusion.

You will find the same distinction existing with reference to the presumptions indulged as to the jurisdiction of superior and inferior, or limited courts, whether it be with reference to jurisdiction over the *person* of the defendant, or over the *subject-matter* of the litigation. Jurisdiction over the subject-matter of the suit is obtained by the superior courts if there be anything to set the court in motion.

It has been said that a blank piece of paper, filed with a prayer attached, will give jurisdiction to the court to decree a specific performance, foreclose a mortgage, or declare a trust.

[TO BE CONTINUED.]

UNITED STATES SUPREME COURT.

PROCEEDINGS OF.

Wednesday, Nov. 10, 1875.

On motion of Edward Lander, Charles A. Yancey and Warren S. Lurty, of Harrisonburg, Va., were admitted.

No. 36. The Steamboat Eliza Hancock, etc., v. Charles S. Langdon. The argument of this case was continued by W. U. Garrard for the appellee, and concluded by Robert Falligant for appellant.

No. 37. Annie Knotts et al., infants, v. Franklin Stearns, executor, etc. This cause was submitted on printed arguments by John Johns, Jr. for appellants, and by John A. Meredith for appellees.

No. 38. Francis Dainese, v. Board of Public Works, District of Columbia.

No. 39. Francis Dainese v. Board of Public Works, District of Columbia. These causes were argued by John W. Ross and F. P. Cuppy for appellants, and by E. L. Stanton for appellees.

No. 40. Henry Bruner et al. v. Leroy P. Walker et al. The argument of this cause was commenced by P. Phillips for appellees.

Adjourned until Thursday at 12 o'clock.

Thursday, Nov. 11.

No. 40. Henry Bruner and Henry S. Moore v. Le Roy P. Walker and Reuben Chapman. The argument of this cause was concluded by P. Phillips for appellees, and submitted on printed arguments by F. P. Ward for appellants.

No. 6. Original. The State of Wisconsin v. The City of Duluth et al. On motion of George Gray, decree pro confesso, heretofore entered in this cause against the Northern Pacific Railroad Company, rescinded and annulled, and leave granted to file answer on or before the first Monday of December next.

No. 41. J. A. Sawyer and L. B. Frazier v. Edward Turpin et al. This cause was argued by J. G. Abbott and Benjamin Dean for appellants, and by J. D. Ball for appellees.

No. 42. J. Sherman Hall et al. v. Ralph A. Lanning et al. This cause was argued by Sidney S. Harris for defendants, and submitted on printed arguments by S. W. Packard for plaintiffs.

Adjourned until Friday at 12 o'clock.

Friday, Nov. 12.

On motion of J. S. Black, H. K. Whiton, of Chicago, Ills., was admitted.

No. 43. The Town of Concord v. The Portsmouth Savings Bank. This case was argued by George H. Williams for plaintiff, and submitted on printed arguments by Isaac G. Wilson and S. B. Perry, of Chicago, for defendant.

No. 44. The Phillips & Colly Construction Co. v. Mark T. Seymour et al. The argument of this cause was commenced by Thomas Dent, of Chicago, for plaintiff, and continued by H. K. Whiton for defendants.

Adjourned until Monday at 12 o'clock.

Monday, Nov. 15.

No. 8. David Dows et al. v. National Exchange Bank of Milwaukee.

No. 17. David Dows et al. v. Wisconsin Marine and Fire Insurance Company. In error to the Circuit Court of the United States for the southern district of New York. Strong, J., delivered the opinions of the court, affirming the judgments of the Circuit Court with costs and interest.

No. 36. The Steamboat "Eliza Hancock" v. Charles S. Langdon. Appeal from the Circuit Court of the United States for the southern district of Georgia. Waite, C. J., announced the decision of the court, affirming the decree of the Circuit Court with costs.

No. 40. Henry Bruner and H. S. Moore v. LeRoy P. Walker et al. Appeal from the District Court of the United States for the northern district of

Alabama. Waite, C. J., announced the decision of the court, affirming the decree of the District Court with costs.

No. 545. B. F. Potts, Governor, etc., et al, v. William Chumasero et al.

No. 478. Chy Lung v. J. H. Freeman et al.

No. 646. Henry M. Rector v. The United States.

No. 692. John C. Hale v. The United States.

No. 772. William H. Gaines and wife et al. v. The United States.

Waite, C. J., announced the orders of the court, granting the motions to advance these causes and assigning them for agreement on the 11th of January next.

No. 513. The United States v. John W. Norton. The motion to advance this cause was submitted by Assist. Atty. Gen. Smith.

No. 459. Joel C. Davis et al. v. State of Indiana ex rel. Board of Commissioners of Bartholomew county. The motion to dismiss was submitted on printed arguments by S. Stausifer in support of the same, and by Ralph Hill in opposition.

No. 647. Faxon D. Atherton et al., executors, etc. v. John Fowler et al. No. 648. Faxon D. Atherton et al., executors, etc. v. Welcome Fowler et al. The motions to dismiss the cases were submitted on printed arguments by M. A. Wheaton in support of same, and by M. Blair in opposition.

No. 693. Daniel Hand v. Thomas C. Dunn, Comptroller General of the State of North Carolina. The motion to dismiss was submitted on printed arguments by D. T. Corbin in support of same, and by P. Phillips in opposition.

No. 633. The Commissioners of Immigration v. The North German Lloyd. This cause was submitted on printed arguments by S. R. & C. L. Walker for the appellants, and by W. S. Benedict and Joseph P. Horner for appellees, under the twentieth rule.

No. 728. Humbolt Township v. Nimrod Long et al. This cause was submitted on printed arguments by Wilson Shannon for plaintiff in error, and by G. C. Clemens for defendants, under the twentieth rule.

No. 44. The Phillips & Colby Construction Company v. Mark T. Seymour et al. The argument in this cause was continued by H. K. Whiton and J. S. Black for defendant in error, and concluded by E H. Abbott for plaintiff in error.

Adjourned until Tuesday at 12 o'clock.

Tuesday, Nov. 16.

No. 45. Sarah Ann Dorsey v. Simon Jackson. This cause was argued by A. G. Riddle for appellant, and by Francis Miller and W. A. Melon for appellee.

No. 47. The Baltimore and Potomac Railroad Company v. The Trustees of the Sixth Presbyterian Church. The argument of this cause was commenced by Wayne MacVeagh for the plaintiffs.

Adjourned until Wednesday at 12 o'clock.

Wednesday, Nov. 17,

On motion of William H. Clifford, Edward Winslow Fox, of Portland, Maine, was admitted.

No. 47. The Baltimore and Potomac Railroad Company v. The Trustees of the Sixth Presbyterian Church. The court declined to hear further argument in this cause.

No. 48. Gustave T. Beauregard v. Charles Case, receiver, etc. No. 406. Thomas P. May v. Charles Case, receiver, etc These causes were argued by J. D. McPherson for the plaintiffs in error, and by P. Phillips and C. Case for defendants.

No. 49. John Carey et al. v. Henry T. Brown. The argument for this cause was commenced by Conway Robinson for plaintiffs.

Adjourned until Thursday at 12 o'clock.

Recent Publications.

LAW REPORTS OF CASES ARGUED AND DETERMINED IN ENGLAND AND THE UNITED STATES ON WARRANTY ON THE SALE OF PERSONAL PROPERTY. By G. W. Hecker, Member of the Crawford County Bar. Meadville, Penn.: 1874. Sold by Ingham, Clarke & Co., Law Booksellers, Cleveland, Ohio.

A person, from reading the title of this volume, would think it much more of a work than it really is. It contains only 464 pages, is miserably bound, poorly printed, and, in its mechanical execution, is devoid of all taste. The index is the worst we ever saw in any law book. It is not arranged in alphabetical order, the cap headings to it are to the cases, as "English Cases," "Pennsylvania Cases," etc. There are no other headings to the index to denote what it contains. We cannot recommend this book to the profession.

OHIO DIGEST, CONTAINING ALL REPORTED OHIO CASES TO THE YEAR 1875. By J. Bryant Walker and Clement Bates. Vol. I. Cincinnati: Robert Clark & Co. 1875.

This work is complete in two volumes, the first of which has only reached us. It digests the opinions found in 52 volumes of reports and 41 volumes of law periodicals, which embraces all reported Ohio cases. The first volume contains 878 pages, and brings the subjects digested down to and including the letter M. No paragraph is repeated in the digest, but each is placed under the head that seems to the author most suitable. Where paragraphs could be placed nearly equally under more than one head, the system of cross-references has been adopted. Each paragraph has its black catch-words and synopsis in italics, designed to enable one, without reading any entire paragraph, to pass from one to another, until the one sought is recognized. To any one having the Ohio reports, this work is indespensable. Price, for both volumes complete, $12,00.

XXV. OHIO REPORTS.

Baltimore and Ohio Railroad Company v. *Joseph May.*—p. 347.

CONTRACT—DEFENSE—GARNISHEE.

In an action to recover money due on contract, it is a sufficient defense to show that the money sought to be recovered has been attached by process of garnishment duly issued by a court of a sister State, in an action there prosecuted against the plaintiff by his creditors, although it appear that the plaintiff and such creditors are all residents of this State.

Hance, executor, v. *Hair et al.*—p. 349.

STATUTE OF LIMITATIONS.

A partial payment on a joint and several promissory note, by one of the several makers, will not prevent the running of the statute of limitations as to the other makers.

Zink v. *Grant.*—p. 352.

SALE OF LIQUOR—LANDLORD'S LIABILITY.

The provision of the 10th section of the act of May 1, 1854, to provide against the evils resulting from the sale of intoxicating liquors, etc., as amended April 18, 1870 (67 Ohio L., 103), which declares certain contracts void, does not apply to a contract whereby the lessor, in good faith, rented or leased his premises, and without any knowledge on his part that the rented or leased property should be used, in whole or in part, for the sale of intoxicating liquors.

A Texas judge is credited with the following decision: "The fact is, Jones, the jail is an old, rickety affair, as cold as an iron wedge. You applied to this court for a release on bail, giving it as your opinion that you would freeze to death, there. The weather has not moderated and to keep you from freezing, I will direct the sheriff to hang you at four o'clock this afternoon."

TRUSTEE'S SALE.—WHEREAS, BY THEIR CERtain deed of trust, dated the first day of May, A. D. 1875, recorded in Cook county, Illinois, in book 518 of records, on page 422, William A. Shepard and Harriet L. Shepard, his wife, conveyed to me, as trustee, all the premises situated in the county of Cook and State of Illinois, known and described as follows, to wit:

Lots numbered twenty-five (25) and twenty-six (26) in block numbered one (1), in Hoyt, Canfield and Matteson's subdivision of the south half (½) of the southwest quarter (¼) of the southwest quarter (¼) of section sixteen (16), township thirty-eight (38), north range fourteen (14), east of the third principal meridian, with all buildings and improvements then on, or which might be thereafter placed on said premises, to secure the payment of one promissory note dated January 10th, 1874, payable to the order of Elisha Gray, for the sum of fifteen hundred dollars, with interest at the rate of ten (10) per cent. per annum payable semi-annually, and due and payable five (5) years from the date thereof.

And whereas, default has been made in the payment of the installment of interest on said note due November 1st, A. D. 1875, and in accordance with the terms of said trust deed the whole principal sum thereby secured, and interest thereon to the time of sale, might, at the option of the holder of said note, become at once due and payable; and the holder of said note having elected to declare said note so due, and directed me to enforce the provisions of said trust deed to make the amount of the note unpaid.

Now, therefore, notice is hereby given that on Saturday the 18th day of December, A. D. 1875, in pursuance of the powers in me vested by said trust deed, I shall, at the north door nearest LaSalle street, of the building used as a court house, on the corner of Adams and LaSalle streets, in the city of Chicago, in said Cook county, at the hour of ten o'clock A. M., sell the above described premises, at public auction, to the highest bidder, for cash, and all the right, title, interest, and equity of redemption of said grantors, their heirs and assigns therein, to pay the amount due on said note being the sum of $1,500, with interest thereon at the rate of ten per cent. per annum from the 1st day of May, A. D. 1875, to the day of sale.

Chicago, November 12, 1875.

8-11 JOSEPH GRAY, Trustee.

SALE OF COLLATERALS.—JAMES C. HYDE made his promissory note for $3,965.00 payable to the order of the undersigned, bearing interest at the rate of ten per cent per annum, and as collateral security therefor deposited with the undersigned the notes and stock hereinafter described, and said Hyde on March 1st, 1875, executed and delivered to the undersigned a power of attorney to sell said collateral securities with or without notice, at public or private sale. Therefore, on the 20th day of November, 1875, at ten o'clock in the forenoon, at the northwest corner of LaSalle and Washington streets, I will sell at public auction to the highest bidder for cash, the notes and stock in said power of attorney described as follows: to wit:

One note of James C. Hyde for $750, dated October 5th, 1874; a note of Francis Sharp for $318.50, dated October 23d, 1874; four notes of Thomas Crowley for $250.00 each, dated May 1st, 1873, due 1, 2, 3 and 4 years respectively after date; a note of Michael *Trover* on which there is a balance of $937.06 and interest due; two notes of Abbey Gibson and Wm. C. Gibson for $400.00 each, dated July 22d, 1872; a note of Anna Pilgrim for $275, dated February 26, 1872; a note of J. W. C. Pilgrim, dated February 26, 1872, on which there is a balance of $175 and interest due; a note of J. B. Crosby for $700, dated July 1st, 1874; all of said notes are secured by trust deed or mortgage on real estate; also ten shares of capital stock in the Louisville City Railway Company, and 80 shares of capital stock in the Pacific Hotel Company.

Chicago, November 13th, 1875.

8- JOHN BALDWIN, JR.

SALE OF COLLATERALS.—PUBLIC NOTICE IS hereby given, that on the 20th day of November, 1875, at ten o'clock in the forenoon, at the northwest corner of LaSalle and Washington streets, in Chicago, Illinois, by virtue of a power of attorney executed and delivered to one James C. Hyde by Thomas D. Snyder and J. Lewis Lee, dated October 8, 1874, and wherein power was given to said Hyde, or his assigns, to sell the note hereinafter described, which was deposited by said Snyder & Lee with said Hyde as collateral security for a certain other note described in said power of attorney, I, John Baldwin, Jr., the assignee of said Hyde, will sell at public auction, to the highest bidder, for cash, a promissory note made by Thomas D. Snyder, dated October 29, 1873, for the sum of five thousand dollars, payable one year after its date, with interest at the rate of ten per cent. per annum, which note is secured by deed of trust to Heman Baldwin, recorded in the recorder's office of Cook county, Illinois, in book 255 of records, at page 161.

Chicago, November 13, 1875.

JOHN BALDWIN, JR.,

8- Assignee of said James C. Hyde.

CHANCERY NOTICE.—STATE OF ILLINOIS. county of Cook, ss. Circuit court of Cook county. December term, A. D. 1875. Florence L. Dorland vs. Alexander Dorland.—In chancery.

Affidavit of the non-residence of Alexander Dorland, defendant above named, having been filed in the office of the clerk of said Circuit court of Cook county, notice is hereby given to the said Alexander Dorland, that the complainant heretofore filed her bill of complaint in said court, on the chancery side thereof, and that a summons thereupon issued out of said court against said defendant, returnable at the court house, in the city of Chicago, in said county, on the third Monday of December next (1875), as is by law required.

Now, unless you, the said Alexander Dorland, shall personally be and appear before said Circuit court of Cook county, on the first day of a term thereof, to be holden at Chicago, in said county, on the third Monday of December, 1875, and plead, answer, or demur to the said complainant's bill of complaint, the same, and the matters and things therein charged and stated, will be taken as confessed, and a decree entered against you according to the prayer of said bill.

JACOB GROSS, Clerk.

A. E. GUILD, Jr., Complts. Solr. 7-10

McDAID & WILSON,
Attorneys, 159 *LaSalle Street.*

ESTATE OF ZENAS COLMAN, DECEASED.—Notice is hereby given to all persons having claims and demands against the estate of Zenas Colman, deceased, to present the same for adjudication and settlement at a regular term of the County court of Cook county, to be holden at the court house, in the city of Chicago, on the third Monday of December, A. D. 1875, being the 20th day thereof.

Chicago, October 29th, A. D. 1875.

NAOMI COLMAN,
Administratrix, with the will annexed.

MCDAID & WILSON, Attys. 6-11a

SNOWHOOK, JOHNSTON & GRAY,
Attorneys, 61 *LaSalle Street.*

ESTATE OF GEORGE W. HAWK, DECEASED—Notice is hereby given to all persons having claims and demands against the estate of George W. Hawk, deceased, to present the same for adjudication and settlement at a regular term of the County court of Cook county, to be holden at the court house, in the city of Chicago, on the second Monday of January, A. D. 1876, being the 10th day thereof.

Chicago, November 9th, A. D. 1875.

MARGARET ANN HAWK, Executrix.

SNOWHOOK, JOHNSTON & GRAY, Attys. 8-13a

T. O. T. HARTIGAN,
Attorneys. Room 21 *Schlocsser Building.*

ESTATE OF THOMAS CANTWELL, DECEASED—Notice is hereby given to all persons having claims and demands against the estate of Thomas Cantwell, deceased, to present the same for adjudication and settlement at a regular term of the County court of Cook county, to be holden at the court house, in the city of Chicago, on the second Monday of January, A. D. 1876, being the 10th day thereof.

Chicago, November 9th, A. D. 1875.

MARGARET CANTWELL, Administratrix.

T. O. T. HARTIGAN, Atty. 8-13a

JOHN P. AHRENS,
Attorney, 108 *LaSalle Street.*

TRUSTEE'S SALE.—WHEREAS, HENRY H. WALker, bachelor, of the county of Cook and State of Illinois, by his trust deed, dated the fourteenth day of July, A. D. 1873, and filed for record on the 5th day of September, A. D. 1873, in the recorder's office of said Cook county, and recorded therein in book 276 of records, on page 397, conveyed to Berthold Loewenthal, as trustee, the premises hereinafter described, to secure the payment, as therein specified, of three certain promissory notes, made by said Henry H. Walker, bearing even date with said trust deed, payable to the order of himself, at the office of the International Bank at Chicago, one principal note for the sum of six thousand dollars, payable one year after date and two coupon notes, for three hundred dollars each, payable on the 14th day of January and July, 1874, respectively, which said notes were afterwards, before the maturity thereof, duly indorsed by said Henry H. Walker.

And whereas, it was, among other things, provided in said trust deed, that in case of default in the payment of said promissory notes, or any part thereof, then, on the application of the legal holder of said notes, it should be lawful for the undersigned, as trustee, to sell and dispose of said premises, and all the right, title, benefit and equity of redemption of said Henry H. Walker, his heirs and assigns therein, at public auction, at the northeast corner of the court house square, corner Clark and Randolph streets, in the city of Chicago, in the State of Illinois, for the highest and best price the same would bring in cash, three weeks notice having been previously given of the time and place of such sale by advertisement in the Chicago Legal News, published in said city of Chicago, and to adjourn or postpone said sale from time to time at his discretion.

And whereas, default has been made in the payment of said principal note (said coupon notes being fully paid), the whole amount now due thereon being the sum of six thousand dollars, with interest at the rate of ten per cent. per annum, payable semi-annually, from January 14, A. D. 1875.

And whereas, application has been made to the undersigned by the legal holder of said note, to sell said premises, under said trust deed, for the purpose of paying said indebtedness and costs of proceedings.

Now, therefore, public notice is hereby given, that I shall sell at public auction, for cash, to the highest and best bidder, at the northeast corner of the court house square, corner of Clark and Randolph streets, in the city of Chicago, in the State of Illinois, at 11 o'clock, A. M., on Tuesday, the 7th day of December, A. D. 1875, the said premises, to wit:

The undivided one-third of the east half of the southwest quarter of the northeast quarter; also of the west quarter of the southwest quarter of the northeast quarter of section thirty-six (36), township thirty-nine (39) north, range thirteen (13), east of the third principal meridian, in the county of Cook and State of Illinois, together with all the right, title, benefit and equity of redemption of the said Henry H. Walker, his heirs and assigns therein.

Chicago, Nov. 13, 1875.

BERTHOLD LOEWENTHAL, Trustee.

JOHN P. AHRENS, Atty. for Trustee. 8-11

TRUSTEE'S SALE.—WHEREAS, ROSWELL BARber, of the city of Chicago, in the county of Cook, and State of Illinois, and Mary Ann Barber, his wife, by their certain trust deed, dated the twenty-eighth day of October, A. D. 1874, and recorded in the recorder's office of Cook county, Illinois, in book 489 of records, on page 56, conveyed to the undersigned, George Herbert, as trustee, the property hereinafter described to secure the payment of the one certain promissory note of the said Roswell Barber, of even date with said trust deed, for the sum of seventeen hundred dollars payable to the order of Charlotte Herbert, in one year from the date thereof, at the Fifth National Bank of Chicago, with interest semi-annually at the rate of ten per cent per annum, upon which a balance of ten hundred and fifty-one dollars and sixty-seven cents is due on said note with interest accruing on said note since October twenty-eighth, A. D. 1875.

And, whereas, default has been made in the payment of the said principal promissory note, due one year from the date thereof, and application has been made by the said Charlotte Herbert, legal holder of said note, to the undersigned, George Herbert, trustee as aforesaid, to sell and dispose of the premises in said trust deed, and hereinafter described, for the purposes therein expressed.

Now, therefore, notice is hereby given that I shall sell at public auction for the highest and best price the same will bring in cash, at the north door of the court house, situated at the southeast corner of Adams and LaSalle streets, in the city of Chicago, in said county and state, being the most westerly of the two north doors of said court house, at ten o'clock in the morning of Saturday, the eighteenth day of December, A. D. 1875, the north forty (40) feet of lots one (1) and two (2), in block two (2), in Julia Foster Porter's subdivision of block twenty-seven (27), in Canal Trustee's subdivision of the north half of the north half of the southeast quarter, and the east half of the southwest quarter of section thirty-three (33), in town forty (40), north range fourteen (14), east of the third principal meridian, situated in the city of Chicago, county of Cook, and state of Illinois, together with all the right, title, benefit and equity of redemption of the said Roswell Barber and Mary Ann Barber, his wife, their heirs and assigns therein.

Chicago, November 13th, 1875.

GEORGE HERBERT, Trustee.

HARRY S. STEVENS, Atty. 8-11

M. A. DeLANY,
Attorney. 59 North Clark Street.

PUBLICATION NOTICE.—STATE OF ILLINOIS, Cook county, ss. County court of Cook county. December term, A. D. 1875. Anna Lundquist, administratrix of the estate of Gustav Lundquist, deceased, vs. Carl Lundquist, and unknown heirs of Gustav Lundquist, deceased, as unknown owners of lot 2, in block 4, in original subdivision of Irving Park, in Cook county, Illinois.—Petition to sell real estate to pay debts.

Affidavit of the non-residence of Carl Lundquist, defendant above named, having been filed in the office of the clerk of said County court of Cook county, notice is hereby given to the said Carl Lundquist, and the unknown heirs of said deceased, that the said plaintiff, as administratrix of the estate of Gustav Lundquist, deceased, has filed her petition in said County court of Cook county for an order to sell the premises belonging to the estate of said deceased, or so much of it as may be needed to pay the debts of said deceased, and described as follows, to wit:

Lot two (2), in block four (4), in original subdivision of Irving Park, in Cook county, Illinois, and that a summons has been issued out of said court against you, returnable to the December term, A. D. 1875, of said court, to be holden on the third Monday of December, A. D. 1875, at the court house, in the city of Chicago, Cook county, Ill.

Now, unless you, the said Carl Lundquist, and the unknown heirs of said deceased, shall personally be and appear before said County court of Cook county, on the first day of a term thereof, to be holden at Chicago, in said county, on the third Monday of December, 1875, and plead, answer, or demur to the said complainant's petition filed therein, the same, and the matters and things therein charged and stated, will be taken as confessed, and a decree entered against you, according to the prayer of said bill.

HERMANN LIEB, Clerk.

M. A. DELANY, Complts. Solr. 7-10

SNOWHOOK, JOHNSTON & GRAY,
Attorneys, 61 *LaSalle Street.*

ESTATE OF CHRISTIAN HALVERSON, DECEASed.—Notice is hereby given to all persons having claims and demands against the estate of Christian Halverson, deceased, to present the same for adjudication and settlement at a regular term of the County court of Cook county, to be holden at the court house, in the city of Chicago, on the third Monday of December, A. D. 1875, being the 20th day thereof.

Chicago, October 29th, A. D. 1875.

CHRISTINA HALVERSON, Administratrix.

SNOWHOOK, JOHNSTON & GRAY, Attys. 6-11a

CHICAGO LEGAL NEWS.

SATURDAY, NOVEMBER 27, 1875.

The Courts.

UNITED STATES SUPREME COURT.

No. 8 and 17.—OCT. TERM, 1875.

DAVID DOWS, JOHN DOWS MAIRS, and ALEXANDER ECTOR ORR, plaintiffs in error,
8. v.
THE NATIONAL EXCHANGE BANK OF MILWAUKEE.
And
DAVID DOWS, JOHN DOWS MAIRS, and ALEXANDER ECTOR ORR, plaintiffs in error,
17. v.
THE WISCONSIN MARINE AND FIRE INSURANCE COMPANY.

In error to the Circuit Court of the United States for the Southern District of New York.

1. McLaren & Co. purchased at Milwaukee with their own money, and became the owners of the wheat. Though they received orders from A. F. Smith & Co to buy wheat for them and to ship it they had not been supplied with funds for the purpose, nor had they assumed to contract with those from whom they purchased on behalf of their correspondents. They were under no obligation to give up their or the possession on any terms other than such as they might dictate. If, after their purchase, they had sold the wheat to any person living in Milwaukee, or elsewhere, other than A. F. Smith & Co., their vendee would have succeeded to the ownership. Nothing in the agency of A. F. Smith & Co. would have prevented it. Having then acquired the absolute ownership, McLaren & Co. had the complete power of disposition. They doubtless expected the firm to become purchasers from them and from their vendors. With that expectation accordingly they drew drafts for the price, but they never agreed to deliver the wheat to the drawees unless upon the condition that the drafts should be accepted and paid. They shipped it, but they did not consign it to Smith & Co., and they sent to the firm no bills of lading. On the contiary, they consigned the wheat to the cashier of the Milwaukee Bank, and handed over to that bank the bills of lading as a security for the drafts drawn against it—drafts which the bank purchased. It is of no consequence that they sent invoices.

2. EFFECT OF TRANSMISSION.—That the transmission of the invoices did not pass the property in the wheat without the acceptance and payment of the drafts drawn against it. Standing alone, an invoice is never regarded as an evidence of title.

3. REMAINED OWNERS.—That McLaren & Co. remained the owners of wheat, nothwithstanding their transmission of the invoices to A. F. Smith & Co., as owners, they had the right to transfer it to the plaintiffs as a security for the acceptance and payment of their drafts drawn against it; that this they did by taking bills of lading deliverable to the cashier of the plaintiffs, and handing them over with the drafts when the latter were discounted. These bills of lading, unexplained, are almost conclusive proof of an intention to reserve to the shipper the "jus disponendi," and prevent the property of the wheat from passing to the drawees of the drafts.

4. EFFECT OF BILL OF LADING.—The court states what is the effect of a bill of lading taken deliverable to the shipper's own order.

5. DELIVERY.—The expressed direction to hold the wheat for the payment of the drafts, and to deliver it only on payment, removes the possibility of any presumed intent to deliver it while the drafts remained unpaid. Effect of delivery to elevator.—[ED. LEGAL NEWS,]

Opinion of the court by STRONG, J.

The verdict of the jury having established that the wheat came to the possession of the defendants below, (now plaintiffs in error,) and that there was a conversion, there is really no controversy respecting any other fact in this case than whether the ownership of the plaintiffs had been divested before the conversion. The evidence bearing upon the transmission of the title was contained mainly in written instruments, the legal effect of which was for the court, and, so far as there was evidence outside of these instruments, it was either uncontradicted, or it had no bearing upon the construction to be given to them. We have, therefore, only to inquire to whom the wheat belonged when it came to the hands of the defendants, and when they refused to surrender it at the demand of the plaintiffs.

It is not open to question that McLaren & Co., having purchased it at Milwaukee and paid for it with their own money, became its owners. Though they had received orders from A. F. Smith & Co. to buy wheat for them and to ship it, they had not been supplied with funds for the purpose, nor had they assumed to contract with those from whom they purchased on behalf of their correspondents. They were under no obligation to give up their title or the possession on any terms other than such as they might dictate. If, after their purchase, they had sold the wheat to any person living in Milwaukee or elsewhere, other than A. F. Smith & Co., no doubt their vendee would have succeeded to the ownership. Nothing in any agency for A. F. Smith & Co. would have prevented it. This we do not understand to be controverted. Having, then, acquired the absolute ownership, McLaren & Co. had the complete power of disposition, and there is no pretense that they directly transmitted their ownership to A. F. Smith & Co. They doubtless expected that firm to become purchasers from them. They bought from their vendors with that expectation. Accordingly they drew drafts for the price, but they never agreed to deliver the wheat to the drawees unless upon the condition that the drafts should be accepted and paid. They shipped it, but they did not consign it to Smith & Co,, and they sent to that firm no bills of lading. On the contrary, they consigned the wheat to the cashier of the Milwaukee bank and handed over to that bank the bills of lading as a security for the drafts drawn against it—drafts which the bank purchased. It is true they sent invoices. That, however, is of no significance by itself. The position taken on behalf of the defendants, that the transmission of the invoices passed the property in the wheat without the acceptance and payment of the drafts drawn against it, is utterly untenable. An invoice is not a bill of sale, nor is it evidence of a sale. It is a mere detailed statement of the nature, quantity, and cost or price of the things invoiced, and it is as appropriate to a bailment as it is to a sale. It does not of itself necessarily indicate to whom the things are sent, or even that they have been sent at all. Hence, standing alone, it is never regarded as evidence of title. It seems unnecessary to refer to authorities to sustain this position. Reference may, however, be made to Shepherd *v.* Harrison, Law Rep., 4 Ap. Cas., 116, and Newcomb *v.* The Boston and Lowell Railroad Company, 115 Mass., 230. In these and in many other cases it has been regarded as of no importance that an invoice was sent by the shipper to the drawee of the drafts drawn against the shipment, even when the goods were described as bought and shipped on account of and at the risk of the drawee.

It follows that McLaren & Co. remained the owners of the wheat, notwithstanding their transmission of the invoices to A. F. Smith & Co. As owners, then, they had a right to transfer it to the plaintiffs as a security for the acceptance and payment of their drafts drawn against it. This they did by taking bills of lading deliverable to the cashier of the plaintiffs and handing them over with the drafts when the latter were discounted. These bills of lading unexplained are almost conclusive proof of an intention to reserve to the shipper the "*jus disponendi*," and prevent the property in the wheat from passing to the drawees of the drafts. Such is the rule of interpretation as stated in Benjamin on Sales, page 306, and in support of it he cites numerous authorities, to only one of which we make special reference—Jenkyns *v.* Brown, 14 Q. B., 496. There it appeared that the plaintiff was a commission merchant, living in London, and employing Klingender & Co. as his agents at New Orleans. The agents purchased for the plaintiff a cargo of corn, paying for it with their own money. They then drew upon him at thirty days' sight, stating in the body of the drafts that they were to be placed to the account of the corn. These drafts they sold, handing over to the purchaser with them the bills of lading, which were made payable to the order of Klingender & Co., the agents, and they sent invoices and a letter of advice to the plaintiff, informing him that the cargo was bought and shipped on his account. On this state of facts the court ruled that the property did not pass to the plaintiff; that the taking of a bill of lading by Klingender & Co., deliverable to their own order, was "nearly conclusive evidence that they did not intend to pass the property in the corn, and that by indorsing the bills of lading to the buyer of the bills of exchange they had conveyed to him a special property in the cargo, so that the plaintiff's right to the corn could not arise until the bills of exchange were paid by him. And that such is the legal effect of a bill of lading taken deliverable to the shipper's own order; that it is inconsistent with an intention to pass the ownership of the cargo to the person on whose account it may have been purchased, *even when the shipment has been made in the vessel of the drawee of the drafts against the cargo*, has been repeatedly decided. (Turner *v.* The Trustees of the Liverpool Docks, 6 Exch., 543; Schorman *v.* Railway Co., Law Reps., 2 Cha. Ap., 336; Ellerslaw *v.* Magniac, 6 Exch., 570.) In the present case the wheat was not shipped on the vessels of A. F. Smith & Co., and the bills of lading stipulated for deliveries to the cashier of the Milwaukee bank. When, therefore, the drafts against the wheat were discounted by the bank, and the bills of lading were handed over with the drafts as security, the bank became the owner of the wheat and had a complete right to retain it until payment. The ownership of McLaren & Co. was transmitted to it, and it succeeded to their power of disposition. That the bank never consented to part with its ownership thus acquired, so long as the drafts it had discounted remained unpaid, is rendered certain by the uncontradicted written evidence. It sent the drafts, with the bills of lading attached, to the Merchants' Bank, Watertown, accompanied with the most positive instruction, by letter and by indorsement on the bills, to hold the wheat until the drafts were paid. And when, subsequently, the Merchants' Bank sent orders to the masters of the carrying vessels to deliver it to the "Corn Exchange Elevator, Oswego, N. Y.," they accompanied the orders with letters to A. F. Smith & Co., the proprietors of the elevator, containing clear instructions to hold the grain and "deliver" it only on payment of the drafts. To these instructions Smith & Co. made no objection. Now, as it is certain that whether the property in the wheat passed to Smith & Co. or not depends upon the answer which must be given to the question whether it was intended by McLaren & Co., or by the Milwaukee bank, their successors in ownership, that it should pass before payment of the drafts, where can there be any room for doubt? What is there upon which to base an inference that it was intended A. F. Smith & Co. should become immediate owners of the wheat and be clothed with a right to dispose of it at once? Such an inference is forbidden, as we have already said, by the bills of lading made deliverable to W. G. Fitch, cashier of the Milwaukee bank, and it is inadmissible, in view of the express orders given by that bank to their special agents the Merchants' Bank at Watertown, directing them to hold the wheat subject to the payment of the drafts drawn against it. No intent to vest immediate ownership in the drawees of the drafts can be implied in the face of these express arrangements and positive orders to the contrary. It is true that A. F. Smith & Co. were the proprietors of the Corn Exchange elevator, and that the wheat was handed over to the "custody of the elevator" at the direction of the Merchants' Bank, but it cannot be claimed that was a delivery to the drawees under and in pursuance of their contract to purchase. The Merchants' Bank, having been only special agents of the owners, had no power to make such a delivery as would divest the ownership of their principals. (Stollenwerk et al. *v.* Thatcher, 115 Mass., 124). And they made no attempt to divest that ownership. They guardedly retained the "jus disponendi." Concurrently with their directions that the wheat should be delivered to the elevator, in the very orders for the delivery, they stated the cargoes were for the account of W. G. Fitch, cashier, and were to be held subject to their order. By accompanying letters to the proprietors of the elevator they stated the cargoes were delivered to them "to be held subject to and delivered only on payment of the drafts drawn by McLaren & Co." All this contemplated a subsequent delivery, a delivery after the receipt of the grain in the elevator and when the drafts should be paid. It negatives directly the possibility that the delivery into the elevator was intended as a consummation of the purchase, or as giving title to the purchasers. It was a clear case of bailment, utterly inconsistent with the idea of ownership in the bailees. A man cannot hold as bailee for himself. By the act of accepting goods in bailment he acknowledges a right or title in the bailor. When, therefore, as was said in the court below, "the proprietors of the Corn Exchange elevator, or A. F. Smith & Co., received the wheat under the instructions of the Merchants' Bank, they received it with the knowledge that the delivery to them was not absolute; that it was not placed in their hands as owners, and that they were not thereby to acquire title." They were informed that there was no intention with the holders of the drafts and bills of lading to let go their ownership so long as the drafts remained unpaid. The possession they had, therefore, was not their possession. It belonged to their bailors, and they were mere warehousemen and not vendees.

We agree that where a bill of lading has been taken containing a stipulation that the goods shipped shall be delivered to the order of the shipper, or to some person designated by him other than the one on whose account they have been shipped, the inference that it was not intended the property in the goods should pass, except by subsequent order of the person holding the bill, may be rebutted, though it is held to be almost conclusive. And we agree that where there are circumstances pointing both ways, some indicating an intent to pass the ownership immediately, notwithstanding the bill of lading—in other words, where there is anything to rebut the effect of the bill, it becomes a question for the jury whether the property has passed. Such was the case of Ogg *v.* Shuter, 10 Law Reps, Com. Pleas, 159. There the ordinary effect of a bill of lading, deliverable to the shipper's order, was held to be rebutted by the court sitting with power to draw inferences of fact. The delivery to the carrier was "free on board," and the bill of lading was sent to the consignor's agent. The goods were also delivered into the purchaser's bags, and there was a part payment. But in this case there are no circumstances to rebut the intent to retain ownership exhibited in the bills of lading, and confirmed throughout by the indorsements on the bills, and by the written instructions to hold the wheat till payment of the drafts. Nothing in the evidence received or offered tended to show any other intent. Hence, there was no necessity of submitting to the jury the question whether there was a change of ownership. That would have been an invitation to find a fact of which there was no evidence. The circumstances as relied upon by the plaintiffs in error as tending to show that the property vested in A. F. Smith & Co. cannot have the significance attributed to them.

It is certainly immaterial that the wheat was consigned to W. G. Fitch, cashier, care of the Merchants' Bank, Watertown, and that it was thus consigned at the request of A. F. Smith & Co., made to McLaren & Co. Had it been consigned directly to that bank, and had there been no reservation of the "jus disponendi" accompanying the consignment, the case might have been different. Then an intent to deliver to the purchasers might possibly have been presumed, but, as the case was, no room was left for such a presumption. The express direction to hold the wheat for the payment of the drafts, and to deliver it only on payment, removes the possibility of any presumed intent to deliver it while the drafts remained unpaid. A shipment on the purchaser's own vessel is ordinarily held to pass the property to the purchaser, but not so, if the bill of lading exhibits a contrary intent; if thereby the shipper reserves to himself, or to his assigns, the dominion over the goods shipped. (Turner *v.* The Trustees of the Liverpool Docks, cited supra). There are many such decisions. A strong case may be found in the Court of Queen's Bench, decided in 1840. It is Mitchell *v.* Ede, 11 Adol. and Ellis, N. S., 888. A Jamaica planter, being the owner of sugars, and indebted to the defendant residing in London, for more than their value, shipped them at Jamaica on the 4th of April, on a ship belonging to the defendant which was in the habit of carrying supplies to Jamaica to the owner of the sugars, and others, and taking back consignments from him and others. On the same day he took a bill of lading by which the goods were stipulated to be delivered to the defendant at London, he paying freight. Two days afterwards (April 6th) the shipper made an indorsement on the bill that the sugars were to be delivered to the defendant only on condition of his giving security for certain payments, but otherwise to the plaintiff's agent. He also drew drafts on the defendant. At the same time he indorsed the bill of lading and delivered it to the plaintiff, to whom he was indebted. The bill was never in the defendant's hands. The sugars arrived in London, and the defendant paid the drafts drawn

by the shipper, but did not comply with the conditions of the indorsement of April 6th. On this state of facts it was held by the court that the plaintiff was entitled to the sugar; that the shipper had not parted with the property by delivering it on board the defendant's ship, employed as it was, nor by accepting the bill of lading, as drawn on the 4th of April; and that he was entitled to change the destination of the sugars till he had delivered them, or the bill. In the case now in hand there never was an instant after the purchase of the wheat by McLaren & Co., when there was not an express reservation of the right to withhold the delivery from A. F. Smith & Co., and also an avowed purpose to withhold it until the drafts should be paid. Consent to consign the wheat to W. G. Fitch, cashier, care of Merchants' Bank, amounts, therefore, to no evidence of consent that it should pass into the control and ownership of the purchasers.

It has been argued on behalf of the plaintiffs in error, that the correspondence between A. F. Smith & Co. and McLaren & Co. shows that the wheat was wanted by the former to supply their immediate need, and that, therefore, it was a legitimate inference both parties to the correspondence intended an immediate delivery. If this were so, it was still in the power of the vendors to change the destination of the property until delivery was actually, or at least symbolically made. And that the intention, if any ever existed, was never carried out, the bills of lading prove. It may be that A. F. Smith & Co. expected to secure early possession of the wheat, by obtaining discounts from the Watertown bank, and then by taking up the drafts. If so, it would account for their request that the drafts and bills of lading might be sent through that bank, but that has no tendency to show an assent by either McLaren & Co. or the Milwaukee bank, to an unconditional delivery of the property before payment of the drafts.

Nor does the fact that any engagement to hold themselves responsible for the safe keeping of the wheat for the plaintiffs, and subject to their orders until the drafts drawn against it should be paid, was exacted from the Watertown bank, have any tendency to prove such an assent. This was an additional protection to the continued ownership of the plaintiffs and the words of the engagement plainly negative any consent to a divestiture of that ownership.

Without reference, therefore, to the testimony of McLaren, which was in substance that before the shipments, Farwell, the agent of Smith & Co., was informed that while the shipping firm would agree to send their time drafts through any bank he might designate, and consign the property to any responsible bank Smith & Co. might designate, they would adhere to their positive business rule in such cases, and on no account consent that any property so shipped should pass out of the control of the banks in whose care it had been placed, until all drafts made against it had been paid; without reference, to this we think it clear the ownership of the wheat, for the conversion of which the defendants were sued, never vested in Smith & Co., never passed out of the plaintiffs.

This is a conclusion necessarily drawn from the written and uncontradicted evidence, and there is nothing in any evidence received, or offered by the defendants and overruled by the court, which has any tendency to resist the conclusion. It is unnecessary, therefore, to examine in detail the numerous assignments of error in the admission and rejection of evidence. None of the rulings have injured the defendants.

If, then, the Exchange Bank of Milwaukee was the owner of the wheat when A. F. Smith & Co. undertook to ship it to the defendants, and when the defendants received it, and converted it to their use, the right of the bank to recover in this action is incontrovertible. Smith & Co. were incapable of divesting that ownership. The defendants could acquire no title, or even lien, from a tortious possessor. However innocent they may have been, (and they were undoubtedly innocent of any attempt to do wrong,) they could not obtain ownership of the wheat from any other than the owners. The owner of personal property cannot be divested of his ownership without his consent, except by process of law. It is not claimed, and it could not be, that the defendants were deceived or misled by any act of the plaintiffs. They are the victims of a gross fraud perpetrated by A. F. Smith & Co., and however unfortunate their case may be, they cannot be relieved by casting the loss upon the plaintiffs, who are at least equally innocent with themselves, and who have used the extremest precaution to protect their title.

It is sufficient to add that, in our opinion, there is no just reason for complaint against the instruction given by the circuit judge to the jury, and his rulings upon the subject of damages and interest.

The judgment is affirmed.

David Dows et al. v. The Wisconsin Marine and Fire Insurance Company. } Error to the circuit court for the Southern District of New York.

This case differs in no essential particulars from the case of Dows *v.* The National Exchange Bank, Milwaukee, (just decided.) It presents the same questions, and is controlled by the same rules of law. The judgment must, therefore, be affirmed.

U. S. CIR. COURT, W. D. OF MO.

OPINION Nov. 23, 1875.

THE UNITED STATES *v.* 17 EMPTY BARRELS, etc., ADLER & FURST, Claimants.

Writ of Error to the District Court.

INFORMATION FOR HAVING DISTILLED SPIRITS IN POSSESSION WITH INTENTION, ETC.

1. NOTICE.—That the revised statutes prescribe the mode of proceeding as to notice, and not the rule of court.
2. WHAT SUFFICIENT ALLEGATION.—That it is a sufficient allegation to follow the language of the statute without alleging that the taxes were not paid on the spirits.
3. TOOLS FOUND ON PREMISES.—That the tools, etc., found and seized in the place where the distilled spirits were found and seized, were under the averments subject to seizure and forfeiture.
4. AVERMENT AS TO RAW MATERIAL.—The court considers whether the averment as to the raw material is sufficient.—[ED. LEGAL NEWS.]

Opinion by DILLON, J.

The seizure of distilled spirits, raw materials, tools, etc., was made under section 3,453 of the Revised Statutes. The claimants, as owners, applied under sections 3,459 of the Revised Statutes for the return of the property seized, and executed the bond therein provided for, which was filed with the proper district attorney. The district court ordered personal service of notice of the pendency of the proceedings to be given to the parties executing the bonds ten days before the term fixed for trial. The required notice was given. A motion was made on a special appearance to quash the notice, because twenty days' notice had not been given as required by rule 45 of the United States district courts for the districts of Missouri.

The answer to this objection is that section 3,459 of the Revised Statutes prescribes the mode of proceeding in the case, and as to notice not the rule of the court referred to.

The third article of the information was demurred to and the demurrer was overruled and judgment of forfeiture entered. Without going into detail my judgment is that the allegations of the third article using and following the language of the statute are sufficient in substance. Under this article it is specially urged that it should be alleged that the taxes were not paid on the spirits. But the averment is that the spirits "were in the possession and ownership of the claimants for the purpose of being sold and removed by them in fraud of the internal revenue laws, and in the design to avoid the payment of said taxes." This is sufficient.

And it is my opinion that the tools, etc., found and seized in the place and inclosure where the distilled spirits were found and seized were, upon the averments of this article, subject to seizure and forfeiture. It is my opinion also that the fourth article is also good, upon a general demurrer. The court cannot judicially notice and on demurrer decide that the averment that certain materials were "raw materials" were not so in the face of the direct allegation of fact to the contrary.

I have some doubt whether the *kind of article* subject into which it is alleged these "raw materials" were intended to be manufactured for the purpose of fraudulently selling such manufactured article with the design to evade the payment of said tax, ought not to have been specifically averred, yet I am inclined to think this generality of statement would not be sufficient ground of reversal where judgment went upon a general demurrer. But, however this may be, the third count is sufficient to support the judgment.

I have no doubt as to the jurisdiction of the district court.

Affirmed.

J. S. BOTSFORD, U. S. Attorney for the United States.

C. H. KRUM, JEFF. CHANDLER and H. S. MUSSER for claimants.

SUPREME COURT OF ILLINOIS.

JUNE TERM, 1875.

THE PEOPLE ex rel., etc. *v.* MCGOWAN.

NATURALIZATION OF ALIENS—CONCLUSIVENESS OF RECORD—COURTS OF "COMMON LAW JURISDICTION."

1. NATURALIZATION OF ALIENS—IMPEACHMENT OF RECORD.—A record of naturalization made by a court of competent jurisdiction, can not be impeached in a collateral proceeding, by showing that the preliminary steps required by law have not, in fact, been taken,—as where it is alleged that the person had not, at the time of the naturalization, resided one year in the State in which the naturalization took place.
2. COURTS OF "COMMON LAW JURISDICTION."—The Criminal Court of St. Louis county, Missouri, is a court having "common law jurisdiction," within the meaning of the act of Congress, relating to the naturalization of aliens, and is therefore competent to admit an alien to citizenship. What courts are embraced within the terms of this statute considered at length, and KNOX Co. *v.* Davis, 63 Ill., 405, overruled.

Opinion of the court by SCOTT, C. J.

The information alleges: Daniel McGowan, at an election held on the 8th day of October, 1874, was regularly elected judge of the City Court of East St. Louis, was duly qualified as judge, and entered upon the discharge of the duties of the office, but charges he could not lawfully hold the office of judge of that court, because he was alien born.

The plea filed admits defendant was born an alien to the United States, but avers he was duly naturalized on the 15th day of May, 1867, in the Criminal Court of the county of St. Louis at a regular term, that court having jurisdiction to admit aliens to citizenship. Two replications filed, first, the Criminal Court of the county of St. Louis had not jurisdiction to naturalize defendant, and, second, *nul.tiel record;* upon which issue was joined.

An exemplication of the record was offered in evidence, which shows that Daniel McGowan, a native of Ireland, applied to become a citizen of the United States at the May term, 1867, of the Criminal Court of the county of St. Louis, and it appearing he had resided in the United States and in the State of Missouri for the requisite length of time, and had complied with the law in all preliminary matters, he was admitted to citizenship on taking the usual oath of allegiance to this government.

On the trial, the people offered to prove that defendant, prior to May 15, 1867, had made no previous declaration of his intention to become a citizen; that he immigrated to the United States after he was twenty-one years of age; that he had never served in the army or navy of the United States, and that he had not resided in the State of Missouri one year previous to his application to become a citizen; which evidence was excluded by the court.

In the exclusion of this testimony, the court ruled correctly. The record of naturalization of an alien, like any other record of a court, imports verity. It can not be impeached for fraud, unless that defense has been specially pleaded, setting forth in what the fraud consists. No replication had been filed alleging fraud, or that the court had not jurisdiction of the person of the defendant. The replication as to jurisdiction is that the court did not have jurisdiction of the subject-matter, but does not put in issue the jurisdiction of the court as to the person of defendant. Hence the evidence was properly rejected. But had the issue been made by the pleadings, we are still of opinion the evidence was inadmissible. It seems clear, both on principal and authority, that a record of naturalization, made by a court of competent jurisdiction, cannot be impeached in a collateral proceeding, by showing that the preliminary steps required by law have not in fact been taken. It is upon the principle that such a record, like any other judgment of a court, affords complete evidence of its own validity. In proceedings of naturalization, matters are submitted to the decision of the court, and the presumption will be indulged that the court heard evidence, and was satisfied that the applicant had complied with the law; and its findings must be held conclusive as to all facts recited in the record. Spratt *v.* Spratt, 4 Peters, 393; The People *v.* Pease, 30 Barb., 588; Campbell *v.* Gordon and Wife, 6 Cranch, 176; McCarthy *v.* Marsh, 1 Selden, 263.

But the principal question in the case is whether the Criminal Court of the county of St. Louis had jurisdiction to admit aliens to citizenship. Under the act of Congress, any State court, being a court of record, having common law jurisdiction, a seal, a clerk or prothonotary, has jurisdiction in matters of naturalization of aliens. Our inquiry, then, is whether the Criminal Court of the county of St. Louis comes within the definition of State courts, mentioned in the act of Congress on that subject.

The Criminal Court of the county of St. Louis was established by an act of the general assembly of the State of Missouri, passed in 1855, and was given all the original and appellate jurisdiction which had been vested in the several circuit courts of the State. It is a court of record having a seal and a clerk, and was given all the powers, was to perform all the duties, and be subject to the restrictions of courts of record as such, according to the provisions of the laws of the State. The judge of the court was made a conservator of the peace, with power to issue writs of *habeas corpus*, and determine the same, to administer oaths, take and certify recognizances and exercise all the powers of an examining magistrate. Gottschalk's Laws, p. 89.

Subsequently, by an act of the legislature, the Court of Criminal Correction in St. Louis county was established and was given exclusive original jurisdiction of all misdemeanors under the laws of the State of Missouri, committed in the county of St. Louis, the punishment of which is by fine or imprisonment in the county jail or both, except in cases of assault and battery and affrays; but this act did not otherwise affect the jurisdiction of the criminal court. Gottschalk's Laws, p. 100.

It will be observed that the Criminal Court of the county of St. Louis answers, in every particular, the description of State courts designated in the act of Congress, which are given power to naturalize aliens, if it has "common law jurisdiction." We have no courts in this country that derive their existence from the common law; our State courts are all creatures of the organic law, or of legislative enactment. Their jurisdiction is not uniform. Some of our courts have only a statutory or special jurisdiction, limited as to subjects and amounts in controversy; others have original common law jurisdiction, unrestricted as to class of cases and as to amounts in controversy. But our State courts, having what is called common law jurisdiction, have not that jurisdiction to the same extent. By no means. We have courts with common law jurisdiction in civil cases only, and others exclusively in criminal causes. It was so with the English court, that had their origin in and existed under the common law, and derived their jurisdiction from that source. Some of them had jurisdiction only in certain classes of actions, and others in different and distinct actions.

Our statutory courts, although they may not have jurisdiction in all cases at law both criminal and civil, are none the less, for that reason, courts with common law jurisdiction, Their character in this regard is not determined altogether by the extent of their jurisdiction as to subjects over which they may adjudicate. We apprehend the State courts mentioned in the act of Congress, as having common law jurisdiction, are such as exercise their powers according to the course of the common law. It was not meant they should have all common law jurisdiction over every class of subjects, including all civil and criminal matters. If this were so, it is apprehended but few courts could be found in any of the States that would possess the requisite "common law jurisdiction." As a matter of fact, some subjects are excluded from the original jurisdiction of circuit courts in this State and in the State of Missouri; and perhaps no court in either State could be found with such extended and unlimited jurisdiction as to include within that jurisdiction all subjects determinable in the various courts, either under the stat-

ute, or under the common law. It may be accurately said that a court having jurisdiction only in civil cases is nevertheless a court of general jurisdiction, although limited to a certain class of cases. The same is true of courts with exclusive jurisdiction in criminal cases, with no civil jurisdiction. Such courts may, and do, exercise their respective powers according to the course of the common law; and their jurisdiction may, with as much propriety as with many of the common law courts of England, be said to be general.

Reference to the act of the legislature in evidence, creating the Criminal Court of the County of St. Louis, shows the Circuit Court of St. Louis county was thereafter prohibited exercising original jurisdiction in any criminal case, or appellate jurisdiction of any [criminal] case tried or determined before the justice of the peace or other magistrate. By positive statute some matters are excluded from the jurisdiction of the Circuit Courts in this State; but can it, with any propriety be said these courts are not for that reason courts of general jurisdiction? The proposition, it seems to us, would be absurd. The Circuit Court and Criminal Court of St. Louis county were created by positive law, and both courts may have had jurisdiction given by statute; but that does not militate against the proposition that they have common law jurisdiction over all matters submitted to them, and exercise not only statutory powers, but powers derived from the common law.

It was pertinently said in the matter of Martin Comner, 39 Cal., 98: "The act of Congress does not require that the court shall have all the common law jurisdiction which pertains to all classes of actions. It is enough that it has common law jurisdiction."

In Morgan *v.* Dudley, 18 B. Monroe, 693, the court, in an elaborate opinion, said: "The act of Congress, in designating the State courts that have authority to admit aliens to become citizens of the United States, does not describe them as courts of general common law jurisdiction, but as courts having common law jurisdiction, and consequently embracing all that has either limited or general common law jurisdiction."

In *Ex parte* Gladhill, 8 Metc., 168, it was held, Chief Justice Shaw delivering the opinion of the court, that the police court of Lowell, being a court of record, having a seal and clerk, and being vested with all the civil and criminal jurisdiction of justices of the peace, was a court of common law jurisdiction within the meaning of the act of Congress, with power to admit aliens to become citizens of the United States.

In the People *v.* Pease, 30 Barb., 588, one question was whether the County Court of New York had jurisdiction, under the act of Congress in matters of naturalization. The court said: "The county County Court has common law jurisdiction in the revision of all judgments given in justice's court. The court of appeals is a court of general common law jurisdiction, and yet it has no original jurisdiction. The county court, as an appellate court, is in like manner a court having common law jurisdiction." Allusion is made, in the opinion of the court, to a decision made by Justice McLean of the Supreme Court of the United States, holding that the probate courts of the several courties in Ohio had jurisdiction in naturalization proceedings, which is said to have been published in the *Law Gazette*, but we have not been able to find the case reported anywhere.

In *Ex parte* Burkhart, 16 Tex., 470, it was declared that the county courts of that State, though of limited jurisdiction, yet had common law jurisdiction within the meaning of the act of Congress.

In Mills *v.* McCabe, 44 Ill., 194, it was held that the "Marine Court of the City of New York" was not a court of record within the meaning of the act of Congress conferring jurisdiction upon State courts to admit aliens to citizenship. That court was created by statute, its jurisdiction defined, and, as we understand, was a court of record for some purposes, but not for all. The proceedings on trial were informal, the pleadings oral, and, in technical strictness, there was no judgment roll. De La Faniers *v.* Jackson, 4 E. D. Smith, 477.

It was in view of the fact that the courts of New York had thus characterized the "Marine Court," declaring its proceedings in part oral, that this court, in its opinion, said: "Having been decided by competent authority to be a court of record only to the extent that it was declared by statute, and not to possess other powers incident to such a court, we are not authorized to hold it a court of record;" and it was then added: "A fair and reasonable construction of the act of Congress requires us to hold that only a court of record for general and not special purposes was intended to bo embraced."

The case of Knox County *v.* Davis, 63 Ill., 405, declares that the court intended to be embraced in the act of Congress was one that exercised a general, although it might be a common law jurisdiction limited as to the sum or amount in controversy, and, it may be, where some kinds of actions are excluded. The conclusion was that the county court in this State, as organized under the Constitution of 1848, did not have jurisdiction to admit aliens to citizenship, and the reason assigned is that that court had no general common law jurisdiction in any matters. It is conceded those courts exercised a general and limited jurisdiction in the settlement of estates, and in all matters pertaining thereto; but that jurisdiction, it is said, was strictly statutory. The common law jurisdiction in actions of debt or assumpsit was limited to certain persons in their official capacity, and limited also as to the sum or amount in controversy, and hence the conclusion was reached that it had no common law jurisdiction within the meaning of the act of Congress.

But we are satisfied, on more mature reflection and a fuller examination of the reported cases, that this case, in so far as it held that the county courts of this State, as organized under the Constitution of 1848, had no jurisdiction to grant naturalization, is in conflict with those authorities, and that it should be overruled and so modified as to conform to the construction generally given to the act of Congress upon the subject of naturalization, which, under the Constitution, should be uniform. The construction of the act should be, as far as practicable, uniform by the decisions in the several States, in order that naturalization of aliens, valid by the decisions of the courts of one State, may not be declared invalid by the courts of another State.

It seems clear, upon authority, as well as upon construction of the federal statute, that the courts designated in the act of Congress, which have jurisdiction conferred upon them to hear and determine applications for naturalization, need not possess general common law jurisdiction over all classes of actions, but must be courts of record for all purposes, possessing powers incident to such courts, with common law jurisdiction over all subjects upon which they have authority to adjudicate, and must exercise their powers accordingly to the course of the common law.

Our conclusion is, that the Criminal Court of the County of St. Louis is such a court, and, it being shown to have "common law jurisdiction" within the meaning of the act of Congress in relation to naturalization, it was therefore competent to admit defendant to all the rights of citizenship.

The judgment of the Circuit Court must be affirmed.

Judgment affirmed.

BREESE, J.—I do not concur in this opinion.

C. W. & E. L. THOMAS, for appellant.

G. & G. A. KOERNER, for appellee.

SUPREME COURT OF TENNESSEE.

KNOXVILLE, JULY 19, 1875.

JOSEPH RUOHS, in error, *v.* M. C. YOUNGLOVE.

COVENANT OF SEIZIN—BREACH OF.—A deed purporting to convey the absolute estate in land in fee, the legal meaning of the covenant of seizin therein was that the maker of the deed had the very estate in quality and quantity which the deed purported to convey, that is, a fee title. As he did not have a fee simple title the covenant was broken and the plaintiff was entitled to recover.

SAME—MEASURE OF DAMAGES.—The measure of damages is the consideration paid with interest where there is an entire failure of title, or where the purchaser has no election to treat it as such. And if the purchaser chooses to sue upon the covenant at law, without a rescission or offer to rescind, he can only recover to the extent of the breach—the contract of sale and the conveyance remaining in force as to the part to which the title does not fail.

M'FARLAND, J. This action was brought by Younglove upon the covenants of seizin and warranty of title in a deed made to him by Ruohs for a tract of land in Chattanooga, both of which covenants are alleged to have been broken. Under the charge of the judge below the plaintiff recovered upon the breach of the covenant of seizin the full consideration paid with interest. The defendant excepted to the charge, and has appealed in error. The deed from Ruohs to Younglove purports to convey a fee simple title to the land. After giving a general description of the land, it says: "Being the same land purchased by me at a chancery sale, made under a decree at the Chancery Court at Chattanooga in the case of Sallie E. Bruce and Nash H. Burts, administrator, etc., against Mattie W. Bruce and others, which sale was made on the 30th of November, 1869, in bar of the equity of redemption, and the dower interest in it which I purchased from Sallie E. Bruce subsequent to said sale of the said chancery land."

It was shown upon the trial that upon a writ of error the decree of sale referred to, under which Ruohs purchased the land, was reversed, and it was adjudged that he acquired no title by his purchase. This is not controverted; but it was insisted that by the deed Ruohs conveyed to Younglove two separate estates—one the life estate of Sallie E. Bruce, the other the fee simple; and as there was no proof that the title was not good to the life estate of Sallie E. Bruce, the plaintiff was only entitled to recover the difference between said life estate and the fee. The deed purported to convey the absolute estate to the land in fee. The reference to the source of this title was not intended to limit or qualify the character of his conveyance or his covenant; the legal meaning of his covenant of seizin was that he had the very estate in quality and quantity which the deed purported to convey, that is, a fee simple title. As it is conceded that he did not have a fee simple title, it is clear that the covenant was broken and that the plaintiff was entitled to recover. See Kincaid *v.* Brittain, 5 Sneed, 119.

The question is as to the measure of damages. It appears that the bargainor claimed the dower interest of Sallie E. Bruce, and it is not shown but what his title to this extent was good. The question is, was the plaintiff authorized to treat the failure as entire and recover the entire purchase money, or was he bound to retain whatever title was acquired to the life estate and recover the difference in value between the fee simple title to the whole and the life estate in such part as was conveyed by the decree? Or, in other words, to recover the purchase money paid and interest or the value of the life estate? It is settled that the measure of damages is the consideration paid with interest, where there is *an entire failure* of title, or, as was said by Judge McKinney in Kincaid *v.* Brittain, 5 Sneed, where the purchaser has an election to treat it as such. And in the latter case the effect of a recovery of an equivalent in damages would be to entitle the bargainor to a re-conveyance of whatever title had passed by the deed, and this, if refused, a court of equity would enforce, and perhaps the effect of such recovery of damages would be by operation of law to vest the title in the bargainor, without more, that is, such title as was conveyed. See also Rawle on Cov., p. 76, et seq.

It is not clearly shown, however, in what cases the purchaser has the right to treat the failure of title as entire. In Rawle on Cov., p. 88, et seq., treating of the covenant of seizin it is said: "It is well settled that while upon a total breach of this covenant, a purchaser may, as a general rule, recover the whole consideration money; so, where there is a partial breach he may recover *pro tanto*. Thus in the early case of Gray *v.* Briscoe, one covenanted that he was seizin of Blackacre in fee simple, when in fact it was copyhold land, and the jury were directed to give damages according to the rate at which the court valued fee simple more than copyhold land. So, where in a case in New York, the parties had a life estate in four-sixths of the premises, and a fee in the remainder, it was held in an action on the covenant for seizin, that the damages should be measured by deducting the value of the life estate from four-sixths of the purchase money, and without interest, as there was no one to call upon the plaintiff for undue profit. So where a tenant for life having conveyed with covenant for seizin in fee, the purchaser was held entitled to recover the consideration money, deducting therefrom the value of the life estate, and for the same reason as in the case last cited, without interest. "The principle adopted in these cases," says the author, "has been recognized and applied in many others." See p. 90 and authorities cited in notes.

The argument against this is, that the purchaser ought not to be compelled to accept a title to a part, or an estate for life, when the fee or the entire estate was the inducement to the purchase. The reply is, that these would be important considerations upon an application to a court of equity for a rescission; but if the purchaser chose to sue upon a covenant at law without a rescission or offer to rescind, he can only recover to the extent of the breach—the contract of sale and conveyance remaining in force as to the part to which the title does not fail. See same authority, page 72; Morris *v.* Phelps, 5 John, 56. We have found no authority holding a contrary doctrine. The result is, the judgment must be reversed and a new trial awarded.

TURNEY, J.—I am of opinion the charge of the Circuit Judge is correct, and therefore dissent from this opinion.—*The Commercial and Legal Reporter.*

WE are indebted to HOYT POST, official reporter of the Supreme Court of Michigan, for the following opinion:

SUPREME COURT OF MICHIGAN.

THE MICHIGAN CENTRAL R. R. CO. *v.* WILLIAM W BURROWS.

Error to Kalamazoo Circuit.

CONNECTING LINES—LIABITITY OF FIRST CARRIER—FRUIT DAMAGED BY FROST IN TRANSIT—MUST BE TRANSPORTED WITHIN A REASONABLE TIME—WHAT WILL EXCUSE A CARRIER FOR NOT DELIVERING IN USUAL TIME—RELIEF GOODS HAVE THE PREFERENCE.

1. The plaintiff in the court below shipped, Nov. 10, 1871, 4 car loads of apples, at Vandalia, Mich., to their agents in Minneapolis. The apples were transferred by the defendant at Chicago to the next carrier Nov. 17, and arrived at Minneapolis on Nov. 22, badly injured by frost, having been frozen after leaving Chicago on or about the 21st of November; that before the fire of Oct. 1871, the usual running time of freight trains between Vandalia and Chicago was 24 hours; that at the time this shipment was made the average running time was ten days in consequence of the road being blocked with relief supplies for sufferers by the Chicago fire. The apples were carried in seven days. *Held*,

First. That they were transported within a reasonable time under the circumstances of the case.

Second. That what would or would not constitute unreasonable delay can not be determined by a comparison between the actual time and what had been the average running time between two given points under usual and ordinary circumstances. The proper question would be what was the average running time under the extraordinary and unusual circumstances existing at the time of the alleged delay? And, then, to ascertain whether the goods in question had been unreasonably delayed beyond such time.

Third. That the company was justified in not sending forward goods in the order received, and giving relief goods the preference: that the law is not so unjust and harsh as to punish a common carrier who makes such a discrimination under the circumstances, but rather commends and approves what was done.

Fourth. Even if there was unnecessary delay between Vandalia and Chicago, the defendant would not, by reason thereof, be liable for the injury which the apples sustained by freezing while in the custody of the next carrier.—[ED. LEGAL NEWS.]

MARSTON, J. — Defendants in error brought an action against the railroad company to recover damages claimed to arise from unreasonable delay on the part of the company in carrying apples from Vandalia, in this State, to Chicago.

It appeared that plaintiffs in the court below shipped, November 10th, 1871, four car loads of apples consigned to their agents at Minneapolis, in the State of Minnesota; that the apples were transferred by defendants, at Chicago, to the next carrier November 17th, and arrived at Minneapolis on the evening of Nov. 22d, badly injured by frost, having been frozen while in transit from Chicago on or after Nov. 21st.

It also appeared, and was not disputed, that the tracks of the railroad company were in good condition; that the company had abundant rolling stock of every kind to do all its business, and that it had no difficulty in moving, storing and taking care of freight previous to October 8th, 1871. That on the 8th of October a fire originated on the West side of the city of Chicago, and that about three hundred acres of the city were burned on that and the next day; that the depots belonging to the company caught fire from the surrounding buildings and were destroyed, as were also the tracks within three thousand feet of the depots, and also the tracks in the freight depots, thus rendering it impossible for the company to receive any fretght, having nei-

ther freight-houses to receive it in or tracks to handle it on. That the company immediately made all possible effort to temporarily replace their tracks and buildings, drawing, for snch purpose, their force of men from the east and west ends of their road. It further appeared, and was not disputed, that large numbers of people in Chicago, after the fire, were suffering and destitute, and that in order to relieve their immediate wants it became necessary to send clothing, provisions, building material, hardware, stoves, and other necessary supplies, known as relief goods, forward, which made the freight business threefold greater than it had been before the fire; that the company under these circumstances immediately issued orders, as soon as they were able to carry any freight, to give relief goods the preference, next in order fruit and perishable property, and then general merchandise.

It also appeared that at the time the apples in question were received by the defendant, its line of road was greatly blocked by an accumulation of freight occasioned by the causes already stated; that previous to the fire, the running time of freight trains from Vandalia to Chicago was about twenty-four hours; that at the time this shipment was made the average running time between the same points was ten days, on account of the fire and great increase of freight, and that the apples were carried in about seven days.

Under facts as stated, the defendant denied that there was any unreasonable delay on its road, and insisted that, having completed the carriage of the fruit over its road, and delivered it to the next carrier in good order, in no event could it be held liable for the alleged injury to the property, occurring while in transit, and in the custody of the next carrier.

Was there, then, under the circumstances stated, any unreasonable delay, on the part of the company, in the carriage of these apples between Vandalia and Chicago?

Railroad companies are bound to have all reasonable and necessary facilities and appliances for conducting and carrying on the business in which they are engaged in a prompt, skillful and careful manner. It is their duty to keep and maintain their tracks in a good condition and state of repair; have a sufficient supply of rolling-stock to carry, and suitable depots to receive, the usual and ordinary quantity of freight offered them for transportation, or which might reasonably and ordinarily be expected. They are not bound, however, to be prepared for unusual and extraordinary contingencies, which no ordinary prudence or foresight could reasonably foresee or anticipate, and where an unusual contingency has arisen, which, unexpectedly, largely increases the business, or prevents, as in this case, the handling of freight in so prompt and expeditious a manner as the company formerly had been accustomed to do, the company cannot be charged with unreasonable delay for not carrying freight in the same time it had done previous to such contingency.

In other words, what would or would not constitute unreasonable delay, can not be determined by a comparison between the actual time and what had been the average running time between two given points, under usual and ordinary circumstances. The proper question would be, What was the average running time under the extraordinary and unusual circumstances existing at the time of the alleged delay? And then to ascertain whether the goods in question had been unreasonably delayed beyond such time.

It appears, in this case, that the average running time between Vandalia and Chicago, when these apples were shipped, was ten days, while the time occupied in carrying and transferring the apples did not exceed seven, thus showing not only that there was really no delay in this case, but that these goods were given a preference, and were carried through in an unusually prompt and expeditious manner, under the circumstances. Look at the result of the doctrine, contended for by plaintiffs, if carried out. The usual and average time for carrying freight, before the fire, between Vandalia and Chicago was two days. Owing to the destruction of the company's tracks and depots, and the large and sudden influx of business, ten days was the average time actually required to carry freight between the same points, and it was impossible for the company to carry it in two days. Should the company, under the facts as presented, be liable for unnecessary delay in each case where more than two days was taken to transport freight between these points? To so hold would be to render the company liable in every instance, and that for a delay caused by circumstances over which it had no control.

The position taken by plaintiffs (defendants in error here), would make it the duty of the company to carry and deliver freight with the same rapidity, during the time of these extraordinary occurrences, that it did previous thereto, and hold it responsible for the delay if it did not. But the company found it impossible, without any fault on its part, so to do. The destruction of the tracks and depots utterly prevented the company from handling freight with its accustomed rapidity, and caused a blockade along the entire line. Circumstances beyond their control prevented, and the law does not seek to hold any one responsible, upon the ground of negligence, for not doing that which it was practically impossible to do.

It was urged, however, that it was the duty of the company to send forward freight in the same order in which it was received; that there should have been no discrimination made, no preference given, between the classes of freight received by the company for transportation.

After the fire large quantities of goods were being sent forward, by relief societies from all parts of the country for the purpose of both preventing and relieving the great suffering and distress which did exist, and otherwise would have existed among the people, who had, by a great public calamity, suddenly been left without proper clothing or houses to shield and protect them from the inclemencies of the season, or sufficient provisions to prevent many of them from imminent danger of starvation. So urgent was the demand for supplies, that relief societies sprung up as if by magic, all over the country. The people promptly responded to their calls, and the necessary supplies of all kinds were sent forward in such abundance that railroad companies, crippled as they were by the fire, found it difficult to promptly carry and dispose of their freights. Relief goods, therefore, were given the preference, and the companies would have been justly chargeable with public condemnation had they refused to give a preference to and carry all such goods offered for transportation, under the circumstances.

Although the company had suffered very great injury by the fire, yet it was doing all in its power to repair the damage as promptly as it could, and at the same time making every effort to carry forward all goods received, making, however, a just, proper and highly commendable discrimination in favor of that class of goods, which would alleviate the suffering and distressed. The law is not so harsh and unjust as to punish a common carrier who makes such a discrimination, under the circumstances, but rather commends and approves what was done.

While, therefore, it may be true as a general proposition, that it was the duty of the company to forward freight in the order in which it was received, yet, in this case, there was a great public necessity to which all general rules must bend, making it the imperative duty of the company to give relief goods a preference.

"The law itself and the administration of it," said Sir W. Scott, 2 Dods, 323-4, "must yield to that to which everything must bend—to necessity; the law, in its most positive and peremptory injunctions, is understood to disclaim, as it does in its general aphorisms, all intention of compelling to impossibilities, and the administration of laws must adapt that general exception in the consideration of all particular cases. In the performance of that duty, it has three points to which its attention must be directed. In the first place it must see that the nature of the necesity pleaded be such as the law itself would respect, for there may be a necessity which it would not.

A necessity created by a man's own act, with a fair previous knowledge of the consequences that would follow, and under circumstances which he had then a power of controlling, is of that nature. Secondly, that the party who was so placed used all practicable endeavors to surmount the difficulties which already formed that necessity, and which on fair trial, he found insurmountable. I do not mean all the endeavors which the wit of man, as it exists in the acutest understanding, might suggest, but such as may reasonably be expected from a fair degree of discretion and an ordinary knowledge of business. Thirdly, that all this shall appear by distinct and unsuspected testimony, for the positive injunctions of the law, if proved to be violated, can give way to nothing but the clearest proof of the necessity that compelled the violation." And it is also said to be a general rule, admitting of ample practical illustration, that, "where the law creates a duty or charge, and the party is unable to perform it, without any default in him, and has no remedy over, then the law will, in general, excuse him. Paradine *v.* Jane Alleyn, 27, cited per Lawrence, J., in 8 T. R., 267; Evans *v.* Hutton, 5 Scott, N. R., 670. This case comes within the principles quoted. Here was a necessity which the law would respect. It was not created by the company's own act, but by a power which proved to be beyond the control of man. The company used all practicable endeavors to surmount the difficulties which formed that necessity, and all this appeared by distinct and unsuspected testimony. We are all of opinion, therefore, that from the undisputed facts in this case there was not only no unreasonable or unnecessary delay in the transportation of the apples, but that the same were carried within the then average time of carrying freight between Vandalia and Chicago, and that the jury should have been so instructed.

Admitting, however, that there was unreasonable delay between Vandalia and Chicago, would the defendant, by reason thereof, be liable for the injury which the apples sustained by freezing while in the custody of the next carrier?

In Clark *v.* Moore et al., 3 Mich., 62, it was said: "No damages are ever recoverable in actions *ex contractu*, unless they are shown by the party claiming them to be the natural and proximate consequence of the breach complained of. Of course, each of the circumstances which concurred with the breach in producing the damage, and without which it would not have happened, is a part of its cause, and if any of these concurring circumstances are so far out of the ordinary course of nature, or of human affairs, that they cannot fairly be presumed to have been contemplated by the parties at the time of making the contract, then the damage is not the natural result of the breach, and is, therefore, not recoverable." This rule has been since repeatedly followed.

The contract which the defendant entered into, in this case, was to carry the property safely, and deliver it, within a reasonable time, to the next carrier at Chicago. The only breach of this agreement complained of was the failure to deliver within a reasonable time. Are, then, the damages claimed the natural and proximate consequence of such breach? We think not. To be so, the loss must be immediately connected with the supposed cause of it. The loss in this case might or might not have occurred, even had there been no delay. If, in the ordinary course of events, a certain result usually follows from a given cause, then we may well consider the immediate relation of the one to the other to be established. Cold, freezing weather does not, however, in the ordinary course of events, follow from mere delay. Such is not the natural and direct result of the delay. It is true that in certain climates and at certain seasons, such an injury would be much more likely to result from delay; while, at others, there would be not even a possibility of such a result following. It is very evident, therefore, that as we approach the one or the other, we must enter upon debatable ground, where it would be very difficult, if not, indeed, impossible, to say what the result of a given delay would be. Where fruit is to be carried a long distance, especially in such a country as this, where the climate is so changeable, it would as frequently result that delay would be the cause of averting such an injury as of contributing to it. It may be true that had there been no delay whatever, on the part of defendants, the loss would not have happened. The law, however, cannot enter upon an examination of, or inquiry into, all the concurring circumstances which may have assisted in producing the injury, and without which it would not have occurred. To do so would only be to involve the whole matter in utter uncertainty, for when once we leave the direct, and go to seeking after remote causes, we have entered upon an unending sea of uncertainty, and any conclusion which should be reached would depend more upon conjecture than facts.

Lord Bacon said: "It were infinite for the law to consider the causes of causes, and their impulses, one of another; therefore, it contenteth itself with the immediate cause, and judgeth of acts by that, without looking to any further degree." Bacon's Maxims.

The following cases are so directly in point, and the reasoning therein so satisfactory, that a reference thereto will render any further discussion unnecessary. Denny *v.* N. Y. C. R. R. Co., 13 Gray, 481; Railroad Company *v.* Reeves, 10 Wall., 176; Morreseri *v.* Davis, 20 Penn. St., 171; and Hoadley *v.* Northern Transportation Co., 115 Cass, 304.

The court, therefore, should have given defendant's eleventh request to charge. We think the court also erred in refusing to give defendant's twelfth request.

This request was based upon the assumption that the Chicago & Northwestern R R. Co. was guilty of negligent delay in carrying the apples, after delivery to them by the defendant, and the court was requested to charge, in substance: If the jury should find that without such delay the damage would not have occurred, then the plaintiffs could not recover. It is somewhat difficult to conjecture upon what theory the request was refused. If the jury should find that there was negligent delay on the part of the carrier to whom defendant delivered the apples, and that without such delay the injury would not have occurred, then clearly, this defendant should not be held responsible for an injury caused by the negligence of others, over whom it had no control.

Take the case of fruit during the summer season, shipped at San Francisco for New York. During the transit it passes over several different lines of railroad. There is a delay of two days on each line, and in consequence of the entire delay, the fruit, on reaching the ultimate consignee, is found badly damaged. Is the first carrier to be held responsible for the consequence of the entire delay? Such a rule, to say the least, would savor very much of harshness, and if carried out to its legitimate results, would, we think, end in absurdity. Suppose the fruit shipped at San Francisco was consigned to the European market, and each different carrier through whose hands it passed delayed it somewhat, and that in consequence of the combined delay, the fruit on arriving at its destination was found injured, or arrived during a riot and was wantonly destroyed, should the first carrier be held responsible for the entire loss? To so hold, there should be something in the undertaking or agreement into which the company entered to show that it contracted with reference to such an enlarged liability. In other words, such an injury would not be the natural result of the delay on the part of the first carrier, but the result in part of the combined delay. It would not, therefore, naturally result from the breach on the part of the first carrier. Nor could such a result have been contemplated by the parties at the time of entering into their agreement.

As the view we have taken of this case will be decisive upon a new trial, we do not consider it necessary to discuss the other questions raised. The judgment of the court below must be reversed with cosants, da new trial granted.

THE CITY MARSHAL.—R. E. GOODELL has been nominated by Mayor COLVIN for City Marshal. This is one of the very best nominations ever made by Mayor COLVIN, and it is to be hoped that Mr. GOODELL'S nomination will be confirmed at the next meeting of the Council. He will make an able and efficient Marshal, and manage the police force for the best interests of the entire city, and to the satisfaction of the law-abiding tax-payers.

CHICAGO LEGAL NEWS.

Lex vincit.

MYRA BRADWELL, Editor.

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We call attention to the following opinions, reported at length in this issue:

Purchase of Grain—Draft—Bill of Lading—Invoice.—The opinions of the Supreme Court of the United States, by Strong, J. In a case where a firm requested a commission house in Milwaukee to purchase a quantity of wheat, which the commission house did, and consigned it to the cashier of the Milwaukee Bank, and handed over to the bank the bills of lading as a security for the drafts drawn against it, and sent invoices to the firm that requested to purchase the wheat. There are several important questions of commercial law settled in this opinion.

Information for Having Distilled Spirits in Possession, etc.—The opinion of the United States Circuit Court for the western district of Missouri, by Dillon, J., as to what are sufficient allegations in an information for having distilled spirits in possession with the intention of evading the payment of the taxes thereon.

Naturalization of Aliens—County Courts May.—The opinion of the Supreme Court of this State by Scott, J., holding that a record of naturalizatlon made by a court of competent jurisdiction, can not be impeached in a collateral proceeding, by showing that the preliminary steps required by law have not in fact been taken, as where it is alleged that the person had not, at the time of the naturalization, resided one year in the State in which the naturalization took place; that the criminal court of St. Louis county, Missouri, has jurisdiction to admit aliens to citizenship. The most important portion of this opinion is that which overrules the doctrine laid down in Knox Co. *v.* Davis, that the County Court as organized under the constitution of 1848 did not have jurisdiction to admit aliens to citizenship. The Court say the construction of "the act should be, as far as practicable, uniform by the decisions in the several States, in order that naturalization of aliens, valid by the decisions of the courts of one State, may not be declared invalid by the Courts of another State." Breese, J., does not concur in the opinion.

Covenant of Seizin—Breach—Measure of Damages.—The opinion of the Supreme Court of Tennessee, by McFarland, J., as to the measure of damages upon breach of a covenant of seizin.

Connecting Lines.—The opinion of the Supreme Court of Michigan, by Marston, J.

NOTES TO RECENT CASES.

WILL—GIFT TO CHILDREN—ILLEGITIMATE CHILDREN NOT INCLUDED.

The House of Lords in Dorin *v.* Dorin, 33 L. T. Rep. N. S., 281, held that the word "children," used in a will, *prima facie* means legitimate children, unless, when the facts are ascertained, some repugnancy or inconsistency would result from so interpreting it; that the probable intention of the testator cannot be taken into account. A testator gave all his real and personal property to his wife for life, with power to dispose of it "amongst our children" by will; and should she make no will, the property to be divided "equally between my children by her." At the time of making the will he had two illegitimate children by her, whom he had always treated as his own; he never had any other children by her. It was held, reversing the judgment of the court below, that the illegitimate children were not the objects of the power and could not take, in default of appointment; and that subject to the life estate of the wife, the property was not disposed of by the will.

PLEA IN FEDERAL COURT OF PRIOR ACTION PENDING IN STATE COURT.

The United States Circuit Court for the district of Iowa, in Brooks *v.* Mills Co., 2 Central Law Journal, 719, held that a plea to an action pending in the Circuit Court of the United States, which sets up the pendency of a prior litigation in a State court within the same district, between the same parties and upon the same subject matter, is a good plea in abatement; but if the plea on its face discloses that the parties to the litigation in the State court are not the same as those to the action in which the plea is filed, the defendant will be ruled to answer.

Recent Publications.

Union College of Law—Moot Circuit Court. Rules and Cases. Judge—a Member of the Faculty. By Professor VanBuren Denslow. Chicago: Legal News Company. October, 1875.

This is a pamphlet of thirty-six pages, written by Professor Denslow, for the use of the students of the Union College of Law. There are two moot courts, one for the senior and the other for the junior class. They are entitled, "Moot circuit court of the senior (or junior) class of the Union College of Law." Each court organizes on the first Wednesday of the term by electing from its own class two associate judges, a clerk and sheriff. Statements of facts are prepared by the faculty, students are selected to personate the respective parties named in the statements, and the suits are brought and defended in the names of such students. Some of the most spirited contests take place in these moot courts. There are 56 cases stated in this pamphlet. It may be obtained of Professor Denslow. Price, 30 cents.

The American Reports: Containing All Decisions of General Interest Decided in the Courts of Last Resort of the Several States, with Notes and References. By Isaac Grant Thompson. Vol. XV. Containing all Cases of general importance in the following Reports: 9 Bush., (Ky.); 47 Georgia; 49 Georgia; 50 Georgia; 4 Houston, (Del.); 44 Indiana; 45 Indiana; 46 Indiana; 10 Kansas; 11 Kansas; 12 Kansas; 111 Massachusetts; 115 Massachusetts; 27 Michigan; 28 Michigan; 56 New York; 57 New York; 24 Ohio St.; 74 Pennsylvania St.; 75 Pennsylvania St. Albany: John D. Parsons, Jr., Publisher. 1875.

This is a valuable series of Reports. The cases selected are the cream of those published in the State Reports. We think, however, that the author claims too much when he says that the present volume contains all cases of any general importance in twenty-one volumes of State Reports. Mr. Thompson is an experienced and skillful reporter. His head-notes are short, clear and accurate. Of the cases in this volume we notice the following: In Hunt v. State, 677, it is held to be error for a judge presiding at a criminal trial to limit the prisoner's counsel to forty minutes for his argument. In Hilderbrand v. The People, 435, where the prosecutor took a drink at a bar and handed a fifty dollar bill to the bar-tender, who took it and refused to give change, it was held to be larceny. In Beck v. Allison, 431, it is said that equity will not enforce specific performance of a covenant in a lease, on the part of the lessor, to repair damages by fire. In Stanly v. State, 605, it is held: the bringing into Ohio, by the thief, of goods stolen in the Dominion of Canada, or other foreign country, is not larceny in Ohio. In Conyers v. State, 687, it was held on the trial of a keeper of a billiard table, charged with permitting a minor to play billiards at his table without the consent of the parent or guardian of the minor, the burden of proving that the parent or guardian did not consent is upon the State.

Reports of Cases Argued and Determined in the Circuit Court of the United States for the Second Circuit. By Samuel Blatchford, Judge of the District Court of the United States for the Southern District of New York. Volume XII. New York: Baker, Voorhis & Co., Publishers, 66 Nassau street, 1875. For sale by E. B. Myers, law bookseller, Chicago.

This volume commences with cases of April, 1874, and ends with cases of June, 1875. We think some of the opinions could be pruned and made to occupy less than one-half the space. That they would be more valuable to the profession if more authorities were cited. Judges who deliver opinions orally, and have them taken down in short hand, are apt to extend them to an unreasonable length. The cases of this circuit involve as great a variey of important questions as any other in the United States, and its judges are able and experienced, which makes this series of reports one of the most valuable of the many federal reports.

The Loves of a Lawyer: His quandary, and how it came out. By Andrew Shuman, editor Chicago *Evening Journal*, Chicago: W. B. Keene, Cook & Co. 1875.

The first thing, upon opening the volume, that meets the eye is Cupid in his chariot drawn by two doves. This, suggestive as it may seem, is simply an insight into the contents of the book. It is a story with a good deal of love in it as its name implies, and yet brimful of good suggestions, capital hits, and most thoroughly sensible ideas. In typographical appearance, it is all one can wish for; it is very handsomely gotten up, and we predict for it a large sale, especially when we remember it is produced by one of Chicago's favorites—a man most highly esteemed by the citizens of the Garden City.

Injunction Dissolved.—On Tuesday Judge Farwell, of the Circuit Court, dissolved the injunction which prevented the county from paying Otto Peltzer $45,000 for his abstract books, which had been purchased by order of the county commissioners. Judge Farwell held that the county board had the authority to make the purchase, and that the court had no right to interfere with their discretion, unless in case of fraud, etc. Mr. Peltzer, soon after the injunction was dissolved, received his money.

The Lake Front.—The sale of a portion of the lake front is now being agitated by the Common Council of this city. It is said the railroads are anxious to purchase it. We are at a loss to see, in the face of Judge Drummond's opinion and injunction, how the city can sell this property. We published this opinion in 1 Chicago Legal News, 427. The learned judge held that there was a dedication of this property to public use subject to the condition that if was to be "public ground forever to remain vacant of buildings," and that the fee, subject to the dedication, was still in the United States. We should like to know by what authority the Council can sell the land of the United States. This injunction has remained in force ever since September, 1869. The railroads have not even dared to present the question to the Supreme Court of the United States, as they undoubtedly would have done before this if they believed the injunction could be dissolved.

Reduce the Rates of Postage on Third Class Matter.—Every lawyer, every clergyman, every literary man, every publisher, every reader of books in the United States, is interested in having the rate of postage on third class matter reduced one-half, which will bring it down to the old rate, where it was before the express companies succeeded in doubling it. Every person who orders a book or package of blanks to be sent by mail has to pay just twice as much postage as formerly, and as a consequence a large proportion of such packages are sent by express. The government, when it has a monopoly of carrying mail matter, ought certainly to be able to carry it as cheap as express companies. Let the people take this matter in hand and see that the old law is restored.

Vice President Wilson.—Vice President Henry Wilson died in what is known as the vice president's room, in the senate wing of the capitol, at an early hour on Monday of this week. It can truly be said of Mr. Wilson that he was a great and good man. For the last twenty years he has been one of the foremost leaders in the cause of liberty and equal rights. He believed that every citizen of lawful age, without regard to sex or color, should have a voice in the management of the government and the selection of officers. It is worthy of remark that Chief Justice Chase and Vice President Wilson, who were strong woman suffragists, should both die in office.

General Albert Erskine.—We regret to have to announce that General Erskine, deputy clerk of the United States District Court in this city, while attending to his official duties, about twelve o'clock on Monday, was, without any warning whatever, seized with an apoplectic stroke, of which he died the following evening. General Erskine was born in Bristol, Maine, and came to the west about twenty years ago. He served through the late war with distinction as colonel of the Thirteenth Illinois Cavalry. For gallant services he received, at the close of the war, a brevet brigadier generalship. He entered the government service after his retirement from the army and was appointed chief clerk in the office of General M. R. M. Wallace, then assessor of internal revenue for this district. Afterwards he held a position of trust in the Chicago post office. About three years ago he was appointed to the clerkship which he held up to the time of his death. He was a cousin of Judge Drummond, of the United States Court. General Erskine had a host of friends; he possessed a cultivated mind, was gentle in his manners, and exceedingly warm-hearted and sympathetic.

THE LIMITS TO THE JURISDICTION OF COURTS.

LECTURE BY A. M. PENCE, ESQ., BEFORE THE UNION COLLEGE OF LAW.

[Continued from page 71.]

And if such decree is not reviewed by writ of error or appeal, that the title obtained under such a decree will be good and binding.

The test of the jurisdiction of a superior court over the *subject-matter* is this: Has such court jurisdiction over that class of subjects, viz.—to decree a specific performance—to foreclose mortgages or declare trusts, etc.?

If it has, then it matters little what may be the allegation of the bill.

And when you examine a title depending upon such a sale, you may be sure the title will not fail for want of jurisdiction of the subject-matter, although the averments of the bill are the most meagre, and the proceedings very erroneous. Thompson *v.* Morris, 57 Ill., 333.

And you will also remember, that although five years have not elapsed since the rendition of the decree or judgment, and hence is subject to a review by writ of error, and may be reversed, yet, if a title be acquired by judicial sale or otherwise by virtue of such judgment, in the mean time, it will be protected and stand, although the judgment on which it is based be reversed afterward.

Hence the importance of knowing what are jurisdictional facts and what are simply errors.

But no presumptions are indulged in favor of the jurisdiction over the *subject-matter* of a court of inferior or limited jurisdiction.

The facts which give jurisdiction must appear set out, properly averred in the bill or petition, or the court will have no power, and its proceedings will be a nullity. For instance, in the case of a petition to sell real estate which has descended to heirs, for purpose of paying debts of ancestor, it must appear by the petition that all the requirements of the statute have been complied with. It must appear affirmatively, or the court will have no jurisdiction of that special case, although it has jurisdiction generally to sell real estate for that purpose.

Every case in a court of limited jurisdiction must appear by the record to be within the jurisdiction, or it will be a nullity, and may be attacked collaterally everywhere. Stow *v.* Kimball, 28 Ill., 93; Bree *v.* Bree, 51 Ill., 367; Unknown Heirs of Langworthy *v.* Baker, 23 Ill., 489.

You know that letters of administration, or letters testamentary, must issue from the probate court of the county where the party resided at the time of his decease.

But suppose that a man resided in Sangamon county, Illinois, at the time of his decease, but that letters of administration were prayed for in Cook county, the petition setting forth that the deceased resided in Sangamon county, or was silent on that subject, the court here would refuse such letters.

But suppose that the petition filed stated that he resided in Cook county, when, in fact, he resided in Sangamon county, the court would hear evidence and decide upon that question. And if the court decided that he resided in Cook county at the time of his decease, which was a mistake of fact, that would give the court jurisdiction over his estate, and the question could never be raised again in a collateral action. If not set aside by a direct proceeding the finding of the court would be conclusive upon the world. Fisher *v.* Bassett, 9 Leigh, 119; Irwin *v.* Schreiber, 18 Cal., 499.

The court had jurisdiction to inquire into its jurisdiction, and although its decree was wrong upon the fact, yet, when found, its finding is conclusive in all collateral proceedings.

And there can be no inspection behind the judgment save by a direct proceeding.

But I take it, if the Court of Probate in Cook county granted letters in the first case, I mentioned, viz: where the petition showed that the decedent resided in Sangamon county, then in that case the proceeding would be a nullity and the administrator no administrator.

I understand that this very question has arisen and is now in the Supreme Court of this State, and the decision will be a matter of some interest. There is one instance in regard to attacking jurisdictional questions collaterally, which is an anomaly, and I call your attention to it. An act of Congress provides that full faith and credit shall be given in each State to the records and judicial proceedings of every other State as are given to them in the State where the proceedings arise. But it is held that any court may examine into the fact as to whether such court of a sister State actually have jurisdiction, and go so far as to contradict the finding of such court by parol, by outside evidence. Why such a rule has obtained I know not. It is contrary to all analogies. See Thompson *v.* Whitman, 18 Wall., 457; Bimeler *v.* Dawson, 4 Scam., 541.

How far is a judge responsible, in case he acts without having jurisdiction?

An action cannot be supported against a judge nor a justice of the peace acting judicially, and who has not exceeded his jurisdiction, however erroneous his decision or malicious his motive. Bradley *v.* Fisher, 13 Wall.; 1 Chitty Pl., 68

It is better that an individual should occasionally suffer a wrong, than that the course of justice should be impeded and fettered by constant restraints and apprehensions on the part of those who administer justice.

And the Supreme Court of the United States, in the case last referred to say in explicit terms, that however malicious a a judge may act, still having jurisdiction, no action can be maintained against him.

A judge is not bound at the peril of an action for damages or of personal controversy to decide right in a matter of law or of fact, but to decide according to his own convictions of right, of which his recorded judgment is the test, and must be taken to be conclusive evidence.

Now, it is manifest that to every controversy there are two sides, and that a decision in favor of one must be against the other, and this extends to every interest men hold most dear—to property, reputation and liberty, civil and social—to political and religious privileges—to all that makes life desirable—and to life itself.

If an action might be brought against a judge, by a party feeling himself aggrieved, the judge would be compelled to put in issue facts in which he has no interest, and the case would be tried before some other judge, who, in his turn, might be amenable to the losing party, and so indefinitely.

The losing party may always aver that the judge has acted partially or corruptly, and if the action was permitted, may offer evidence to prove it, and these proofs are addressed to the court and jury before whom the judge is called to defend himself, and the result is made to depend not upon his original conviction, the conclusion of his own mind in the decision in the original case, as by the theory of jurisprudence it ought to do, but upon the conclusion of other minds, under the influence of other and different considerations. See opinion of Chief Justice Shaw, in Pratt *v.* Gardner, 2 Cush., 68.

No one would ever dare to sit as a judge or make a decision if he could be accused of corruption and be called upon to defend himself. It would ruin him in estate and reputation.

Hence, the law throws a shield around the judge from public policy. If he acts corruptly he is liable to impeachment, but it cannot be permitted that he shall ever be called upon to defend himself in an action for damages.

Courts of review are established to correct erroneous judgments. Judges have been impeached for corruption, and that is the only remedy. When the judge has jurisdiction to pass upon the question submitted he is not liable in damages. But courts must act within their jurisdiction, and if they go beyond or exceed it they do become liable.

Thus, if the court of probate should issue a warrant to arrest a man for murder or burglary, and he should be arrested thereon, such judge would be held liable in an action for damages, for he has no more authority to issue such a writ than has any other individual.

But should a justice of the peace cause a man to be arrested upon a warrant for the same offense, he would not be held liable in damages, although the charge turns out to be unfounded, because the justice of the peace is given such authority, and he can not be called upon to account for a mistake in judgment, that class of cases being within his jurisdiction.

No person is liable in a civil action for what he has done as a judge, while acting within the limits of his jurisdiction; but if persons having a special or limited judicial authority do any act beyond the scope of their authority, they make themselves trespassers. Every such tribunal decides at its peril.

And process issuing therefrom is no protection to the court, attorney, party or officer who innocently executes it. If the act be done within the limit of their authority, although it be done through an erroneous or mistaken judgment, they are not thereby liable to such an action.

A judgment was rendered by a justice against A. and B., co-defendants, but over A. he had no jurisdiction.

An execution issued therein, in its terms leviable on the individual property of either defendant. *Held*, the justice was liable in damages for a levy upon the property of A.

A justice of the peace is liable for an arrest for contempt, when the act charged as a contempt was committed at a time when the justice was not actually engaged in a trial. See Winship *v.* People, 51 Ill., 296.

The want of jurisdiction which renders the judge liable, applies to want of jurisdiction either over the person or the subject-matter.

We have before seen that a party may appear and consent and submit to jurisdiction of the court when there is no service, but the want of a general jurisdiction over the offense can not be cured by assent, that is, a man can not give jurisdiction to the probate court to try him for burglary. Nor can he give jurisdiction to the criminal court of Cook county to try an action of ejectment. A judgment in such a case would be a nullity and could not be set up in defense in any action.

When, however, a court has a *general* jurisdiction over the subject-matter of a complaint or action, the proper way for defendant to take advantage of a want of jurisdiction over the person is at the time by plea.

And a party who fails to make the objection then may be precluded from relying upon it in the future.

A party cannot be relieved against a sentence for contempt, unless it should appear that the court pronouncing the contempt did not have jurisdiction in the matter.

A disobedience to the order of a court will be a contempt only when the court had the jurisdiction over the case in which the order was made. A proceeding for a contempt is a collateral action, and the jurisdiction of the court can only be attacked when there is an absolute want of power in the court to entertain jurisdiction over the class of subjects sought to be brought into adjudication by the proceeding in which the order was made.

Where there is a want of power, the decree is void collaterally; but where it is only meant by the term want of jurisdiction, that it would be erroneous to exercise the power, and the decree would be reversed on appeal. It means a want of equity, and not a want of power. A decision upholding the jurisdiction of a court is entirely consistent with a denial of any equity, either on the plaintiff or any one else. People *v.* Sturtevant, 9 N. Y., 273; Davis *v.* Mayor, 1 Duer., 451; Curtiss *v.* Brown, 29 Ill., 231.

As to courts of general jurisdiction that have the general power to commit for contempt, while in session, for acts done in their presence, if the sheriff, in return to a writ of *habeas corpus*, should simply make a general return that he held the party under a warrant issued by such a court for a contempt, nothing further could be done, and the petition for the discharge would be dismissed.

Either house of Congress or of the English Parliament has the authority of a superior court in such matters.

A very interesting case arose before Lord C. J. Denman, before referred to—that of Stockdale *v.* Hansard, 11 Ad. & Ellis, 292.

As before stated, Stockdale had obtained a judgment before the Queen's Bench against the Hansards, who were the parliamentary printers, on account of a parliamentary report, published by them, which contained a libel upon him. An execution was issued and levied upon their property; whereupon the House of Commons issued a warrant for the arrest of the sheriffs for contempt of their authority in ordering the same to be published, as was done by the Hansards. A *habeas corpus* was sued out by the sheriffs before the Queen's Bench. The attorney general directed the sergeant-at-arms to make a *general* return; that he held the bodies of the sheriffs by virtue of a warrant under the hand and seal of the speaker, for a *contempt* and breach of privilege of the House.

Lord Denman stated it, as clear law, that the Court of Queen's Bench could not examine into the validity of the commitment, but must presume that what any great court, much more, what either house of Parliament, acting on great legal authority (that of the Attorney-General Campbell), takes upon it to pronounce a *contempt* is so, adding, with graver sarcasm: "Indeed, it would be unseemly to suspect that a body acting under such sanctions as a House of Parliament would, in making its warrant, suppress facts which, if discussed, might entitle the person committed to his liberty."

As before stated the chief justice decided that the House had no such privilege as to cause the publication, and that hence, a party could not be committed for a breach of that which did not exist.

But the case well illustrates the powers and limitations of the courts.

The House having the general power to commit for contempt, the court could not inquire into its improper exercise by going outside of the record.

An amusing case occurred not long since in one of the English courts. R. V. Williams, County court judge and magistrate, was summoned before the magistrates of Rhyl, by Edward Powell, a car driver, for an assault. That is, he was summoned before his own court. He appeared before the other magistrates, and upon coming in he saw the car driver, and asked a police officer: "Is that the man?" On being informed that it was, the defendant went on to say: "I sentence you to seven days imprisonment in the jail at Mold. You interrupted me when I was coming to this court, and by the Act of Parliament I have the power to send you to jail without any evidence or any inquiry whatever." Mr. Justice Williams then pointing said: "Take this man to jail." And he was committed for contempt.

When the other magistrates arrived, although Mr. Justice Williams had stricken out the charge against himself with his own hand, they proceeded to try the cause. It appeared in the evidence that the justice had struck Powell over the face with his whip, on the road, because Powell did not get out of his way. After consultation the other judges found that the assault had been committed, and they inflicted the highest penalty upon their fellow judge—£5 and costs. Mr. Justice Williams said, "I shall not pay." Says the court, "In default, there will be fourteen days imprisonment."

The case shows not only the incorruptibility of English courts, but the sequel is this: Mr. Powell having been committed to jail for contempt, by the offending justice, the other judges could not interfere because each justice had general authority to commit for contempt.

The man remained in jail, and afterwards brought an action for damages against the judge, because he had no jurisdiction to send him to jail.

I believe that the judge subsequently was compelled to resign his office on account of public opinion against him, because of his illegal acts.

I have stated, that if a court exceeds its authority the judge becomes liable at the suit of the party injured, but it is sometimes a little difficult to determine whether the exercise of the power is simply erroneous, or whether the judge exceeds his powers.

A very interesting case has recently arisen in New York city. A party by the name of Lange was indicted before Judge Benedict of the U. S. District Court, for converting to his use certain mail bags. The penalty for the offense was a fine not exceeding $200, *or* imprisonment for one year. The court read or construed the penalty, maliciously or otherwise I do not know, to be $200 *and* imprisonment for one year; and upon conviction sentenced him to suffer both penalties. Lange paid his $200, and then after eleven days imprisonment, the term having ended, the court having discover-

ed his mistake, sent for him and resentenced him for one year, omitting the first penalty which had been already paid.

Thus he paid one penalty, suffered 11 days, and was then sentenced for one year, making his whole punishment in in reality both penalties, and eleven days beside, whilst the law provided that he should suffer only the one or the other.

A *habeas corpus* was then sued out before His Honor, but without relief. Then he applied to Judge Blatchford, the Circuit Judge, without relief; and then he applied to the Supreme Court at Washington, who released him, upon the ground that the court exceeded its jurisdiction in sentencing him to both penalties, and having paid one, he was entitled to his release, and, especially, was the second sentence of the court, the term having ended, *coram non judice*, and void.

You know that a court can not interfere to change its judgment after the term is past.

Mr. Lange, who is said to be a gentleman, has sued Judge Benedict in the State court for a large amount of damages for false imprisonment.

The Judge pleaded his privilege as a judge, but Judge Van Brunt sustained a demurrer to his plea, holding that the plea is bad.

We may therefore see a high federal judge mulcted in large damages in a State court, for exercising jurisdiction where he had no right. But this is an open question.

Another case has also arisen in New York, with which the public is familiar, viz: the Tweed case, in which the Court of Appeals of the State of New York have attempted to apply the doctrine of the Lange case, in the interest of the greatest scoundrel on American soil, but without success.

It has been the law, wherever the principles of the common law had obtained, that a party might be tried for several misdemeanors at one and the same time, and cumulative sentences imposed, — one sentence commencing when the other ended. No legal writer has ever disputed the rule, and I believe that not a single case in England or America can be found holding a contrary doctrine. The same doctrine has just been announced by the Supreme Court of Illinois. But the New York Court of Appeals has chosen to lay down a different rule, commencing with Mr. Tweed, and in his interest. It would seem that the court might have commenced to announce its new doctrine with some other criminal than Tweed.

But the infamy of the decision does not consist in this change of a long established rule, because if the Tweed case had been taken to the court of appeals, by appeal or writ of error, and that court had seen fit to reverse the case and establish a rule, that only one misdemeanor could be tried at a time, then he might have been tried anew, upon all these charges, in separate suits; but having released him on *habeas corpus*, which is a collateral proceeding, he can not be tried again for the same offense, for if he were put on trial for the same offense, he could plead the former judgment, and defeat the action upon the ground that no one can be twice put in jeopardy for the same offense.

Tweed having raised the legality of his commutation sentences in a collateral action, the only question the court of appeals had a right to ask or decide was, whether the court of Judge Davis which tried him, had jurisdiction of the person of Tweed and over the subject matter. There was jurisdiction of his person, and the court had jurisdiction over misdemeanors, and how can any lawyer claim that the action of the court in the premises was absolutely void for want of jurisdiction. The court might have held the judgment erroneous (but without precedent), but that it should be held void, is a surprise and shock to the sense of the legal fraternity.

The Tweed case has nothing in common with the Lange case. There seems to have been an appeal taken from the Court of Appeals, to the people, and the question is now being discussed before that tribunal in the State of New York, and we may expect an earlier decision of the cause than the Court of Appeals could have reasonably anticipated.

CIRCUIT COUR OF COOK CO., ILL.

OPINION NOV. 17, 1875.

PERKINS v. PAUL.

JUDGMENT OF JUSTICE—FILING TRANSCRIPT—LIEN ON LAND—EFFECT OF APPEAL ON.

A plaintiff recovered judgment before a justice of the peace, swore out execution on the day of the judgment, had it returned no property found on the day it issued, and filed a transcript of the judgment in the office of the clerk of the Circuit Court. The defendant appealed the case to the Circuit Court, and moved the court to set aside the record of the transcript of the judgment, which the court refused to do on motion, holding that the appeal did not divest the lien of the plaintiff which he had acquired by filing the transcript.—[ED. LEGAL NEWS.]

Opinion by ROGERS, J.

This case presents a question that I have not had occasion to consider before, and one that I am not aware has been considered by any of my brother judges.

Perkins and others obtained a judgment against Edgar T. Paul, before Justice Meech, on the 5th day of August last. An execution was immediately issued upon the affidavit filed by complainants, and returned by the constable the same day, "no personal property found" on which to levy an execution. Thereupon the complainants obtained a transcript of the record of the judgment, execution, et cetera, filed it in the clerk's office of this court, under the statute authorizing such a proceeding, and sued out an execution upon it. Before the twenty days had expired from the rendering of the judgment, within which time defendant had a right to take an appeal and file a bond before this court, which was approved, and his appeal was perfected by filing his transcript and bond in this court. Thereafter and during the present term of the court, a motion was made by the attorneys of the appellee to set aside the record of the transcript in this court, upon the ground that the case had been appealed, and upon his insisting that that superseded the judgment below, and that the party had no right to have his lien which he had obtained by filing his transcript in this court continued on the dockets of this court, or the records of this court.

I was very much inclined, when I first heard this case, and it was argued briefly before me, to sustain the motion at that time, suggesting, however, that the term having expired, I doubted my authority. And the case went over, but the motion was renewed, or again called up subsequently, and is now for my decision.

The statute gives that right. In express terms it authorizes a party upon obtaining a judgment before a justice having his execution issued and returned "no personal property found" to levy upon, to file his transcript here, which, in the language of the statute, is to have the effect of a judgment, and upon which he is entitled to his execution, and having the effect of a judgment, as a matter of course it makes a lien upon the real estate, and that, I suppose, is the trouble in this case. That is the reason they want to get clear of it. If it is a judgment of this court, then, having been filed and made a judgment in the July term of the court, I would have no right, I think, to set it aside; although it was insisted that, under the statute abolishing writs of error *coram vobis* and *coram nobis*, and giving this court jurisdiction in such cases upon motion, this court would have a right. I don't think so. There was no error committed by this court at all. There was no action by this court. It is a statutory provision—a statutory remedy—a right given by a statute, and there is no action of this court required at all. Under the statute it has simply to be filed in the clerk's office, made a matter of record, and thereupon, without any action of the court at all, it has the effect of a judgment. I don't think, therefore, that a writ of error from this court would have met the case under the old statutes, and I don't think that a motion can reach it now. First, because the term has expired if it is a judgment of this court; second, because it is a statutory remedy given, and the courts have no right to interfere with them. It is sharp practice. It is speedy action. But it does not give the plaintiff, at last, any more rights than the plaintiff in this court where we have original jurisdiction of cases entirely, when a case is tried here, and judgment rendered, and the case is appealed to the Supreme Court.

The judgment remains as a lien upon the real estate, and the party has his additional security, and of the appeal bond also, just as this plaintiff has the additional security here by his appeal bond. I don't think I have any right to interfere with it, and shall overrule your motion, sir, though I think it is a practice that is a little sharp.

A man ought to have a right to have time to turn round and take his appeal, before these liens are accumulated upon him. But if the statute gives him the right, this court has no right to interfere with it. My remarks, therefore, apply simply to my opinion that the law ought to be amended in some respects, but you will have to go to the legislature for that and not apply to this court.

PERKINS & TRUMAN.
L. C. COLLINS.

SUPREME COURT OF ILLINOIS.

The following table has been prepared by Mr. Hamburgher, clerk of the Central Grand Division, showing when cases will be called, and the time when Briefs and Abstracts must be filed in each:

JANUARY TERM, 1876.

No. of cases called each day.	WHEN CALLED.	Plaintiffs or Appellants Abstracts & Briefs must be filed.	Defendants or Appellees Briefs must be filed.	Plaintiffs or Appellees Reply must be filed.
1 to 20	Jan. 10	Jan. 8	Jan. 18	Jan. 28
21 to 40	" 11	" 10	" 20	" 29
41 to 60	" 12	" 11	" 21	" 31
61 to 80	" 13	" 12	" 22	Feb. 1
81 to 100	" 14	" 13	" 22	" 2
101 to 120	" 15	" 14	" 24	" 3
121 to 140	" 17	" 15	" 25	" 4
141 to 160	" 18	" 17	" 27	" 5
161 to 180	" 19	" 18	" 28	" 7
181 to 200	" 20	" 19	" 29	" 8
201 to 220	" 21	" 20	" 29	" 9
221 to 240	" 22	" 21	" 31	" 10
241 to 260	" 24	" 22	Feb. 1	" 11
261 to 280	" 25	" 24	" 2	" 12

All records for the Term must be filed by the second day of the Term.

Notice is also given that the people's docket is not enumerated here; they having preference over other cases; also rehearing docket.

Parties transmitting Records and Briefs, will please send same by express, charges paid.

E. C. HAMBURGHER, *Clerk.*

It is not strictly true to say, "all records for the Term must be filed by the second day of the Term." Mr. Hamburgher might have added in a note, that section 72, Revised Statutes 783, provides that if ten days, and not twenty, shall have intervened between the date of the decree judgment, or order appealed from and the sitting of the Supreme Court, then the record shall be filed on or before the tenth day of the Term.

TO THE MEMBERS OF THE CHICAGO BAR.

OFFICE OF CLERK SUPERIOR COURT OF COOK COUNTY, CHICAGO, ILL., NOV. 27TH, 1875.—As my term of office is about to terminate, I would respectfully ask the members of the bar to send to me by letter, or otherwise, a statement of the title of cause, date of receipt, and the amount of moneys that has been paid into court, in any cause in which they are interested, to abide event of suit, and which moneys still remain in the hands of the clerk.

I desire to compare these statements with my books, so as to correct any mistakes that may have occurred.

A. F. STEVENSON.

JUDGE MCALLISTER AND THE PRISONER WHOSE COUNSEL WAS NOT ON THE ROLLS OF THE COURT.

Judge McAllister, formerly of the Supreme Court of Illinois, was, several years ago, judge of the Criminal Court of Cook county, in Chicago. One morning, amongst other cases, a woman was arraigned before him for some offense. When her case was called, the Judge looked for some member of the bar—of which there were a goodly number present—to interpose in her behalf, but, as none moved in that direction, the Judge turned his attention to the prisoner, who, as appears, was a kind of religious enthusiast of some sort, and inquired. "Madam, who appears for you as your counsel in this case?" The woman promptly replied, with an air of the utmost unconcern, "Your Honor, the Lord is my counsel and defender." "That may be, madam," responded the Judge, "but he does not practice in this court."
—E. M. HAINES, *in Legal Adviser.*

UNITED STATES SUPREME COURT.

PROCEEDINGS OF.

Thursday, Nov. 18, 1875.

On motion of R. P. Lowe, Wm. Phillips, of Des Moines, was admitted.

No. 49. John Carey et al. v. Henry T. Brown. The argument of this cause was continued by Conway Robinson for plaintiffs, and by T. J. Durant for defendant, and concluded by Conway Robinson for plaintiffs.

No. 50. Isaac N. Bressler v. Nelson Maxson et al. This cause was submitted on printed arguments by Jas. K. Edsall, of Illinois, and Wm. M. Kilgour of counsel for the plaintiff in error, and by H. C. Burchard, of Illinois, for defendants.

No. 57. The Mississippi and Missouri Railroad Company et al v. Chas. Cromwell. This cause was submitted on printed arguments by Geo. G. Wright and P. P. Lowe for the appellants, and by John A. Rogers for appellee.

No. 52. Rufus K. Sewell, administrator and, etc. v. John Winslow Jones et al. The argument of this cause was commenced by E. A. Dickerson for appellant.

Adjourned until Friday at 12 o'clock.

Friday, Nov. 19.

On motion of P. Phillips, Uri J. Baxter of Grand Rapids, Michigan, and William J. Johnson of the District of Columbia, were admitted.

No. 52. Rufus K. Sewell, administrator, etc. v. John Winslow Jones et al. The argument of this cause was continued by E. N. Dickerson for the appellant, and by W. H. Clifford for appellees, and concluded by E. N. Dickerson for appellant.

No. 53. The Town of Venice v. Evander Murdock. The argument of this cause was commenced by Warren T. Warden for plaintiff in error.

Adjourned until Monday at 12 o'clock.

Monday, Nov. 22.

Chief Justice Waite announced to the bar that the court had just received the painful intelligence of the sudden death, this morning, of the Vice President of the United States, at his rooms, in the capitol, and that out of respect to his memory will now adjourn for the day, without transacting any business.

Adjourned until Tuesday at 12 o'clock.

GRINNELL & MARSH,
Attorneys, 94 Washington Street.

TRUSTEE'S SALE.—WHEREAS, ROBERT C. Garrabrant, a bachelor, of the city of Chicago, in the county of Cook and State of Illinois, by his certain trust deed, duly executed, acknowledged, and delivered, bearing date the first day of July, A.D. 1874, and recorded in the recorder's office of Cook county, in the State of Illinois, in book 255 of records, at page 379, did convey unto Thomas D. Snyder, as trustee, all the following described premises, situated in the county of Cook and State of Illinois, to wit:

Lots Nos. twenty-five (25), twenty-six (26), twenty-seven (27), twenty-eight (28), twenty-nine (29), thirty (30), thirty-one (31), thirty-two (32), thirty-three (33), thirty-four (34), thirty-five (35), and thirty-six (36), in block four (4), of D. Goodwin's subdivision of the northwest quarter of the northeast quarter of section twenty-three (23), of township thirty-nine (39) north, range thirteen (13), east of the third principal meridian, to secure the payment of one principal promissory note, of even date, for the sum of twenty-five hundred dollars, executed by the said Robert C. Garrabrant, and payable to the order of the treasurer of the Brattleboro Savings Bank, Brattleboro, Vermont, due and payable in five years after the date thereof, with exchange on New York, together with ten interest coupons, of even date, thereto attached, for the sum of one hundred and twenty-five dollars each, payable in 6, 12, 18, 24, 30, 36, 42, 48, 54, and 60 months after date, with interest on all of said notes at ten per cent. per annum, after due, until paid.

And whereas, it is provided in and by said trust deed, that in case of default in the payment of the said notes, or any part thereof (either interest or principal), according to the tenor thereof, then, on the application of the legal holder of said notes, it should and might be lawful for the undersigned, Thomas D. Snyder, to sell and dispose of the said premises, and all the right, title, benefit and equity of redemption of said Robert C. Garrabrant, his heirs and assigns therein, at public auction, at the north door of the court house of Cook county, for the time being, in the city of Chicago, in the State of Illinois, or on said premises, for the highest and best price the same will bring in cash, at least thirty days public notice having been previously given of the time and place of such sale by advertisement in one of the newspapers at that time published in the said city of Chicago, once a week, for four weeks, and to make, execute, and deliver to the purchaser or purchasers at such sale, good and sufficient deed or deeds of conveyance for the premises sold, and out of the proceeds of such sale to pay all costs and expenses incurred in advertising and selling said premises, also the principal and interest on said notes, as in said trust deed specified.

And whereas, it is further provided in said trust deed, that in case of default in any of said payments of principal or interest, according to the tenor and effect of said promissory notes, or either of them, as aforesaid, then and in that case the whole of said principal sum thereby secured, and the interest thereon to the time of sale, may at once, at the option of the legal holder thereof, become due and payable, and the said premises be sold, in the manner and with the same effect as if the said indebtedness had matured.

And whereas, default has been made in the payment of a part of the first and the whole of the second of said interest notes for the sum of one hundred and twenty-five dollars each, which became due in six and twelve months, respectively, from the said first day of July, 1874; and the legal holder of said notes has made application to the undersigned, the trustee in said trust deed named, and requested him, as such trustee, to sell and dispose of said premises under the power in said trust deed, and for the purposes therein stated.

Now, therefore, public notice is hereby given that in pursuance of said trust deed, and by virtue of the power and authority to me granted in and by the same, and by virtue of the statute of the State, I, the undersigned, will, on Wednesday, the 15th day of December, A.D. 1875, at eleven o'clock A. M., at the north door, to wit: at the east door of the north doors of the building now used as a court house for Cook county, situate on the southeast corner of Adams and LaSalle streets, in the said city of Chicago, sell and dispose of the premises above and in said trust deed described, and all the right, title, benefit and equity of redemption of the said Robert C. Garrabrant, his heirs or assigns therein, at public auction, for the highest and best price the same will bring in cash, for the purposes in said trust deed specified.

Dated 30th October, 1875.

THOMAS D. SNYDER, Trustee.

GRINNELL & MARSH,
Attorneys for holder of notes. 7-10 8-11

TRUSTEE'S SALE.—WHEREAS, JAMES L. CAMPbell and Sophronia R. Campbell, his wife, by their trust deed, dated September the 11th, A. D. 1874, and filed for record in the recorder's office of Cook county and State of Illinois, on the 12th day of September, A.D. 1874, and is recorded therein in book 456 of records, on page 154, conveyed to the undersigned, J. B. Nutting, as trustee, the premises hereinafter described, to secure the payment, as therein specfied, of eleven certain promissory notes, made by the said James L. Campbell, and of even date with said trust deed, one of said notes being for the principal sum of fifteen hundred dollars, and due in five years from date, and each of the other notes being for the sum of seventy-five dollars, given for the semi-annual interest upon the said principal note, and one of them due on the eleventh days of March and September, respectively, of each year, until the maturity of the said principal note.

And whereas, it was and is, among other things, provided in said trust deed, that in case of default in the payment of the said promissory notes, or any part thereof, then it should be lawful for the said party of the second part, on application of the legal holder of said promissory notes, or either of them, to sell and dispose of the premises described in said trust deed, and all right, title, benefit and equity of redemption of the said party of the first part, their heirs and assigns therein, at the court house door in the city of Chicago in the State of Illinois, or upon the said premises, or any part thereof, as might be specified in the notice of such sale, for the highest and best price the same would bring for cash, thirty days' previous notice of such sale having been given by publication, once in each week, for four successive weeks, in the Chicago Legal News.

And, whereas, default has been made in the payment of the said note due on the eleventh (11th) day of September, A. D, 1875; and whereas, application has been made to the undersigned, by the legal holder of said note, to sell said premises, under said trust deed.

Now, therefore, public notice is hereby given, that I, the undersigned, as such trustee, shall, on Wednesday, the 22nd day of December, A. D. 1875, at 10½ o'clock in the forenoon of said day, at the house upon said premises, sell at public auction, for cash, the said premises, situate in the city of Chicago, county of Cook, and State of Illinois, to wit:

Sub-lots three (3) and four (4) in T. L. Campbell's subdivision of the south half (½) of lots fifteen (15) and eighteen (18), in block five (5), of Rockwell's addition to Chicago, except the east 16 feet thereof, together with all the right, title, benefit and equity of redemption of said grantors, their heirs and assigns therein.

J. B. NUTTING, Trustee.

B. W. ELLIS, Atty. 35-38-4-7 9-13

M. J. WENTWORTH,
Attorney, 45 LaSalle Street.

CHANCERY NOTICE.—STATE OF ILLINOIS, county of Cook, ss. Superior court of Cook county. January term, A.D. 1876. Sarah A. McBeth vs. Sinclair McBeth.—In chancery.

Affidavit of the non-residence of Sinclair McBeth, defendant above named, having been filed in the office of the clerk of the Superior court of Cook county, notice is hereby given to the said Sinclair McBeth, that the above named complainant heretofore filed her bill of complaint in said court, on the chancery side thereof, and that a summons thereupon issued out of said court against the above named defendant, returnable on the first day of the term of the Superior court of Cook county, to be held at the court house, in Chicago, in said Cook county, on the first Monday of January next (1876), as is by law required, and which suit is still pending.

ALEXANDER F. STEVENSON, Clerk.

M. J. WENTWORTH, Complts. Solr. 7-10

TRUSTEE'S SALE.—WHEREAS, THE MARINE Company, of Chicago, a corporation organized under the laws of the State of Illinois, and having its place of business at the city of Chicago, in the county of Cook and State of Illinois, by its certain trust deed dated the 23d day of January, A. D. 1874, and filed for record in the recorder's office of Cook county, State of Illinois, January 30th, 1874, and recorded February 12th, 1874, in book 335 of records, at page 176, conveyed to the undersigned, William F. Coolbaugh, as trustee, the premises hereinafter described, to secure the payment as therein specified of its three certain certificates of deposit bearing even date with said trust deed, each of said certificates being for the sum of three thousand three hundred and thirty-three dollars and thirty-three and two-third cents ($3.333,33⅓) and payable to the Mechanics' National Bank (a corporation organized under and by virtue of the laws of the United States, and having its place of business at the city of Chicago), in one (1), two (2) and three (3) years, respectively, after date thereof, with interest at the rate of seven (7) per centum per annum, payable semi-annually at the Metropolitan National Bank of New York.

And whereas, it was among other things in said trust deed provided, that the said trustee have and hold the property and premises thereby conveyed, together with all and singular the tenements, hereditaments, privileges and appurtenances thereunto belonging, to the said party of the first part, to wit: the said trustee, his successor in trust, and his and their heirs and assigns forever. In trust, nevertheless, that in case of default in the payment of the said certificates of deposit or any part thereof, according to the tenor and effect of said certificates, or in case of the breach of any of the covenants or agreements therein mentioned, then, on the application of the legal holder of said certificates, or either of them, to sell and dispose of the said premises, and all the right, title, benefit and equity of redemption of the said Marine Company, its successors and assigns therein, at public auction, at the north door of the then court house in the city of Chicago, in the State of Illinois, or on said premises, or any part thereof, as may be specified in the notice of such sale, for the highest and best price the same will bring in cash, sixty (60) days' notice having been previously given of the time and place of such sale by advertisement in the Chicago Legal News, or in any newspaper at that time published in said city of Chicago, and to make, execute, and deliver to the purchaser or purchasers at such sale, good and sufficient deed or deeds of conveyance for the premises sold, and out of the proceeds or avails of such sale, and the purchase money paid thereon, after first paying all costs of advertising, sale and conveyance, including the reasonable fees and commissions of said trustee, and all other expenses of this trust, including all moneys advanced for insurance, taxes, and other liens or assessments, with interest thereon at ten per cent. per annum, then to pay the principal of said certificates, whether due and payable by the terms thereof or not, and interest due on said certificates up to the time of such sale, rendering the overplus (if any) unto the said Marine Company, its successors, legal representatives, or assigns, on reasonable request; and it shall not be obligatory upon the purchaser or purchasers at any such sale to see to the application of the purchase money; which sale or sales so made shall be a perpetual bar, both in law and equity, against the said Marine Company, its successors and assigns, and all other persons claiming the premises aforesaid, or any part thereof, by, from, through or under said Marine Company, or any of them.

And whereas, default has been made in the payment of that one of said certificates of deposit, due one year after the date thereof and in the payment of the interest on said certificates of deposit, except that due six months after their date; and there is now due said first certificate and the interest on the three certificates, except the first installment of said interest;

And whereas, the legal holder of said certificates has made application to the undersigned, to sell said premises under said trust deed for the purpose of paying said indebtedness.

Now, therefore, public notice is hereby given, that I, the undersigned, trustee as aforesaid, in execution of the powers by said trust deed in me vested, and in pursuance of the terms thereof, shall sell at public auction, for cash, to the highest bidder on lot seven (7), hereinafter described, being a part of the premises in said trust deed described and conveyed, in the city of Chicago and State of Illinois, at 10 A. M., Saturday, January 15th, A. D. 1876, the said premises in said trust deed described, to wit:

Lots seven (7) and eight (8), in Elijah Smith's subdivision of original lot ten (10) and the south three-fourths (¾ths) of original lot seven (7) in block eighteen (18) in fractional section fifteen (15) addition to Chicago; said Elijah Smith's subdivision being recorded in the recorder's office of Cook county, in book eighty-five (85) of maps, page 119, and all the right, title, benefit and equity of redemption therein of said Marine Company, the grantor in said trust deed, its successors or assigns.

WM. F. COOLBAUGH, Trustee.

FULLER & SMITH, Attys. 8-

ELDRIDGE & TOURTELLOTTE,
Attorneys, 129 Dearborn Street.

ESTATE OF JEREMIAH T. JEWETT, DECEASed.—Notice is hereby given to all persons having claims and demands against the estate of Jeremiah T. Jewett, deceased, to present the same for adjudication and settlement at a regular term of the County court of Cook county, to be holden at the court house, in the city of Chicago, on the second Monday of January, A. D. 1876, being the 10th day thereof.

Chicago, Nov. 19th, A. D. 1875.

JOHN M. THOMPSON, Executor.

ELDRIDGE & TOURTELLOTTE, Attys. 9-14a

M. F. HEENAN,
Attorney, 146 Madison Street.

ESTATE OF WILLIAM GILMORE, DECEASED.—Notice is hereby given to all persons having claims and demands against the estate of William Gilmore, deceased, to present the same for adjudication and settlement at a regular term of the County court of Cook county, to be holden at the court house, in the city of Chicago, on the second Monday of January, A. D. 1876, being the 10th day thereof.

Chicago, Nov. 19th, A. D. 1875.

MARGARET GILMORE, Administratrix.

M. F. HEENAN, Atty. 9-14a

ELLIS & FRAKE.
Attorney, 36 Metropolitan Block.

ESTATE OF JESSE MATTESON DECEASED.—Notice is hereby given to all persons having claim and demands against the estate of Jesse Matteson deceased, to present the same for adjudication and settlement at a regular term of the County court of Cook county, to be holden at the court house, in the city of Chicago, on the second Monday of January, A. D. 1876, being the 10th day thereof.

Chicago, November 16th, A. D. 1875.

CHAUNCEY F. MATTESON, Administrator.

ELLIS & FRAKE, Att'ys. 9-14

PERKINS & CHASE,
Attorneys, Room 30 Major Block.

ESTATE OF STEPHEN McNICHOLS, DECEASED. Notice is hereby given to all persons having claims and demands against the estate of Stephen McNichols, deceased, to present the same for adjudication and settlement at a regular term of the County court of Cook county, to be holden at the court house, in the city of Chicago, on the second Monday of January, A. D. 1876, being the 10th day thereof.

Chicago, Nov. 19th, D. D. 1875.

FANNIE McNICHOLS, Executrix.

PERKINS & CHASE, Attys. 9-14a

D. H. HAMMER,
Attorney, 188 Madison Street.

ESTATE OF JACOB DE YOUNG, DECEASED.—Notice is hereby given to all persons having claims and demands against the estate of Jacob DeYouug, deceased, to present the same for adjudication and settlement at a regular term of the County court of Cook county, to be holden at the court house, in the city of Chicago, on the second Monday of January, A. D. 1876, being the 10th day thereof.

Chicago, Nov. 19th, A. D. 1875.

GRIETJE DE YOUNG, Executrix.

D. H. HAMMER, Atty. 9-14a

ABNER SMITH,
Attorney 175 LaSalle street.

EXECUTOR'S SALE OF REAL ESTATE.—BY virtue of a decretal order of the County court of Cook county, Illinois, made and entered on the seventh (7th) day of June, 1875, on the petition of Laura N. Stark and Wilson K. Nixon, as executors of the estate of James L. Stark, deceased, for leave to sell the real estate of said decedent to pay the debts of said estate, the undersigned will sell at public vendue to the highest bidder, on Tuesday, the twenty-first (21st) day of December, 1875, at 12 o'clock, noon: at the entrance to Nixon's building, No. 175 South LaSalle street, in the city of Chicago, Cook county, Illinois, all the right, title and interest which was of the said James L. Stark, deceased, at the time of his death, in and to the following described real estate, to wit:

Lots one (1), two (2), three (3), four (4), and five (5), in the re-subdivision of lots twenty-six (26), twenty-seven (27), thirty (30), and thirty-one (31), of lot fourteen (14), in Bronson's addition to Chicago, with the improvements thereon, consisting of a block of five (5) brick houses;

Also the west half (½) of the west half (½) of the southwest quarter (¼) of section thirty-four (34), town thirty-nine (39), north range thirteen (13) east of the third (3d) principal meridian, Cook county, Illinois, with the improvements thereon, consisting of frame house, barn and fences;

Also lots eight (8), nine (9), ten (10), eleven (11), twelve (12), thirteen (13) and fourteen (14), in block one (1); and lots seven (7), eight (8), nine (9), ten (10), eleven (11), twelve (12), in block two (2); and lots one (1) and two (2), in block three (3), in J. L. Stark's addition to Ravenswood, Cook county, Illinois;

Also, the east forty (40) feet of lot three (3), Assessors' subdivision of block thirty-six (36), in Kinzie's addition to Chicago;

Also, lot two (2), in Assessors' subdivision of block thirty-six (36), in Kinzie's addition to Chicago, with the improvements thereon, consisting of a brick house and barn;

TERMS OF SALE:—One-half cash, the balance on a credit of one year, with interest at eight per cent. per annum, said deferred payments to be secured in the manner prescribed by law.

Chicago, November 15th, 1875.

LAURA N. STARK and
WILSON K. NIXON,
Executors.

ABNER SMITH, Atty. 9-12a

WHEREAS, ON THE NINETEEETH DAY OF October, A. D. 1874, James A. Cameron, of the city of New York, in the county and State of New York, by his certain deed of trust, duly executed acknowledged, and recorded in the recorder's office of Cook county, in the State of Illinois, in book 466 of records, on page 1, did convey to the undersigned, as trustee, the following described premises, situate in the county of Cook and State of Illinois, to wit:

Block number thirty-seven (37), in Jones' subdivision of all but eighty (80) acres of the west half of section twenty-nine (29), in township thirty-eight (38), north range fourteen (14), east of the third principal meridian—which said deed of trust was given to secure the payment of six certain promissory notes, three of which are dated October 19th, A. D. 1874, and executed by the said James A. Cameron, one payable to the order of James Hill and Matson Hill, for the sum of one hundred and thirty-three and 33-100 dollars, due April 10, 1875, with interest at the rate of 8 per cent. per annum; one payable to the order of Matson Hill, for the sum of sixteen hundred dollars, and one payable to the order of James Hill, for the sum of twenty-six hundred and ninety-seven and 46-100 dollars, both due three years after date, with interest at eight per cent. per annum, payable annually; and the other three notes are dated August 11th, A. D. 1874, made by James Hill, payable to the order of Camille Marie, each for the sum of eight hundred and thirty-eight and 25-100 dollars, due, respectively, in one (1), two (2) and three (3) years after their date, with interest at 8 per cent. per annum, payable annually, said notes being described in a certain trust deed, recorded in the recorder's office of the said Cook county in book 111 of records, page 564. Said James A. Cameron gave the said first three notes, and assumed and agreed to pay the said last three notes, as part of the purchase money agreed to be paid by him for the premises above described.

And whereas, default has been made by the said James A. Cameron in the payment of the entire principal and interest of the first one of the said notes executed by him, and in the entire principal and interest of the first one of the said notes assumed by him, and of the interest on all of the said six notes; nothing whatever having been paid on any of the said six notes, and the said James Hill and Matson Hill, the legal holders of the said three notes executed by the said James A. Cameron, by virtue of the powers given them in and by the said deed of trust, made by James A. Cameron to Jno. W. Waughop, having declared due and payable the principal of the said three notes executed by the said James A. Cameron, and the interest thereon to the day of this sale, and they having applied to me for the sale of the said premises to pay the said notes:

Now, therefore, notice is hereby given, that by virtue of the power in me vested in and by the said deed of trust, I shall, on Saturday, the eighteenth day of December, 1875, at the hour of ten o'clock A. M., on the northwest corner of Clark and Washington streets, in the city of Chicago aforesaid, sell at public auction, to the highest and best bidder, for cash, subject to the incumbrance hereinafter mentioned, and pursuant to the terms of the said deed of trust, all the premises hereinbefore described, and all the right, title, benefit, and equity of redemption of the said James A. Cameron, his heirs, successors and assigns therein.

The sale will be made subject to the said trust deed recorded in book 111 of records, page 564, and to the payment of the notes therein described, which the purchaser at this sale will be expected to assume and to pay as they become due.

JOHN W. WAUGHOP, Trustee.

Chicago, Nov. 16th, A. D. 1875. 9 12

TRUSTEE'S SALE.—WHEREAS, MELISSA D. Parsons, in her own right, and Augustus Parsons, her husband, grantors, made their certain deed of trust dated the fifth day of November, A. D. 1874, conveying to the undersigned, as trustee, the premises hereinafter described, to secure the payment of one promissory note for $5 000, made by said Melissa D. Parsons and Augustus Parsons, payable three years after date, and six other notes for $250 each, for semi-annual interest thereon, payable at intervals of six months after date, all bearing even date with said deed, which trust deed is recorded in the recorder's office of Cook county, Illinois, in book 41 of records, at page 558.

And whereas, default has been made in payment of the first two of said interest notes, and also in payment of taxes on said premises; and application has therefore been made by the legal holder of said notes, to said trustee, to sell, under said deed of trust, said premises, for the purposes in said deed specified.

Now therefore, notice is hereby given, that in pursuance of the terms of said deed of trust, I shall sell at auction, for cash, at the north door, nearest LaSalle street, of the court house, situated at the southeast corner of the intersection of LaSalle and Adams streets, in the city of Chicago, at one o'clock in the afternoon of the 28th day of December, A. D. 1875, the following described lands and premises, or so much thereof as may be necessary, to wit:

Lots numbers seven and eight, in block number four, in the University subdivision of that part of the southhalf of the northeast quarter of section thirty-four, township thirty-nine, north range fourteen, east of the third principal meridian, lying west of Cottage Grove avenue; also the twenty feet north of and adjoining the south twenty and one-half feet of lots number twenty-five, twenty-six, twenty-seven, twenty-eight and twenty-nine, in Walker and Kreighs' re-subdivision of blocks sixteen and nineteen, in Smith's subdivision of the northeast quarter of the northeast quarter of section eighteen, township thirty-nine, north range fourteen, east of third principal meridian, in the city of Chicago, Cook county, Illinois, together with all the right, title, and equity of redemption, and homestead exemption rights of said grantors, their heirs and assigns therein.

Chicago, Nov. 20, 1875.

9-14 GEORGE SCOVILLE, Trustee.

NORTON, HULBURD & HATCH,
Attorneys.

MORTGAGEE'S SALE.—WHEREAS, ELIZABETH Parks (widow), by mortgage, dated October twenty-second (22d), 1872, filed for record in the recorder's office of Cook county, Illinois, June 16, 1873, and recorded June 21st, 1873, in book 252 of records, on page 132, did convey to William B. Ogden, the premises hereinafter described, to secure her four (4) certain promissory notes of even date with said mortgage, for the principal sum of five hundred dollars ($500) each, payable to the order of said Ogden in one (1), two (2), three (3) and four (4) years after date thereof, respectively, with interest at eight (8) per cent. per annum till due, and ten (10) per cent. per annum thereafter until paid, given for purchase money of said premises; and did in and by said mortgage provide and agree that in default of payment of said notes, or any part thereof, or the interest thereon, or any part thereof when due and payable, then, in such case, the whole of said principal and interest secured by said notes, should, at the option of said mortgagee, her heirs, executors, administrators, attorneys, or assigns, become immediately due and payable, and that thereupon said mortgagee, his heirs, executors, administrators, attorneys or assigns, after publishing a notice in the Chicago Legal News, or any newspaper then published in Chicago, for four weeks before the day of such sale, might sell the said premises and all the right and equity of redemption of said mortgagor, his heirs, executors, administrators or assigns therein, at public auction, at the west door of the north front of the court house on Adams street, in the city of Chicago, Illinois, to the highest bidder for cash, at the time mentioned in such notice, and make, execute, and deliver to the purchaser or purchasers thereof, a deed or deeds for the premises so sold;

And, whereas, said unpaid notes, due in two, three and four years, respectively, after date, and said mortgage, have been duly assigned to me, the undersigned, Hamilton B. Bogue (said note due October 22d, 1873, and interest on all said notes to that date having been paid), and default has been made in the payment of the first two of said notes so assigned to me and in payment of interest on all and each of said notes since October 22d, 1873, and I have therefore elected to declare and have declared immediately due and payable the whole of the principal and interest secured by said mortgage and still unpaid, being three notes of five hundred dollars each, with interest on each from October 22d, 1873, at eight per cent, till due, and ten per cent. thereafter till paid; and there is also due under said mortgage the sum of sixty-seven dollars and twenty-seven cents ($67.27), advanced May 17th, 1875, for taxes on said premises, with interest at the rate of ten per cent. from that date.

Now, therefore, I shall, by virtue of the conditions of said mortgage, and in pursuance of the powers therein given, at ten (10) o'clock in the forenoon on Monday, the twentieth (20th) day of December, A.D. 1875, at the west door of the north front of the building used as a court house, situated on the southeast corner of Adams and LaSalle streets, in said city of Chicago, county of Cook and State of Illinois, offer for sale and sell at public auction, to the highest bidder, for cash, the premises in said mortgage described, to wit: Lot nine (9), in block nine (9), in Ashland addition to Chicago, in Cook county, Illinois, together with all benefit and equity of redemption therein of said Elizabeth Parks, mortgagor, her heirs, executors, administrators and assigns, and free from all homestead exemption rights.

Chicago, Nov. 20th, 1875.

HAMILTON B. BOGUE,
Assignee of Mortgagee.

NORTON, HULBURD & HATCH, Attys. 9-12

McCLELLAN HODGES & CUMMINS,
Attorneys, 94 Washington street.

STATE OF ILLINOIS, COOK COUNTY, SS.—CIRcuit court of Cook county. December term, A. D. 1875. To all persons concerned:

Take notice, that the undersigned, guardian of Minnie A. Bliss, a minor, will apply to the Circuit court of said county, at the next December term thereof, to be holden at the court house, in said county, on the third Monday in December next, for an order to sell the following described real estate, belonging to said minor, and situate in the county of Cook and State of Illinois, to wit:

The undivided one-fifth of certain premises, to wit: Commencing at a point in the center of Park avenue, in the city of Chicago, two hundred and twenty-seven (227) feet east of the west line of block number fifty-one (51), in the Canal Trustees subdivision of section number seven (7), town number thirty-nine (39) north, range number fourteen (14) east of the third principal meridian, thence east along the center of Park Avenue sixty (60) feet; thence north one hundred and seventy-four (174) feet, more or less, to the center of an alley; thence running west along the center of the alley sixty (60) feet; thence south one hundred and seventy-four (174) feet to the place of beginning, and that the petition therefor is now on file in the office of the clerk of said court.

MARY J. BLISS,
Guardian of Minnie A. Bliss.

November 15, 1875.

McCLELLAN, HODGES & CUMMINS, Attys. 9-11

CHAS. H. MORSE,
Attorney, Otis Block.

TRUSTEE'S SALE.—IN THE EXERCISE OF THE powers conferred upon me by a certain deed in trust, executed to me by John and Margaret Kean, of the city of Chicago, county of Cook, and State of Illinois, dated the 20th day of February, A. D. 1874, and filed for record the 2nd day of March, A.D. 1874, and recorded the 9th day of March, A.D. 1874, in the records of said Cook county, book 348, page 499, to which deed reference is here made, I, the undersigned, Algernon B. Baldwin, of Chicago, as trustee in said deed, hereby give public notice, that, on Monday, the sixth day of December, A. D. 1875, at the hour of 10 o'clock, A. M., I will, at the front door of the main building, on the premises described in said trust deed, and hereinafter mentioned, offer for sale, at public auction, to the highest bidder, for cash, the property conveyed to me by said trust deed situated in said Chicago, and described in said deed as follows, viz:

"Lot seventeen (17), in the subdivision of the north half of block thirty-nine (39), in the canal trustee's subdivision of the west half, and so much of the southeast quarter as lies west of the south branch of the Chicago river of section twenty-one (21), in township thirty-nine (39), north of range fourteen (14), east of the third principal meridian, reference being had to the plat of said first named subdivision, which was recorded on the 11th day of February, 1864, in book 162 of maps, page 29, and to the plat of the subdivision secondly above named, which was recorded August 3d, 1848, in New Volume of maps, page 30, said records being made in record maps of the county of Cook and State of Illinois, said lot fronting northerly on Canal Port Avenue, with a width of 24 feet, and having the same width to a depth of one hundred (100) feet to an alley, and being between Union and Halsted streets in said city of Chicago."

Said sale will be made by me, as above, under the authority of said trust deed, for default in the payment of a note, executed and delivered by said John and Margaret Kean to David E. Fiske, for value received, on the 20th day of February, A. D. 1874, and dated Chicago, the 20th day of February, A. D. 1874, by which they promised to pay to the order of said D. E. Fiske, eight months after said date, at the Commercial National Bank of Chicago, Illinois, the sum of six hundred dollars, with interest at the rate of ten per cent. per annum, until due, and with interest at the rate of thirty per cent. per annum after the maturity of said note, as damages for non-payment, if said note is not paid at the maturity thereof, being the note to secure the payment of which the said trust deed was made.

The principal and interest of said note being now long overdue and unpaid, the present legal holder of the same has applied to me to sell the said property, in pursuance of the requirements of the said deed, for the payment of the debt secured by the same as above.

For the further particulars of said trust deed, reference is hereby made to the record of the same, and the original will be read by me at the said sale for the information of all whom it may concern.

9-11 ALGERNON B. BALDWIN, Trustee.

CHICAGO LEGAL NEWS.

SATURDAY, DECEMBER 4, 1875.

The Courts.

UNITED STATES SUPREME COURT.

No. 9.—OCT. TERM, 1875.

THE WILMINGTON AND WELDON RAILROAD COMPANY *v.* HENRY KING, executor of HARDY KING, deceased.

In error to the Supreme Court of the State of North Carolina.

CONTRACTS DISCHARGEABLE IN CONFEDERATE MONEY.

1. CONTRACTS DISCHARGEABLE IN CONFEDERATE MONEY—WHEN VALID.—Contracts made during the war in one of the Confederate States, payable in Confederate currency, but not designed in their origin to aid the insurrectionary government, are not, because thus payable, invalid between the parties.

2. EVIDENCE—VALUE OF CURRENCY.—In actions upon such contracts evidence as to the value of that currency at the time and in the locality where the contracts were made is admissible.

3. CONSTITUTIONAL LAW—OBLIGATION OF CONTRACTS — NORTH CAROLINA STATUTE — CASE IN JUDGMENT.—A statute of North Carolina of March, 1866, enacting that in all civil actions "for debts contracted during the late war, in which the nature of the obligation is not set forth, nor the value of the property for which such debts were created is stated, it shall be admissible for either party to show on trial, by affidavit or otherwise, what was the consideration of the contract, and that the jury in making up their verdict shall take the same into consideration, and determine the value of said contract in present currency, in the particular locality in which it is to be performed, and render their verdict accordingly," in so far as the same authorizes the jury in such actions, upon the evidence thus before them, to place their own estimate upon the value of the contracts, instead of taking the value stipulated by the parties, impairs the obligation of such contracts and is, therefore, within the inhibition upon the State of the Federal Constitution. Accordingly, in an action upon a contract for wood sold in that State during the war, at a price payable in Confederate currency, an instruction of the court to the jury that the plaintiff was entitled to recover the value of the wood without reference to value of the currency stepulated, was erroneous. —*Central Law Journal.*

Mr. Justice FIELD delivered the opinion of the court.

The contract between the defendant and the plaintiff's testatrix, upon which the present action was brought, was made in North Carolina during the war. By its terms the wood purchased by the railroad company was to be paid for in Confederate currency. Contracts thus payable, not designed in their origin to aid the insurrectionary government, are not invalid between the parties It was so held in the first case in which the question of the validity of such contracts was presented, that of Thorington *v.* Smith, 8 Wallace, 1, and the doctrine of that case has been since affirmed in repeated instances. The treasury notes of the Confederate government, at an early period in the war, in a great measure superseded coin within the insurgent States, and, though not made a legal tender, constituted the principal currency in which the operations of business were there conducted. Great injustice would, therefore, have followed any other decision, invalidating transactions otherwise free from objection, because of the reference of the parties to those notes as measures of value. See Hanauer *v.* Woodruff, 15 Wallace, 448; Confederate Note Case, 19 Ibid., 556.

But as those notes were issued in large quantities to meet the increasing demands of the Confederacy, and as the probability of their ultimate redemption became constantly less as the war progressed, they necessarily depreciated in value from month to month, until in some portions of the Confederacy, during the year 1864, the purchasing power of from twenty-one to upwards of forty dollars of the notes only equaled that of one dollar in lawful money of the United States. When the war ended the notes, of course, became worthless and ceased to be current, but contracts made upon their purchasable quality existed in large numbers throughout the insurgent States. It was, therefore, manifest that if these contracts were to be enforced with anything like justice to the parties, evidence must be received as to the value of the notes at the time and in the locality where the contracts were made; and, in the principal case cited, such evidence was held admissible. Indeed, in no other mode could the contracts as made by the parties be enforced. To have allowed any different rule in estimating the value of the contracts and ascertaining damages for their breach, would have been to sanction a plain departure from the stipulations of the parties, and to make for them new and different contracts.

In the case at bar the State Court of North Carolina declined to follow the rnle announced by this court and refused to instruct the jury that the plaintiff was entitled to recover only the value of the currency stipulated for the wood sold, and instructed them that he was entitled to recover the value of the wood without reference to the value of that currency. This was nothing less than instructing them that they might put a different value upon the property purchased from that placed by the parties at the time. In this ruling the court obeyed a statute of the State, passed in March, 1866, which enacted "that in all civil actions which may arise in courts of justice for debts contracted during the late war, in which the nature of the obligation is not set forth, nor the value of the property for which such debts were created is stated, it shall be admissible for either party to show on the trial, by affidavit or otherwise, what was the consideration of the contract, and the jury in making up their verdict shall take the same into consideration, and determine the value of said contract in present currency, in the particular locality in which it is to be performed, and render their verdict accordingly."

This statute, as construed by the court, allowed the jury to place their own judgment upon the value of the contract in suit, and not require them to take the value stipulated by the parties. A provision of law of that character, by constituting the jury a revisory body over the indiscretions and bad judgments of the contracting parties, might in instances relieve them from hard bargains, though honestly made upon an erroneous estimate of the value of the articles purchased, but would create an insecurity in business transactions which would be intolerable. It is sufficient, however, to say that the Constitution of the United States interposes an impassable barrier to such new innovation in the administration of justice, and with its conservative energy still requires contracts, not illegal in their character, to be enforced as made by the parties, even against any State interference with their terms.

The extreme depreciation of Confederate currency at the time the wood, which is the cause of the suit, was purchased, gives a seeming injustice to the result obtained. But until we are made acquainted with all the circumstances attending the transaction, we can not affirm anything on this point. The answer alleges that the wood was to be cut by the defendant's hands, and that the plaintiff's testatrix was only to furnish the trees standing. It may be that under such circumstances the costs of felling the trees and removing the wood was nearly equal to the value of the wood by the cord as found by the jury, which was fifty cents. Be that as it may, it is not for the court to give another value to the contract than that stipulated by the parties, nor is it within the legislative competence of a State to authorize any such proceeding.

The judgment of the Supreme Court of North Carolina must be reversed, and the cause remanded for further proceedings.

Mr. Justice BRADLEY dissenting.

I dissent from the judgment of the court in this case. The parties never contracted that the price to be paid for the wood was to be equivalent to any amount of specie. The price contracted for was one dollar per cord. Specie at that time was worth twenty-one dollars to one of Confederate currency. Can it be supposed that the parties agreed on a value of five cents per cord for the wood? The suggestion does not appear to me to be reasonable. The truth is, that the relation between Confederate currency and specie in North Carolina at that time is entirely unsuitable to be used as a rule in estimating the value of contracts. Specie could not be had at all, and consequently the relations between currency and specie was no guide as to the value of currency in purchasing commodities. The verdict finds that the wood, at the time of the contract, was worth fifty cents in specie per cord, and yet it sold for a dollar in currency. This shows that currency was equivalent to fifty cents on the dollar in purchasing capacity. I hold, therefore, that the law of North Carolina, in allowing the jury to estimate the real value of the consideration, in cases where it is impossible to get at the true value of the money named in the contract, is a most sensible and just law.

By what authority do we scale down the price named in the contract at all? Is it not on the ground that the value of the money named by the parties is not a true criterion of the value of the contract? When once we admit this we make that money a mere commodity, and endeavor to find its true value. How, then, is its true value to be measured? Is it to be measured only by the amount of specie it would purchase at the time, when, perhaps, no specie existed in the country? Why not measure its value by the amount of United States treasury notes which it would buy? They were money, as well as specie. But suppose they were not to be had in the market any more than specie. Under such circumstances, is not the true method of ascertaining its value the purchasing capacity which it had? I hold that this is the true test, when, as stated by the legislature of North Carolina in its preamble to the act, it is impossible to scale the value of Confederate money accurately for all parts of the State under the varying circumstances that arose. Under such circumstances, the only fair mode of ascertaining the purchasing value of the currency used, is to ascertain the true value of the consideration or thing purchased. This is not to set aside the contract of the parties, but to carry out their contract. It is the proper method of ascertaining what their contract really meant, and giving it full force and effect.

Where a regular merchantable ratio exists between a paper currency and specie or other lawful money, of course it ought to be used as the rule to ascertain the true value of contracts. But when no such regular marketable value does exist, then the next best mode of getting at the value of the contract, or of the currency mentioned therein, is to ascertain the true value of the subject-matter about which the contract was made. This is what the legislature of North Carolina authorized to be done, and what was done in this case.

I think the judgment should be reversed.

U. S. DIST. COURT, D. OF OREGON.

OPINION NOV. 18, 1875.

In Re THE OREGON BULLETIN PUBLISHING AND PRINTING CO.—*In Bankruptcy.*

BANKRUPTCY — CORPORATION — PETITION MAY BE FILED BY ONE CREDITOR.

A petition to have a corporation adjudged a bankrupt may be maintained under § 5,122 of the R. S. by *any creditor* of such corporation, and the provision of § 12 of the act of June 22, 1874, in relation to the number and amount of the creditors required to join in such petition against a natural person does not apply.

The original bankrupt act of 1867, and all the acts amendatory thereof except the act of 1874 aforesaid, were superseded by the title BANKRUPTCY of the R. S., and repealed by § 5,596 of said statutes.

Quære, whether such repeal took effect from the enactment of the R. S. on June 22, 1874, or from December 1, 1873, the data on which said statutes took effect as declared in § 5,595 thereof.

DEADY, J.

On September 10, 1875, Blake, Robbins & Co., of San Francisco, Lewthwaite and Smith, H. W. Scott and H. L. Pittock, of Oregon, filed their petition in bankruptcy against the *Oregon Bulletin* Printing and Publishing Co., a corporation duly formed under the laws of Oregon, stating that they constituted one-fourth in number and one-third in value of the creditors of such corporation, and that the same owed each of them debts amounting in the aggregate to $4,481; that within the six calendar months next preceding the date of said filing, said corporation committed five several acts of bankruptcy; for that, being insolvent, said corporation did make four certain payments to certain of its creditors, amounting in the aggregate to $1,610, with intent to thereby give such creditors a preference, and also procure its property, to be taken on legal process for the purpose of foreclosing a chattel mortgage held by one of its creditors for the sum of $6,000, and praying that for these causes said corporation may be adjudged a bankrupt.

On September 21, the corporation filed an answer to the petition, containing, among other things, a denial that the petitioners constitute one-fourth in number and one-third in value of the defendant's creditors; and also a separate statement in writing to the same effect.

The petitioners now move to strike out said denials as being irrelevant.

The motion is made upon the ground that a petition to have a corporation adjudged a bankrupt, is not, as to the number and value of the creditors necessary to join therein, within the purview of § 39 of the bankrupt act, as amended by § 12 of the act of June 22, 1874, but is governed in this respect solely by § 5,122 of the R. S. The latter section is given in the title BANKRUPTCY of the R. S. in place of § 37 of the act of 1867. By the latter the provisions of the act were applied to corporations. It provided that a corporation might be declared a bankrupt "upon the petition of any creditor or creditors" of the same without any reference to the value of their debts.

The section as contained in the R. S. provides that the provisions of the act shall apply to private corporations, and that—

* * "upon the petition of any officer of any such corporation * * * duly authorized by a vote of a majority of the corporators at any legal meeting called for the purpose or *upon the petition of any creditor of such corporation*, * * *made and presented in the manner provided in respect to debtors*, the like proceedings shall be had and taken as are provided in the case of debtors."

The section further provides substantially as follows: (1) All the provisions of the act "which apply to the *debtor* or set forth his duties" in relation to the bankruptcy are made applicable to the officers of such corporation; (2) All payments, etc., declared fraudulent and void, when made by a *debtor*, are declared to have the same effect when made by a corporation; (3) *All* the assets of a corporation declared bankrupt are to be distributed to its creditors, and no allowance or discharge is to be granted to it.

The Revised Statutes of the United States appear to have taken effect from December 1, 1873 (§ 5595 *et seq.*), but were not enacted until June 22, 1874. They contain the title BANKRUPTCY, numbered LXI, which was intended as a substitute for the bankrupt act of March 2, 1867. On the same day congress passed "An act to amend and supplement" said act of 1867. By this latter act, § 39 of the original act, the same constituting §§ 5021, 5022 and 5023 of the R. S., was amended so as to require at least one-fourth in number and one-third in value of the creditors of a natural person to join in a petition to have him declared a bankrupt. Prior to this amendment it was only necessary that one or more creditors, the aggregate of whose debts amounted to $250, should join in such petition.

By means of § 5,122 the statute is first applied to corporations. Upon its language it cannot be contended that any particular number of creditors whose debts are of any particular value are required to join in a petition to have a corporation adjudged a bankrupt. The words of the section are unambiguous and too plain to leave any room for construction. "Upon the petition of *any creditor* of such corporation, made and presented in the manner provided in respect to debtors, the like proceedings shall be had and taken as are provided in the case of debtors." The petition may be brought by "any creditor" of the corporation without reference to the number of its creditors or the aggregate of their debts. True, the petition is to be "made and presented *in the manner* provided in respect to debtors." But surely, a direction as to the *manner* in which a petition is to be made and presented does not touch the question *by whom* it is to be made and presented—more especially, when, as in this case, the statute in that immediate connection—as it were in the same breath—declares that it may be made and presented by *any creditor* of the corporation.

Does § 39, as amended by the act of June 22, 1874, expressly or by necessary implication modify or amend § 5,122 of the R. S. in any particular?

The act of 1874 was passed on the same day as § 5,122. They are exactly cotemporaneous, and therefore there is nothing to be said in favor of such modification upon the ground that § 39 is the later expression of the legislative will. If there really is any conflict between the two sections, there is as much reason for holding that § 39 must yield to § 5,122 as otherwise, so far as the time of their enactment is concerned.

Again, the act of 1874, although it con-

tains a general repealing clause (§ 21) as to "all acts and parts of acts inconsistent with its provisions," does not contain any *general* amendments to the act of 1867, leaving the court to ascertain, as best it might, how far and where they are in conflict with the original, and therefore repeal it by implication. On the contrary, all the amendments are specific; each section amended is named. The amendment is made by either striking out or inserting particular words at particular places, or, as in the case of § 39, by reforming the section so as to embody in it the desired changes, and then enacting it as amended. The rest of the sections are supplementary to the original act, and not in conflict with it.

There is, then, no reason to presume that the amendment to § 39, providing who must join in a petition to have a natural person adjudged a bankrupt, was intended to amend or modify § 37 of the act of 1867, or its substitute, § 5,122, as to who might maintain a petition to have a corporation declared a bankrupt. On the contrary, if it was intended to amend this section so as to require a certain proportion in number and amount of the creditors to join in a petition for that purpose, the inference from the circumstances is satisfactory that it would have been done specifically and directly, as in the case of the other 12 amended sections.

Section 5,122 not being amended by the act of 1874, it and § 39 stand in the same relation to one another that they did in the original act. By that, as has been shown, while a natural person could only be declared a bankrupt upon the petition of one or more of his creditors whose debts, in the aggregate, amounted to $250, a corporation might be so declared upon the petition of such creditors, without reference to the amount of their debts.

The two sections are separate provisions, relating to distinct subjects—the one, the involuntary bankruptcy of natural persons, and the other that of corporations. They are not contradictory or in conflict. and both may stand and have effect upon the subject-matter to which they respectively relate.

The reason of the difference between the two sections may not be so apparent as the difference itself. But several reasons suggest themselves. In the case of a corporation, the bankrupt is neither entitled to any allowance or a discharge. By reason of the adjudication it is in effect dissolved, and its existence terminated. There is nothing left to grant a discharge to. It is stripped of all its property and rights of property, and can acquire no more. The law creates it and the law destroys it. But in the case of a natural person, the bankrupt is entitled to an allowance and a discharge from his debts, upon certain conditions, and by the act of 1874 (§ 12), in a case of compulsory bankruptcy, he is entitled to a discharge, without reference to the proportion between his assets and debts, "or the assent of any portion of his creditors." On this account it may have been thougnt necessary to require, in the case of a natural person, a certain proportion in number and amount of the creditors to join in the petition, to prevent collusion between a debtor and a friendly creditor. The very fact that the act of 1874 (§ 12) requires the judge to be satisfied that the *written admission* of the debtor that the requisite number and amount of creditors have petitioned to put him into bankruptcy *is made in good faith*, gives strong color to this suggestion. When a statute requires a court to be satisfied, that an admission in the pleadings of the defendant that the plaintiff is entitled to sue, is made in good faith, it is a reasonable inference that the enactment was intended to guard against collusion.

Again, it is well known that the amendments contained in the act of 1874 were passed under the influence of the panic of 1873. Under such circumstances, sympathy for the debtor class may have induced Congress to provide that a natural person should not be forced into bankruptcy except upon the petition of a large proportion of his creditors, and thereby prevent his being pressed to the wall, unless, in an extreme case; while in the case of an artificial person, as a corporation, which is created upon the implied condition that its existence depends upon its solvency, no such consideration would or ought to have effect.

By the laws of most civilized countries, mere inability to pay its debts is a cause of dissolution against a corporation. Being insolvent, it has ceased to fulfill the law of its being, and ought no longer to exist, unless by the consent or forbearance of all its creditors. But if § 39, as amended by the act of 1874, is applicable to corporations, then their existence may be prolonged with impunity, against the wishes and interests of any number of the creditors less than one-fourth in number and one-third in value of the whole, long after they are both insolvent and bankrupt.

Or it may be that the difference between the two sections is a *casus omissus*—the result of a mere oversight on the part of Congress.

But however this may be, the distinction exists, as to who may maintain a petition in involuntary bankruptcy. One rule is prescribed in the case of a corporation, and another in that of a natural person. To confound or obliterate this distinction by construction—by the merest assumption that § 39 was intended to modify § 5,122—is not only going beyond the office and power of a court, but in a direct opposition to it.

As is well said by a distinguished commentator:

"Upon all acts of the legislature, such construction should be made as that one clause shall not frustrate or destroy, but on the contrary, shall explain and support another—*sound exposition requiring effect to be given to every significant clause, sentence or word in a statute.*" Smith's Com., § 575.

On the argument of the motion, counsel for the defendant cited the clause in § 5,013 of the R. S. (§ 48 of the act), which declares that in the title, BANKRUPTCY, "the word 'person,' shall also include corporation," and argued therefrom, that as by § 39 a "person" can only be adjudged a bankrupt upon the petition of a certain proportion of his creditors, so is it, also, in the case of a "corporation," for the reason, that the word "person" being made to include that of "corporation," any provision of this title relating to a "person" is also applicable to a "corporation."

This conclusion may be admitted so far as the statute does not otherwise expressly or by necesssry implication provide. For instance, the statute provides, that a "person" shall be entitled to a certain allowance out of his property and under certain circumstances to a discharge from his debts. Now, in these two cases, the word "person" does not include a corporation because the statute (§ 5,122 R. S.) expressly provides that "no allowance or discharge shall be granted to any corporation or joint stock company, or to any person or officer or member thereof."

But the clause cited from § 5,013 of the R. S., declaring that the word "person" in the title BANKRUPTCY shall include "corporation," has no application to § 39 of the act of 1867 as amended by § 12 of the act of 1874.

A few words will make this apparent. The original act of 1867 and all the acts amendatory thereof, prior to that of 1874, are no longer in force. They are superseded by the title BANKRUPTCY of the R. S., which is itself a new statute differing in many particulars from the original one, and were repealed by § 5,596 of the R. S, on December 1, 1873, or June 22, 1874.

Therefore, § 48 of the act of 1874, containing this definition of the word "person" is no longer in force. § 5,013 has taken its place, but this section, in declaring the word "person" to include a corporation, limits its operation to the title BANKRUPTCY of the R. S. Now, § 39 of the act of 1867 as amended by § 12 of the act of 1874 is no part of the R. S., but is an independent statute passed on the same day as the latter. So it follows, that the word "person" in that section is not to be enlarged in its operation on account of the definition given to it as used in the Revised Statute, title BANKRUPTCY.

But it may be conceded that in the absence of any statute definition to that effect, the word "person" should be construed to include a corporation, unless it appears that it was used in a more limited sense. Such is the rule prescribed in § 1 of the R. S., which provides that "in determining the meaning" of said statutes or any act of Congress passed subsequent to February 25, 1871, "the word 'person' may extend and be applied to partnerships and corporations * * unless the context shows that such word was intended to be used in a more limited sense."

The act of 1874 being passed since 1871 is within the purview of this provision, and therefore the word "person" wherever it occurs in it, ought to be construed to include a corporation unless the context shows that such was not the intention. On this point there can be but little if any doubt. The context which is the title BANKRUPTCY of the R. S., and the contemporaneous act of 1874, shows plainly that the application of the statutes of bankruptcy, including § 12 of the act of 1874, to corporations, is generally provided for in § 5,122 of the R. S., and particularly as to who may maintain a petition against a corporation.

It was also objected to this motion by counsel for defendant that the allegations sought to be stricken out were made in response to an allegation in the petition. So far as I have looked into them, there seems to be some conflict or confusion among the authorities upon this point. None were cited on the argument.

I think the better rule is to allow a motion to strike out irrelevant or immaterial matter in a pleading, although it may be a mere denial of an immaterial allegation in a prior pleading. But in such case, the motion, in analogy to the rule in case of a demurrer, should be held to reach back to and include the first fault.

The motion to strike out is allowed, including the allegation in the petition concerning the number and amount of the creditors joining therein.

GEORGE H. DURHAM, pro motion.
JOSEPH SIMON, contra.

U. S. DIST. COURT, D. OF OREGON.

TUESDAY, Nov. 16, 1875.

In Re C. B. COMSTOCK & CO.—*In Bankruptcy.*

RIGHTS OF WITNESS BEFORE REGISTER—APPEARANCE OF ASSIGNEE.

A witness summoned before the register on the application of the assignee to be examined under § 5,087 of the R. S. is not a "party" to such proceeding, and is therefore not entitled "to take the opinion of the district judge upon any point or matter arising in the course of such proceeding."

A witness summoned as aforesaid, not being a "party" to the proceeding is not entitled to be attended or represented by counsel during his examination.

A creditor of the bankrupt is not a "party" to such proceeding, and is therefore not entitled to interfere with it, or be represented in it by counsel.

An assignee can only be represented in the written proceedings by his duly appointed attorney; but this does not prevent another attorney from appearing in court as counsel for the assignee in a particular proceeding therein pending, as provided in § 1,000 of the Or. Civ. Code.

An attorney who has no authority to appear in a proceeding instituted by the assignee, cannot be heard to question the authority of the attorney who appears in such proceeding as counsel for such assignee.

DEADY, J.—On the application of the assignee, W. W. Francis was summoned before the register to be examined in the above entitled matter.

Upon the appearance of Francis before the register, he was accompanied by an attorney of this court, who offered and desired to appear as attorney for the witness, and also for the Bank of British Columbia, a claimant against the estate of Comstock & Co.

Counsel for the assignee objected to the appearance of counsel for the witness or the bank, on the ground that neither the witness nor the bank is a "party" to the proceeding, although it was admitted that the proposed examination of the witness had reference to "an affair of the bankrupts with the said bank on and about Nov. 14, 1873."

The register ruled that the "witness is not entitled to counsel," and that "the bank cannot appear in this proceeding by counsel," and the question, "shall the ruling of the register be sustained?" was certified to the judge for decision.

No person is entitled, under § 5,010 of the R. S., "to take the opinion of the district judge upon any point or matter arising in the course of the proceeding" before the register unless he is a "party" thereto. The witness Francis is not a party to this proceeding. The only party to it is the assignee. The law gives him the right to examine this witness with reference to the affairs of the bankrupt, so as to enable him to act intelligently in the premises. The witness is no more a "party" to the proceeding than if he was being examined on behalf of the plaintiff or defendant in an ordinary action.

Neither is the bank a party to this proceeding. The examination of the witness is *ex parte*, and cannot be used as evidence against the bank in any action or proceeding to which it is a party. As has been stated, it is taken solely for the information of the assignee, to enable him, as the representative of all the creditors, to understand and assert or defend their rights in the premises. In re Fredenberg, 1 N. B. R., 270; In re Frienberg et al., 2 N. B. R., 426; In re Fay, 3 N. B. R., 661; In re Stuyvesant Bank, 7 N. B. R., 446.

This being so, the register might properly have refused to certify this question. In re Fredenberg, *supra*. Indeed, I think he *ought* to have refused it, and proceeded at once with the examination of the witness.

But for the same reason—that the witness is not a "party" to the proceeding—he is not entitled to counsel. It is only *parties* who are thus entitled. In this proceeding, whatever interest he may have in the matter sought to be inquired into, if any, Francis is merely a witness, and is no more entitled to appear or be attended by counsel than he would be if called as a witness in an ordinary action.

The same is true of the bank, and for the same reason. It is not a "party" to the proceeding, and the information elicited by it is merely for the benefit of the assignee. If the examination discloses the fact that the knowledge of the witness is or may be material in any controversy with the assignee, to which the bank is or may be a party, before such knowledge could be used against the bank he would have to be called and examined, subject to cross-examination, as an ordinary witness in such controversy.

The attorney who offered to appear as counsel for the witness and the bank also objected that the attorney who appeared as counsel for the assignee was not "*the* attorney of the assignee," and therefore not entitled to appear for him upon this proceeding.

While I have no doubt that the assignee can only be *represented* in the written proceedings by his duly appointed attorney, yet I see no reason why another attorney may not appear in court as counsel for the assignee, in a particular proceeding therein pending, as provided in § 1,000 of the Or. Civ. Code.

But the attorney seeking to appear for the witness that has no standing before the court in this proceeding, and therefore cannot be heard to question the authority of the attorney who appears as counsel for the assignee. For the same reason the question arising upon such objection ought not to have been certified.

The rulings of the Register are affirmed, and the clerk will certify a copy of this decision to him, and is hereby required under rule 58 to tax the expenses of this certificate together with a sum of $5 to be paid to the assignee or his attorney, against the attorney who sought to appear for the witness.

SUPREME COURT OF NEW YORK.

GENERAL TERM, NOV. 1875.

THE PEOPLE v. WILLIAM L. LEARNED, justice, etc.

CANAL INVESTIGATION—POWER OF COMMISSION TO COMMIT FOR CONTEMPT.

Held, that the commission was constitutionally created; that it was vested with authority to issue subpœnas, to enforce the attendance of witnesses, and to compel the production of books and papers; and in case of disobedience or refusal, it was authorized to proceed as if it were a court of record; that the refusal of the witness was without excuse, and the commission properly adjudged him guilty of contempt, and awarded a warrant of commitment against him.—[ED. LEGAL NEWS.]

JAMES, J.—The return to the writ of *certiorari* shows that one Denison was brought before a justice of this court on *habeas corpus* issued to the sheriff of Albany county. In his return to the writ of *habeas corpus*, said sheriff set forth that said Denison was in his custody by virtue of a warrant of commitment for contempt, issued by the canal investigating commission; that said warrant recited the creation of such commission, the appointment of its members, the matters pending before it, that said Denison had been subpœnaed to attend before it to testify, and to bring with him certain books and papers relating to certain specified contracts with the State; that on the 14th day of July, 1875, said commission being duly organized as a board and holding a regular meeting for purposes of investigation, etc., said Denison

appeared before it in answer to said subpœna, and did then and there admit that he had present with him the books and papers relating to the contracts with the State then under investigation—and did then and there in the presence of said commission willfully refuse to produce said books and papers, and to obey the subpœna issued to and served upon him; whereupon said Denison was adjudged guilty of contempt, and ordered to be punished.

After a hearing on the return to the *habeas corpus*, the said Denison was discharged from the custody of said sheriff, the learned justice holding that although the commission had power to enforce the attendance of witnesses, it had no power to compel a witness to answer, or to produce books and papers, or to punish him for refusal.

This investigating commission was created in March, 1875, by a concurrent resolution of the senate and assembly of this State. The members thereof were duly appointed by the governor, with the advice and consent of the senate. Its duty, as defined by the resolution, was to investigate the affairs of the canals of this State, etc., and power was given it to compel the attendance of witnesses, and require the production before it of any books or papers in the custody or possession of any witness touching the subject of such investigation, etc.

This resolution and the appointments under it were subsequently recognized and ratified by the legislature (chap. 91, laws of 1875, page 80), which also gave to the commission authority to issue subpœnas, compel the attendance of witnesses, and the production of books and papers before it; and, on failure of any witness to obey its mandate, power to issue attachments, with the like proceedings as courts of record.

In this case Denison had been properly subpœnaed to appear before said commission and to produce before it certain books and papers. He did so appear; he brought with him said books and papers, but he refused to produce them, without giving any reason or making any excuse.

Upon the argument it was claimed that the refusal was justified because the commission had no legal existence; no legal power to act. That it could not be legally created by concurrent resolution, and that all its doings were void. That such a tribunal could only be created by bill, enacted by both branches of the legislature, and signed by the governor. Certain clauses of the Constitution were cited in support of said objections. It is not necessary to discuss those in detail. It is sufficient to say that there is no clause in the Constitution expressly prohibiting the creation of a commission by concurrent resolution. People *v.* New York Central Railroad Company, 24 N. Y., 455, and where not expressly prohibited by the Constitution, the legislative power is unrestricted and unlimited. People *v.* Dayton, 55 N. Y., 580; Leggett *v.* Hunter. 19 N. Y., 445.

Appointing commissions for various purposes by concurrent resolution has been practiced by both State and national legislatures more or less from the organization of this government. It has been repeatedly done in this State since the adoption of the Constitution of 1846, as the Session Laws of the State will show. This fact alone would seem entitled to a controlling weight on the question of constitutionality. People *v.* Dayton, supra. Story on the Constitution, sec. 408. Cooley on Con., 67.

But, conceding the concurrent resolution unauthorized, the legislature has, by bill and enactment, recognized the commission as a legal entity, validated its creation, and vested it with all the powers exercised in this proceeding. Laws of 1875, chap. 91, p. 80.

But it is claimed this act is also unconstitutional. First, as in conflict with that clause of the Constitution which declares that "no person shall be deprived of life, liberty, or property without due process of law." This provision has no more application to this act than it has to any other act requiring witnesses to answer, and authorizing their punishment if they refuse. In such cases the proceedings to adjudicate, and to impose sentence, if adjudged guilty, is due process of law. Second, as in violation of act 3, sec. 7, a new clause which came into the Constitution in January, 1875, which declares that "no act shall be passed which shall provide that any existing law, or part thereof, shall be made or deemed a part of said act, or which shall enact that any existing law shall be applicable to it, except by inserting it." The act in question is not obnoxious to said clause of the Constitution in the sense in which it is used in that instrument. The said act neither comes within the letter or spirit of the inhibition. And besides, this clause should receive a strict construction, and if said act is not strictly within the mischief sought to be provided against by the Constitution, it should be held as not within the inhibition.

I am, therefore, of the opinion that the commission was lawfully created; that it was vested with authority to issue subpœnas, to enforce the attendance of witnesses, and to compel the production of books and papers, and in case of disobedience or refusal it was authorized to proceed as if it were a court of record. It is true the language of the act does not say in express words, the commission may furnish, but that power is fairly to be implied from its whole scope and purpose.

In this case the witness was guilty of a willful disobedience; his refusal was without explanation or excuse, and the commission very properly adjudged him guilty of contempt and awarded a warrant of commitment against him. He should have been remanded.

The order of the justice should be reversed, and an order entered directing that the relator be remanded to the custody of the sheriff of Albany county, with costs against the relator.

C. S. FAIRCHILD, for the people.
WILLIAM C. RUGER, for the relator.

U. S. COMMISSIONER HAMLIN, BANGOR, MAINE.

THE UNITED STATES *v.* GUSTAVUS L. BEAN.

ARREST OF MAIL CARRIER ON CIVIL PROCESS.

Held, that a driver and carrier of the United States mail is exempt from arrest on civil process while engaged in the service, and this exemption extends to such driver or carrier while he is waiting for the mail.—[ED. LEGAL NEWS.]

This was a proceeding before Commissioner Hamlin against Gustavus L. Bean for delaying by arrest for debt one John G. Withee, a mail carrier, who had come to the post office for the mail for Belfast, Nov. 15. The testimony was closed on the 25th, of November and the commissioner rendered his opinion. The case was based upon the Act of Congress, Revised Statutes, chap. 9, section 3,995, which provides that any person who shall knowingly and willfully obstruct or retard the passage of the mail, or any carriage, horse, driver, or carrier carrying the same shall, for every such offense be punishable by a fine of not more than one hundred dollars."

HAMLIN, J.

Upon these facts the question arises, was the arrest of the complainant by the defendant, taking into consideration the time when, and the place where, under these circumstances, such an obstruction or retarding of the driver and carrier as is within the intent of the statute? The defendant pleads that he is an officer of the law, a deputy of the sheriff, and in the legal exercise of his duty as such, having executions issued by courts of competent jurisdiction, requiring him to arrest the body of the complainant, and that the complainant was and had been under arrest all the time from November 8th down to the morning of the 15th, when he resumed the custody or re-arrested him. It does not appear necessary to determine whether the arrest made on the 8th of November and continued to the 11th, remained an arrest after Thursday or not, or whether, it having ceased at that time, the defendant could take the execution debtor as an escape, because it is not perceived how the officer on fresh pursuit could have any higher rights in the case than at the time the arrest was first made, if it were similar to that made Nov. 15th, and was unlawful. Was the last arrest then lawful? It was held in U. S. *v.* Harvy, 8 Law Reporter, p. 77, by Taney, C. J., "that a warrant in a *civil suit* against a mail carrier was no justification to the ministerial officer executing it, although he may have acted without knowledge of the law of Congress, and did not detain the carrier longer than was necessary for the execution of the warrant." In this case the retention was but a short time and the carrier got to the next office (Bel-Air) at his usual hour.

The Supreme Court of the United States recognized and affirm the principles of this decision in U. S. *v.* Kirby, 7 Wall, p. 482, and say: "All persons in the public service are exempt *as a matter of public policy* from arrest upon civil process while thus engaged," and "where the acts which create the obstruction are in themselves unlawful, the intention to obstruct will be imputed to their author, although the attainment of other ends may have been his primary object.

The justification of the defendant therefore in this respect fails, if the complainant at the time of the arrest was engaged in the public service. Was he so engaged?

It already appears that Withee was a sworn driver and carrier of the mail, and that in performance of his duty went to the Post Office to get the mail, which was about ready, and at the time of day when his duties as driver and carrier had begun. It should not be overlooked that the defendant was within the Post Office room in violation of the rules of the Postmaster General (Secs. 30 and 31, Postal Laws and Regulations) and therefore the place of arrest was as much within the prohibition of public policy as the arrest of the person of the complainant himself when in the performance of his duties; and the fact therefore that the driver had not at the time of the arrest actual possession of the mail, the delivery of which the defendant had forbidden, cannot avail the respondent.

The exemption from arrest of persons engaged in the public service as was the complainant Withee, does not depend upon the manual possession of the mail, but upon principles of public policy, which would be quite futile were the operations of the general government subject to be interrupted by the enforcement of merely private rights as in this case. Finally it was urged that the defendant did not know that the complainant was a driver or carrier of the mail when he arrested him November 15th. Something was said at the hearing which seemed to show the defendant had learned that Withee, some time about July 15, had abandoned his contract and defendant beileved that complainant had not had time or opportunity to be sworn as a driver after reaching Bangor late Saturday night, Nov. 13th, and before he came to the post-office on the morning of the 15th. Sufficient appears to show the driver was sworn, and no provision of the statute or regulation of the Post Office Department was pointed out requiring the driver to be sworn again, when he resumed the driving of the mail, Nov. 9th; nor does it appear to be material whether the complainant was the contractor or not, so long as he was acting as the driver or carrier.

No claim is made that Withee was exempt from arrest on civil process because of his being a contractor, but the exemption is put on the ground that he is and was a driver and carrier within the terms of the statute. Still less can the defendant set up his want of knowledge that the complainant was engaged in the public service as a driver or carrier of the mail.

It is impossible to reconcile the acts of the defendant in going into the post-office at so early an hour in the day, directing the clerk not to deliver the mail to Withee, and finally going with him to arrange for another driver to take the team upon any other theory, except that the defendant well knew the complainant was acting in the capacity of a driver, and it must be held that he run his own risk in delaying the mail, if acting with such belief, it afterwards turned out that he was mistaken.

Defendant ordered to recognize.

KENTUCKY COURT OF APPEALS.

QUESTIONING COMMISSIONER'S SALES IN COLLATERAL PROCEEDINGS.

Elizabeth Dawson, etc. *v.* G. W. Lifsey. From Daviess. Prior, Judge.

In May, 1851, Meredith McGee obtained a judgment in Daviess Circuit Court, enforcing his lien for the purchase money due on a tract of land sold by him to John A. Gist, in trust for Letitia Gist. The judgment directed the commissioner to sell so much of the land as would satisfy the debt, amounting to $316.26. The commissioner, instead of following the judgment, sold the land for $435, Harrison Yewell being the purchaser. The report of sale was made, confirmed by the court, and the purchase money having been paid, a deed was made to Yewell by the commmissioner, under an order of court, and recorded. Yewell sold the land to McGee, McGee to Wade, and Wade to J. M. Dawson. The latter having died, a deed was made to his widow and children. Letitia Gist having married G. W. Lifsey, and those parties being in possession of the land, the widow and children of Dawson instituted this action for its recovery, making the proceedings in the action of McGee to enforce his lien for the purchase money the evidence of their title. Lifsey and wife filed a demurrer to the petition upon the ground, as maintained by counsel, that it appearing from the record, in the case of McGee *v.* Lifsey, that the land was sold by the commissioner for more than the judgment, the sale and all subsequent proceedings under it were null and void, passing no title whatever to the land. But this court holds that said sale was not void, but only voidable, and that in order to avoid it, the party seeking to do so should have at the time resisted its confirmation, or by appeal *in that case* have had any wrong judgment therein righted. But the validity of the sale can not be questioned in a collateral proceeding like the present one. The court furthermore recognizes a distinction between the sale by a commissioner, in a case like this, and a sheriff under an ordinary execution. An error by the latter, like the one alleged here, would have been void, because it would be merely a ministerial act, while the act of the commissioner was a judicial one.

SUPREME COURT OF INDIANA.

[From the Indianapolis Sentinel.]

WILL—CONSTRUCTION OF—ESTATES TAIL AND REMAINDERS.

4412. Huxford, administrator, etc., vs. Milligan et al., Parke, C. C. DOWNEY, J.

The material question arises upon the construction of the following language in a will:

"Sixth—I bequeath to my two sons, Charles W. Huxford and Benjamin D. Huxford, all the residue of my estate, both personal and real, * * and should either of my sons, Charles W. Huxford, or Benjamin D. Huxford, die without issue, then their share of my estate to go back to my estate.

Seventh—Should any of the property herein bequeathed go back to my estate, I direct that it shall be divided equally among my children then living."

The question was what kind of estate was created by this will in the sons—and the court says: "It has been almost uniformerly held in England and in this country that a limitation over in the event that the first taker shall die without heirs, without issue, or on failure of issue creates an estate tail. The language generally is that the devise without the limitation over would create a fee simple, but with the limitation over is a fee simple cut down to an estate tail."

"We think that the limitation over after the death of the sons, Charles W. and Benjamin, vested in them an estate tail, or cut down the fee given to them to an estate tail. The court then held that this estate tail was converted by the statute into a fee, and that the remainder limited over, inasmuch as it was not to take effect until after an indefinite failure of issue, would be void as creating a perpetuity. Held, also, that as the limitation over of the real estate was void, a fortiori would the limitation over of the personal estate be void? Reversed.

ACTION ON PROMISSORY NOTE—LIABILITY OF THE BANKRUPT'S SURETY ON THE NOTE.

4361. George W. Gregg *v.* Wilson, Rush C. C. Worden, J.

Action by Wilson against George W. Gregg and John T. Gregg on a joint and several promissory note, executed by the two Greggs to Wilson. George W. Gregg answered that he was surety on the note; that John T. Gregg had been adjudged bankrupt; that the plaintiff had filed the note or a copy in the bankrupt court and there obtained judgment for the allowance of his distributive share of the assets when the same should be ascertained, etc. A demurrer to this answer was sustained, which is the error assigned. The court is of opinion that

the answer sets up no ground of defense or suspension of the action, and that even if the note were joint only; and this opinion is based upon section 19 (see Bump, 402) of the bankrupt act. Under this section, if the appellant pay the debt, he will be entitled to stand in the place of the plaintiff, and receive whatever would come to him. Affirmed.

VACATION OF HIGHWAY—DAMAGES TO LAND OWNERS—REMONSTRANCE.

4253. Butterworth *v.* Bartlett et al., Laporte C. C. Worden, J.

This was a petition by the appellees to the Board of Commissioners of Laporte county for the vacation of a certain public highway. Viewers reported in favor of the vacation. Butterworth, who was the owner of a tract of land through which the road passed, filed his remonstrance against the vacation on the ground that the highway was of public utility, and on the ground that he would be damaged by the vacation to the extent of $1,000, which sum he claimed. The board struck out the remonstrance entirely. There was an appeal to the Circuit Court, where the remonstrance was allowed to stand in fact, but the portion as to damages was stricken out which is the error assigned.

The court is of unanimous opinion that the statute (sections 19, 20 and 21, 1 G. & H., 363) authorizes damages in behalf of one through whose land a highway runs which is sought to be vacated, and the majority of the court hold that such a person may remonstrate on the ground of the inutility of the proposed vacation, and in the same remonstrance claim damages in consequence of the proposed vacation. Reversed.

MOTION IN ARREST OF JUDGMENT—THE COMMON LAW DOCTRINE AND THE CODE.

4189. Gander *v.* the State, ex. rel., etc., Warrick C. C. Worden, J.

This was a suit on a gaurdian's bond. Appellant was surety on the bond.

The evidence is not in the record, so there is no question before the court except that arising on the motion in arrest of judgment.

The court is of opinion that the facts are stated in the complaint in "such a manner as to enable a person of common understanding to know what was intended;" and that these facts, fairly interpreted, uphold the finding of the court.

There was no demurrer to the complaint. There are many cases where the complaint will not stand a demurrer, and yet would be held good after verdict against a motion in arrest of judgment. The spirit of the common law doctrine on this subject (3 Blackstone 394) has been embodied in our code. 2 G. & H. 122, section 101. Affirmed.

WITNESS—RIGHT TO BE QUESTIONED BY HIS COUNSEL.

5239. Clark *v.* the State of Indiana, Clark C. C. Downey, J.

Indictmenl against appellant for murder; verdict of guilty; motion for new trial overruled, which is the error assigned.

Defendant was put on the stand, and after answering a few questions put by his counsel, was interrupted by the judge and instructed to give a general statement of the whole affair, the judge stating that he would not permit the witness to be questioned by his attorneys. Prisoner's counsel inquired if that would exclude such questions of the defendant as might be necessary to bring out any important points which he might omit to state. The court replied that he could not permit the defendant's attorneys to ask any questions. Thereupon the prisoner left the stand and did not further testify.

The defendant is allowed, at his option, to testify in his own behalf. (Acts 1873, p. 228). He has a right to testify as other witnesses do, and, as in case of other witnesses, his counsel have a right to interrogate him. (29 Ind., 124). Reversed.

COUNTERFEIT MONEY—DUE DILIGENCE TO ASCERTAIN ITS GENUINENESS.

3257. Samuels et al. *v.* King, Bartholomew C. C. Buskirk, J.

Action by appellee against appellants to recover the value of work done as a tailor.

The questions in the case are, whether appellants in the payment of $18.00, due appellee, paid him a $20.00 counterfeit bill, and whether appellee used due diligence in reference thereto.

The evidence is contradictory, so this court can not disturb the finding below on the weight of the evidence.

But the judgment is reversed on the ground that it does not appear from the evidence that the appellee used the proper diligence to ascertain whether the note was genuine. (Wingate *v.* Neidlinger—present term, reported below.) Reversed.

COUNTERFEIT MONEY—DILIGENCE IN ASCERTAINING THE SAME.

4,407. Wingate *v.* Neidlinger, Putnam C. C. Buskirk, C. J.

On the 26th day of February, 1873. appellant purchased clover seed of appellee and paid for them in currency. Appellee took the money home with him, and in August he returned to appellant a $50 legal tender treasury note, etc., which he claimsd he had received of him, and which was counterfeit.

The question presented in this case is, whether a person, who receives currency in payment of debt, is required to use diligence to ascertain whether it is genuine, and if it is discovered to be forged, to return it within a reasonable time after such discovery, or if it can not be returned to give notice of its character.

The court cites approvingly Atwood *v.* Cornwall, reported in the American Law Register for 1874, p. 230, answering these questions in the affirmative. Reversed.

SUPREME COURT OF ILLINOIS.

HEAD-NOTES TO RECENT CASES, PREPARED BY THE REPORTER.

Belleville Nail Mill Company v. *Childs.*

PRACTICE.

1. *Trial with demurrer undecided.* — Where parties go to trial by consent with a demurrer to a count of the declaration undecided, it will be no cause for the reversal of the judgment.

First Nat. Bank of Shawneetown v. *Cook et al.*

TAXES.

1. *When equity will restrain the collection of.*—It is well settled in this State that a court of equity has the power to restrain the collection of taxes, where fraud has occurred, or where the assessment or levy has been made without legal authority.

2. *Altering assessment without notice to owner.*—The assessor has no power, after he has accepted from the owner a list and valuation of his property, arbitrarily and without notice to the owner, to alter the assessment and materially increase the valuation of his property.

3. *Power of county board to increase assessment.*—After an assessment of property for taxation has been made and equalized by the state board, the taxes extended thereon, and the books in the hands of the collector, it is extremely doubtful whether the county board has any legal authority to change the assessment; but it certainly has no power to make such change to the detriment of the taxpayer without notice to him, and so far as it may increase the assessment without notice its action is void.

4. *By cities and towns.*—The certificate of the amount required to be levied as taxes by cities and towns, etc., under section 122 of the act of 1871-72, must be filed with the county clerk within the time prescribed by law, or the levy will be void, and the collection of the same may be enjoined.

The American Insurance Company v. *Padfield et al.*

INSURANCE.

Breach of condition to keep house insured occupied.—A condition in a policy of insurance of a dwelling house that if the house should become vacant and unoccupied the policy should become void, is broken when the tenant occupying the same leaves the house two months before a loss by fire and gives the assured notice of the fact; and no recovery can be had on the policy for the loss. The fact that the tenant has left a few articles in the building and has not delivered the key to the owner, but with no intention of holding possession, will not change the rule.

City of Collinsville v. *Cole.*

ORDINANCE.

Licensing hackmen, teamsters, etc.—An ordinance that "there shall be levied upon every hackman, drayman, omnibus driver, carter, teamster, cabman or expressman, and all others pursuing a like occupation, the sum of ten dollars for a license." *Held*, not to embrace a farmer driving his team through the city. The purpose and object of such an ordinance is to impose a tax upon a business, calling or occupation, and not upon one who may occasionally haul a few loads in an emergency for another, when that is not his calling.

AGENCY—CONSEQUENCES OF A RATIFICATION.

[From the London Law Times.]

The maxim of the common law, as we have seen, is that a ratification has the effect of a previous command. In order, however, to see as clearly as possible the consequences which flow from a ratification, it will be well to consider the parties separately whose rights may be respectively affected. The relative rights then, which may be affected by a ratification are those of

(1) The principal and the agent.
(2) The principal and third parties.
(3) The agent and third parties.

In the first place, the consequences of a ratification as it affects the relative rights of the principal and agent will be considered. The general rule is, that if an act done for another by a person not assuming to act for himself, but for such otner person, though without any precedent authority whatever, it becomes the act of the principal if subsequently ratified by him. In such a case the principal is bound by the act whether it be to his detriment or for his advantage, and whether it is founded on a tort or a contract, to the same extent and with all the consequences which follow from the same act, if done by his previous authority. (Wilson *v.* Tumman, 6 M. & G, 236; 6 Scott, N. R., 894; 1 D & L, 513.) Hence, if an agent incur expenses by departing from his instructions, and the principal afterwards ratify such departure, the agent is entitled to recover the expenses so incurred. (Frixione *v.* Tagliafero, 10 M. P. C. C., 175.) In Hovil *v.* Pack (7 East, 164), the same rule was stated more briefly. If you adopt A. as your agent on your own behalf, you must adopt him throughout and take his agency *cum onere*. (See to the same effect Ramazotti *v.* Bowring, 7 C. B., N. S., 851, per Erle, C. J.; Attwood *v.* Small, 6 Cl. & F., 232.) The act done must be for the benefit of the principal. (Wilson *v.* Barker, 4 B. & Ad., 614; Goodtitle *v.* Woodward, 3 B. & Ald., 689.)

A ratification must extend to the whole of a transaction. So well established is this principle that if a party is treated as an agent in respect of one part of a transaction, the whole is thereby ratified. (Wilson *v.* Poulter, 2 Str., 859; Small *v.* Attwood, 6 Cl. & F., 232.) From this maxim results a rule of universal application, namely, that where a contract has been entered into by one man as agent for another, the person on whose behalf it has been made cannot take the benefit of it without bearing its burdens. The contract must be performed in its integrity. (Bristowe *v.* Whitmore, 4 L. T. Rep. N. S., 622).

The master of a ship entered into a charter party whereby he was himself to receive the freight. As a consideration for this he was to convey troops, and to fit the vessel for that purpose. He advanced money out of his own pocket, and drew bills on the owner for the rest of the expenses, to enable the ship to earn the freight. The contract was ratified by the owner. The House of Lords held that the owner could not take the benefit of the contract and leave the onerous parts; that the master, if sued by the owner for the freight as money had and received, would have had a right at law to deduct the money so advanced without pleading a set-off, and that he had a right in equity to be reimbursed out of the freight so earned, such a case not falling within the rule that the master has not, in ordinary circumstances, a lien on the freight for wages and disbursements (ib.). Lords Wensleydale and Chelmsford dissented from the opinion of the majority of the noble lords, on the ground that there was no question of ratification, and that the master should therefore look to the owner only for reimbursement in the usual way. They did not dissent from the principle above stated. The maxim "*Qui sentit commodum sentire debet et onus*" requires little to be urged in its support, founded, as it is, upon just and equitable grounds. Where a ratification is proved, the principle applies, but it is not always easy to decide whether the facts in a particular case support the inference of a previous but implied authority, or whether, not going to that length, they prove a ratification. Of course, in the former case, the principle has no application: (see Bristowe *v.* Whitmore, sup).

We now come to the second question, namely, the effect of a ratification upon the relative rights of the principal and third parties. As soon as there is a ratification the principal steps into the place of the agent He becomes immediately invested with all the rights and all the duties that flow from the transaction, or conduct by him ratified. The person whose conduct is ratified sinks into a subordinate position, and exchanges his original rights and duties, so far as these were due to the particular transaction, for the rights and duties of a duly authorized agent. Hence, where an unauthorized person entered into and signed, as agent of the owner, an agreement for the sale of an estate, and the owner afterwards signed it, expressing at the same time on the face of his instrument his sanction and approval of the agent's conduct, the agent could not be rendered personally liable upon the contract, the purchaser's remedy being against the principal. (Spittle *v.* Lavender, 2 Brod. & Bing, 452; and see Kendray *v.* Hodgson, 5 Esp, 228). So if a contpact in writing is made for a principal without authority, and the principal subsequently ratifies the contract, the ratification renders the agent authorized to enter into the contract under the Statute of Frauds. (Maclean *v.* Dunn, 5 Bing, 722; see also Wilson *v.* Tumman, 6 M. & G., 236; Bird *v.* Brown, 4 Ex., 786; Maclean *v.* Dunn, 4 Bing, 722; Hilbury *v.* Hatton, 2 H. & C., 822; Soames *v.* Spencer, 1 Dow. & Ry., 32).

One of the most recent cases upon the question of the operation of the Statute of Frauds in cases of ratification, came before the Court of Queen's Bench this year. (The Leather Cloth Company *v.* Hieronimus, 10 L. Rep. Q. B., 140). A verbal contract for the delivery of three cases of leather cloth to the defendant at Cologne was entered into in Feb., 1870, between the defendant's son, A., and the plaintiffs. The goods were to be sent from London, by Ostend. When the goods were ready, the plaintiffs had given up their Ostend route and returned to the Rotterdam route. They shipped the goods in March, and sent an invoice to the defendant, together with a notification of the change in the route. The defendant did not answer this letter, but ordered more goods, which were forwarded in the same way. In the voyage the three cases were much damaged. The defendant, in a letter dated 5th July, refused to pay for them, on the ground that the instructions were to send them *via* Ostend. Two questions on the above facts were raised at the trial: first, whether there was sufficient memorandum in writing signed by the defendant; secondly, whether he had, by his silence and subsequent conduct, assented to the changed route before the loss. Both questions were answered in the affirmative. The full court upheld the ruling of the learned judge at the trial. "It is impossible to say," said Lord Chief Justice Cookburn, "that there was not in this case a written memorandum of the original contract, and that the departure from the terms of that contract in the mode of delivery cannot be ratified by the other party without writing. If he receives the goods, or if he has ratified the mode by which they were sent, he cannot be heard to say that it was a new contract, and cannot be enforced because it was not in writing. There was sufficient evidence in the present case for the jury that the defendant had ratified the route by which the plaintiffs had forwarded the goods." Mr. Justice Blackburn spoke to the same effect: "The first part of the letter of the 5th July in the most distinct terms refers to the plaintiffs' letter of the 1st March, and clearly admits that all that was said in it was quite true. * * This letter was signed by the defendant or his agent, and therefore the statute has been satisfied, and there is a memorandum in writing by the defendant, the party to be charged, or his agent. But it was argued that though there was that letter of the defendant to the plaintiff, there was no assent in writing to the substituted contract." But, as his lordship pointed out, the plaintiffs did not rely on a substituted contract, but on the original contract.

[TO BE CONTINUED].

CHICAGO LEGAL NEWS.

Lex vincit.

MYRA BRADWELL, Editor.

CHICAGO: DECEMBER 4, 1875.

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CHICAGO LEGAL NEWS COMPANY,

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We call attention to the following opinions, reported at length in this issue:

Contracts Dischargeable in Confederate Money.—The opinion of the Supreme Court of the United States by Field, J. holding that contracts made during the war in one of the Confederate States, payable in Confederate currency, but not designed in their origin to aid the insurrectionary government, are not, because thus payable, invalid between the parties.

Bankruptcy—Corporation—Law Relating to Construed.—The opinion of the United States District Court for the District of Oregon, by Deady, J., holding that a petition to have a corporation adjudged a bankrupt may be maintained under section 5,122, of the Revised Statutes by any creditor of such corporation, without regard to the number and amount of creditors required to join in such petition against a natural person. The learned judge states the effect the adoption of the title "bankruptcy" in the Revised Statutes had on the original bankrupt act and the amendments thereto.

Power of Canal Commission to Commit for Contempt.—The opinion of the Supreme Court of New York, at General term, by James, J., holding that the commission known as the Governor's Commission was lawfully created, and had the power to commit a witness for contempt in refusing to testify. We do not believe that this opinion will be sustained by the Court of Appeals. It has been carried there by writ of error. If every little commission created by the governor of a State or its legislature, has the same power to commit as a court of record, this is a dangerous country to live in.

Arrest of Mail Carrier.—The opinion of United States Commissioner Hamlin, of Bangor, Maine, holding that a driver and carrier of the mail is exempt from arrest on civil process while engaged in the service, and that this exemption extends to such driver or carrier while waiting for the mail.

NOTES TO RECENT CASES.

COMPOSITION.

The United States District Court for the District of Mass., held, In re Langdon, 13 N. B. R., 60, that a resolution of composition which provides for payment in indorsed notes is defective, and will not be ratified.

BANK—FUNDS OF BANKRUPT'S ESTATE.

The opinion of the Supreme Court of New York in Havens *v.* N. C. Bank of Brooklyn, 13 N. B. R., 95, holding that no State Court can require a bank in which the funds belonging to a bankrupt's estate are deposited, to pay a judgment against the assignee out of such funds.

THE SUPREME COURT JUDGESHIP.

Governor Beveridge has called a special election for the 21st of this month, to fill the vacancy on the Supreme Bench occasioned by the resignation of Judge McAllister.

Judge T. Lyle Dickey, on Thursday, issued the following card addressed to the voters of the Seventh District:

To the Voters of the Seventh District of the State of Illinois, for the election of Judge of the Supreme Court:

I place my name before you as a candidate for Judge of the Supreme Court of this State, at the election to be held on Tuesday, the 21st day of this month.

I do this in compliance with the expressed wish of a considerable number of citizens living in the different counties composing the district, embracing men of all political parties and of nearly all classes of the community: and among them several of the ablest members of the Bench and Bar.

For many years I have been a resident of this State, six of which years have been spent in Chicago. Many of you have known me personally.

As an assurance of fidelity to duty in case of my election, I refer to my past life, as a citizen, as a soldier, at the Bar and on the Bench.

T. Lyle Dickey.

Chicago, *December* 2, 1875.

We understand the republicans intend calling a convention to nominate a candidate for this office. It would seem from Judge Dickey's card that he intends to run independent.

CALL ON JUDGE HIGGINS.

The Hon. Van H. Higgins:

Dear Sir: Understanding there is to be a vacancy upon the Supreme Bench of this State, growing out of the probable resignation of Judge McAllister, the undersigned members of the Bar respectfully request you to become a candidate for the position.

Hitchcock & Dupee	Ira O Wilkinson,	R C Bacon,
J H Roberts,	C G Whitney,	Fred C Hale,
Hervy, Anthony & Galt,	Edwin Bean,	Fred Ullman,
	H S & F S Osburn,	H M Matthews,
J W Jewett,	J M Flower,	Ewing & Leonard,
Sidney Smith	D S Pride,	Lockwood & Bacon
Barker, Buell & W,	D K Tenney,	James Goggin,
Bentley & Quigg,	S S Gregory,	E W & W W Evans,
Obadiah Jackson,	A H Chetlain,	A E Guild, Jr.
Wm P Black,	B D Magruder,	V B Denslow,
E B McCagg,	J Leaming,	L S Swezey,
J Rosenthal,	E C & W C Larned,	H W Magle,
A M Pence,	E W Russel,	P B Smith,
Whiteside & Bush,	J F Bonfield,	Wm A Sheridan,
Wm H King,	R H White,	W H Peck.
Ira Scott.	J Y Scammon,	Wm G Dyas.
L C Paine Freer,	Perkins & Chase,	W H Garrison,
Frank Baker,	Fairchild & Black-man,	Homer Bushnell,
J J Herrick,		E B Sherman,
Theo Schintz,	Hutchinson & Luff,	G W Roemmer,
J C Patterson,	D L Shorey,	W D Bishop,
L W Perse,	R W Bridge,	H C Bennett,
E G Asay,	F W Tourtelotte,	S W Osgood,
A H Lawrence,	E A Sherburne,	W E Leffingwell,
B M Munn,	Wm C Grant,	C J Johnson,
P H Pope,	W H Swift,	R S Hill,
H N Hibbard,	Sidney Thomas,	A J Johnson,
D W Munn,	John Hutchinson,	M Bryant,
R E Jenkins,	H C Noyes,	Wm H Sisson,
J Mayer,	Geo Willard,	James G Milier,
H O McDaid,	G C Latshaw,	W T Burgess,
L H Bisbee,	P L Sherman,	Firman Church,
J Wright,	B W Ellis,	Abbott & Olliver,
W I Culver,	C W Triggs,	G T Graham,
R W Pike,	Hugh H White,	N P Kinsley,
S B Perry,	H H Thomas,	J E Munroe,
J E Greene,	A G Otis,	D W Jackson,
D W C Castle,	W W Hooker,	W J Herrick,
C H Hulburd,	J C Latimer,	S M Moody,
A Ryerson,	F Dennison,	J H Speers,
H Henderson,	J G Reid,	W Monroe,
C W Fullerton,	D C Carmichael,	J Leddy,
T H Schintz,	W B Gibbs,	W S Johnson,
S S Willard,	J D Boardman,	G W Phillips,
G Goodrich,	G Gardener,	E A Fisher,
R C Hall,	F A Leaming,	R P H Durkee,
J H Whipple,	S B Mitchell,	Wm B Bradford,
F J Loesch,	J A Hinkley,	W Law, Jr.,
G P Whitcomb,	N Bacon,	E Crave,
S M Booth	A Cate.	M Beem.
W S Mulligan,	M L Coffeen,	M T Roper
G Glasner,	L D Webster,	D Appleton,
E D Swan,	F D Ball,	J Johnson, Jr.,
E L Knott,	H S Monroe,	G J Waterman,
J Schlernitzauer	S J Hanna,	J J Knickerbocker
H F Waite,	A W Windett,	A Smith,
C C Clark,	J Newman,	H Brown,
R M Dorman,	C W Wood,	H F White,
H J Peer,	E D Parker,	W S Brackett,
H H Wollsey,	Canfield & Parker,	J Mattocks,
H Decker,	C B Wells,	F J Crawford,
H G Lunt,	A D Hatch,	W L Hirst, Jr.,
J C Robinson,	J L Norton,	A J Brown,
Grinnell & Marsh,	Wells & Ingham,	W A Compton.
J Pfirshing,	D J Hamilton,	H Archambault,
J J McClellan,	C A Farnsworth,	J W Hayes,
A B Cummins,	E S Evarts,	F D Ackley,
A S Mcguire,	J W Murday,	R Hervey,
E G Hooke,	J S Noyes,	E Bayley,
E Washburn,	J R Doolittle, Jr.,	J F Dale,
F C Ingalls,	S P McConnell,	Alta M Hulett,
H E Seeley,	F A Riddle,	Springer & Scoville
A D Rich,	Frank L Osborn,	W F Mitchell,
H M Shepard,	T S McClelland,	J C Knickerbocker
Phineas Ayer,	John F Flower,	W F Whitehouse,
Allen & Barnum,	H S Austin,	R W Ricaby,
H C Ballard,	G W Kretzinger.	

Judge Higgins has also received a call signed by many of the leading merchants of the city. To these calls Judge Higgins responds as follows:

To the Members of the Bar, and to the Merchants and Business Men of the Seventh Judicial District of the Supreme Court:

Gentlemen: To be selected by you as a candidate for the highest judicial station in our State is, in my opinion, an honor as great as can be conferred upon any lawyer who loves his profession.

It is scarcely possible to overestimate the importance of the judicial department of the government, as the administration of justice is the great end for which society is organized.

There can be no higher function or dignity than that of the upright judge, who fairly and impartially administers justice between individuals and the country.

To be named as fit for such an office is an honor for which I shall always feel grateful to you. Thanking you for this expression of your confidence, I place myself at the will of the people, and if elected I will try to merit the good opinion you entertain of me.

Van H. Higgins.

Recent Publications.

Tennessee Chancery Reports. Reports of Cases Argued in the Court of Chancery of the State of Tennessee, and decided by the Hon. William F. Cooper, Chancellor of the Seventh Chancery District, at Nashville. Vol. I. St. Louis, Mo.: G. I. Jones & Co., publishers. 1875.

The mechanical execution of this volume is good, in fact it is better printed than any other law-book ever before printed in St. Louis. The manner in which the Missouri Reports are printed is not at all creditable to the State. Mr. Cooper, the chancellor who delivered the opinions reported in the volume before us, is one of the most experienced chancellors in the country, having devoted many years of his life exclusively to chancery practice. The opinions are able, and skillfully reported. We do not know of any recent volume of reports that contains as many valuable chancery cases as this one. We can cheerfully recommend it to the profession. We desire in this connection to not only call the attention of attorneys, but particularly the judges of State courts, to the following excellent rule of Chancellor Cooper:

"Rule 26, in Divorce Cases.—Where the defendant is out of the State, a solicitor of the court shall be appointed to defend, whose duty it shall be to write to the party and inform him or her of the charges of the petition; and if the place of residence be not stated in the petition, and the attorney appointed to defend is not assured of such place of residence, the plaintiff may be required to appear in court, or before the master, and be personally examined, on oath, touching the place where notice may be sent, and such other matters with respect to the fair conduct of the suit as to the chancellor may seem proper."

If such a rule were adopted by the judges in this State, and rigidly enforced we should not hear of so many fraudulent divorce cases. Since the crusade by the bar association against the divorce lawyers of this city, they have commenced less suits here. But we regret to say that it has, so far, only caused them to change the venue. They commence their cases defore the Circuit judges, in the country. We have no doubt that the judges in the country will take steps to stop this fraudulent practice. The above volume may be had of Soule, Wentworth & Thomas, Law Booksellers, of St. Louis.

The Chief Justice Declines.—Chief Justice Waite has written a letter, an extract from which appears in the Toledo (Ohio) *Commercial*, as follows:

Of course, I am always grateful to my friends for any efforts in my behalf, and no one ever had friends more faithful or indulgent; but do you think it quite right for one occupying the first judicial position in the land, to permit the use of his name for political position? The office came to me covered with honor, and when I accepted it my chief duty was not to make of it a stepping-stone to something else, but to preserve its purity, and, if possible, make my name as honorable as that of my predecessors. No man ought to accept this place unless he shall take a vow to leave it as honorable as he found it. There ought never to be any necessity for rebuilding from below. All additions should be above. In my judgment the Constitution might wisely have prohibited the election of a chief justice to the presidency. Entertaining such a view, could I properly or consistently permit my name to be used for the promotion of a political combination, as now suggested? If I should do so, could I at all times and in all cases remain an unbiased judge in the estimation of the people?

SUPREME COURT OF ILLINOIS.

HEAD-NOTES TO RECENT CASES, PREPARED BY THE REPORTER.

Primmer v. *Claybough.*

WITNESS.

1. *Widow a competent witness to protect her separate property.*—When the litigation involves the separate property of the wife, she is made a competent witness to protect the same, and the fact that her husband is dead will not render her incompetent as a witness against his administrator, when her property is replevied in a suit by a party claiming under her against the administrator of her husband's estate.

MARRIED WOMEN.

2. *Use of her property by husband.*—The fact that a married woman allows her husband to have a general use and control over her personal property, such use and control being of a character consistent with their common interests and the proper enjoyment of it by both, will not make it liable for his debts, or entitle his administrator to claim the same as against her mortgage.

Burke v. *Monroe County.*

CONSTITUTIONAL LAW.

1. *Whether statute embraces more than one subject and that is expressed in title.*—The act entitled an act to restore uniformity in the taxation of real and personal property for all purposes, in the several counties and cities in the State, which took effect July 1, 1872, so far as it provides for the repeal of certain other acts, is not in violation of the constitutional provision which declares that no act shall embrace more than one subject, and that shall be expressed in its title.

2. *Provision germane to general object and not be expressed in title.*—Where the general object of an act of the legislature is to restore uniformity in taxation in counties and cities, the constitution does not require that the title should be as comprehensive as the act itself, and the act may contain any provision which is germane to the primary object of the bill. Therefore the repeal of special laws which interfere with uniformity of taxation may be promptly embraced in such an act.

STATUTE.

3. *Construction of.*—In construing statutes courts look at the language of the whole act, and if they find in any particular clause an expression not so large and extensive in its import as those used in other parts of the act, if upon a review of the whole, they can collect, from the mere large and extensive expressions used in other parts, the intention of the legislature, it is their duty to give effect to the larger expression.

4. Thus where the object of an act was to restore uniformity in taxations in counties, and for that purpose it provided that "all laws requiring any city to support and provide for its paupers, to assume liabilities or perform duties required of counties by the general laws of this State are hereby repealed," it was held that the repealing clause embraced incorporated towns as well as cities, as without it the object of the act could not be attained, and because the word city as defined by lexicographers embraced incorporated town.

The English Supreme Court of Judicature Act abolishes bills of exceptions and proceedings in error, and substitutes for them a motion for a new trial.

THE SECRET BALLOT.

REPLY TO OPINION OF HON. JOHN A. JAMESON ON THE CONSTITUTIONALITY OF THE ILLINOIS ELECTION LAW, BY A. M. PENCE, OF THE CHICAGO BAR.

To the Editor of the LEGAL NEWS:

The people of these States are profoundly interested in all questions pertaining to government. Hence the recent opinion or letter of Judge Jameson to the State's attorney of this county, published by you in your issue of the 20th ultimo, has excited much controversy; and grave doubts exist in the minds of many as to the soundness of the judge's views. And absolute conviction obtains on the part of a still greater number, that the opinion is without foundation.

If it be the law as there announced, then the only fraud known to the law which does not vitiate, is fraud in an election, and yet it would seem, that of all things in a republic, fraud in elections should receive the greatest condemnation.

It will not be denied by Judge Jameson, I presume, that the only effectual method by which fraudulent votes can be traced, is by identifying the ballot cast with the voter, whenever it becomes necessary to make investigation into the same, for it becomes useless to ascertain the name of the man who cast the vote, if no method remains whereby it can be ascertained for whom he voted. No election, however fraudulent, could ever be contested, if it could not be proven for whom the fraudulent votes were cast. Any method whereby such a fact could be ascertained, would be invading the constitutional right of parties to a *secret ballot*, according to the views of the Judge. The consequences of such logic, at once beget a distrust as to the soundness of interpretation.

1st. Is a *secret* ballot a constitutional right?

2d. How far does secrecy extend, and what is the object of secrecy?

The Constitution of 1848 and 1870 both provide that "all votes shall be by ballot." The right of suffrage is a public right and affects the whole community. The protection of private rights of individuals is provided for in other portions of the Constitution. There is no property or civil right of the individual involved in its exercise. We find an entire article of the Constitution given to the question of suffrage, and we would expect that the legislature, when called upon to legislate and carry into effect that part of the Constitution, would only have an eye single to the protection of the public, and not to the protection of the rights of the individual.

It would seem that the only object of secrecy is to prevent ihe citizen from being intimidated in the performance of this political duty, so that he may vote according to his sentiments or judgment, and thus secure the greatest benfit to the State, and not for the purpose of protecting the citizen from some subsequent undefined injury. It would seem that the laws were sufficient for the protection of the citizen from oppression, on account of his political views, just as they are sufficient to protect him from oppression on account of his religious views. Is there any doubt that religious fanaticism is stronger and more dangerous than political fanaticism? Why not frame a law to protect a man from disclosing or testifying upon the witness stand as to whether he is a Methodist or Catholic. The Constitution guarantees the free exercise and enjoyment of religious profession and worship, and if the views now entertained by Judge Jameson and the Indiana court are the true ones in regard to the guarantee of individual political freedom, there seems a much greater reason for guaranteeing to every person an individual religious freedom. He should be protected upon the witness stand, and everywhere, from a voluntary disclosure of his religious belief, and should not be compelled to disclose whether he worships at the shrine of the Virgin, or in a Joss house.

Judge Jameson thinks the object of the Constitution is to protect the individual, after the vote cast, from persecution. It seems to me that the only object of a vote by ballot is to protect the State by removing the pressure at the time the vote is cast, thus insuring the expression of the voter's real sentiment, and leaving him alone to protect himself afterwards, as every citizen protects himself from oppression on account of his religious views.

It seems to me very absurd to seek for a definition of a *word* a hundred or a thousand years ago, when it has a present meaning well understood. Words are forever changing their signification, and we are never confined to any period of time for their definition.

But the word *ballot* does not, by force of its own inherent character, *ex necessitate rei*, carry with it the idea of secrecy, but only the opportunity for secresy, or secresy to a common intent. It is admitted by the Indiana case, upon which the Judge chiefly relies, and of which his letter is only a re-statement, that a ballot did not necessarily imply secrecy in Greece, but in Rome during the Republic, it did. Having found a single instance, therefore, where it did not imply secrecy, the argument that it must, under all circumstances, imply secrecy, is utterly overthrown. The idea of secresy does not inhere in the word.

It seems to me to be perfectly evident, that it is simply a question of policy for each State. One State may think it politic to have absolute secresy—another, the contrary; and hence it cannot be claimed that the Constitution-makers intended, by the use of the word "ballot," to adopt the accidental incident of secresy, but rather to leave it to the legislature to make it secret or otherwise, or only to give an opportunity for secresy, at time of casting the ballot, as true policy might from time to time dictate.

But the present meaning of a word is to be ascertained, not by consulting former ages, but by referring to the every-day use of it. What do the people understand by the use of the word?

In the City of Beardstown *v.* the City of Virginia, 7 LEGAL NEWS, 314, the Supreme Court of Illinois laid down the following rules of interpretation. Says the court:

"It is not allowable to interpret what has no need of interpretation, and when the words have a definite and precise meaning, to go elsewhere in search of conjecture in order to restrict or extend the meaning.

"Statutes and contracts should be read and understood according to the natural and most obvious import of the language, without resorting to subtle and forced construction, for the purpose of either limiting or extending their operation. McClusky *v.* Cromwell, 11 N. Y., 601.

"The rule is well expressed by Johnson, J., in Newell *v.* The People, 3 Seld., 97, in these words: 'Whether we are considering an agreement between parties, a statute or a constitution, with a view to its interpretation, the thing we are to seek is the thought which it expresses. To ascertain this, the first resort in all cases is to the natural signification of the words employed in the order and grammatical arrangement in which the framers of the instrument have placed them. If thus regarded, the words embody a definite meaning which involves no absurdity, and no contradiction between different parts of the same writing; then that meaning apparent upon the face of the instrument is the one which alone we are at liberty to say was intended to be conveyed. In such a case there is no room for construction. That which the words declare is the meaning of the instrument, and neither courts nor legislatures have the right to add to or take away from that meaning.'

"The question in this and other cases of construction of written instruments is not what was the intention of the parties, but what is the meaning of the words they have used. (See Denman, C. J., in Rickman *v.* Carstairs, 5 B. & A., 129; see ibid, 129).

"It was said by Brennan, J., in Walker *v.* Harris, 20 Wend., 561, that 'the current of authority at the present day is in favor of reading statutes according to the natural and most obvious import of the language, without resorting to subtle and forced constructions for the purpose of either limiting or extending their operation.' And see People *v.* Purdy, 2 Hill, 35; 4 Hill, 384; Denn *v.* Reid, 10 Pet., 524; Spragins *v.* Houghton, 2 Scam., 377.

"These doctrines received the explicit recognition and approval of this court in Hills *v.* The City of Chicago, 50 Ill., 86.

"In view of the well-settled and sound and only safe principles applicable to the exposition of constitutions, statutes, and instruments in writing above declared, we do not feel at liberty to enter into the field of speculation and essay whether we may not construe away the plain and obvious meaning of the clearly expressed language in question according to some conjectural intention of the framers of the Constitution.

"The Constitution does not derive its force from the convention which framed, but from the people who ratified it, and the intent to be arrived at is that of the people. Cooley's Const. Lim., 55. Says Judge Story, in speaking of the Constitution of the United States: 'The people adopted the Constitution according to the words of the text in their reasonable interpretation, and not according to the private interpretation of any particular men.' 1 Story Com. on Const., 392, note."

Now then, according to the foregoing rules, what did the people understand by the word ballot, at the time of the adoption of the new Constitution in 1870? The question before us is not what political theorizers or persons accustomed to seek for the meaning of a word, by going back to its root, may suppose it once meant, but, what meaning does the public at large attach to it?

And first—Webster defines the word ballot as follows: "Originally a ball used in voting, hence a piece of paper or other thing used for same purpose." Our great lexicographer is supposed to be quite accurate, and he does not attach any meaning of secresy to the word. If secresy had been an inherent quality of the ballot, would not Webster have indicated that fact? Secresy no more inheres in the signification of the word ballot than does the idea of a ball. According to the same method of reasoning, the courts ought to declare the law unconstitutional, because the legislature provided for paper ballots, and not for balls, as the means of expressing the political wish. Because a ball was the ancient method, therefore it should continue forever. The idea of ball inheres in the word just as much as the idea of secresy. To such absurdities must we come.

The first Constitution of Illinois, that of 1818, provided that elections should be *viva voce* until altered by the General Assembly. As early as 1829, the General Assembly provided that the citizen might vote *viva voce*, or by presenting an open ticket with the name and the office written or printed upon it, and from that open ticket or ballot the clerks of the election were to write the name of the person voted for and the office, together with the name of the voter upon the poll-book. This was the first introduction of the ballot in Illinois. See Gale's Stat., p. 263. Thus we see an opportunity was given the voter to cast his ballot so as to conceal the same from those outside, at the time of voting; but no provision was made for a continual concealment, for the judges of election knew, and the poll-books showed for whom he voted. This mixed system of *viva voce* and ballot voting continued until the adoption of the Constitution in 1848, which provided for a vote by ballot exclusively. And the legislature, on February 12th, 1849, provided for the method of voting by ballot. There was no provision in that law for absolute concealment, but only for an opportunity of concealment at the time of voting. The statute made provision for a contest of elections and as there was no provision against an investigation but in favor of it, it must be presumed that the legislature intended that when necessary, a disclosure should be made as to the contents of the ballot. And we find many cases in Illinois where the poll-books were purged of illegal votes. The law continued unchanged until February 5, 1861, when a statute was passed which provided for the numbering of the ballot to correspond with the number set opposite the name of the voter on the poll-book, thus enabling all frauds to be directly traced. That statute continued up to the adoption of the new Constitution in 1870, which provided for a vote by ballot as the Constitution of 1848 did. Thus we find that a construction was given by the legislature chosen by the people of the meaning of the word ballot, and it must be presumed after such a lapse of time and such a general acquiescence, that the legislature construed the meaning of the word as the people understood it. Thus, by act of the legislature, from 1829 to 1849—a period of 20 years—an open ticket was voted; and from 1849 to 1861—a period of 12 years—a ticket which enabled the voter to conceal his vote while voting, and thus preventing an immediate control over his wishes, but without protection of secresy after the vote was cast. And then from 1861 to 1870, a period of 9 years, in which, by express provision of law, the ballot was numbered. If all this period of time is not suffieient in which to give a definition to a term, or to change its definition and meaning, if it ever had a different one, then we must admit that language is fixed as the hills, and that no change can take place.

Did not the people, at the time of the adoption of the Constitution of 1870, have a definite idea of the meaning of the ballot? Had they not acquiesced for nine years in the very law now upon the statute book, which compelled a numbering of every vote? How is it possible to obtain in a more explicit way, the public understanding of a term, than by looking to the laws of the people's legislature where it is defined, and by absolute acquiescence in that definition. The new Constitution was adopted with that definition before them; and, to repeat Judge Story: "The people adopted the Constitution according to the words of the text, on their reasonable interpretation, and not according to the private interpretation of any particular men." And to repeat again the language of the Supreme Court of Illinois: "The Constitution does not derive its force from the convention which framed it, but from the people who ratified it, and the intent to be arrived at is that of the people."

Even if it were true that the word ballot had a definite, well-fiefined signification of absolute secresy, at any particular time, or even at the time of the adoption of a constitution, it could not be claimed that such signification should always continue. For instance, the Constitution of the United States provides that "Congress shall have the power to establish uniform laws on the subject of bankruptcies throughout the United States."

At the time of the adoption of the Constitution of the United States, the "subject of bankruptcy" was well defined. It had a certain signification in England, from whence our law came. It meant that the entire property of the bankrupt should be taken hold of and distributed among his creditors. But the Congress of the United States has now provided that such property need not necessarily be taken hold of at all or distributed, but it provides that a certain number of a man's creditors may assent to a composition, and accept from the debtor a certain percentage of his liabilities and discharge him from the balance. And such assent will bind all the creditors whether they all assent or not. Here is a taking away property and rights without due process of law. It could not be done under the English bankrupt act, or at common law, at the time of the adoption of our Constitution, but the law is held by the courts to be constitutional, and that Congress is not confined to the terms or signification of the old English bankrupt law, but they may change it so that it can scarcely be recognized. Hence, bankruptcy has a different meaning to-day from what it had a hundred years ago.

The Constitution of this State provides that no person shall be deprived of life, liberty, or property, *without due process of law*.

As well might a party contend that due process of law means process of law in accordance with the common law practice, and that the legislature could not constitutionally change the practice and adopt the New York code system. Or, that the legislature could not change the rules of evidence so as to permit parties to a suit to testify, or husband and wife to testify against each other. All these things are subject to the control of the legislature as policy may from time to time dictate, and so long as the ballot is preserved, the legislature may or may not make it secret as to it seems best. The subject and its regulation is under the control of the legislature.

In the case of Byler *v.* Asher, 47 Ill., 105, the Supreme Court of Illinois said:

"There can be no question that the legislature may provide all reasonable safeguards to preserve the ballot-box from fraud, and to maintain the purity of our elections. As the wisdom of our laws, the fair and impartial administration of justice, depends upon the officers chosen by the people, and even the per-

petuity of our present form of government can only be maintained by preserving our elections free from fraud and corruption, all reasonable requirements for the purpose, not calculated to abridge the elective franchise, are within the scope of legislative power."

Hence we perceive that our own Supreme Court recognized the importance of a pure ballot-box, and the power of the legislature to provide by law for its protection. And not only has the Supreme Court of this State laid down the salutary rule as a theory, but it has also actually decided that the parties who cast this ballot, which Judge Jameson holds should be an inviolable secret, may be called upon the witness stand and interrogated as to the person for whom he voted.

This idea of absolute secresy is now attempted to be used as a sword against the public instead of a shield to the well-being of the State. Frauds must go unpunished, and governments be revolutionized, in order that the individual may be protected from oppression, while the laws remain ample for his protection, as in all other cases of oppression—political, religious, or otherwise. The intent of the ballot is thus made to serve just the opposite end from which it was originally intended, viz., the protection of the State.

This is indeed a new political heresy. It has been invented in Indiana, and has never gone further than Indiana, where we hope it will be confined.

In the State of Missouri the constitution provides that elections shall be by ballot, as our constitution does. The question there arose as to the validity of the returns of a certain district, where the votes had not been numbered. The court excluded the whole poll because in conflict with the statute. In the decision of the case, West *v.* Ross, 53 Mo., 354, the court uses the following language:

"Can we say that this negative clause is only directory, and in that indirect way nullify or repeal, by a judicial decision, the whole provision of the statute requiring ballots to be numbered? If we deny the consequence affixed by legislature to the non-performance of a regulation provided by law, it, in effect, nullifies the law itself. It is said that to ascertain whether a law is intended to be directory or imperative does not depend so much on the construction of the language of the law as of its application. 'The statute is sufficiently clear; the only point is, what shall be the consequence of a disobedience of its directions.' (Sedg. Stat. and Com. Law, 369). In the statute now under consideration, the legislature has not only by the statute directed what shall be done, but has also declared what consequence shall follow disobedience.

"In the present case the legislature has provided and required that the ballots shall be numbered, and then provides, in express terms, that no ballot not numbered shall be counted. Can we say that such ballots shall be counted, without an attempt at judicial legislation? I think not, and it would be a misapplication of terms to say that such a statute is only directory."

It is strange, indeed, that the question was not even raised or alluded to by the court or counsel in that case, if the definition and meaning of the word ballot so clearly signifies secresy for all time to come. The very fact that the question was not raised, is the most conclusive evidence that the legal mind of Missouri had never imagined that the ballot meant absolute secresy.

It is simply a question of policy. One State thinks absolute secresy or partial secresy is the better policy. Another thinks openness and honesty and manhood are the better qualities of the true citizen of the republic. In my humble opinion it is a political or judicial heresy of the gravest consequence; and for a judge to construe a law to be in contravention of the Constitution is a deep responsibility, unless the provisions of the two instruments cannot be harmonized, and are utterly inconsistent.

A. M. PENCE.

OLD TIMES IN NEW YORK—LEGAL TRIALS OF THE DUTCH PERIOD.

Mr. James W. Gerard, who seems to be untiring in his archæological researches into the history of this city, has given us the result of his labors in a paper lately read before the New York Historical Society, entitled "The Old Stadt Huys of New Amsterdam."

The main interest of Mr. Gerard's account of the Old Stadt House or City Hall of New Amsterdam consists in the vivid portraiture of the manner, habits of thought, and social condition of the Dutch settlers of New York, as transmitted to us in the legal trials of the Dutch period, held in the Old Stadt Huys, which in 1654 stood on the corner of Coenties lane, facing Coenties slip, where now are the warehouses 71 and 73 Pearl street. In those days there was no State prison, and therefore the punishments inflicted were fines, banishment, the pillory, flogging, and confinement in one's own house, or for a limited time with the town jailor in the City Hall or Stadt Huys. Theft was punished by scourging with rods, or banishment and fine. Branding on the cheek was employed for hardened criminals. Violators of the Sabbath were severely punished. It was forbidden to go nutting or picking strawberries on that day. Fowling, running, sailing, driving, or playing any games, were also forbidden on that day.

"Albert the Trumpeter, when brought up for having an axe on his shoulder on the Sabbath, saved himself from punishment other than a reprimand by showing that he was cutting a bat for his little boy.

"Theft was punished severely.

"The defenses of Lysbert Anthony, brought up for stealing black seawant from her mistress, Mrs. Dominie Drysius, show a comical want of logic. Her defense was that 'Barbar, the negress, who lived at Jan, the joiner's, had stolen a silver bell from Burgher Jorison,' and for a second defense, 'that the cupping woman told her to steal.'

"Lysbert's pleas did not avail, and she was sentenced to be chastised by her mother Mary. 'Mary,' the chronicle reads, 'undertaking it, hath, with the assistance of long Anna, severely punished and whipped her daughter with rods in the presence of the worshipful magistrates.'

"We have also the record of a capital punishment from the earlier annals of 1641. The court proceedings before the Council, urged by the Fiscal, were against Jan, of ort Orange, Manuel de Gerritt, the giant, Anthony Portugese, Simon Congo, and five others, all negroes belonging to the company, for killing Jan Premero, another negro.

A GIANT ESCAPES HANGING.

"The prisoners having pleaded guilty, and it being rather a costly operation to hang nine able-bodied negroes belonging to the company, the sentence was that they were to draw lots to determine 'who should be punished with the cord until death, praying the Almighty God, Creator of heaven and earth, to direct that the lot may fall on the guiltiest,' whereupon the record reads, 'the lot fell, by God's providence, on Manuel Gerrit, the giant, who was accordingly sentenced to be hanged by the neck until dead, as an example to all such malefactors.' Four days after the trial, and on the day of the sentence, all Nieuw Amsterdam left its accustomed work to gaze on the unwonted spectacle. Indians also gathered to the scene. The giant negro was brought out by the black hangman and placed on the ladder against the fort, with two strong halters around his neck. After an exhortation from Dominie Bogardus, during which the negro chanted barbaric invocations to his favorite fetich, he was turned off the ladder. Under the violent struggles and weight of the giant, however, both halters broke. The man fell to the ground uttering piteous cries, twisting and grovelling in the earth on his knees. The women shrieked, the men joined in his prayers for mercy to the stern Director, but he was no trifler, and the law took its course. The hangman prepared a stronger rope. But the cry for mercy was so general that the Director relented, and the fortunate giant was led off the ground by his swarthy friends, somewhat disturbed in his intellect by his near view of the grim King of Terrors."

MALTREATING QUAKERS.

Although Mr. Gerard cannot and does not claim for our Dutch predecessors entire innocence of the charge of religious intolerance, for he is obliged to admit that "Stuyvesant hated and maltreated Quakers, and interdicted them from preaching. But," he continues, "Stuyvesant's harshness was not indorsed by the people, and met with the opposition of even his own sister."

"They were driven away from New Nederland, but were not led to the gibbet as in New England. Even when the colony was needy and suffering, Director Kieft, the predecessor of Stuyvesant, with heavy ransoms rescued the Jesuit fathers, Joques and Bressani, from the Indians, gave them refuge, food, and clothing, and free transport to Europe."

The only witchcraft trial in New York on record, is this:

"In 1670, the people of the town of Westchester, which was settled mostly by New Englanders, were very much disturbed, There came among them a poor old widow and her children, one Katherine Harrison. She was fleeing from religious people of Wethersfield, Conn., who wanted to praise God by hanging their fellow creatures.

"Complaint was made to the governor by the Westchestrians of this terrible visitation, and of a Capt. Richard Panton, who had humanely given the hunted woman asylum. It was prayed to the governor, by these valorous people, that he would order the old woman to be removed from among them.

"The governor scouted the petition of these who, in his words, 'pretend their fears to be of a public concern,' and the old woman having given bonds for her 'civil carriage and good behavior,' the ensuing court of Assizes held at New York peremptorily ordered the bonds to be discharged, and declared 'that she hath liberty to remaine in the towne of Westchester, where she now resides, or anywhere else in the Government, during her pleasure.'

"Thus peremptorily were the magistrates of the town of Westchester rebuffed." —*N. Y. Sun.*

JUDGMENTS BEFORE ACTING JUDGE.—The Supreme Court of Louisiana, on the 29th November gave an opinion in the case of the State of Louisiana against Pete Phillip appealed from the Superior Criminal Court. The defendant was convicted of perjury while Geo. H. Broughan, an attorney-at-law, was acting as judge under an order of Judge Atocha and was sentenced to the penitentiary for five years. The appellant alleged that Broughan had no legal right to act as judge, and that the judgment against Phillips should be annulled and the case remanded for trial according to law.

UNITED STATES SUPREME COURT.

PROCEEDINGS OF.

Monday, Nov. 29, 1875.

No. 33. William H. Scudder v. The Union National Bank of Chicago. In error to the Circuit Court of the United States for the Northern District of Illinois. Hunt, J., delivered the opinion of the court, affirming the judgment of the Circuit Court with costs and interest.

No. 41. Jabez A. Sawyer et al v. Edward Turpin et al. In error to the Circuit Court of the United States for the district of Massachusetts. Strong, J., delivered the opinions affirming the judgment of the Circuit Court with costs.

No. 37. Annie Knotts et al., infants, etc. v. Franklin Stearns, executor, etc. Appeal, from the Circuit Court of the United States for the eastern district of Virginia. Field, J., delivered the opinion, affirming the decree of the Circuit Court with costs.

No. 571. The United States v. The Union Pacific Railroad Company. Appeal from the Court of Claims. Davis, J., delivered the opinion, affirming the judgment of the Court of Claims.

No. 38. Francis Dainese v. The Board of Public Works of the District of Columbia. No. 39. Francis Dainese v. The Board of Public Works of the District of Columbia. Appeals from the Supreme Court of the District of Columbia. Miller, J., delivered the opinion, reversing the decrees of the Supreme Court with costs, and remanding the causes for further proceedings, including leave to amend pleadings, as may be in accordance with equity and with the opinion of this court.

No. 22. Charles A. Nichols, assignee, etc. v A. M. Eaton et al. Appeal from the Circuit Court of the United States for the district of Rhode Island. Miller, J., delivered the opinion, affirming the decree of the Circuit Court in this cause with costs.

No. 35. Mary C. Sawyer v. Clarke W. Upton, assignee. No. 34. Benjamin Carver v. Clark W. Upton. In error to the Circuit Court of the United States for the northern district of Illinois. Swayne, J., delivered the opinion, affirming the judgments of the Circuit Court in these causes with costs and interest.

No. 275. Jay Cook & Co. v. The United States. In error to the Circuit Court of the United States for the Southern District of New York. Waite, C. J., delivered the opinion, reversing the judgment of the Circuit Court, and remanding the cause, with directions to enter judgment reversing the judgment of the District Court, and direct that court to award a *venire facias de novo*. Dissenting, Clifford, J., Field, J., Bradley, J. Miller, J., did not sit on the argument, and took no part in the decision of this cause.

No. 32. George W. Long et al v. James W. Converse et al., receivers, etc. No. 31. Henry W. Farwell v. James W. Converse et al., receivers, etc. In error to the Supreme Judicial Court of the State of Massachusetts. Waite, C. J., delivered the opinion, dismissing the writs of error in these causes for want of jurisdiction.

No. 7. Original. Ex parte Ira G. French, petitioner. Waite, C. J., delivered the opinion of the court, denying the motion for mandamus in this cause.

No. 4?9. Joel C. Davis et al v. The State of Indiana et al., Board of Commissioners of Bartholomew County. Waite, C.J., announced the decision, denying the motion to dismiss this cause.

No. 513. The United States v. John W. Norton. Waite, C. J., announced the decision, granting the the motion to advance this cause, and assigning it for argument on the 15th of March, 1876.

No. 854. William H. W. Cushman et al. v. E. P. Hathaway. No. 855. William H. W. Cushman et al. v. E. P. Hathaway. In error to the Circuit Court of the United States for the Northern District of Illinois. On motion of Thomas Dent, of Chicago, docketed and dismissed with costs.

No. 500. The New Orleans Gas Light Company v. The Cresent City Gas Light Company. On motion of N. Wilson, dismissed for want of jurisdiction, per stipulation.

No. 748. Louis Rose v. Frank F. Chase, receiver. Motion to advance this cause was submitted by C. Case for the defendant in error.

No. 643. The United States v. Wm. Allison. The motion to advance this cause was submitted by Solr. Gen. Phillips for appellants.

No. 616. Dobbins & Spurck v. The United States.
No. 617. Dobbins & Spurck v. The United States.
No. 618. Dobbins & Spurck v. The United States.
No. 619. Dobbins & Spurck v. The United States.
No. 620. Thomas S. Dobbins v. The United States.

The motion to advance these causes was submitted by Assist. Atty. Gen. Smith for the United States.

No. 53. The Town of Venice v. Evander Murdock. The argument of this cause was continued by Warren T. Worden for plaintiff, and by David Wright for defendant.

Adjourned until Tuesday at 12 o'clock.

Tuesday, Nov. 30.

On motion of T. J. Durant, Edmund J. Davis, of Austin, Texas, was admitted.

On motion of E. L. Stanton, S. M. Smith, of St. Louis, and Rufus L. B Clark and A. S. Worthington, of Washington, D. C., were admitted.

No. 53. The Town of Venice v. Evander Murdock. The argument of this case was continued by David Wright for the defendant, and concluded by Warren T. Worden for plaintiff.

No. 55. The Town of Venice v. James O. Woodruff et al. No. 56. The Town of Venice v. William L. Matson. No. 90. The Town of Venice v. Opher Edson. These causes were submitted on printed arguments by Warren T. Worden for plaintiffs, and by David Wright for defendants.

No. 54. The Town of Genoa v. James O. Woodruff et al. This cause was argued by H. L. Comstock for plaintiff, and by David Wright for defendant.

No. 57. The First Unitarian Society, of Chicago, v. H. F. Faulkner et al. This cause was submitted on printed arguments by Daniel L. Shorey, of Chicago for plaintiff, and by R. M. and Quinton Corwine for defendants.

No. 58. Ira P. Nudd and S. R. Noe v. George B. Borrows, assignee. This cause was submitted on printed arguments by W. H. Swift for plaintiffs, and by W. H. Lewis and Wm. J. C. McKenney for defendant.

Adjourned until Wednesday at 12 o'clock.

Wednesday, Dec. 1.

On motion of J. G. Abbott, George E. Betion, of Boston, Mass., was admitted.

On motion of P. Phillips, Benjamin H. Hill, of Athens, Georgia, was admitted.

On motion of D. B. Duffield, Ashley Pond, of Detroit, Mich., was admitted.

No. 59. Sarah McMurray et al. v. Austin P. Brown. This cause was argued by James S. Edwards for appellants, and by E. L. Stanton for

appellee. No. 231. The Home Insurance Co. of New York v. George Davis, etc. This cause was submitted on printed arguments by George W. McCrary for plaintiff, and by J. H. Ashton for defendants, under the twentieth rule.

No. 532. The County of Moultrie v. The Rockingham Ten Cent Savings Bank. This cause was submitted on printed arguments by John R. Eden and W. J. Henry for plaintiffs and by S. M. Cullum, of Springfield, for defendant, under the twentieth rule.

No. 60. John H. Kennard v. The State of Louisiana, ex rel. P. H. Morgan. This cause was argued by T. Durant for defendant, and submitted on printed arguments by Semmes and Mott, and N. P. Chipman for plaintiff.

No. 61. The Western Union Telegraph Co. v. The Western and Atlantic Railroad Co. The argument of this cause was commenced by J. H. Ashton for appellant, and continued by B. H. Hill for appellee.

Adjourned until Thursday at 12 o'clock.

LEGAL TRIALS OF THE DUTCH PERIOD.

It seems that the barbaric sport of "gander pulling," which has been generally attributed to the south, as an institution peculiarly sectional, was not unknown to the old Knickerbockers.

"In 1654, we find there was a terrible *to do* between the fort and the City Hall; all arising out of the Governor's interference with the people's holidays, and preventing the boys and girls from riding at the goose at Shrovetide. This sport consisted in greasing a goose's neck, hanging the bird in the air, and trying to capture it in riding rapidly past.

"The Director and Council had issued an order prohibiting such festivities. Dominie Biom also issed a pronunciamento against them from Wyldwick. Whereat the worthy city representatives had demurred and grumbled greatly. Thence came another fulmination from the fort of a most sarcastic and belittleing character. It was addressed "to the small bench of justices."

THE BURGOMASTERS INDIGNANT.

"It recites the prior proclamation of the Director and Council, forbidding farmers' servants 'to ride the goose at the feast of Backus and Shrovetide, and that the Burgomasters and Schepens were aggrieved that the order should be made without their assent. It farther recites, 'Besides, in their time it has never been practiced here. Moreover, it is altogether unprofitable, unnecessary and criminal for subjects and neighbors to celebrate such popish and pagan feasts, and to practice such customs; and yet, notwithstanding, the same (as the Burgomasters and Schepens sustain,) may, in some places of Faderland, be tolerated and looked at through the fingers.'

"Several delinquents were legally summoned by Claes Van Elslant, the Court Messenger, but did not come, and on being cited and summoned by the Fiscal before the Director, some of their number began threatening, cursing, deriding and laughing at the High Council, in an insolent and contumacious manner, in the presence of the Director general and Council, for which they were properly commtited to prison. At which the Burgomasters and Schepens 'do feel themselves in their quality, particularly aggrieved,' forsooth! because the Director-general had done this without their consent and knowledge. As if, without the knowledge and consent of the Burgomasters and Schepens, no order can be made, no mob interdicted from celebrating the feast of Backus, much less have the privilege of correcting such persons as tread under foot the Christian and holy precepts, without the knowledge and consent of a little bench of justices.

"Thereafter, accordingly, the lads and lasses, instead of 'riding the goose,' and honoring Backus on Shrove Tuesday, or at '*Pinckster*,' had to content themselves with pleasure parties to Nooten Island, the Knick Hock, or Bloemondael; or with rambling in the Maadge Paadtje and to the Common or *Vlacke*, now the Park, for nuts or strawberries."

Courts were jealous of their honor and authority under the Dutch *regime*.

"In 1660, Walewyn Van der Veen appeared in court to answer the charge of having called the court mere 'simpletons and blockheads' for a certain adverse decision against him on a bill of exchange. After proof of the fact that these terrible words were uttered, the court made sentence as follows:

"That Walewyn Van der Veen, for his committed insult, shall here beg forgiveness, with uncovered head, of God, justice, and the Worshipful Court, and moreover, pay as a fine 190 guilders.

"Walewyn having refused to obey the sentence, was committed a prisoner to his own house till the sentence was obeyed.

THE COURT ON ITS DIGNITY.

"On another occasion the court felt called upon to vindicate its dignity in the case of Pietertje Jans, widow of Claes Jansen Ruyter, whose house had been sold on an execution. She was brought up before the court for saying of the court, 'Ye despoilers! ye bloodsuckers! ye have not sold but given away my house.' The complaining officer stated that, as this is a sting that cannot be endured, he demands that Pietertje be severely reprimanded and fined. The reprimand and fine were decreed by the court.

"Ill fared it also with Jan Willemsen Van Iselstepa, commonly called Jan of Ecyden, who for abusive language and writing an insolent letter to the magistrates of Bushwyck, was sentenced to be fastened to a stake at the place of public execution with a bridle in his mouth, rods under his arm, and a paper on his breast with an inscription, 'Lampoon writer, false accuser, and defamer of magistrates.' He was afterward banished."

Among the records of the solemn surrender of the old colony to the English, 1664, comes in two amusing episodes. First, Albert the Trumpeter appears before the court and demands the prosecution of a certain attachment made on a hog. Following this record is the conclusion of the transfer of authority to Gov. Nichols, and then amid the solemn proceedings there is this amusing interlude:

"On the last day of the sessions of the old court comes Mrs. Pieterje Jans with a suit against Evert Duyckinck, for 'a little ornamental head-dress,' worth fifty-five guilders, bought by his daughter from plaintiff, but which Mrs. Duyckinck had sent back, saying that the daughter had no right to buy such without the knowledge of the parents. The defendant says he was not present when his daughter bought the head dress, and knew nothing of it, and says it is now no time to wear head-dresses, and, besides, that the price is extortionate. The plaintiff retorts that the defendant was near by at the time, and said it was his children's money, and what she states is as true as that she is a sinful woman and stands there. Mrs. Jans was awarded the price of the head-dress."—*N. Y. Sun.*

SERVED HIM RIGHT.—One morning this week upon the opening of the United States Court in this city, a juryman summoned staggered into the court room under the influence of liquor. Judge BLODGETT, noticing it, said, "Mr. Clerk, pay Mr. ——— what is due him up to this date. We have no use for such jurymen in this court."

JUDGE BLODGETT, on yesterday, fined James A. Ferguson, who was a juryman in his court, one hundred dollars, and ordered him committed to the county jail for sixty days, for attempting to communicate with the agent of the plaintiff in a case he was trying as a juryman.

E. WASHBURN, Jr.,
Attorney, 15 Kendall Building.

STATE OF ILLINOIS, COOK COUNTY. ss.—County court, Cook county, Illinois.—In the matter of the estate of Joseph Woodward, deceased.—To Joseph Woodward, Mary A. Woodward, John Woodward, Robert P. Woodward and Ella J. Woodward, heirs at law of said deceased.

Take notice, that at ten o'clock A.M., on the third (3d) day of January, A. D. 1876, or as soon thereafter as said matter can be heard, the undersigned, as executor of said estate, will present to said court his final account, and report as such executor, and ask that the same be approved, and that said estate be declared settled, and the undersigned discharged as such executor, at which time and place you can be present and consent to or contest the approval of said accounting if you so desire.

Chicago, Dec. 2d, 1875.
11 a WALTER HAY, Executor.

TRUSTEE'S SALE.—WHEREAS, THOMAS HOWorka, and Rozy Howorka, of the city of Chicago, county of Cook and State of Illinois, on the 17th day of November, 1874, executed and delivered to the undersigned, as trustee, bearing date aforesaid, and filed for record in the recorder's office of Cook county on the 18th day of November, A. D. 1874, and recorded in book 316 of records, on page 239, conveying lot six (6), in C. H. Deere's subdivision of block seventeen (17), in Walsh & McMullen's subdivision of part of the southeast quarter of section twenty (20), township thirty-nine (39), north range fourteen (14), east of the 3rd principal meridian, in the city of Chicago aforesaid, with all improvements thereon, to secure the payment of one promissory note of even date therewith, payable two years, after its date, for the sum of one thousand dollars, with interest at ten per cent. per annum, payable semi-annually, payable to the order of John Houdek.

And whereas, default has been made in the payment of all the interest due on said promissory note, and the legal holder has declared the whole of said indebtedness due, by reason of such default, and has applied to me, as such trustee, to sell said premises to pay the same.

Now, therefore, in pursuance of the power in me vested by said trust deed, I shall sell the said premises at public auction, for cash, to the highest bidder, on Wednesday, the 5th day of January, A. D. 1876, at one o'clock in the afternoon of said day, at the office of the Sheriff of Cook county, at Chicago, Illinois, and all right, title, equity of redemption and homestead rights of said grantors, their heirs and assigns therein.

Chicago, December 4th, 1875.
11-14 FRANK NOWAK, Trustee.

TRUSTEE'S SALE.—WHEREAS, JAMES L. McKeever and Mary A., his wife, by their certain trust deed, dated the first (1st) day of June, A. D. 1874, and recorded in the recorder's office of Cook county, Illinois, in book 366 of records, at page 457, conveyed unto the undersigned, William C. Ives, for the purpose of securing the payment of a certain promissory note for the sum of fifteen hundred dollars, in said trust deed set forth, the following described premises, situated in the county of Cook and State of Illinois, to wit:

The east half (½) of the east half (½) of lot numbered nine (9), in block one (1), in Cleaverville addition to Chicago, being a subdivision of part of the north half of the northeast quarter of section three (3), township thirty-eight (38) north, range fourteen (14), east of the third principal meridian, in trust, to wit: upon the trusts specified in and created by said trust deed, to which reference is hereby made.

And whereas, default has been made in the payment of said note, both of the principal and interest, which said default still continues,

And whereas, William T. McKeever, the legal holder of said promissory note, has applied to the undersigned to sell the said premises and otherwise to execute the trusts created by said trust deed.

Now, therefore, public notice is hereby given, that I, William C. Ives, as trustee named in said trust deed, in pursuance of the power and authority in me vested by the said trust deed, will, on Thursday, the sixth (6th) day of January, A.D. 1876, at ten (10) o'clock A.M., of said day, at the east door of the two doors opening into Adams street, of the court house situated at the southeast corner of LaSalle and Adams streets, in the city of Chicago, Cook county, Illinois, sell at public auction, to the highest and best bidder, for cash, the said premises hereinbefore and in said trust deed described, and all the right, title, benefit, interest and equity of redemption of the said James L. McKeever and Mary A. McKeever therein,

Chicago, Dec. 3d, 1875.
11-14 WILLIAM C. IVES, Trustee.

WHEREAS, ADALBERT H. BABCOCK, OF THE city of Chicago, county of Cook, and State of Illinois, by his certain deed of trust, duly executed, acknowledged and delivered, bearing date the 28th day of April, 1875, and recorded in the recorder's office of said county, on the second day of June, 1875, in book 526 of records, page 288, did convey to the undersigned, as trustee, the following described premises, situate in the said city of Chicago, to wit:

Lots twenty-three and twenty-four, in block fifteen, in Uhlich & Muehlke's addition to Chicago, which trust deed was made to secure the payment of three promissory notes, bearing even date with said trust deed, executed by the said Babcock, payable to the order of Louisa Augusta Uhlich; two of said notes being for one thousand dollars each, payable two years and three years after date thereof, respectively, and one of said notes being for two thousand dollars, payable five years after date, all of said notes bearing interest at the rate of eight per cent. per annum after date thereof, respectively; which said three notes were made to secure the purchase money of said premises,

And whereas, it is provided in said trust deed, that in case of default in the payment of said notes, or any or either of them, or of any part thereof, either interest or principal, according to the tenor thereof, then, on application of the legal holder of said notes, it should be lawful for the undersigned to sell and dispose of said premises, and all right, title, benefit and equity of redemption of said Adalbert H. Babcock, his heirs and assigns therein, at public auction, at the southwest corner of Washington and LaSalle streets, in the city of Chicago, State of Illinois, or on said premises, or on any part thereof as might be specified in the notice of such sale, for the highest and best price the same would bring in cash, thirty days previous notice of such sale having been given by publication, once in each week for four successive weeks, in the Chicago Legal News, or in any newspaper at that time published in said city of Chicago, and to make, execute, and deliver to the purchaser or purchasers at such sale, good and sufficient deed or deeds of conveyance for the premises sold, and out of the proceeds or avails of such sale, and the purchase money paid thereon, after first paying all costs of advertising, sale and conveyance, including the reasonable fees and commissions of the undersigned, attorney's fees, and all other expenses of said trust, including all moneys advanced for insurance, taxes and other liens or assessments, with interest thereon at ten per cent, per annum, then to pay the principal of said notes, whether due and payable by the terms thereof or not, and interest on said notes up to the time of such sale, rendering the overplus (if any) unto said Adalbert H. Babcock, his legal representatives or assigns, on reasonable request.

And whereas, it was and is further provided in and by said trust deed, that in case of default in any of said payments of principal or interest, according to the tenor and effect of said promissory notes, or either of them, or any part thereof, then, and in that case, the whole of said principal sum thereby secured, and the interest thereon to the time of sale, might at once, at the option of the legal holder thereof, become due and payable, and the said premises be sold in the manner and with the same effect as if the said indebtedness had matured.

And whereas, default has been made in the payment of the semi-annual interest upon each and all of said notes, which interest became and was due and payable on the 28th day of October, 1875, and whereas said Louisa Augusta Uhlich, the legal holder of all of said notes, has elected to declare, and has declared, and hereby declares the entire principal sum so secured thereby, due and payable by reason of such default, and has made application to the undersigned, as trustee, to sell and dispose of said premises, under and by virtue of the power in said trust deed contained, and for the purposes therein specified.

Now, therefore, public notice is hereby given, that on Saturday, the 8th day of January, 1876, at the hour of four o'clock P. M. of said day, upon said premises, I shall sell at public auction, to the highest bidder, for cash, the said premises, and all the right, title, benefit and equity of redemption of the said Adalbert H. Babcock, his heirs and assigns therein.

Chicago, December 4th, A. D. 1875.
THOMAS A. MORAN, Trustee.
MORAN, ENGLISH & WOLF, Attys. for Trustee. 11

S. W. RAWSON,
Attorney, 143 W. Madison St.

MORTGAGE SALE.—WHEREAS, EDWARD KUNkel and Victoria Kunkel, his wife, of Chicago, Cook county, State of Illinois, as party of the first part, by their certain mortgage, bearing date the second day of December, A. D. 1872, and filed for record in the recorder's office of Cook county, Illinois, on the 7th day of December, A. D. 1872, and duly recorded in book 107 of records, page 311, did grant, bargain, sell and convey unto the undersigned, Joseph Scharmach, of said Chicago and Cook county, as party of the second part, the following described lot, piece or parcel of land, situate in the county of Cook and State of Illinois, and known and described as follows, to wit:

Lot twenty-five (25), of block No. one (1), in Ridgley's addition to Chicago, county of Cook and State of Illinois for the purpose of securing the payment of one certain promissory note, dated the 2d day of December, A. D. 1872, executed by the said Edward Kunkel, and Victoria Kunkel, his wife, and payable to the order of said Joseph Scharmach, for the sum of five hundred dollars ($500), payable one year after date thereof, which said note was drawing interest at ten per cent. per annum.

And whereas, it is provided in and by said mortgage, that if default be made in the payment of said note, either of principal or interest, on the days whereon the same shall become due and payable, the whole of said principal and interest secured by the said note, in said mortgage mentioned, should thereupon, at the option of said party of the second part, become immediately due and payable, and said mortgage might be immediately foreclosed to pay the same by the said party of the second part, his heirs, executors, administrators or assigns, after publishing a notice in a newspaper printed in the city of Chicago, county and State aforesaid, ten (10) days before the day of such sale, might sell the said premises, and all right and equity of redemption of said Edward Kunkel and Victoria Kunkel, his wife, their heirs and assigns therein, at public auction, at the court house door in said city of Chicago, to the highest bidder, for cash, at the time mentioned in such notice, and to make, execute, and deliver to the purchaser or purchasers thereof, a deed or deeds for the premises so sold, and out of the proceeds of such sale to pay all costs and expenses incurred in advertising and selling said premises, also the principal and interest due on said note, and as otherwise provided in said mortgage.

And whereas, default has been made in the payment of said note in principal and interest; and whereas, said note, both principal and interest, is now past due and unpaid, and there is now due thereon the sum of five hundred and fifty ($550) dollars, and the undersigned, Joseph Scharmach, being now the legal owner and holder of said note;

Now, therefore, public notice is hereby given, that in pursuance of the provisions of said mortgage, on Thursday, the 23d day of December, A. D. 1875, at ten (10) o'clock in the forenoon of that day, at the westerly north door of the court house, on the S. E. corner of Adams and LaSalle sts., in the city of Chicago, in the county of Cook and State of Illinois, I shall sell, for cash, at public auction, to the highest bidder, the premises in said mortgage and hereinbefore described, and all the right and equity of redemption of said Edward Kunkel and Victoria Kunkel, his wife, their heirs and assigns therein.

Dated December 4th, 1875.
JOSEPH SCHARMACH, Mortgagee.
S. W. RAWSON, Atty. 11-12

TRUSTEE'S SALE. — WHERAS, JOSEPH E. Young, and Mary T. Young, his wife, by their certain trust deed, dated the eleventh day of April A. D. 1873, duly executed and recorded in the recorder's office of Cook county, in the State of Illinois, in book 222 of records, at page 509, did convey to Gilbert B. Sarvent, the undersigned, as trustee, the following described real estate, situate in said county of Cook and State of Illinois, to wit:

Lots eighty-nine (89), eighty-eight (88) and ninety (90), in Isaac R. Diller's subdivision of block forty (40) in the Canal Trustee's subdivision of section seven (7) of township thirty-nine (39) north, range fourteen (14) east of the third (3d) principal meridian, which said trust deed was given to secure the payment of a certain promissory note made by the Chicago, Danville and Vincennes Railroad Company, bearing date the 11th day of April, A. D. 1873, for three thousand dollars, payable one year after date, with interest at the rate of ten per cent. per annum, to the order of Mary Thomas.

And whereas, default has been made in the payment of two thousand dollars of the principal of said note, together with the interest thereon since the 18th day of February, A. D. 1875, and the legal holder of said note has applied to the undersigned, trustee, to sell said real estate;

Now, therefore, notice is hereby given that by virtue of the power in me vested in and by said deed of trust, I shall, on Wednesday, the 5th day of January, A. D. 1876, at the hour of ten o'clock in the forenoon of said day, at the north door of the court house, (to wit: the door nearest to LaSalle street, fronting on Adams street, in the building on the southeast corner of Adams and LaSalle streets), in the city of Chicago, in the State of Illinois, sell at public auction to the highest bidder for cash, the said real estate above described, and all the right, title, and equity of redemption of the said Joseph E. Young, and his wife, their heirs and assigns in and to the same, for the purpose of satisfying the amount due on said note and costs of sale.

11- GILBERT B. SARVENT, Trustee.

ADOLPH MOSES,
Attorney, 79 Fifth Avenue.

PUBLICATION NOTICE IN ATTACHMENT.—State of Illinois, county of Cook, ss. Circuit court of Cook county. November term, A. D. 1875. Annie Stern vs. Solomon Stern, alias Solomon Starr.—Attachment.

Public notice is hereby given to the said Solomon Stern, alias Solomon Starr, that a writ of attachment issued out of the office of the clerk of the Circuit court of Cook county, dated the 3rd day of December, A. D. 1875, at the suit of the said Annie Stern, and against the estate of Solomon Stern, alias Solomon Starr, for the sum of twelve hundred dollars, directed to the sheriff of Cook county, which said writ has been returned executed.

Now, therefore, unless you, the said Solomon Stern, alias Solomon Starr, shall personally be and appear before the said Circuit court of Cook county, on or before the first day of the next term thereof, to be holden at the court house in the city of Chicago, on the third Monday of December, A. D. 1875, give special bail and plead to the said plaintiff's action, judgment will be entered against you, and in favor of the said Solomon Stern, alias Solomon Starr, and so much of the property attached as may be sufficient to satisfy the said judgment and costs, will be sold to satisfy the same.

JACOB GROSS, Clerk.
ADOLPH MOSES, Atty. 11-13

HITCHCOCK & DUPEE,
Attorneys, 107 Dearborn Street.

PUBLICATION NOTICE IN ATTACHMENT.—State of Illinois, county of Cook, ss. Superior court of Cook county. January Term, A.D. 1875. Josephus C. Farrington vs. Alvin N. Lancaster.—Attachment.

Public notice is hereby given to the said Alvin N. Lancaster, that a writ of attachment issued out in the office of the clerk of the Superior court of Cook county, dated the 3d day of December, A.D. 1875, at the suit of the said Josephus C. Farrington, and against the estate of Alvin N. Lancaster, for the sum of two hundred and four dollars and thirteen cents, directed to the sheriff of Cook county to execute.

Now, therefore, unless you, the said Alvin N. Lancaster, shall personally be and appear before the said Superior court of Cook county, on or before the first day of the next term thereof, to be holden at the court house, in the city of Chicago, on the first Monday of January, A.D. 1876, give special bail and plead to the said plaintiff's action, judgment will be entered against you, and in favor of the said Josephus C. Farrington, and so much of the estate attached as may be sufficient to satisfy the said judgment and costs will be sold to satisfy the same.

ALEXANDER F. STEVENSON, Clerk.
HITCHCOCK & DUPEE, Attys. 11-13

CHICAGO LEGAL NEWS.

SATURDAY, DECEMBER 11, 1875.

The Courts.

THROUGH the kindness of Senator UPTON, of this city, we have received the following important opinion:

UNITED STATES SUPREME COURT.

No. 35.—OCT. TERM, 1875.

MARY E. SANGER, plaintiff in error, *v.* CHARLES W. UPTON, assignee in bankruptcy of the GREAT WESTERN INSURANCE COMPANY.

In error to the Circuit Court of the United States for the Northern District of Illinois.

BANKRUPT INSURANCE COMPANY—POWER OF COURT TO ORDER AN ASSESSMENT UPON ITS CAPITAL STOCK.

1. POWER OF COURT TO ORDER PAYMENT.—That it was competent for the court to order payment of the stock, as the directors, under the instruction of a majority of the stockholders might, before the decree in bankruptcy, have done. The former is as effectual as the latter would have been. A court of equity has often made and enforced the requisite order in such cases. The bankrupt court possesses the same power in the case in hand.

2. VOID AGREEMENT.—An agreement that a stockholder may pay in any other medium than money is void, as a fraud upon the other stockholders, and upon creditors as well.

3. CAPITAL STOCK.—The capital stock of an incorporated company is a fund set apart for the payment of its debts. It is a substitute for the personal liability which subsists in private copartnerships When debts are incurred a contract arises with the creditors that it shall not be withdrawn or applied otherwise than upon their their demands. Until such demands are satisfied, the creditors have a lien upon it in equity. If diverted, they may follow it as far as it can be traced and subject it to the payment of their claims, except as against holders who have taken it *bona fide* for a valuable consideration and without notice.

4. RIGHTS OF ASSIGNEE.—The rights of the bankrupt Insurance Company passed to the assignee in bankruptcy, and he could enforce them by a legal remedy. The assignee was subrogated to all the rights, legal and equitable, of the bankrupt corporation. This suit was well brought in the form adopted; that the assignee might have filed a bill against all the delinquent shareholders jointly, but when a company is utterly insolvent, a separate action at law in each case is to be preferred. It is cheaper and more speedy.

5 APPELLANT'S INTEREST.—That under the evidence appellant was the owner of the stock. The certificates showed the par of the stock and the amount to be paid in. Upon receiving them the law implied an agreement on her part to respond to the balance whenever called upon in any lawful way to do so.

6. DEFECTS IN ORGANIZATION.—That where there are any defects in the organization of a corporation which might be fatal upon a writ of *quo warranto*, a stockholder who has participated in its acts as a corporation *de facto*, is estopped to deny its rightful existence.—[ED. LEGAL NEWS.]

Justice SWAYNE delivered the opinion of the court.

Several errors are assigned and relied upon touching the admission of evidence and the instructions given to the jury.

We shall give our views of the case as it is presented in the record so as to meet these objections without adverting specifically to any of them.

The original charter of the Great Western Insurance Company fixed its capital at $100,000. By an amendment of the charter the capital was increased to $5,000,000. It became insolvent. A petition was filed against it in the District Court of the United States for the Northern District of Illinois, and on the 6th of February, 1872, it was adjudged a bankrupt. On the 11th of April, 1872, the defendant in error was appointed its assignee in bankruptcy. Upon the application of the assignee, the district court made an order that the balance unpaid upon the stock held by the several stockholders should be paid to the assignee on or before the 15th day of August, 1872; that notice of the order should be given by publication in a newspaper or otherwise, and that in default of payment the assignee should proceed to collect the amount due from each delinquent. The assignee gave notice by publishing the order accordingly, and by mailing a copy, with a demand of payment, to each stockholder. The plaintiff in error was so notified. It was claimed that she was the owner of $10,000 of the stock, upon which it was alleged there was due sixty per cent. The original charter required the payment of five per cent. of the capital stock, and that the balance should be secured in the manner prescribed. The amended charter is silent upon the subject. The stock certificates issued by the company set forth that twenty per cent. was to be paid in four quarterly installments of five per cent. each, "the balance being subject to the call of the directors as they may be instructed by the majority of the stockholders represented at any regular meeting."

This was a regulation of the company, and not a requirement of either the original or amended charter. It did not appear that any call was ever made by the directors or authorized by the stockholders.

The plaintiff in error having failed to pay pursuant to the order of the court, this suit was instituted by the assignee.

The order was conclusive as to the right of the assignee to bring the suit. Jurisdiction was given to the district court by the bankrupt act (Rev. Stat. U. S., sec. 4,972) to make it. It was not necessary that the stockholders should be before the court when it was made, any more than that they should have been there when the decree of bankruptcy was pronounced. That decree gave the jurisdiction and authority to make the order. The plaintiff in error could not, in this action, question the validity of the decree, and for the same reasons she could not draw into question the validity of the order. She could not be heard to question either except by a separate and direct proceeding had for that purpose. She might have applied to the district court to revoke or modify the order. Had she done so, she would have been entitled to be heard, but it does not appear that any such application was made. As a stockholder she was an integral part of the corporation. In the view of the law she was before the court in all the proceedings touching the body of which she was a member. In point of fact, stockholders in such cases can hardly be ignorant of the measures taken to reach the effects of the corporation. If they choose to rest supine until cases against them like this are on trial, they must take the consequences. Not having spoken before, they cannot be permitted to speak then, especially to make an objection which looks rather to the embarrassment and delay than to the right and justice of the case. A different rule would be pregnant with mischief and confusion. Hall *v.* U. S. Ins. Co., 5 Gill, 484; Sagory *v.* Dubois, 3 Sandf. Ch. Rep., 510.

This court has applied the same rule to an order made by the comptroller of the currency, under the 50th section of the national bank act, appointing a receiver and directing him to proceed to make collections from the stockholders of an insolvent bank. Kennedy *v.* Gibson and others, 8 Wall., 505.

In that case it was said: "It is for the comptroller to decide when it is necessary to institute proceedings against the stockholders to enforce their personal liability, and whether the whole or any part, and if a part, how much, should be collected. These questions are referred to his judgment and discretion, and his determination is conclusive. The stockholders cannot controvert it. Its validity is not to be questioned in the litigation that may ensue. He may make it at such time as he may deem proper, and upon such data as shall be satisfactory to him."

This principle was applied also in Cadle, receiver, *v.* Baker & Co., 20 Wall., 650.

It was competent for the court to order payment of the stock, as the directors under the instruction of a majority of the stockholders might, before the decree in bankruptcy, have done. The former is as effectual as the latter would have been. It may, perhaps, be well doubted whether the stockholders would have voluntarily imposed such a burden upon themselves. The law does not permit the rights of creditors to be subjected to such a test. It would be contrary to the plainest principles of reason and justice to make payment by the debtor for such a purpose in any wise dependent upon his own choice. A court of equity has often made and enforced the requisite order in such cases. The bankrupt court possessed the same power in the case in hand. The order rests upon a solid foundation of reason and authority. Ward *v.* The Griswold Manufac. Company, 16 Conn., 599; Adler *v.* The Mil. Pat. Brick Man. Co. et al., 13 Wisconsin, 61; Sagory *v.* Dudois, 3 Sandf. Chy., 510; Man *v.* Pentz, 2 Id., 285.

A resolution or agreement, that no further call shall be made, is void as to creditors. 3 Sandf. Chy., sup. An agreement that a stockholder may pay in any other medium than money is also void as a fraud upon the other stockholders and upon creditors as well. Henry et al. *v.* Vermillion and A. R. R. Co., 17 Ohio St. R., 187. The owner of stock cannot escape liability by taking it in the name of his infant children. Roman *v.* Fry, 6 J. J. Marshall, 634. Nor is it any defense to show that the holder took and held the stock as the agent of the corporation, to sell for its benefit. Allibone *v.* Hager, 46 Pa. St., 48.

The capital stock of an incorporated company is a fund set apart for the payment of its debts. It is a substitute for the personal liability which subsists in private co-partnerships. When debts are incurred, a contract arises with the creditors that it shall not be withdrawn or applied, otherwise than upon their demands, until such demands are satisfied. The creditors have a lien upon it in equity. If diverted, they may follow it as far as it can be traced and subject it to the payment of their claims, except as against holders who have taken it bona fide for a valuable consideration and without notice. It is publicly pledged to those who deal with the corporation, for their security. Unpaid stock is as much a part of this pledge and as much a part of the assets of the company as the cash which has been paid in upon it. Creditors have the same right to look to it as to anything else, and the same right to insist upon its payment as upon the payment of any other debt due to company. As regards creditors there is no distinction between such a demand and any other assets which may form a part of the property and effects of the corporation. Curran *v.* Arkansas, 15 How., 308; Wood *v*, Dummer, 3 Mason, 308; Slee *v.* Bloom, 19 Johnson, 474; Briggs *v.* Penniman, 8 Cow., 387; Society, &c. *v.* Abbot, 2 Beav., 559; Walworth *v.* Holt, 4 Mylne & Craig, 789; Ward *v.* Griswoldville Man. Co., 16 Conn., 598; Fowler *v.* Robinson, 31 Maine, 789; Angel & A. on Cor., sec. 600, and post; Wright *v.* Petrie, 1 Smedes & M., 319; Nevitt *v.* Bk. Port Gibson, 6 Id.; Nathan *v.* Whitelock, 3 Edw. C. R., 215; 4 Amer. Law Mag, 93.

The earliest authority upon the point under consideration is Dr. Salmon *v.* The Hamborough Company, decided in 1670, 1 Cases in Chancery, 204; 6 Viner's Abridg., 310-11. The bill in that case alleged that Salmon held a bond of the company of 1800 pounds, given to him for lent money. The company was incorporated, and had power to assess rates upon cloths, in which it dealt. "and by poll on every member, to defray the charges of the company." The company had imposed rates accordingly, to wit: "4*s.* 6*d.* upon every white cloth exported, and divers others, and thereby raised eight thousand pounds per annum," &c.

"And the bill did charge, that the company, having no common stock, the plaintiff had no remedy at law for his debt, but did charge that their usage had been to make taxes, and levy actions upon the members and their goods, to bear the charge of their company to pay their debts, and did complain that they now did refuse to execute that power, and did particularly complain against divers of the members by name, that they did refuse to meet and lay taxes, and that they did pretend want of power by their charter to lay such taxes; whereas, they had formerly exercised power, and thereby gained credit; whereupon, the plaintiff lent them two thousand pounds which was for the use and support of the company's charge, and so ought to be made good by them, and so prayed to be relieved."

The company, though served with a process, failed to appear. "But divers particular members being served in their natural capacities, did appear and demur for that they were not in that capacity liable to the plaintiff's demand." The Lord Chancellor sustained the demurrer and as to them dismissed the bill. The case was taken by appeal to the House of Lords. There the decree of the Chancellor was reversed and the case was remanded to his court with directions to cause the officers of the company "to make such *leviation* upon every member of said company who is contributory to the public charge, as shall be sufficient to satisfy the said sum to be decreed to the plaintiff in this cause, and to collect and levy the same, and to pay it over to the plaintiff as the court shall direct." Ample provision was made in the decree for the enforcement of this order. See, also, Curson *v.* The African Co., decided in 1682, 1 Vernon, 124.

By the deed of assignment, all the property and effects of every kind which belonged to the company when the petition to have it declared a bankrupt was filed, passed to the assignee. Rev. Stat. U. S., sec. 5,044; Bump on Bankruptcy, 473, 478. He was clothed with the power and duty to sue whenever suit was necessary. The statute in terms gave him the same right in any litigation he might institute which the bankrupt would have had "if the decree in bankruptcy had not been rendered and no assignment had been made." Idem, sec. 5,047; Bump on Bank., 528. The liability of the plaintiff in error, and the right and title of the company were legal in their character. If the company had sued it might have sued at law. The rights of the company passed to the assignee and he also could enforce them by a legal remedy. The assignee was subrogated to all the rights, legal and equitable, of the bankrupt corporation. This suit was, therefore, well brought in the form adopted. Hall *v.* U. S. Ins. Co., 5 Gill, 484.

The assignee might have filed a bill in equity against all the delinquent shareholders jointly. Oglevie et al. *v.* Knox Ins. Co. et al., 22 How., 380. But if the company is utterly insolvent, in any event, a separate action at law in each case is much to be preferred. It is cheaper, more speedy, and more effectual. If the contingency should occur that the assets realized exceed the liabilities to be met, the district and circuit courts will see that no wrong is done to those adversely concerned. It is not to be doubted that this power will be exercised upon all proper occasions.

Upon the trial a large mass of testimony was given by the plaintiff, consisting of a prospectus and the original charter of the company, certified copies of the papers in the office of the secretary of the State touching the amendment to the charter, the deed of the register to the assignee, the petition of the assignee and order of the district court relative to further stock payments, and proof of the publication of the order and of the sending of a copy of the order, with a demand of payment, to the defendant by mail. The admission of all this evidence was excepted to. Further testimony was given tending to prove that the defendant bought and received from the company two stock certificates of $5,000 each, dated March 10, 1870, in the usual form, and in all respects complete, except that there was a blank for the name of the owner, which was not filled up.

And further: "That said defendant paid for said stock twenty per cent. of the par value of the same, paying part of said twenty per cent. in northwestern land scrip, and giving her notes for the balance of said twenty per cent., which notes were duly paid to said company, and that said stock stood in her name upon the books of said company, and that there was evidence introduced tending to show that she received a dividend from said company thereon.

"And that shortly after the fire of October 9, 1871, General Stewart, the president of the company and brother of defendant, paid for her a call of twenty per cent. made upon said certificates of stock by the company, but that said defendant never authorized such payment, but repudiated the same, and that no more than forty per cent. had ever been paid on said stock.

"No evidence was introduced tending to show that said defendant ever subscribed for said certificates of stock or for any stock of said company, or that her name appeared on any list of stockholders of said stock circulated by said company.

"No other express contract was shown to have been made between said company and defendant."

The court charged the jury, in effect, that if they believed the testimony, the defendant was liable. The charge was excepted to by the defendant. It was clearly correct. The only question was whether she owned the stock. No one else claimed it. The certificates were issued and delivered to her. They belonged to her. They were the muniment of her title. She could have filled the blanks with her name whenever she thought proper. She had paid to the company all that was then payable, and subsequently received a dividend. Her name was placed upon the stock list. These facts were conclusive against her. She was estopped from denying her ownership. She could not assert her title if there were a profit, and deny it if there were a loss. The certificates showed the

par of the stock and the amount to be paid. Upon receiving them the law implied an agreement on her part to respond to the balance whenever called upon in any lawful way to do so. No special express agreement, written or oral, was necessary. The former was as obligatory as the latter could have been. It would be a mockery of justice to permit such an objection to prevail. Ellis *v.* Schomoeck and Thomas, 5 Bing., 521; Doubleday *v.* Musket et al., 7 id., 110; Harvey et al. *v.* Kay, 9 Barn. & Cress., 356; Upton, assignee, *v.* Tribilcock, not yet reported.

Where there are defects in the organization of a corporation which might be fatal upon a writ of quo warranto, a stockholder who has participated in its acts as a corporation *de facto*, is estopped to deny its rightful existence. Eaton et al. *v.* Aspinwall, 19 N. Y., 119; Abbot *v.* Aspinwall, 26 Barb., 202.

Where a party executes a deed poll reserving rent, and the grantee enters into possession, he is under the same liability to pay such rent as if the deed were an indenture *inter parties*, and he had executed it. The law implies a promise to pay which may be enforced by an action of indebitatus assumpsit. Goodwin et al. *v.* Gilbert et al., 9 Mass., 484. It has been held frequently in cases of this class, where the instrument was under seal and executed by only one of the parties, that the covenant would lie against the other. Finley *v.* Simpson, 2 Zabriskie, 310.

We find no error in the record, and the judgment is affirmed.

BENJAMIN CARVER, plaintiff in error,
24 *v.*
CLARK W. UPTON, assignee of the GREAT WESTERN INSURANCE CO., a bankrupt.

In error to the Circuit Court of the United States for the Northern District of Illinois.

The decision of this case is controlled by the opinion of the court just delivered in the case of Sanger *v.* Upton, assignee in bankruptcy, No. 35.

The judgment of the Circuit Court is affirmed.

D. W. MIDDLETON,
C. S. C. U. S.

BOUTELL & WATERMAN, for assignee.
MONROE & BISBEE, and Attorney General WILLIAMS, for defts.

UNITED STATES SUPREME COURT.

No. 571.—OCTOBER TERM, 1875.

THE UNITED STATES, appellant. *v.* THE UNION PACIFIC RAILROAD COMPANY.

Appeal from the Court of Claims.

THE ACTS OF CONGRESS RELATING TO THE CONSTRUCTION OF THE UNION PACIFIC RAILROAD AND THE PAYMENT OF THE INTEREST AND PRINCIPAL ON ITS BONDS CONSTRUED, AND ITS RELATIONS TO THE GOVERNMENT STATED.

Mr. Justice DAVIS delivered the opinion of the Court.

The Union Pacific Railroad Company, conceding the right of the government to retain *one-half* of the compensation due it for the transportation of the mails, military and Indian supplies, and apply the same to reimburse the government for interest paid by it on bonds issued to the corporation to aid in the construction of its railroad and telegraph lines, seeks to establish by this suit its right to the other moiety. The United States, on the other hand, having paid interest on these bonds in excess of the sums credited to the company for services rendered by it, insists upon its right to withhold payment altogether. One of the grounds on which this right of retention is sought to be maintained is by reason of the general right of set-off. It is true this right, as a general proposition, exists in the government, and is commonly exercised by it when settling with those having claims against it. But, manifestly, the rules applicable to ordinary claimants for services rendered the United States, do not apply to this controversy. The bonds in question were issued by the United States, in pursuance of a scheme to aid in the construction of a great national highway; in themselves they do not import any obligation on the part of the corporation to pay, and whether, when the United States have paid interest on them an obligation arises on the part of the corporation to refund it, depends wholly on the conditions on which the bonds were delivered to the corporation and received by it. These conditions are embodied in the legislation of Congress on the subject; and if, on a fair interpretation of this legislation, the corporation is found to be now a debtor to the United States, the deduction for interest paid on the bonds can be lawfully made. But if the converse of this proposition is ascertained to be trne, the government cannot rightfully withhold from the corporation one-half of its earnings.

In construing an act of Congress we are not at liberty to recur to the views of individual members in debate, nor to consider the motives which influenced them to vote for or against its passage. The act itself speaks the will of Congress, and this is to be ascertained from the language used. But courts may with propriety, in construiug a statute, recur to the history of the times when it was passed, and this is frequently necessary, in order to ascertain the reason as well as the meaning of particular provisions in it. (Aldridge *v.* Williams, 3 Howard, p. 24; Preston *v.* Browder, 1 Wheaton, 120.)

Many of the provisions in the original act of 1862 are outside of the usual course of legislative action concerning grants to railroads, and cannot be properly construed without reference to the circumstances which surrounded Congress when the act was passed. The war of the rebellion was in progress, and the country had become alarmed for the safety of the Pacific States, owing to complications with England. In case these complications resulted in an open rupture, the loss of our Pacific possessions was feared, but, even if this fear were groundless, it was quite apparent that we were unable to furuish that degree of protection to the people occupying them which every government owes its citizens. It is true the threatened danger was happily averted, but wisdom pointed out the necessity of making suitable provision for the future. This could be done in no better way than by the construction of a railroad across the continent. Such a road would bind together the widely separated parts of our common country, and furnish a cheap and expeditious mode for the transportation of troops and supplies. And if it did nothing more than afford the required protection to the Pacific States, it was felt that the government, in the execution of a plain duty, could not justly withhold the aid necessary to build it. And so strong and pervading was this opinion that it is by no means certain the people would not have sanctioned the action of Congress, if it had departed from the traditional policy of the country regarding works of internal improvements, and charged the government itself with the direct execution of the entreprise.

This enterprise was viewed as a national undertaking for national purposes, and the public mind was directed to the end to be accomplished rather than the particular means employed for the purpose. Although this road was a military necessity, there were other reasons active at the time in producing an opinion for its completion besides the protection of an exposed frontier. There was a vast, unpeopled territory lying between the Missouri and Sacramento rivers which was practically worthless without the facilities afforded by a railroad for the transportation of person and property. With its construction the agricultural and mineral resources of this territory could be developed; settlements made where settlements were possible, and thereby the wealth and power of the United States essentially increased. And there was also the pressing want, in times of peace even, of an improved and cheaper method for the transportation of the mails and supplies for the army and the Indians.

It was in the presence of these facts that Congress undertook to deal with the subject of this railroad. The difficulties in the way of building it were great, and, by many intelligent persons, considered insurmountable.

Although a free people, when resolved upon a course of action, can accomplish great results, the scheme for building a railroad 2,000 miles in length, over deserts, across mountains, and through a country inhabited by Indians jealous of intrusion upon their rights, was universally esteemed at the time to be a bold and hazardous undertaking. It is nothing to the purpose that the difficulties in the way of the undertaking, after trial, in a great measure disappeared, and that the road was constructed at less cost of time and money than was considered possible. No argument can be drawn from the wisdom that comes after the fact. Congress acted with reference to a state of things supposed to exist at the time, and no aid can be derived, in the interpretation of its legislation, from the consideration that the theory on which it proceeded turned out not to be correct. The project of building the road was not conceived for private ends, and the prevalent opinion was that it could not be worked out by private capital alone. It was a national work, originating in national necessities, and requiring national assistance.

The policy of the country, to say nothing of the supposed want of power, stood in the way of the United States taking the work into its own hands. Even if this were not so, reasons of economy suggested that it were better to enlist private capital and individual enterprise in the project. This Congress undertook to do, and the inducements held out were such as it was believed would procure the requisite capital and enterprise. But the purpose in presenting these inducements was to promote the construction and operation of a work deemed essential to the security of great public interests.

It is true the scheme contemplated profit to individuals, for without reasonable expectation of this capital could not be obtained, nor the requisite skill and enterprise; but this consideration does not in itself change the relation of the parties to this suit. This might have been so if the government had incorporated a company to advance private interests, and agreed to aid it on account of supposed incidental advantages which would accrue to the public from the completion of the enterprise. But the government proceeded on a wholly different theory. It promoted the enterprise to advance its own interests, and endeavored to enlist private capital and individual enterprise as a means to an end—the securing a road which could be used for governmental purposes. Whatever obligations, therefore, rest on the company incorporated to accomplish this purpose, must depend on the true meaning of the enactment itself, viewed in the light of cotemporaneous history.

It has been observed by this court that the title of an act, especially in congressional legislation, furnishes little aid in the construction of it, because the body of the act, in so many cases, has no reference to the matter specified in the title. (Hadden *v.* The Collector, 5 Wallace, page 110). This is true, and we have no disposition to depart from this rule, but the title, even, of the original act of 1862, incorporating the defendant (12 Stats., p 489), seems to have been the subject of special consideration by Congress, for it truly discloses the general purpose Congress had in view in passing it. It is "An act to aid in the construction of a railroad from the Missouri river to the Pacific ocean, and to secure to the government the use of the same for postal, military, and other purposes." That there should, however, be no doubt of the national character of the work which Congress proposed to aid, the body of the act contains these words: "And the better to accomplish the object of this act, namely, to promote the public interest and welfare by the construction of said railroad and telegraph lines, and keeping the same in working order, and to secure to the government at all times (but particularly in time of war) the use and benefits of the same for postal, military, and other purposes, Congress may at any time, having due regard for the rights of said companies named therein, add to, alter, amend, or repeal this act." (See 18th section of charter, 12 Statutes at Large, p. 497). Indeed, the whole act contains unmistakable evidence that if Congress was put to the necessity of accomplishing a great public enterprise through the instrumentality of private corporations, it took care that there should be no misunderstanding about the objects to be accomplished or the motives which influenced its course of action.

If it had been equally explicit in the provision regarding the bonds to be issued in aid of the road, there would have been no occasion for this suit. But even in this particular, looking to the motives which led to the act, and the objects intended to be effected by it, we do not think there is any serious difficulty to get at the true meaning of Congress. The act itself was an experiment and must be considered in the nature of a proposal to enterprising men to engage in the work, for there was no certainty that capital, with the untried obstacles in the way, could be enlisted. If enlisted at all, it could only be on conditions which would insure, in case of success, remuneration proportionate to the risk incurred.

The proffered aid was in lands and interest-bearing bonds of the United States. There is no controversy about the terms on which the lands were granted, and the only point with which we have to deal relates to the nature and extent of the obligation imposed by Congress on the company to pay these bonds. It is not doubted that the government was to be reimbursed, both principal and interest, but the precise question for decision is, whether the company was required to pay the interest before the maturity of the principal.

The solution of this question depends upon the meaning of the 5th and 6th sections of the original act of 1862, and the fifth section of the amendatory act of 1864. (12 Statutes at Large, 492; 13 Statutes at Large, 359). The fifth section of the original act contains the undertaking of the government, and the sixth defines the obligation of the company. By the fifth it is provided that on the completion of the road, in sections of forty miles, there shall be issued and delivered to the company a certain number of interest-bearing bonds of the United States, payable thirty years after date, with interest payable semi-annually. And "to secure the re-payment to the United States, as *'hereinafter provided,'* of the amount of said bonds, together with all interest thereon which shall have been paid by the United States," it was further provided that the issue and delivery of the bonds should constitute a first mortgage on the property of the company, with a right reserved to the government to declare a forfeiture and take possession of the road and telegraph line in case "of the refusal or failure of the company to redeem said bonds, or any part of them, when requested to do so by the secretary of the treasury, *in accordance with the provisions of the act.*" The manifest purpose of this section is to take a lien on the property of the corporation for the ultimate redemption of the bonds, principal and interest, but the manner of redemption and time of it are left for further provision.

That the government was expected, in the first instance, to pay the interest, is clear enough, for the mortgage was taken to secure the re-payment of the bonds, "together with all interest thereon which shall have been paid by the United States." This phrase implies a *prior* payment by the United States, whatever may be the duty of the corporation in regard to reimbursement, as subsequently defined. Besides this, when re-payment is spoken of, it is understood that something has been advanced which is to be paid back. Apart from this, had it been the intention that the corporation itself should pay the interest as it fell due, phraseology appropriate to such a purpose would have been used. But when and how the reimbursement was to be made was declared to be "as hereinafter provided"—that is, in conformity with the terms prescribed in another portion of the act. And that this is so, is evident enough from the latter part of the section, which directs the secretary of treasury to enforce the forfeiture and take possession of the road on failure of the corporation to redeem said bonds or any part of them (referring to the different periods of their issue), according to the plan of redemption thus provided, or, in other words, "in accordance with the provisions of this act." The obligations imposed on the corporation, or assumed by them, in relation to the re-payment of the bonds, are set forth *entire* in the next or sixth section, which, on account of its importance, is set forth at length.

"SEC. 6. And be it further enacted, That the grants aforesaid are made upon condition *that said company shall pay said bonds at maturity*, and shall keep said railroad and telegraph line in repair and use, and shall at all times transmit dispatches over said telegraph line, and transport mails, troops, and munitions of war, supplies and public stores, upon said railroad for the government, whenever required to do so by any depart-

ment thereof; and that the government shall at all times have the preference in the use of the same for all the purposes aforesaid (at fair and reasonable rates of compensation, not to exceed the amounts paid by private parties for the same kind of service); and *all compensations for services rendered for the government* shall be applied to the payment of said bonds *and interest*, until the whole amount is fully paid. Said company may also pay the United States, wholly or in part, in the same or other bonds, treasury notes, or other evidences of debt against the United States, to be allowed at par, *and after said road is completed*, until said bonds and interest are paid, at least five per centum of the net earnings of said road shall also be annually applied to the payment thereof."

Leaving out of consideration the parts of this section not pertinent to the present inquiry, there are three things, and three only, which the corporation is required to do concerning the bonds in controversy. 1st. To pay said bonds at maturity. 2d. To allow the government to retain the compensation due the corporation for services rendered, and apply the same to the payment of the bonds and interest, until the whole amount is fully paid. 3d. To pay over to the government, after the road shall have been fully completed, five per cent. of the net earnings of the road, to be appropriated to the payment of the bonds and interest.

If we take the language used in its natural and obvious sense, there can be no difficulty in arriving at the meaning of the condition "to pay said bonds at maturity," which was imposed upon this corporation. As commonly understood, the word "maturity," in its application to bonds and other similar instruments, refers to the time fixed for their payment, which is the termination of the period they have to run. The bonds in question were bonds of the United States promising to pay to the bolder of them one thousand dollars thirty years after date, and the interest every six months. This obligation the government was required to perform, and as the bonds were issued and delivered to the corporation to be sold for the purpose of raising money to construct its road, it is insisted that Congress must have meant to impose a corresponding obligation on the corporation. In support of this construction it is sought to give to the word "maturity" a double signification, applying it to each payment of interest as it falls due as well as to the principal. But this is extending the operation of words by a forced construction beyond their natural and ordinary meaning, which is contrary to all legal rules. Courts cannot supply omissions in legislation, nor afford relief because they are supposed to exist. "We are bound," said Justice Buller, in an early case in the King's Bench, "to take the act of Parliament as they have made it; a casus omissus can in no case be supplied by a court of law, for that would be to make laws; nor can I conceive that it is our province to consider whether such a law that has been passed be tyrannical or not." (Jones *v.* Smart, 1 Term Reports, 44-52.)

Lord Chief Baron Eyre, in the case of Gibson *v.* Minet (1 H. Bl., 569-614), said: "I venture to lay it down as a general rule respecting the interpretation of deeds, that all latitude of construction must submit to this restriction, namely, that *the words may bear the sense* which by construction is put upon them. If we step beyond this line we no longer construe men's deeds, but make deeds for them." This rule is as applicable to the language of a statute as to the language of a deed. The words "to pay said bonds at maturity," do not *bear the sense* which is sought to be attributed to them. They imply, obviously, an obligation to pay both principal and interest when the time fixed for the payment of the principal has passed; but they do not imply an obligation to pay the interest as it accrues and the principal when due. It is one thing to be required to pay principal and interest when the bonds have reached maturity, and a wholly different thing to be required to pay the interest every six months and the principal at the end of thirty years. The obligations are so different that they can not both grow out of the direct words employed, and it is necessary to superadd other words in order to extend the condition so as to include the payment of semi-annual interest as it falls due. Neither on principle or authority is such a plain departure from the express letter of the statute warranted. And especially is this so when the construction leads to so great an extension of a condition to defeat a grant.

The failure to perform the condition is cause of forfeiture. If the natural meaning of the words be adopted as the true meaning there can be no forfeiture until the bonds themselves have matured. On the contrary, if the construction contended for be allowed, the grants made to the corporation are subject to forfeiture on each occasion that six months' interest falls due and is not met. It would require a pretty large inference to draw from the language used authority to enlarge in a particular so essential the terms of a condition assumed by the corporation when it assented to the act. Besides this, when Congress imposed this condition it well knew that the undertaking of the Government bound it to pay to the holder of any bond, interest every six months and the principal at the time the bond matured. With this knowledge, dealing as it did with the relations the company were to bear to the Government on the receipt of these bonds, had it intended to exact of the company the payment of interest before the maturity of the bonds, it would have declared its purpose in language about which there could be no misunderstanding. But, if the words "to pay said bonds at maturity" do not give notice that this exaction was intended, neither do the other provisions of the sixth section. They created no obligation to keep down the interest, nor were they so intended. The proposition to retain the amount due the company for services rendered, and apply it towards the general indebtedness of the company to the Government, can not be construed into a requirement that the company shall pay the interest from time to time, and the principal when due. It was in the discretion of Congress to make this requirement, and then, as collateral to it, provide a special fund or funds out of which the principal obligation could be discharged. This Congress did not choose to do, but rested satisfied with the entire property of the company as security for the ultimate payment of the principal and interest of the bonds delivered to it, and, in the mean time, with special provisions looking to the reimbursement of the Government for interest paid by it, and the application of the surplus, if any remained, to discharge the principal. The company, for obvious reasons, might be very willing to accept the bonds of the Government on these terms, and very unwilling to come under an absolute promise to pay the current interest as it accrued. If it were in a condition, either during the progress of the work or on its completion, to earn anything, there was no hardship in the proposed application of the compensation due it, but, it can be readily seen, if the company were required to raise money every six months to pay interest, when all its available means were necessary to the prosecution of the work, the burden might be very heavy. Congress did not see fit to impose this burden, and place the company in a position to risk the forfeiture of all its grants, in case of failure to provide the means to pay current interest. Besides, it is fair to infer that Congress supposed that the services to be rendered by the road to the Government would equal the interest to be paid, and that this was not an unreasonable expectation, the published statistics of the vast cost of transporting military and naval stores and the mails to the Pacific coast, by the ancient methods, abundantly show.

The views presented regarding the provision—that the Government shall retain the compensation for services rendered by the company, either before or after the road is completed, are equally applicable to the provision, that after the road is completed, five per cent. of the net earnings of the road shall be *annually* applied to the payment of bonds and interest. It is not perceived how, on any principle of construction, an obligation of the corporation to pay the interest on the bonds every six months after they shall have been issued can be predicated on the terms of this provision, any more than on the terms of the other. Both are reserved funds, out of which the Government was to be reimbursed in the first instance the interest it had paid, leaving the surplus, if any, to be applied to the payment of the principal of the bonds.

In addition to all that has been said, there is enough in the scheme of the act, and the purposes contemplated by it, to show that Congress never intended to impose on the corporation the obligation to pay current interest. The act was passed in the midst of war, as has been stated, when the means for national defense were deemed inadequate to the wants of the country, and the public mind was alive to the necessity of uniting by iron bands the destiny of the Pacific States with those of the Atlantic. Confessedly the undertaking was outside of the ability of private capital to accomplish, and only by the helping hand of Congress could the problem, difficult of solution under the most favorable circumstances, be worked out. Local business, as a source of profit, could not be expected while the road was in course of construction, on account of the character of the country it traversed; and whether when completed, as an investment it would prove valuable, was a question for time to determine. But vast as the work was, limited as were the private resources to build it, the growing wants of the country, as well as the existing and future military necessities of the Government, demanded that it be completed. Under the stimulus of these considerations Congress acted. It did not act for the benefit of private persons, nor in their interest, but for an object deemed essential to the security of the country, as well as to the prosperity of the country.

Compelled as it was to incorporate a private company to accomplish its object, it proffered the terms on which it would lend its aid, which, if deemed too liberal now, were then considered, with the lights before it, not more than sufficient to engage the attention of enterprising men, who, if not themselves capitalists, were in a position to command the use of capital. These terms looked to ultimate security, rather than immediate reimbursement. And for the obvious reason that the corporation would require all its available means in construction; and to exact from it, while the work was in progress, the obligation to keep down the interest on the bonds of the United States, would tend to cripple the enterprise at a time when the primary object with Congress was to advance it. There could, however, be no reasonable objection to the application "of all compensations for services rendered for the government" from the outset, and "five per cent. of the net earnings after the completion of the road" to the payment of the bonds and interest, and these exactions were accordingly made.

Of necessity there were risks to be taken in aiding with money or bonds an enterprise unparalleled in the history of any free people, which, if completed at all, would require, as was supposed, twelve years in which to do it. But these risks were common to both parties, and Congress was obliged to assume its share and advance the bonds or abandon the enterprise, for obviously the grant of lands, however valuable after the road was built, could not be available as a resource with which to build it.

If the road were a success, in addition to the benefit it would be to the United States, the corporation would be in a situation to repay advances for interest, and pay the principal when due. If, on the contrary, the investment proved to be a failure, subjecting the private persons who embarked their capital in it to a total loss, there was left for the government the entire property of the corporation, of which immediate possession could be taken on a declaration of forfeiture.

In view of the circumstances under which the act of 1862 was passed, and the purposes to be accomplished by it, appearing as they do in the title as well as the body of the act, and constituting as they do the public history of this legislation, this brief summary presents, as we think, fairly its scope and effect, which are inconsistent with the position asserted by the appellant.

Notwithstanding the favorable terms proposed by Congress the road languished, and the effect of this was the amendatory act of 1864. By this the grant of lands was doubled; a second in lieu of a first mortgage accepted by the government, and a provision inserted that "only one-half of the compensation for services rendered for the government by said companies (meaning this and the auxiliary companies incorporated at the same time) shall be required to be applied to the payment of the bonds issued by the government in aid of the construction of said road."

This amendment was, without doubt, intended merely to modify the provision in the original act so as to allow the government to retain only one-half of the compensation for services rendered, instead of all. Although the requirement in this provision is that the compensation shall be applied to "the payment of the bonds," and in the former "to pay the bonds and interest," yet it cannot be supposed Congress intended to relinquish the right secured in the former act to make the application in the first place to the interest and then to the principal. The purpose of Congress could have been nothing more than to surrender on behalf of the government the right to retain the whole of the companies' earnings and to accept in lieu of it the right to retain the half, leaving unaffected by this change any right touching this subject secured in the former act. The change was a very material one, and intended, doubtless, as a substantial favor to the companies, but on the principle contended for it would prove, instead of this, to be of no value. Of what possible advantage could it be to these companies to receive payment for one-half their earnings, if they were subject to a suit to recover it back as soon as it was paid? And this is the effect of the provision on the theory that the companies are debtors to the government on every semi-annual payment of interest. They could not, in the nature of things, have accepted the stipulation with an understanding that any such effect would be given it. If the government consents to the diminution of its security, so that only half of the prices due for sevices are to be applied to the payment of the interest or principal, what is to become of the other half? Surely there is no implication that the government shall retain it, and, if not, who is to get it? Manifestly the companies who have earned the money.

It is very clear that the Congress of 1864 did not suppose, in making this concession, that it would be barren of results, but as the rights of the parties have been settled by the construction given to the original provision on this subject, it is unnecessary to pursue the subject further.

The practice of the government, for a series of years, was in conformity with the views we have taken of the effect of the charter, until the Secretary of the Treasury arrested the payment of the money earned by the companies for services rendered the government, and directed that it be withheld. This action of the secretary brought the subject to the attention of Congress, and the act of March 3, 1871, (16 Stats. at Large, p. 525, section 9,) was passed, directing that one half of the money due the Pacific Railroad Companies for services rendered, either "heretofore or hereafter," be paid them, leaving open the question of ultimate right for legal decision.

After this, another act was passed on this subject, by virtue of which this suit was instituted by the appellee in the Court of Claims. (Act of March 3, 1873, section 2, 17 Statutes at Large, p. 508.) It is contended that the purpose of this act is to repeal that portion of the charter of the Union Pacific Company containing the provisions we have discussed. But, manifestly, the purpose was very different. It is true, the act directs the Secretary of the Treasury to withhold all payments to the Pacific Companies on account of freights and transportation, but at the same time it authorizes any company thus affected to bring suit in the Court of Claims for "such freight and transportation," and in such suit "the right of such company to recover the same upon the law and the facts shall be determined, and also the rights of the United States upon the merits of all the points presented by it in answer thereto by them." This means nothing more nor less than the remission to the judicial tribunals of the country of the question whether this company, and others similarly situated, had the right to recover from the government one-half of what it earned by transportation, which question was to be determined upon its merits.

The merits of such a question are determined when the effect of the charter

is determined. It is hardly necessary to say that it would have been idle to authorize a suit to be brought if it were the intention to repeal the provision on which the suit could alone be predicated.

We cannot go into an argument on the consequences which follow our decision. Consequences are not an element to e considered in the determination of the question whether an act of incorporation is less beneficial to the government than it supposed. And whether an act of Congress be more or less politic and wise it is not our province to determine. When we have declared the meaning of it, if there be power to pass it, our duty in connection with it is ended.

The judgment of the Court of Claims is affirmed.

SUPREME COURT OF ILLINOIS.

OPINION FILED OCT. 12, 1875.

FRANCIS BUTLER *v.* S. P. WALKER.

Appeal from Superior Court of Cook Co.

INSURANCE COMPANY UNDER SPECIAL CHARTER—EFFECT OF GENERAL LAW ON CHARTER—LIABILITY OF STOCKHOLDER FOR LOSS BY FIRE TO POLICY-HOLDER WHEN ALL THE STOCK IS NOT PAID—THE LIABILITY OF THE STOCKHOLDERS OF THE BANKRUPT EQUITABLE INSURANCE COMPANY.

1. The Equitable Insurance Company was chartered in 1861. The 14th section defined the liability of its stockholders, and the 16th provides that the act may "at any time be altered, amended, or repealed." *Held*, that the 16th section of the general law regulating insurance companies passed in 1869, which provides that "the trustees and corporators of any company organized under this act shall be severally liable for all debts or responsibilities of such company to the amount by him or them subscribed until the whole amount of capital of such company shall have been paid in, and a certificate thereof recorded as hereinbefore provided," works as an amendment to the charter of the Equitable Insurance Company.

2. LIABILITY OF STOCKHOLDER.—In this case the appellant insured in the company had the property destroyed by fire, brought suit against the appellee, who was a stockholder, after having pursued the company into bankruptcy, the whole amount of the stock not having been paid in and a certificate thereof recorded. *Held*, that she could recover of such stockholder her loss to the amount of his stock.

3. CAPITAL STOCK MUST BE PAID IN FULL.—The full amount of the capital stock should be paid in. If it is not, the law holds the several stockholders liable to the amount of their subscriptions for the debts of the company; it is, therefore, made the interest of each shareholder to see that the entire capital is paid in.—[ED. LEGAL NEWS.]

Opinion by WALKER, J.

Appellee brought an action in the court below, against appellant, to recover the amount of loss she claims to have sustained from fire, under a policy of insurance.

To the declaration a demurrer was filed which was sustained by the court, and a judgment was rendered in bar of the action.

The General Assembly, by a special charter, on the 20th day of February, 1861, incorporated the Equitable Insurance Company. The charter confers the powers usual to such organizations. The fourteeth section of the charter contains this provision: "In case of any loss or losses, whereby the capital stock of said company becomes lessened before all the installments are paid in, each proprietor or stockholder shall be held accountable for the installments that may remain unpaid on his share or shares, at the time of such loss or losses taking place. Provided that the stockholders shall not be individually liable beyond the amount of stock held by them respectively.

The sixteenth section declares that the act shall take immediate effect, and continue in force for fifty years, but contains this reservation: "But may at any time be altered, amended, or repealed by the legislature of the State of Illinois."

The company organized, its capital stock being duly subscribed and a portion thereof paid by the stockholders. No change was made in the charter unless by the general act of incorporating and regulating insurance companies, which was adopted on the 11th day of March, 1869. The sixteenth section of this act provides that "the trustees and corporators of any company organized under this act, shall be severally liable for all debts or responsibilities of such company to the amount by him or them subscribed, until the whole amount of the capital of such company shall have been paid in and a certificate thereof recorded as hereinbefore provided" In this case the whole amount of stock was not paid in and a certificate thereof recorded.

The nineteenth section provided that "all insurance companies heretofore organized in the State of Illinois, and now doing business in this State, are hereby brought under all the provisions of this act, except that their capital may continue of the amounts and character named in and authorized by their respective charters, during the existing term of such charters, and the investment of the capital and assets of such companies may remain the same as prescribed by their charters, anything in this act to the contrary notwithstanding; and such companies shall be entitled to all the privileges and powers granted them by their charters." (Sess. Laws 1869, p. 217).

These are believed to be all the enactments which bear on the questions presented by this record.

About one and a half years after the adoption of this act the insurance company issued to appellant a policy of insurance on her property to the amount of $2,500, and whilst the policy was in force the property was destroyed by the fire in Chicago of the 9th of October, 1871. By reason of heavy losses, the company was prosecuted to bankruptcy. Appellant gave proper notice of her loss, proved her claim, but received nothing from the bankrupt estate. Appellee was a stockholder when the policy was issued, at the time of the fire, and until the company was declared a bankrupt, and owned two thousand five hundred dollars of the stock of the company. To render him liable as a stockholder, to the extent of her loss under the policy, she brought this suit. The declaration discloses the facts we have stated, and to it a demurrer was interposed, and sustained by the court, and a judgment in bar of the action and for costs was rendered. The case is brought to this court, and the judgment sustaining the demurrer is assigned for error.

It is agreed that but two questions arise in this record. First. Had the General Assembly the power, under the reservation in the charter, to alter, amend or repeal their charter or power to impose duties and liabilities not imposed, but from which they were exempted by the charter. And if there were such power, did the General Assembly exercise it in enacting the general insurance law?

Had the General Assembly the power to impose this liability upon the stockholders? We think they unquestionably had, by virtue of the reservation of the power to alter, amend or repeal the charter.

The question as to whether the General Assembly may alter or amend a charter which does not contain such a reservation of power, is not presented by this record, as the reservation is clear, distinct and unambiguous, and was assented to when the charter was accepted and the company organized. Hence, that question need not now be discussed.

But in a case like the present, when the general assembly in express terms reserves the right to alter, amend or repeal, that enters into and forms a part of the contract precisely as does any other provision of the charter. Any reasonable construction which can be placed on this reservation, must hold that the company entrusted the General Assembly with any and all powers in reference to the rights, duties and liability of the body and its members which they may deem proper to impose.

They, in receiving such a charter, trusted to the wisdom and justice of the General Assembly in their future action. The reservation is explicit and is ample in its terms, and we are at a loss to see how it can be questioned. If so plain a proposition required the citation of authorities to sustain it, many adjudged cases could be referred to directly in point.

The authorities referred to by appellee do not apply to this question. They are decisions growing out of amendments to charters imposing duties or restrictions on such bodies when the power was not reserved by the Constitution or in the charter itself, or where such a power was reserved, and the body had, under their charter, paid for property or privileges to others, of which the General Assembly subsequently attempted to deprive them by enactment. But we have not in our researches found any case which holds that when such power has been reserved that it may not be exercised constitutionally. Neither the fundamental law or public policy forbids the General Assembly and a corporation from making a contract that the former may alter, amend or repeal their charter at pleasure, or from its exercise, as was done in this case. The nineteenth section of the general insurance act is broad and comprehensive. It brings all insurance companies in plain and unmistakable terms under all of the provisions of the act with the enumerated exceptions. And the liabilities imposed by the sixteenth section constitute one of the provisions of the act. And the General Assembly having reserved the power without any limit to alter, amend or repeal the original charter of the company, they, it seems to us, intended to impose these liabilities on the shareholders of the Equitable Insurance Company. It was a company, theretofore organized in this State, and was then doing business in the State, and was manifestly brought under these and all other provisions of that law as fully as had the act in terms named this company.

When such a charter is obtained, the stock subscribed and the company organized, it procures business, and individuals receive policies on the faith that the entire stock so subscribed has been or will be paid in and held as a fund to meet all losses. It is this assurance that gives such a company credit in the community, and the general insurance law is designed to secure the policy-holders against loss from the insolvency of such companies.

Thus should be paid in the full amount of the capital subscribed, and if not, then the law holds the several stockholders liable, to the amount of their subscriptions, for the debts of the company. It is, therefore, made the interest of each shareholder to see that the entire capital is paid in, and a certificate of the fact made and recorded, as required by the law. And a failure to have that done, renders the several stockholders liable for the debts of the company to an amount equal to the stock he holds. Nor is the requirement of the law answered by a portion of the shareholders paying the full amount subscribed by them. They remain liable until the stock is all paid in and the certificate of the fact is made and recorded. Hence it is a matter of no importance in considering this question, whether appellee has paid in full for all of the stock for which he subscribed.

All the stock had not been paid in full, a certificate of the fact had not been made and recorded, and hence appellee was liable for the amount of appellant's claim for the loss under her policy. It then follows, that as the charter was amended by the general insurance law, and as its requirements were not observed, and the loss sustained by appellant become a debt against the company, appellee's liability became fixed to the amount of his stock therein. And the claim of appellant not exceeding that amount, the declaration disclosed a right to recover, and the court below erred in sustaining the demurrer, and the judgment must be reversed and the cause remanded.

Judgment reversed.

SHUFELDT, BALL AND WESTOVER for plaintiffs.

D. E. K. STEWART for defendant.

AGENCY.—CONSEQUENCES OF A RATIFICATION.

[Continued from page 84.]

The same learned Judge could not see why the assent to a substituted mode of performing one of the terms of a contract need be in writing, though the contract must have been in writing, there being totally different things involved, "the proof of a substituted contract of the prove of a ratification or approval, after performance, of the substituted mode of performance." A careful examination of this case will show no undue relaxation of the principle requiring substantial proof of a ratification (*vid. sup.*) In the first place, the substituted mode of delivery was the usual one when the port was open; secondly, the defendant made no objection before the loss, nor for four months after receiving notice of the change; thirdly, during this period, the defendants sent several orders, and the goods were sent by the route on which the loss occured.

In Cheetham *v.* Mayor, &c., of Manchester (L. Rep. 10 C. P. 201), an attempt was made to maintain the existence of a qualified kind of ratification. A town clerk, acting on behalf of the coporation, directed the surveyor who had certified as required by 3 Vict. c. 36 sect. 38, that there was imminent danger from a building of which the plaintiff was the owner and occupier, to cause the buildings mentioned in his certificate to be taken down or repaired in such manner as he should think fit. By sect. 39 of the above Act the expenses so incurred may be recovered from the owner. Assuming that the acts of the officers were ratified, it was contended by the Solicitor-General that a ratification might suffice to protect the agent from liability, and yet not make his acts the acts of the corporation, that the ratification might be valid as against the defendants, and have no further effect. The argument fell to the ground. No case was cited in its support, nor, upon principle, can anything be urged in its favour. If a ratification means anything it means that the party ratifying has, by his act, become invested with the rights and duties of a principal in relation to third parties, and to the individual whose conduct is ratified. Wherever a ratification is proved there can be no doubt that this is the general effect.

As regards the consequences of a ratification in the case of the agent and third parties, the rule is that wherever an agent acts without authority he is personally liable (East India Company *v.* Hensley 1 Soy. 112; Polhill *v.* Walter, 3 B. & A. 113; Bowen *v.* Morris. 2 Taunt. 385.) As between the principal and agent the want of authority is entirely remedied by a subsequent ratification (*sup.*) But in considering how a ratification affects the relative rights of the agent whose conduct is ratified and third parties, a distinction must be made between contracts and torts, when the contract of an agent is duly ratified, his rights and liabilities arising from that contract are wholly transferred to the party ratifying, and the agent occupies a position identical with that of one invested with full authority to do the act ratified. He can neither sue in his own right nor be rendered personally liable (see cases cited above). When, on the other hand, an individual duly ratifies a tort committed by another on his behalf, the ratification has not the same wide effect. For whilst on the one hand it avails to shield the agent from any liability to the principal from the conduct so ratified, it does not take away his liability by third parties who have suffered a tort at his hands. This distinction applies universally, except in cases of ratification by the Crown: (Baron *v.* Denman 2 Ex. 67.)

In Stephens *v.* Elwall (4 M. & S. 256), decided in 1815, Lord Ellenborough applied the principle in an action of trover brought against an agent. Wherever an agent is so sued, it is no answer that he acted under authority from another who had himself no authority to dispose of the property. So where a servant or other agent has done some act amounting to a trespass in assertion of his master's right, he is liable, not only jointly with his master, but for every penny of the damage. nor can he recover contribution (*ib.* 261). It is well established that an agent is liable in trover for a conversion to which he is a party, though it be for the benefit of his principal: (Perkins *v.* Smith, 1 Wil. 328; Cranch *v.* White, 1 New. Ca. 414; Davies *v.* Vernon, 6 Q. B. 443; and Hilbery *v.* Hatton, 10 L. T. Rep. N. S. 39, per Martin, B.) The Crown may ratify the torts of its agents, and such a ratification has a novel effect upon the relative rights of the agents and third parties. If an individual ratifies an act done on his behalf, the nature of the act remains unchanged, it is still a mere trespass, and the party injured has his option to sue either; if the Crown ratifies an act, the character of the act becomes altered, for the ratification does not give the party injured the option of bringing his action against the agent who committed the trespass, or the principal who ratified it, but a remedy against the Crown only, if there is any remedy at all, and exempts from all liability the person who commits the trespass: (Per Parke, B. in Baron *v.* Denman, 2 Ex. 167.)—*The London Law Times.*

CHICAGO LEGAL NEWS.

Lex vincit.

MYRA BRADWELL, Editor.

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We call attention to the following opinions, reported at length in this issue:

Bankrupt Corporation — Power of Assignee to Collect Balance Unpaid on Stock.—The opinion of the Supreme Court of the United States, by Swayne, J., holding, in the case of a bankrupt insurance company, that the District Court has power to order, and the assignee of such company power, under such order, to collect the balance unpaid upon the stock held by the several stockholders of such company. Senator Upton has been remarkably successful in his litigation with the stockholders of this bankrupt corporation. In 8 Chicago Legal News we published the opinion of the Supreme Court of the United States in a case brought by him in the U. S. Circuit Court of Iowa against another stockholder of this same company, reversing the judgment of Judge Dillon in the court below in favor of the stockholder.

Acts Relating to the U. P. R. R. Co. Construed. — The opinion of the Supreme Court of the United States, by Davis, J., construing the acts of Congress relating to the construction of the Union Pacific Railroad, and the payment of the interest and principal on its bonds. This is the most important case decided by the Supreme Court at its present term.

Insurance—Special Charter—General Law—Liability of Stockholder.—The opinion of the Supreme Court of this State, by Walker, J., holding there being a clause in the charter of the bankrupt Equitable Insurance Company of this city, that its charter "may at any time be altered, amended or repealed;" that the provisions of the general law regulating insurance companies relating to the liability of stockholders operated as an amendment to its charter, and that a person holding a policy in such company and having suffered a loss, the whole amount of the capital stock of such company not having been paid in, and a certificate thereof recorded, might sue a stockholder and recover of him for the loss to the amount of his stock. Many suits have been brought within a few weeks agaiust stockholders upon the strength of this opinion. We had a policy in this company at the time of the great fire. Under this decision we may be able to find some stockholder from whom we may recover for our loss.

Contested Will—Old Age—Undue Influence—Mental Capacity—Evidence of Experts.—The opinion of the Supreme Court of this State, by Breese, J., in a contested will case, as to what constitutes undue influence, and when a testator will be regarded of sufficient mental capacity to make a will. We know of no case where the weight to be given to the evidence of physicians, when introduced as experts, is so thoroughly discussed as in this opinion. Judge Breese says: "These doctors were summoned by the contestants 'as experts,' for the purpose of invalidating a will deliberately made by a man quite as competent as either of them to do such an act. They were the contestant's witnesses, and so considered themselves—Dr. Bassett, especially, whose whole testimony is pregnant with such indications. The testimony of such is worth but little, and should always be received by juries and courts with great caution. It was said by a distinguished judge, in a case before him, if there was any kind of testimony, not only of no value, but even worse than that, it was, in his judgment, that of medical experts. They may be able to state the diagnosis of the disease more learnedly; but upon the question whether it had at a given time reached such a stage that the subject was incapable of making a contract, as irresponsible for his acts, the opinion of his neighbors, if men of good common sense, would be worth more than that of all the experts in the world. If we give heed to such testimony, and suffer it to prevail against the flood of proof in favor of the testator's competency, we should be doing great wrong and departing from the rules we have laid down in like cases, to which we will hereafter refer. It must be apparent to every one, but few wills could stand the test of the fanciful theories of dogmatic witnesses, who bring discredit on science and make the name of 'expert' a by-word and a reproach. We concur with the judge above referred to; we would not give the testimony of these common-sense witnesses, deposing to what they know and saw almost every day for years, for that of so-called experts, who always have some favorite theory to support, men often as presumptuous as they are ignorant of the principles of medical science."

We know nothing of the facts in this case except as we gather them from the opinion, but we fully indorse what Judge Breese says about medical experts. There is no testimony, even when honest, that is so uncertain, and so often false. We remember a case tried before Judge Bradwell and a jury in the county court of this county some years ago, which shows how easy it is for the best doctors to be mistaken. A man had, some years before, been committed to the insane asylum, at Jacksonville, and for some months had been at large, It was alleged that he was restored to reason. The Judge refused to order a jury to try the question until the party had been examined daily for two weeks by physicians, and their certificates obtained that he was restored to reason. Doctor Wickersham, a physician of skill and respectibility, after repeated examinations, gave a certificate that he was restored to reason. Dr. Orin Smith, an excellent man and skillful physicinn, now deceased, appeared before the jury and testified that he had made repeated examinations of the party; that he was not only restored to reason, but that there was not the first symptom of insanity about him. The jury retired and wrote out their verdict finding him restored to reason. But, before they returned into court, the party raved violently, and said that $500,000 in gold, which God had given him one night in a shanty, had been stolen from him. The jury were recalled and instructed not to announce their verdict. Additional evidence was introduced, showing the conduct of the party during the absence of the jury, and a verdict was rendered the same afternoon finding that the petitioner was not restored to reason. This case was afterwards brought before the Cook county medical society and created considerable excitement at the time. In making these remarks, we say nothing against the medical profession as a profession; but we do say that too much weight is given to the testimony of doctors when called as experts. Hundreds of persons are to-day unjustly confined in the public and private insane asylums of the United States upon the mistaken opinions of medical experts.

Recent Publications.

The Law of Taxation. By Francis Hilliard, author of "The Law of Torts," "The Law of Mortgages," etc. Boston: Little, Brown & Company. 1875.

The typographical execution of this work is excellent, and reflects great credit upon its publishers. Its subject, the Law of Taxation, is one of the greatest importance to the American people at this time, when they are burdened with excessive State and Federal taxation. We examined this work of Mr. Hilliard's hoping to find it a thorough treatise, worthy of the patronage of the profession, and one to which they could resort for light, when in doubt upon any question relating to taxation, or the weight to be given to any particular decision; but we regret to say it is not such a work. It is more of a digest than a treatise. It bears evidence, upon its face, of hasty preparation. Many important opinions upon questions of taxation, rendered within the last few years, are not noticed. There is the greatest contrast between this volume and Mr. Bishop's work on Married Women, also noticed in this issue. The one is bold and incisive, stating legal principles, construing decisions, and giving the present state of the law, with an accuracy and clearness seldom found in a text-book. The practitioner who resorts to it feels its strength and relies upon it with confidence. The other is weak, and thorough in nothing. The practitioner will consult its pages without getting that aid which he had reason to expect from a book written by such a distinguished author as Mr. Hilliard.

Commentaries on the Law of Married Women under the Statutes of the Several States, and at Common Law and in Equity. By Joel Prentiss Bishop. Vol. II. Boston: Little, Brown & Company, 1875.

The law of married women under the statutes of the several States, is one of the most difficult branches of the law to treat upon in a text book, owing to the fact that the main principles upon which these statutes are framed were unknown to the common law, and have been adopted by the States within the past thirty years. The statutes are not uniform and the decisions are conflicting. The profession are to be congratulated that this difficult task has been undertaken by Mr. Bishop, the Napoleon of American law writers. Mr. Bishop says, the principal scope of the present volume is to bring to view the recent legislation, with the interpretations of it given by the courts; and to show how it modifies the doctrines of the unwritten law, both those doctrines which were presented in the first volume and those which were reserved for this. Mr. Bishop has not chosen the easy way many authors would have selected of introducing the statutes one after another, and showing what the courts have held under each of them; but after stating in a series of chapters, some rules by which these statutes are interpreted, and the effect of some forms of statutory provision under the restraints of our written constitutions, and bringing to view the doctrines which determine the consequences of these statutes in things beyond their terms, with some special applications of those doctrines, he takes up the several topics more at large; he then gives in the briefest possible form the substance of the legislation of the several States, and the decisions of the courts construing the same. Mr. Bishop undertakes to tell us what the law is, and not what it ought to be, and he does so in a vigorous style, and with his usual accuracy. We have not been able to find any of the recent statutes or decisions that have escaped his notice. This volume will not only be useful to the profession, but it should be read by every intelligent husband and wife.

A Treatise on the Doctrine of Ultra Vires, being an investigation of the Principles which Limit the Capacities, Powers and Liabilities of Corporations, and more especially of Joint Stock Companies. By Seward Brice. M.-A., L.L.D., London, of the Inner Temple, Esq., Barrister at Law. With Notes and References to American Cases, by Ashbel Green, of the New York Bar. New York: Baker, Voorhis & Co., Publishers, 66 Nassau Street. 1875. Sold by E. B. Myers, Law Bookseller, Chicago.

We have upon a former occasion given a favorable opinion upon the merits of the original English edition of this work. The present edition is of much more value to the American lawyer than the English, as it embraces the most important of the American cases upon the subject treated. The notes to the American cases are by Mr. Green, and are so arranged as to be distinguishable from the original English notes of Mr. Brice. The publishers present the American edition in an acceptable style.

THE SUPREME COURT JUDGESHIP.

The last Sunday's issue of the *Tribune* of this city contained the following letter of Mr. Hurd relative to his candidacy for Supreme Judge:

To the Editor of The Chicago Tribune:

Chicago, Dec. 4.—In your article this morning in regard to "the Supreme Court election," you say that I had "peremptorily declined to withdraw in favor of Mr. Higgins," implying that a request to that effect had been made upon me. Such is not the case. I have never been asked to withdraw in favor of Mr. Higgins, either by himself or any other person. Nor has a desire to that effect ever been expressed to me by any one. On the contrary, I have been repeatedly and earnestly urged to be a condidate, and that in a number of instances by the same persons whose names are attached to Mr. Higgins' published call. I have frequently said that it could not be expected that either of us would stand aside for the other, and the only proper way of determining who should be the candidate of the Republican party was by a nomination by a convention, and I am still of the same opinion. For many other reasons it is my firm conviction that the Republicans should in some authoritative way put forward the candidate to fill the place made vacant by the resignation of Judge McAllister. I cannot think even fair minded Democrats will deny that it would be better that the Court should stand three Republican Judges to four Democratic in preference to five Democrats to two Republicans. Yours, etc.,

H. B. Hurd.

Justices' Fees in Criminal Cases.—Judge Jameson, in a case before him this week, very properly decided that a justice of the peace had no right to charge a person who swears out a warrant in a criminal case his fees in the case. The only wonder is that there should ever have been any question about the matter. Justices have been in the habit of charging these fees, although they knew it was illegal. Just as many justices are now charging a fee for ordering themselves to issue a summons in civil cases.

SUPREME COURT OF ILLINOIS.

OPINION FILED NOV. 4, 1875.

REUBEN C. RUTHERFORD et al. *v.* MARY ANN MORRIS et al.

Appeal from Adams.

CONTESTED WILL—EFFECT OF PROBATE IN COUNTY COURT—EFFECT OF VERDICT OF JURY IN CIRCUIT COURT UPON ACTION OF CHANCELLOR—EVIDENCE AS TO CAPACITY CONSIDERED—WHAT CONSTITUTES CAPACITY—UNDUE INFLUENCE—ISSUE OUT OF CHANCERY—SENILE DEMENTIA—OLD AGE DOES NOT DISQUALIFY A PERSON FROM MAKING A WILL—PREVIOUS DECLARATIONS OF TESTATOR—EFFECT TO BE GIVEN TO THE EVIDENCE OF EXPERTS CONSIDERED—IN THIS CASE THE EVIDENCE OF SIXTY COMMON-SENSE WITNESSES, NEIGHBORS OF THE TESTATOR, WAS TAKEN IN PREFERENCE TO THAT OF THE EXPERTS.

Opinion of the court by BREESE, J.

This was a proceeding on the chancery side of the Circuit of Adams county to contest the validity of the last will of John P. Robbins, late of that county, deceased.

The will in question purports to have been executed on the 3d day of May, 1866, all the forms of law having been observed, but when offered for probate it was refused probate. On appeal to the Circuit Court this judgment was reversed and the will admitted to probate. This bill in chancery followed.

The grounds of attack being: 1. Incompetency of the testator to make the will; and, 2. Undue and improper influence exercised over the testator, by Reuben C. Rutherford, leading to its execution.

The jury found the issue for the contestants, and having overruled a motion for a new trial, the Court, by its decree, eclared the instrument produced was ot the last will and testament of John . Robbins.

To reverse this decree, the proponents of the will appeal and assign various errors. We have examined the record with great care, and given to the testimony full consideration, and submit the conclusions we have reached.

It appears the testator, John P. Robbins, migrated from the south of New Hampshire to Adams county, settling near Quincy as a farmer in 1829. He had a good education, and by diligence and the proper application of his talents, acquired quite a fortune, chiefly in real estate. From the testimony of more than sixty witnesses, who had known the testator intimately for more than thirty years up to the time of making his will, who saw him, had frequent intercourse with him, and transacted business with him occasionally during all this time, it would appear he was a man of more than ordinary vigor, of strong mind and decision of character, and a good man whose sympathies and heart were very kind, combining intelligence and virtue, as well made and balanced as most men, He was a good reasoner and not easily converted to the opinions of others, of decided principles and views, and could not be easily influenced. When he formed opinions they were very fixed; had a good mind and sound judgment; was an honest man who intended to do right. This was his condition up to June, 1869, when he was stricken with paralysis, of which the record gives an imperfect account.

It further appears the testator had, at the time of making his will, a wife, who did not survive him, and two daughters surviving him; a third daughter had died leaving children by two different husbands, and who were living at the time of the execution of the will. To these daughters the testator had long before conveyed by deed real estate, near Quincy, in his judgment of equal value. His eldest daughter was Mary Ann, who had many years before intermarried with Isaac N. Morris, of Quincy, and who was under tood to be the possessor of a handsome fortune. They had long been absent from the paternal home, rearing a family of their own in affluence and abundance.

Rebecca Maria was the only remaining child. She seems to have been a favorite child, and on her marriage with Reuben C. Rutherford in 1854 she, with her husband, continued inmates of her father's house. Rutherford himself, apparently with the approbation of Robbins, taking charge of much of his business, and in co-operation with Mrs. Robbins, of their homstead establishment, all seeming to live in the greatest harmony, each bestowing and each inspiring confidence.

During the rebellion Rutherford was for a considerable portion of the time in the military service of the United States, on duty in distant States varied by occasional visits to his home in Quincy. He was so absent in May, 1866, when the will in question was executed, and it was executed under these circumstances:

On the second day of that month, the testator being then about 72 years of age, and in appearance, in the judgment of all who knew him, in the full possession of all his faculties, physical and mental, went unaccompanied, to the office of Goodwin & Davis, practicing lawyers of good standing in Quincy, where he remained some time in consultation with Mr. Goodwin in the inner office, the other room being occupied by Mr. Davis. Goodwin took notes of the conversation on sheets of paper.

The next day, or day after, unaccompanied as before, Robbins returned to the office and again conferred with Mr. Goodwin, then returned to the outer office, and pointing to the papers lying on Goodwin's desk, invited Davis to witness the paper, as his will, it having been signed by Robbins, which Davis did, and Goodwin, since dead, also signed it as witness.

Davis was the only surviving witness to the execution of the will—he knew the testator well—and testified he was at that time of sound mind and memory.

Robbins took the will with him when he departed, unattended as he came. What disposition he made of the will does not appear. It is not shown any member of his family knew anything about it, or knew he had made a will. From this date, May, 3d, 1866, the testator continued his usual course of life until some time in June, 1869, more than three years thereafter, he was stricken with paralysis, which did not wholly incapacitate him, and four years thereafter, on the 12th of June, 1873, he died in the midst of his family, then consisting of his daughter, with her children, and Dr. Rutherford, Mrs. Robbins having died some time previously.

By this will of May 3, 1866, appellant Reuben C. Rutherford was appointed sole executor, without being required to execute a bond. To his widow he devised his whole estate, real and personal, during her life. To Mrs. Morris, the appellee, one or more valuable tracts of land, in Adams county, subject to the life estate of her mother. To Mrs. Reuben Rutherford, wife of the executor named, other tracts of valuable land, and his homestead in the same county, subject to the same life estate, and also all the personal property which might remain after the death of the widow. To the children of his deceased daughter, Harriet Warren, he made certain specific devises of real estate.

The devise to Mrs. Rutherford, it is claimed, equals in value two thirds of the whole estate.

The first point made by appellants is as to the weight to be given to the verdict of the jury. They insist that the verdict in such cases as this is nothing more, and entitled to no greator consideration, than a verdict rendered on a feigned is sue out of chancery—that it is designed merely to inform the conscience of the judge, and which he may wholly disregard.

We do not approve this view. The statute is express when a will is attacked for any of the causes specified by bill in chancery, "an issue at law shall be made up, whether the writing produced be the will of the testator or testators or not, which shall be tried by a jury in the Circuit Court of the county, wherein such will. testament or codicil, shall have been proved, and recorded as aforesaid, according to the practice in courts of chancery in similar cases."

In chancery it is the received doctrine on issue directed thereout upon a disputed fact, supposed, being directed to the judge on his own motion, a verdict upon such an issue is merely advisory, which the jndge can disregard in arriving at his conclusions. But the issue in this case was not a feigned but a real issue, directed by the statute upon real facts, which the jury were sworn to try, and their finding must have the effect of a verdict rendered in any other cause upon an issue made up for trial. This was the view entertained by this court in Bromfield *v.* Bromfield, 43 Ill., 155, and we see no necessity for changing it.

Giving to the verdict in this case the same weight accorded to verdicts rendered on ordinary issues at law, the consequence follows, the verdict must stand if there be evidence to support it. And the rule is equally well settled, if there be a great and decided preponderance of evidence against the finding, the verdict will be set aside. And the more urgent is this command, if it shall appear from the whole record that injustice has been done.

Impressed with the great importance of this case to the parties litigant, and considering the large amount of property involvsd, some $100,000 or more, we have bestowed all the attention to this record, in our power to bestow, and have permitted no important fact to escape us, and we are well satisfied it furnishes no sufficient evidence of mental incapacity of the testator at the time he made the will in question, nor any evidence of any undue influence, exerted by any one over the testator, to induce the making of the will.

The testimony to sustain the first ground of attack, that of mental incapacity of the testator, is that of Moses F. Bassett, who had been for some years prior to, and up to 1864, two years before the will was made, the family physician of the testator, and who was examined as an expert, and who testified he had no intercourse with the testator from 1864 up to December, 1870; supplemented by the testimony of Dr. Wilson, who did not know the testator, who had heard the testimony of Dr. Bassett, and who said he thought the facts stated by him, disconnected from the cause would hardly designate what the testator's real condition was, and who said "absolutely and necessarily paralysis might occur in 1869, without there having been any softening of the brain in 1866, and that persons have paralysis without having softening of the brain, and that brain softening is not necessarily connected with premonitory symptoms of paralysis; and by Dr. Curtis, who did not hear Bassett's testimony, but had seen the testator in 1871 and 1872, and personally knew nothing about him previously, but who could not testify there was any softening of the brain in 1866; and Dr. Byrd, who never knew or saw the testator, but who says if a man was stricken with paralysis in 1869, it would not establish that he was afflicted with softening of the brain in 1866, and that Robbins might have been stricken with paralysis in 1869, and have been a sound man in 1866—paralysis follows other diseases besides softening of the brain; and Mrs. Hannah C. S. Brown, a sister of Mrs. Robbins, a resident of Hancock county, whose visits to the family were not very frequent, the last being in 1865, who testified: "In these visits Robbins would tell her of his having been sick and of the doctor's visiting him—of pain in his head, affection of the eyes; he would come in flushed, his bald head would show a flushed appearance; he would lie down and her sister would bathe his head, and he would be better; spoke of his eyes being sore and paining him; he did not say much of these attacks, but he seemed more feeble after them; could not endure as well, nor walk as far, because he said it pained him in the bottom of his feet sometimes; there was a place there he complained of; did not see him in any of the attacks after he moved into his new house; did not complain of dizziness at these times; he complained of this flush, and rush of blood; that he would shed tears readily, especially on coming to very fine passages when they were reading to each other; his voice, if he was reading, would be choked, and if she was reading his tears would fall."

These doctors were summoned by the contestants "as experts," for the purpose of invalidating a will deliberately made by a man quite as competent as either of them to do such an act. They were the contestants' witnesses, and so considered themselves—Dr. Bassett especially, whose whole testimony is pregnant with such indications. The testimony of such is worth but little, and should always be received by juries and courts with great caution. It was said by a distinguished judge, in a case before him, if there was any kind of testimony not only of no value, but even worse than that, it was, in his judgment, that of medical experts. They may be able to state the diagnosis of the disease more learnedly; but upon the question whether it had, at a given time, reached such a stage that the subject of it was incapable of making a contract, as irresponsible for his acts, the opinion of his neighbors, if men of good common sense, would be worth more that that of all the experts in the country.

The question in this case is: Was there senile *dementia*, no matter how occasioned, of this testator on the 3d day of May, 1866, the day he made his will? Is there any evidence of imbecility of old age at this time? Not one witness so testifies. There is not a particle of proof such was the condition of the testator at that time or at any time prior thereto or subsequent until stricken by paralysis.

No man has had the hardihood to testify in this case that there was the least weakness of intellect at this time. More than sixty witnesses of good common sense and observation, knowing the testator well, men of the highest character and of unquestioned judgment, all concur with extraordinary unanimity that up to 1869 no man excelled him in intellectual or physical vigor. There is no dissentient voice; all testify to the same effect. Is there any medical testimony sufficient to overturn this? Taking it to the extent claimed for it, it fails to establish mental incompetency, when the will was executed. What is the amount of this medical testimony? Dr. Bassett, the leading expert, says he was the family physician in 1864, and for several years previous; that the testator was subject to occasional attacks of fever, attended with pain in the head, delirium, nausea, which the doctor attributed to congestion of the brain—that the attacks lasted generally three or four days, and were relieved by the ordinary treatment usual in like cases; that at the time, these symptoms did not excite in his mind any suspicion of softening or other organic disease of the brain, but that in years afterward, in 1869, when the testator had been attacked with paralysis, he, the doctor, then connected these symptoms with the supposed softening of the brain, which he then conceived might have existed from the date of his last attendance upon him in 1864. Now what was there in the symptoms of these periodical attacks to warrant the supposition that they indicated cerebral softening? Pain in the head, delirium, nausea, these as we all know from our own observation are closely allied to, and are not the unusual concomitants of any form of fever, and it needs no doctor to instruct us that they generally pass off, leaving no trace of evil effect behind, either on the bodily health or mental vigor. Every day's observation teaches us this. It is notorious that some persons are highly delirious while under a slight attack of fever. All the head disturbances pass off with the fever which induced them, and the patient is soon restored to his wonted mental and bodily condition. We need no books or doctors to inform us that the symptons in the case of this testator were merely the ordinary symptoms of fever of almost every kind, and do not, in our judgment, taken in connection with the testimony of the testator's many neighbors and intimate acquaintances, warrant the conclusion there was active congestion of the brain in any of the attacks prior to 1869, much less that inflammatory softening followed these attacks. How few of us have escaped distressing periodical headaches, this temporary prostration of body and mind!

The neighbors of the testator who saw him and conversed with him almost every day during these attacks and afterwards never perceived they had any effect upon his mental or bodily vigor. We do not think the evidence satisfactorily shows that any of the ordinary symptoms of cerebral softening existed in the case of this testator at the time he made his will. No one has testified there was any paralysis or weakness of the muscular system other than such as might be expected in advancing age—no marked diminution of mental power. Indeed, the principal reason for supposing the mental powers were failing is found in the testimony of Mrs. Brown, and that was, that the testator was easily moved to tears on the recital of fine poetry, or when in an excited state of feeling. If this is to be received as evidence of mental imbecility or softening of the brain, many persons who now enjoy high public distinction, and are re-

markable for strength of mind and great business capacity might deserve the care of a conservator, at least.

These experts tell us, as do the books, there is no necessary connection of softening of the brain and apoplexy or paralysis, nor does cerebral softening usually proceed at a slow pace of years before death ensues. On a careful review of the testimony of these experts, we are unable to discover anything in the symptoms and history of the case justifying the conclusions of Dr. Bassett, that the testator was suffering from a cerebral softening. If mental imbecility did exist, it must have arisen from some other cause, and we feel confident we will be more likely to arrive at a just estimate of the mental condition and business capaoity of the testator by relying on the accordant testimony of his lifelong acquaintances and neighbors with whom the testator was in frequent intercourse, rather than from the testimony of these medical gentlemen—and so would the jury.

If we give heed to such testimony, and suffer it to prevail against the flood of proof in favor of the testator's competency, we should be doing great wrong, and departing from the rules we have laid down in like cases, to which we will hereafter refer.

It must be apparent to every one, but few wills could stand the test of the fanciful theories of dogmatic witnesses who bring discredit on science and make the name of "experts" a by-word and a reproach.

We concur with the judge above referred to; we would not give the testimony of these common-sense witnesses, deposing to what they know and saw almost every day for years, for that of so-called experts, who always have some favorite theory to support—men often as presumptuous as they are ignorant of the principles of medical science.

It is upon the ground of *senile dementia* chiefly this case rests.

As this is wholly disproved as existing at the time of the execution of this will, or at any time previous, the verdict should have been for the proponents of the will.

What is the effect of old age upon testamentary capacity, is a subject which has received the attention of all courts, this among them, and it has never been held anywhere that age alone denotes incompetency. In Watson *v.* Watson, 2 B. Munroe, 74, one 86 years old and afflicted with disease, was held competent to execute a will. So, also, one of 80 years of age, with energies greatly impaired, ib., 79. In Van Abst *v.* Hunter, 5 Johns Ch. 148, Chancellor Kent said, in regard to the will of a person between 90 and 100 years of age: "A man may freely make his testament, how old soever he may be. It is one of the painful consequences of extreme old age that it ceases to excite interest, and is apt to be left solitary and neglected. The control which the law still gives to a man over the disposal of his property, is one of the most efficient means he has in protracted life to command the attention due to his infirmities. The will of such an aged man ought to be regarded with great tenderness, when it appears not to have been produced by fraudulent arts, but contained those very dispositions which the circumstances of his situation and the course of the natural affections dictated."

Admitting this testator had softening of the brain in 1864, which is not proved, still, if he retained capacity sufficient to transact his business, and knew the state of his affairs, his property, and the claims of his children, and acted understandingly, the will cannot be rejected. This court said, in Silby *v.* Wagoners, 27 Ill., 395, that a want of mental powers must be such as to render the testator incapable of acting rationally in the ordinary affairs of life, or incapable of understanding the effects and consequences of his act; and further, that legal soundness of mind, until inquest had, is a presumption of law to be overturned by proof only of incompetency at the time of the act in question.

In Fish *v.* Newell, 62 ib., 196, it was said that prior incompetency or insanity of the testator, arising from accident or temporary disease, does not presume after incompetency to make a will; it is enough if the testator understands the nature of the business in which he is engaged, has recollection of the property he intends to devise, of the persons who are the objects of his bounty, and of the manner in which it is to be distributed among them.

And the court further said that the best form of expressing the law as to the mental capacity is, were the testator's mind and memory sufficiently sound to enable him to know and understand the business in which he was engaged at the time he executed the will. The same doctrine was announced in Yoe *v.* McCord, decided at the September term, 1874, and in Meeker *v.* Meeker, decided at the same time, where it was said: "The law has adopted the rule, that where persons have arrived at full age, the presumption must be indulged that the party has the requisite capacity to enter into and bind himself by all lawful engagements, and amongst others may dispose of their property by will and testament. and to avoid their acts the presumption must be rebutted by evidencing a want of sufficient intellectual capacity to make the agreement or the disposition of his property by will. Like all other matters relating to the human mind, it is difficult to find any precise, undeviating rule by which it can be determined when a person has mind and memory. And further, it is a rule of law that a person who is capable of transacting ordinary business, is also capable of making a valid will. It is not required he should possess a higher capacity than that, than for the transaction of the ordinary affairs of business." Further on the court says: "And the usual test is that the party be capable of acting rationally in the ordinary affairs of life." Testing this case by this rule it is impossible for any man to say with truth, that the testator, on May 3d, 1866, was not capable of making a will. The whole weight of the testimony of more than sixty intelligent witnesses, the familiar acquaintances of the testator, is that up to the time of the paralytic stroke, in 1869, and during all the years prior thereto, he was a man remarkable for his physical and mental power. No one of his numerous acquaintances with whom he freely mingled, had the slightest suspicion of unsoundness of mind or memory, or a weakening even of his mental powers, save the testimony of Dr. Bassett, that in 1864 and prior there to he had occasional attacks of pain and headache not incapacitating him, however, from attending to his ordinary business.

That there is no necessary connection between these and the paralytic attack of 1869 is shown by the medical testimony produced by appellees.

But suppose the testator had incipient softening of the brain in 1864, there is no proof it incapacitated him from the transaction of ordinary business. The proof is ample that it did not, and his testamentary act is within the rule established by this court in the cases cited. We find no sufficient evidence of mental incapacity.

The next point is, the will was the result of undue influence exercised over the testator by Reuben C. Rutherford.

The principal witness to establish this is Edgar R. Morris, the son of appellee, Mrs. Morris; Mrs. Brown amounts to nothing. There is nothing whatever in his testimony tending to show undue influence of Rutherford, or any other person exercised upon the testator to make his will.

The witness was always on the best of terms with his grandfather, whom he visited quite frequently; thinks Rutherford had a good deal of influence over him; noticed it in his manner of life; he (his grandfather) as most western farmers do, had lived on corn-bread, bacon and coffee; he changed his diet, as he said, by Rutherford's advice; he got him to drinking weak tea and eating beef, as pork was not healthy; got him to quit the use of pepper to a greater or less extent, and on a great many occasions Mr. Robbins would quote Dr. Rutherford as to whether this drink was right and that was wrong. This the witness noticed within one or two years after the marriage of Rutherford.

He further says, he can only answer as to the influence of Dr. Rutherford over the testator, by stating circumstances which occurred. That influence increased up to 1866. Witness was at the house of testator on Broadway, when he lived on the McCoy place, and offered him a cigar. He (Robbins) said the doctor thought it was best not to smoke, and he had kind of promised not to smoke, but said he, "I like a cigar occasionally, lets go behind the stable and sit down and smoke and have a chat." He further says his grandfather was a very industrious man, and one day he asked his grandfather what Dr. Rutherford was going to do, as it was getting to be neighborhood talk that the doctor was not doing anything. The old gentleman said he thought it was time the doctor did something, but the old lady (his grandmother) said the doctor was a literary man; was getting ready to write a book; could not work now; was not his nature; was not made for that purpose; all they wanted him to do was to care for their old age and attend to Mr. Robbins' business. This was in 1858 or 1859, before they moved into the new house; and about building that house this witness thinks the doctor exerted his influence over Mr. Robbins,

It seems the family had overruled Mr. Robbins, and had the house built in the city on Twenty-fourth street, convenient to church, schools and places of amusement. This was the work of the doctor and his grandmother. Though it was not exactly the kind of house the old gentleman would have preferred, he yielded to their wishes, as they had set their hearts upon it. "They" being understood to mean his daughter Maria, Dr. Rutherford, and his grandmother. On one occasion in 1865–66 witness went to Mr. Robbins to borrow a reaper. He said witness would have to see the doctor, as he had charge of the reaper. This was in 1866. Declining to speak to the doctor about it, the old gentleman said he would speak to "grandma" about it, and witness got the reaper and took it home.

This is the substance of all the evidence on the question of undue influence, and that such trivialities should be introduced in a court of justice and against the objections of the opposite party, excites surprise. They fail to touch the question of the execution of the will.

In Broomfield *v.* Broomfield, supra, it was said, that fraud or undue influence to avoid a will must be directly connected with its execution; that although the testator acted under the advice of the devisee in his ordinary affairs and was influenced by that advice, such relations and influence would not tend to prove that he used undue influence in procuring the execution of the will. In Carmichael *v.* Reed, 45 Ill., 108, this court said that a wife who was the principal devisee in the will of her husband, might lawfully exercise the natural and proper influence of her position to induce the testator to make a will appointing her executrix, giving her what the law allows, and preferring her children over those by a former wife.

In Roe *v.* Taylor, ib., 575, this court said the rule is that the influence exercised must be of such a nature as to deprive the testator of his free agency and that neither advice, nor argument, nor persuasion would vitiate a will freely made, and from conviction, though the will might not have been made but for such advice and persuasion, that the influence to avoid a will must be such as to destroy the freedom of the testator's will, and thus render his act obviously more the offspring of the will of others than his own, and that it must be an influence specially directed toward the object of procuring a will in favor of particular parties. That these rulings are in strict harmony with those of other courts will be seen from the following citations: It is said in 1 Redf. on Wills, ch. 10, p. 523, that the influence to avoid a will must be such as to destroy the freedom of the testator's will, and thus render his act obviously more the offspring of the will of others than of his own; that it must be an influence specially directed toward the object of procuring a will in favor of particular parties, that if any degree of free agency, or capacity remained in the testator, so that when left to himself, he was capable of making a valid will, then the influence which so controls him as to render his making a will of no effect, must be such as was intended to mislead him to the extent of making a will, essentially contrary to his duty.

This influence, to avoid a will, must be one still operating at the time the will is made, and producing that persuasion of mind which made the will. Ib., 244. It is said a will is set aside in such cases on the ground it is not an honest will—that it does not reflect the unbiased intent or wishes of the testator, but, on the contrary, has been extorted—procured from the deceased in the weakness or imbecility of old age or disease, or by artifice, deceit, or imposition, or by persistent importunity, amounting to a species of coercion or moral duress. Under influence, in this sense being a fraud and for the fraud, it is not the act, deed or will of the deceased; upon no other ground has the court a right to set aside a deed or will executed by a person of sane mind or memory, when the execution of the same was not procured, and the free agency of the party overcome, by some contra-active coercion, duress or fraud. Kinne *v.* Johnson, 50 Barb., 70; Tyler *v.* Gardner, 35 N. Y., 610; Tyson *v.* Tyson, 37 M. D., 567; Eadie *v.* Sampson, 26 N. Y., 11. In Miller *v.* Miller, 3 Serg. & Rawle, 269, it was held that influence and persuasion may be fairly used; and a will procured by honest means, by acts of kindness, attention and importunate persuasions, which delicate minds would shrink from, would not be set aside on that ground alone. Influence, to vitate an act, must not be the influence of affection or attachment; it must not be the mere desire of gratifying the wishes of another, for that would be a very strong ground in support of a testamentary act. M. *v.* R. Cox, 355.

It was held, in Rubb *v.* Gersham, 43 Ind., 9, that advice, persuasion, or entreaty does not constitute undue influence. Nor will love, affection or gratitude afford ground from which undue influence may be inferred. Kinne *v.* Johnson, 50 Barb., 70, supra.

The fact that the beneficiaries of this will are those by whom the testator was surrounded, and with whom he stood in confidential relations at the time of its execution, is no ground for inferring undue influence. Wilson *v.* Moran, 3 Bradf. 185. Nor even where the principal beneficiary has for years had the exclusive management of the testator's property. Reynolds *v.* Post, 62 Barb., 207; nor when the provisions of the will, for the benefit of such person, may seem grossly unreasonable or unequal. Brown *v.* Mattison, 3 Wheaton, 131; Jackson *v.* Jackson, 39 N. Y., 152; Clapp *v.* Fullerton, 34 ib., 97; Bleeker *v.* Lynch, 1 Bradford, 471.

These being generally received principles governing cases of this kind, this case, tested by them, fails to show any undue influence in procuring the execution of this will.

That Dr. Rutherford, from his position, the husband of the testator's youngest and favorite child, as it would seem, residing in his family as his own, should have acquired some influence over the testator is not to be questioned. It was manifested in inducing the testator to quit a bad habit, and to regulate his diet on sanitary principles; to erect a more imposing edifice, in a more agreeable quarter, than was originally intended; but that the doctor was influential in the latter is not shown, though there can be no doubt he aided his wife and her mother in their efforts to that end. They were determined to have a fine house, in a fashionable quarter—the testator had the means with which to build it—and no doubt felt a secret gratification when occupying it that he had yielded to their importunities.

It is urged that these facts show an influence over the mind of the testator. Granted; but it is not such an influence as the books condemn as undue, when the execution of the will is considered. There is not a word of proof that any of the beneficiaries of this will exerted a particle of influence towards its execution, or that Rutherford ever knew of it until after Robbins' death. At the time of its execution he was absent from the State, and not a word or syllable of his is brought up against him to charge him with suggesting any portion of it, or his daughter, or her mother either. From all appearauces it was the unprompted act of the testator. He went alone and unattended from his home, distant a mile and a quarter from Quincy, to the office of a prominent law firm in that city, and after private consultation with Mr. Goodwin, the leading member of the firm, he left, on his return home. He returned a day or two thereafter, as before, unattended, signed the paper, calling in Mr. Davis to witness it as his will, in conjunction with Mr. Goodwin. He was then, and had been for thirty years and more prior to that time, in fine physical and mental health; was in the full possession of all his faculties; fully competent to make a will.

[To be continued.]

BAR ASSOCIATION.

DISCUSSION OF THE BILL IN REFERENCE TO WRITS OF ERROR AND APPEALS.

The regular meeting of the Chicago Bar Association was held Saturday afternoon, Dec. 4th, at their rooms, No. 148 Madison street. Mr. B. F. Ayer presided, and there was a large attendance.

The monthly report of the Treasurer was read by the Secretary, Mr. H. W. Jackson. It showed a balance at the end of the month of $860.68. Adopted.

Mr. Robert Hervey, of the Committee on Admissions, reported in favor of Philip Stein, Franklin H. Dennison, and O. Skinner. Laid over for a week under the rules.

On motion, J. G. Wilson, G. W. Smith, and J. L. High were appointed a Special Committee to audit the account of the Treasurer for last year.

The bill reported at the previous meeting by the special committee, consisting of W. P. Black, J. L. High and Obadiah Jackson, providing for writs of error and appeals from the decisions of the U. S. District Judge, while sitting as a circuit judge, to the Circuit Judge proper, and which had been made the special order for to-day, was then taken up and discussed. The bill, as reported by the committee was published.

Mr. W. P. Black, Chairman of the Special Committee which prepared the bill, moved to amend Sec. 6 by striking out the words "single or double costs," and inserting "including a reasonable attorney's fee not exceeding in any case $250," and by adding another section as follows:

SEC. 8. The provisions of this act shall apply to all cases tried and determined by the Circuit Court held by a district judge sitting alone, where the final judgment or decree has been entered in such cause within the six months prior to the passage of this act.

Mr. S. A. Goodwin inquired why the bill should be passed, and expressed himself opposed to it on principle.

Mr. Black defended and explained the objects of the bill in an able speech. He said, in view of the settled policy of the country, and in view of their knowledge of human nature, there was occasion and necessity for legislation of this kind. While the bill might not provide all that might be needed, still it was a step in the right direction—namely, in the direction of securing greater care, watchfulness and wisdom in the settlement of the property rights of our fellowmen. It might be argued that it would increase the labor of the circuit judges. But for what did the circuit judge exist? Not for his own comfort, convenience, leisure, or delight, but as the appointed servant of the people to determine their rights in the cases brought before him. If, however, the judge could not keep up with the increase of business, more judges could be appointed. The whole plan and thought of the judiciary system was the obtaining of justice, no matter at what cost.

Mr. M. W. Fuller suggested that, if the amendments were agreed to by the Committee, they should be embodied in the bill.

Mr. Black remarked that that was the intention of the committee.

Mr. Goodwin was not satisfied with the arguments brought forward in support of the bill. In his opinion the proposed legislation was a step in the wrong direction. The remedy for the evils which existed was not by a multiplication of hearings, but by an increase of the judiciary to enable the cases to be heard. This bill practically repealed that act of Congress which authorized the holding of the Circuit Court without the presence of the circuit judge. He suggested that the association frame a substitute, and submit it to the bar associations of New York, Philadelphia, and Boston, before undertaking to decide upon this question. He thought the remedy lay in the creation of an intermediate court between the Circuit and District Courts to hear those cases.

Mr. Fuller submitted the following:

Resolved, That the pending proposition and amendments be recommitted, with instructions to consider and report upon the expediency of pressing upon Congress the passage of bills reducing the $5,000 limit on appeal to $2,000; providing for two district judges in this district; repealing the act of Congress of March, 1875, providing for the removal of causes from State to United States courts; providing for the creation of an intermediate court; and such other measures as might relieve the Supreme and Circuit Courts of the United States from the accumulation of business.

Mr. Fuller said he believed it was inexpedient to press such a measure as the one before them; it certainly would not pass Congress. A series of measures, such as were indicated in the resolution, were needed. The jurisdiction of the United States courts had been improperly enlarged, and the whole tendency of congressional legislation was reprehensible in the extreme.

Mr. J. S. Cooper supported the bill in an effective speech.

Mr. Goudy moved to amend the resolution by referring to the Committee on Judiciary.

Mr. Fuller offered to amend by adding "and that the Judiciary Committee act with the said committee in considering the subject."

After further discussion, Mr. Goudy withdrew his amendment.

Mr. Black replied to the objections made to the bill, and claimed that it accomplished, in the main, what was contemplated by the resolution.

Mr. J. L. High, of the Special Committee, said that they had been instructed by the Association to report such a bill, and had simply endeavored to follow their instructions. They had not submitted the bill as perfect, and desired that it should be carefully dissected and considered. The discussion thus far had only strengthened him in the conviction that the principle of the bill was correct; and that it contained the germ, at least, of the desired reform. All were agreed as to the evil; the only difficulty lay in applying the specific remedy. Under the present system, defendants in the United States Circuit Courts, in actions determined by the district judge holding the Circuit Court, when the amount was under $5,000, were absolutely at the mercy of the district judge, without remedy and without appeal. Such despotic power was repugnant to our whole system of jurisprudence, and no such anomalous condition of affairs existed in any other common law country. He urged that an expression of the Association should be taken on the bill.

Col. Waterman thought the remedy for the existing evil was the system adopted in England and New York of taxing costs and attorneys' fees, and so making those interested bear a portion of the burden now thrown upon the public. He moved to refer to the committee on the Amendment of the Law. Lost.

Mr. Robert Hervey suggested there should be a full discussion of the bill presented by the special committee, and moved to postpone its further consideration until the next regular meeting. Carried.

On motion, the following committee was appointed to make arrangements for the annual dinner of the Association: Messrs. B. F. Ayer, M. W. Fuller, Robert Hervey, and Norman Williams.

The Association then adjourned.

S. W. PACKARD REMOVED.—Mr. PACKARD, of the well-known law firm of Cooper, Garnett & Packard, of this city, has removed to Yankton, Dakota, and opened an office for the practice of his profession there. Mr. PACKARD was induced to take this step, from the hope that that climate might restore the failing health of Mrs. PACKARD. The members of the Yankton bar will find Mr. PACKARD an able and honorable practitioner, and a gentleman worthy of their confidence.

THE LEGAL TENDER ACTS, CONSIDERED IN RELATION TO THEIR CONSTITUTIONALITY AND THEIR POLITICAL ECONOMY. By Samuel T. Spear, D. D. New York: Baker, Voorhis & Co., Publishers. 1875.

This is a pamphlet of 106 pages; it contains thirteen articles which were prepared by Dr. Spear, and published in *The Independent*. They are: 1. Paper Money and the Federal Convention. 2. National Bills of Credit. 3. The Question of Implied Power. 4. Legal Tender Repudiation. 5. The Money of the Constitution. 6. Legal Tender Power of the States. 7. Limitation of Legislative Power. 8. Construction of the Legal Tender Acts. 9. The Legal Tender Debt. 10. The Finance of War. 11. The Crisis in the Treasury. 12. The Plea of Necessity. 13. The Legal Tender Note Scheme. These articles have attracted considerable attention throughout the country, and we are glad they have been published in the present form. Whether the student of our financial legislation agrees with the views of the learned author as expressed in these articles, he will certainly be greatly aided in his investigation by their perusal.

UNITED STATES SUPREME COURT.

PROCEEDINGS OF.

Thursday, Dec. 2, 1875.

On motion of J. G. Abbott, Charles P. Thompson, of Gloucester; William W. Warren, of Boston, and John K. Tarbox, of Lawrence, Mass., were admitted.

On motion of D. B. Duffield, Frank H. Canfield, of Detroit, Mich., was admitted.

No. 61. The Western Union Telegraph Co. v. The Western and Atlantic Railroad Co. The argument of this cause was continued by B. H. Hill for appellee, and concluded by J. H. Ashton for appellant.

No. 62. Richard L. Wallach et al. v. John Van Riswick. The argument of this cause was commenced by Luther H. Pike for appellants, and continued by T. A. Lambert and T. J. Durant for appellee.

Adjourned until Friday at 12 o'clock.

Friday, Dec. 3.

On motion of George B. Hibbard, Elbridge G. Lapham, of Canandaigua, was admitted.

No. 62. Richard L. Wallach et al. v. John Van Riswick. The argument of this cause was concluded by Albert Pike for appellants.

No. 63. Laban S. Major v. Clark Upton, assignee, etc. This cause was submitted on printed arguments by Charles Hitchcock, of Chicago, of counsel for the plaintiff in error, and by L. H. Boutell, of Chicago, for defendant.

No. 64. Thomas Pitts, executor, etc. v. The River and Lake Shore Steamboat Line, etc. The argument of this cause was commenced by H. Flanfield for appellant, and by Ashley Pond for appellees.

Adjourned until Monday at 12 o'clock.

Monday, Dec. 6.

On motion of R. D. Massey, Roberick Seal, of Mississippi City, Miss., was admitted.

On motion of J. S. Black, Charles W. Mackey, of Franklin, Penn., was admitted.

On motion of Asst. Atty. Gen. Smith, N. Van Slyck, of Providence, R. I., was admitted.

On motion of D. B. Duffield, William B. Moran, of Detroit, was admitted.

On motion of Ashley Pond, George W. Lawton, of Lawton, Mich., was admitted.

No. 45. Sarah Ann Jackson (now Dorsey) v. Simon Jackson. Appeal from the Supreme Court of the District of Columbia. Field, J., delivered the opinion of the court, reversing the decree of the Supreme Court with costs, so far as it awards any portion of the property in controversy to the husband, and directs a conveyance by the wife to him, and remanding the case for further proceedings in conformity with the opinion of this court.

No. 48. Gustave Beauregard v. Charles Case, receiver, etc.

No. 406. Thomas P. May v. Charles Case, receiver, etc. In error to the Circuit Court of the State of Louisiana. Field, J., delivered the opinion of the court, affirming the judgment of the Circuit Court in these causes, with costs and interest.

No. 49. John Carey et al v. Henry F. Brown. In error to the Circuit Court of the United States for District of Columbia. Swayne, J., delivered the opinion of the court, affirming the judgment of the Circuit Court with costs.

No. 47. The Baltimore and Potomac Railroad Company v. The Trustees of the Sixth Presbyterian Church. In error to the Supreme Court of the District of Columbia. Clifford, J., delivered the opinion of the court, affirming the judgment of the Supreme Court with costs and interest. Bradley, J., did not sit on the argument, and took no part in the decision.

No. 647. Faxon D. Atherton et al., executors, v. John Fowler et al. No. 648 Faxon D. Atherton et al. v. Welcome Fowler et al. Waite, C.J., delivered the opinion, denying the motion to dismiss these causes.

No. 231. The Home Insurance Company of New York v. George Davis et al. In error to the Supreme Court of the State of Michigan. Waite, C. J., announced the decision, reversing the judgment of the Supreme Court with costs, and remanding the cause with directions to reverse the judgment of the Circuit Court of Manistee county, and to direct that court to permit a transfer to the Circuit Court of the United States, upon the showing under the petition filed March 20, 1873, on the authority of Insurance Company v. Morse, 20 Wall., 445.

No. 63. Laban S. Major v. Clark W. Upton, assignee, etc. In error to the Circuit Court of the United States for the Northern District of Illinois. Waite, C. J., announced the decision of the court, affirming the judgment of the Circuit Court with costs and interest, on the authority of Sanger v. Upton, decided at the present term, and reported in this number of the LEGAL NEWS.

No. 43. The Town of Concord v. The Portsmouth Savings Bank. Ordered for re-argument.

No. 483. William Koemer v. Edward Simon et al. Waite, C. J., delivered the opinion, denying the motion to remand this cause.

No. 613. The United States v. Wm. Allison. Advanced and set down for hearing on printed arguments on the first Monday of January next.

No. 862. The American Emigrant Company v. The County of Adams. Appeal from the Circuit Court of the United States for the District of Iowa. On motion of R. L. B. Clarke, docketed and dismissed with costs.

No. 863. Michael McStay et al. v. Joseph S. Friedman. In error to the Supreme Court of the State of California. On motion of A. A. Sargent, docketed and dismissed with costs.

No. 750. The County of Warren v. George O. Marcy. No 760. The County of Warren v. Augustus T. Post. No. 761. The County of Warren v. The Portsmouth Savings Bank. The motions to dismiss these causes were submitted on printed arguments.

No. 64 Thomas Pitts, executor, v. The River and Lake Shore Steamboat Line, etc. The argument of this cause was continued by Ashley Pond and W. A. Moore for the appellees, and concluded by D. B. Duffield for appellant.

No. 65. The Propeller Colorado, etc. v. Elon W. Hudson, etc. The argument for this cause was commenced by George B. Hibbard for appellants.

Adjourned until Tuesday at 12 o'clock.

Tuesday, Dec. 7.

On motion of J. G. Abbott, John F. Hageman, of Princeton, N. J., was admitted.

On motion of Assist. Atty. Gen. Smith, G. C. Yeaton, of South Berwick, Maine, was admitted.

No. 65. The Propeller Colorado, etc. v. Elon W. Hudson, owner of barge H. P. Bridge, etc. The argument of this cause was continued by George B. Hibbard for appellant, and by J. G. Abbott and Ashley Pond for appellee, and concluded by George B. Hibbard for appellant.

No. 66. August F Ludwig et al v. The Propeller Free State, etc. The argument of this cause was commenced by W. A. Moore for appellants, and by George B. Hibbard for the appellee.

Adjourned until Wednesday at 12 o'clock.

Wednesday, Dec. 8.

On motion of W. A. Moore, George H. Durand, of Flint, Michigan, was admitted.

On motion of S. S. Henkle, C. H. Armes, of Washington, D. C., was admitted.

No. 496. Samuel Black et al. v. The United States This cause was submitted on printed argument by C. F. Peck for appellants, and by Assist. Atty Gen. Smith for appellee, under the twentieth rule.

No. 66. August F Ludwig et al. v. The Propeller Free State. The argument of this cause was continued by George B. Hibbard and Ashley Pond for appellees and concluded by W. A. Moore for appellants.

No. 79. (Substituted.) John Miner v. Thomas Pitts. This cause was argued by W. A. Moore and Ashley Pond for appellants, and by F. H. Canfield and D. B. Duffield for appellee.

No. 67. Caleb Ives and George B. Green v. M. A. Hamilton, executor, etc. The argument of this cause was commenced by Charles J. Hunt for the plaintiffs.

Adjourned until Thursday at 12 o'clock.

ESTATE OF MARY MCNULTY, DECEASED—Notice is hereby given to all persons having claims and demands against the estate of Mary McNulty, deceased, to present the same for adjudication and settlement at a regular term of the county court of Cook county, to be holden at the court house, in the city of Chicago, on the third Monday of February, A. D. 1876, being the 21st day thereof.

Chicago, December 3d, A. D. 1875.

11-16 FANNIE MCNULTY, Executrix.

CHICAGO LEGAL NEWS.

SATURDAY, DECEMBER 18, 1875.

The Courts.

UNITED STATES SUPREME COURT.

OCTOBER TERM, 1875.

In error to the Supreme Court, District of Columbia.

FRANCIS DAINESE, plaintiff in error, *v.* CHARLES HALE.

1. Judicial powers are not necessarily incident to the office of consul, although usually conferred upon consuls of Christian nations in the Pagan and Mahometan countries, for the decision of controversies between their fellow citizens or subjects residing or commorant there, and for the punishment of crimes committed by them.

2. The existence and extent of such powers depend on the treaties and positive laws of the nations concerned. In Turkey, for example, the judicial powers of consuls depend on the treaty stipulations conceded by the government of that country, and on the laws of the several States appointing the consuls.

3. The treaty between the United States and Turkey, made in 1862, (if not that made in 1830), has the effect of conceding to the United States the same privilege in respect to consular courts and jurisdiction which are enjoyed by other Christian nations, including civil as well as criminal jurisdiction; and the act of Congress of June 22, 1860, established the necessary regulations for carrying the jurisdiction into effect.

4. But as this jurisdiction is, in terms, only such as is allowed by the laws of Turkey, or its usages in its intercourse with other Christian nations, those laws or usages must be shown in order to know the precise extent of the jurisdiction.

5. The court can not ordinarily take judicial notice of foreign laws and usages; a party claiming the benefit of them by way of justification, must plead them.

6. The defendant, as consul-general of Egypt, in 1864, issued an attachment against the goods of the plaintiff, there situate, neither the plaintiff nor the persons at whose suit the attachment was issued being residents or sojourners in the Turkish dominions, but both being citizens of the United States. For this act the plaintiff brought suit to recover the value of the goods attached. The defendant pleaded his official character, and as incident thereto, claimed jurisdiction to entertain the suit in which the attachment was issued. *Held*, that the plea was defective for not setting forth the laws or usages of Turkey upon which, by the treaty and act of Congress conferring the jurisdiction, the latter was made to depend, and which alone would show its precise extent, and that it embraced the case in question.

Opinion by BRADLEY, J.

This action was brought to recover the value of certain goods, chattels, and credits of the plaintiff, which the defendant, in November, 1864, then being Consul-General of the United States in Egypt, caused to be attached. The declaration alleged that the defendant, by usurpation and abuse of his power as such Consul-General, and for the malicious purpose of injuring the plaintiff, took cognizance of a certain controversy between the plaintiff and Richard H. and Antony B. Allen, (all being citizens of the United States and none of them residents of or sojourners within the Turkish dominions at that time,) and made and issued the order of attachment by virtue of which the seizure in question was made.

The defendant pleaded that at the time of issuing the attachment he was agent and Consul-General of the United States in Egypt, and was furnished with a letter of credence from the President of the United States to the Pacha; that in his said official capacity he exercised the functions and duties of a minister, and by the law of nations, as well as the laws of the United States, he was invested with judicial functions and power over citizens of the United States residing in Egypt, and in the exercise of those functions took cognizance of the cause referred to in the declaration, and issued the attachment complained of.

To this plea there was a general demurrer.

The defendant, by his plea, asked the court to take judicial notice that his official character gave him the jurisdiction which he assumed to exercise. Could the court do this? Can this court do it?

It cannot be contended that every consul, by virtue of his office, has power to exercise the judicial functions claimed by the defendant, for it is conceded that this is not the case in Christian countries. And whilst, on the other side, it is also conceded that in Pagan and Mahometan countries it is usual for the ministers and consuls of European states to exercise judicial functions as between their fellow subjects or citizens, it clearly appears that the extent to which this power is exercised depends upon treaties and laws regulating such jurisdiction. The instructions given by the British Foreign Office to their consuls in the Levant, in 1844, as quoted by Mr. Phillimore do not claim anything more. They say:

"The right of British consular officers to exercise any jurisdiction in Turkey in matters which in other countries come exclusively under the control of the local magistracy, depends originally on the extent to which that right has been conceded by the Sultans of Turkey to the British Crown, and, therefore, the right is strictly limited to the terms in which the concession is made. The right depends, in the next place, on the extent to which the Queen, in the exercise of the power vested in her majesty by act of Parliament, may be pleased to grant to any of her consular servants authority to exercise jurisdiction over British subjects."—(Int. Law, vol. 2, p. 273, section 276.)

Historically it is undoubtedly true, as shown by numerous authorities quoted by Mr. Warden, in his treatise on the Origin and Nature of Consular Establishments, that the consul was originally an officer of large judicial, as well as commercial powers, exercising entire municipal authority over his countrymen in the country to which he was accredited. But the changed circumstances of Europe and the prevalence of civil order in the several Christian states, have had the effect of greatly modifying the powers of the consular office. And it may now be considered as generally true, that for any judicial powers which may be vested in the consuls accredited to any nation, we must look to the express provisions of the treaties entered into with that nation, and to the laws of the states which the consul represent.

The transactions which are the subject of this suit took place in 1864, and the powers of our Consul-General in Egypt at that time must be regulated by the treaties with Turkey and by the laws of the United States then in force.

The first treaty between the United States and the Ottoman Porte was concluded in 1830, and, amongst other things, it provided, in article III., that "American merchants established in well defended states of the Sublime Porte for purposes of commerce, shall not be disturbed in their affairs, nor shall they be treated in any way contrary to established usages." By article IV. it was further provided, as follows:

"If litigations and disputes should arise between the subjects of the Sublime Porte and citizens of the United States, the parties shall not be heard, nor shall judgment be pronounced, unless the American Dragoman be present. Causes in which the sum may exceed five hundred piasters shall be submitted to the Sublime Porte, to be decided according to the laws of equity and justice. Citizens of the United States of America, quietly pursuing their commerce, and not being charged or convicted of any crime or offense, shall not be molested; and even when they may have committed some offense they shall not be arrested and put in prison by the local authorities, but they shall be tried by their minister or consul, and punished according to their offense, following, in this respect, the usage observed towards other Franks."

In 1848 an act of Congress was passed, entitled "An act to carry into effect certain provisions in the treaties between the United States and China and the Ottoman Porte, giving certain judicial powers to ministers and consuls of the United States in those countries. (9 Stat. 276.) A treaty had been made with China in 1844, conceding to the authorities of the United States full civil and criminal jurisdiction between citizens of the United States in that country. The law was passed in reference to this treaty and that with the Ottoman Porte, before cited.

This act contained regulations as to the mode of exercising the judicial powers stipulated for in the treaty with China. It conferred these powers upon the resident commissioner and consuls respectively, and authorized them to adjudicate in accordance with the laws of the United States and the common law, supplemented, when these were insufficient, by decrees and regulations to be made by the commissioner himself. The commissioner with the advice of the consuls, was to prescribe the forms of processes and proceeding. By the 22d section of the act its provisions, so extended to Turkey under the treaty of 1830, to be executed by the ministers and consuls of the United States in that country, who were *ex officio* vested with the powers given by the act to similar officials in China, so far as regarded the punishment of crime.

It is evident that this act failed to confer upon the consuls of the United States in Turkey any power to exercise judicial functions in civil cases, whatever may have been the scope and intention of the treaty of 1830. Whilst it may be true that the expression in the third article of the treaty—that American merchants shall not be disturbed in their affairs, nor treated contrary to established usages—was understood to and did confer upon American merchants the same privileges of exterritorially enjoyed by the subjects of other Christian nations, the act of 1848 did not assume to enforce such a construction of it.

But in 1860 another act was passed to carry into effect a new treaty made with China in 1858, and other treaties made with Japan, Siam, Persia, and other countries (12 Stat., 72), by which very full and explicit regulations were again made in reference to the exercise of judicial powers by ministers and Consuls of the United States in those countries. By the 21st section of this act the same declaration was made as in the 22d section of the Act of 1848, in reference to the criminal jurisdiction to be exercised by the minister and consuls of the United States in Turkey; and a clause was added giving them civil jurisdiction also as follows: "who" (referring to such ministers and consuls) "are hereby *ex officio* vested with the powers herein conferred upon the minister and consul in China, for the purposes above expressed, so far as regards the punishment of crime," [adding,] "and also for the exercise of jurisdiction in civil cases wherein the same is permitted by the laws of Turkey; or its usages in its intercourse with the Franks or other foreign Christian nations."

So far, then, as the true construction of the treaty of 1830 would permit the exercise of civil jurisdiction by our consuls, the act of 1860 authorized it to be exercised, and supplied all the regulations necessary for that purpose.

In 1862 another treaty was entered into with the Ottoman Porte, by which after confirming all such parts of the treaty of 1830 as were not abrogated or changed, amongst other things, it was provided in article I., as follows: "All rights, privileges, or immunities which the Sublime Porte now grants, or may hereafter grant to, or suffer to be enjoyed by, the subjects, ships, commerce, or navigation of any foreign power, shall be equally granted to and exercised and enjoyed by the citizens, vessels, commerce and nativation of the United States of America." If, therefore, it be true, as laid down by writers and public documents, that the subjects of other Chistian nations have and enjoy in Turkey the right to have their civil controversies decided by their own minister and consuls, it would seem clear that under the treaty of 1862, if not under that of 1830, the same right is gauranteed to citizens of the United States.

But it is objected that in 1864 no act had been passed by Congress to carry the last treaty into effect. Such an act was passed in 1866, simply, however, extending to Egypt and the Consul-General there, the provisions of the act of 1860. (Sec. 11 of Approbation Bill, 14 Stat., 322.) This clause was probably adopted merely to obviate any doubt on the subject. For as treaties made under the authority of the United States are, by the Constitution, declared to be part of the supreme law of the legislation to carry them into effect, such legislation is not necessary for the purpose of giving them force and validity. So far as relates to the jurisdiction in question, this is the character of the treaty of 1862, taken in connection with the act of 1860. The act gave the jurisdiction, so far as usage in Turkey would permit it. The treaty secured the consent of the Turkish government to its exercise.

The State Department of the United States seems to have regarded the treaty of 1830 as establishing the jurisdiction in question. In the instructions contained in the Consuls' Manual, promulgated by the department in December, 1862, (adopting the learned opinion of Attorney-General Cushing, dated October 23, 1855,) it is said that the acts of Congress af 1848 [and 1860] provide in terms for the exercise of judicial authority by ministers and consuls in Turkey only so far as regards the punishment of crime, leaving the question of civil jurisdiction to stand upon treaties or the peculiar public law of the Levant. (Sec. 165.) And after referring to the language of Article III. of the treaty of 1830, which stipulated that "American merchants established in the well-defended states of the Sublime Porte for purposes of commerce, * * shall not be disturbed in their affairs, nor shall they be treated in any way contrary to established usages." And conceding that its construction might admit of discussion, the following conclusions were, nevertheless, reached; "As to all civil affairs to which no subject of Turkey is a party, Americans are wholly exempt from the local jurisdiction; and in civil matters, as well as criminal, Americans in Turkey are entitled to the benefit of 'the usage observed towards other Franks'. * * * * The phrase in the second article engages that citizens of the United States in Turkey shall not be 'treated in any way contrary to established usages.' The 'established usages' are the absolute exemption of all Franks, in controversies among themselves, from the local jurisdiction of the Porte.

"The general doctrine thus in force in the Levant, of the exterritoriality of foreign Christians, has given rise to a complete system of peculiar municipal and legal administration, consisting of—

"1. Turkish tribunals for questions between subjects of the Porte and foreign Christians.

"2. Consular courts for the business of each nation of foreign Christians.

"3. Trial of questions between foreign Christians of different nations in the consular court of the defendant's nation.

"4. Mixed tribunals of Turkish magistrates and foreign Christians, at length substituted in part for cases between Turks and foreign Christians.

"5. Finally, for causes between foreign Christians, the substitution at length of mixed tribunals in place of the separate courts, an arrangement introduced first by the legations of Austria, Great Britain, France, and Russia, and then tacitly acceded to by the legations of other foreign Christian nations." (Consuls' Manual of December, 1862, sections 169–171.)

These conclusions being publicly issued by the proper Executive Department of the government for the instruction and guidance of our consuls, be entitled to the highest respect in construing the statutes and treaties upon which their powers depend. And in view of the confirmatory, as well as independent, effect of the act of 1860, and the treaty of 1862, we have no doubt that in 1864, when the transactions in question took place, the minister and principal consuls of the United States in Turkey (including the Consul-General in Egypt) had all such jurisdiction in civil causes between citizens of the United States as was permitted by the laws of Turkey, or its usages in its intercourse with other Christian nations.

But here we are met by a difficulty arising from the extreme generality of the defense set up in the plea. What are the laws of Turkey and its usages in its intorcourse with other Christian nations, in reference to the powers allowed to be exercised by their public ministers and consuls in judicial matters? The plea does not inform us. It leaves the court to infer or to take judicial knowledge of of those laws and usages. But can it do this? Foreign laws and usages are, as to use matters of fact, and not matters of law; and although the court may take judicial cognizance of many matters of fact of public importance, yet, of foreign laws and customs, which are multiform and special in their character, it would be very dangerous for it to do so, at least without having had them brought to its attention and knowledge by previous adjudications or proofs. The general fact that public ministers and consuls of Christian states in Turkey exercise jurisdiction in civil matters between their fellow-citizens or subjects, might be assumed as sufficiently attested by the works on international law and the acts and instructions of our own government. But the precise extent of this jurisdiction is unknown to us. Whether it applies to any but residents in Turkey, or to travelers as well; whether to persons not in the country at all, but having property there, or claims against persons who are there; whether to cases like the present, where neither party resides in

Turkey or is sojourning there, are questions which are not answered by the ordinary statements made in reference to this jurisdiction. As the power of the consuls of the United States, according to the treaties and laws as they stood in 1864, depended on the laws or usages of Turkey, those laws or usages should have been pleaded in some manner, however briefly, so that the court could have seen that the case was within them. For failing to do this, the plea was defective in substance, and judgment should have been rendered for the plaintiff on demurrer.

The judgment of the Supreme Court of the District of Columbia must be reversed, and the cause remanded with directions to allow the defendant to amend his plea on payment of costs.

UNITED STATES SUPREME COURT.

JAMES BROWN AND WILLIAM SEAVEY, appellants, *v.* ENOCH PIPER.

Appeal from the Circuit Court of the United States for the District of Massachusetts.

PATENT — PRESERVING FISH AND MEATS —WHEN THE PROCESS BELONGS TO THE GENERAL DOMAIN OF KNOWLEDGE AND SCIENCE PATENT VOID—WHAT THE COURT WILL TAKE JUDICIAL NOTICE OF.

1. The claim here was for a "new and improved method of preserving fish and meats." The court *held* that the patent was void on its face, and that the court below might have stopped short at that instrument, and without looking beyond it into the answers and testimony, *sua sponte*, if the objection were not taken by counsel, will have adjudged in favor of the defendant; that the principle and substance of the appellee's claim are set forth as belonging to the general domain of knowledge and science.

2. JUDICIAL NOTICE.—In trying the validity of a patent it is stated what facts the court will take judicial notice of.—[ED. LEGAL NEWS.]

Justice SWAYNE delivered the opinion of the court.

The bill is founded upon two patents granted by the United States to the appellee—one numbered 732, of the 19th of March, 1861; the other numbered 36,107, and dated August 5th, 1862. The second and later patent was not relied upon in the argument here, and may, therefore, be laid out of view. Our attention will be confined to the prior one. It is declared in the specification to be "for a new and improved method of preserving fish and meats." The invention is alleged to consist "in a method of preserving fish and other articles in a chamber, and cooling the latter by means of a freezing mixture so applied that no communication shall exist between the interior of the preserving chamber and that of the vessels in which the freezing mixture is placed." The specification continues: "I do not profess to have invented the means of artificial congelation, nor to have discovered the fact that no decay takes place in animal substances so long as they are kept a few degrees below the freezing point of water, but the practical application of them to the art of preserving fish and meats, as above described, is a new and very valuable improvement. The apparatus for freezing fish and keeping them in a frozen state may be constructed in various ways and of different shapes. The apparatus shown in the drawing, however, will suffice to illustrate the principle and mode of operation."

The process and apparatus are then described as follows: A box of wood or other suitable material, surrounded by a packing of charcoal or other non-conducting substance, is to be provided, and the fish in small quantities laid in it on a rack. Metallic pans filled with a freezing mixture, such as salt and ice, are then to be set over them, and a cover shut over the pans. "In about twenty-four hours, the freezing mixture having been changed once in twelve hours, the fish will be frozen completely through."

After being frozen, the fish or meat may, if desired, be covered with a thin coating of ice, and this coating may be preserved by applying the substances named, which will exclude the air and prevent the juices from escaping by evaporation. "The fish are then *to be packed closely* in a large preserving box, which is enclosed in a still larger box, the space between the boxes being filled with charcoal or other non-conducting material, to exclude the heat." Other minor details are described, which it is not deemed material to repeat. The patentee then declares: "I do not desire to be understood as confining myself to the specific apparatus above described, nor to the use of either or both the preliminary processes of freezing and cooling; but I have described the mode of operation which, by experience, I have found best for preserving the most delicate varieties of fish." The summation and claim are: "Having described my invention, what I claim as new, and desire to secure by letters-patent, is, *preserving fish or other articles in a close chamber by means of a freezing mixture, having no contact with the atmosphere of the preserving chamber, substantially as set forth.*"

The patent is not for the principle long and well-known to physicists, that a low degree of cold, like a high degree of heat, prevents the decay of animal matter, nor is it for the freezing of the articles to be preserved before or after they are placed in the preserving chamber, nor is it for applying, by means of an apparatus with any particular details of construction, cold to the articles to be preserved, nor is it for the frigorific effect of the freezing mixture upon the atmosphere of the inner chamber, but it is for the application to such articles of the degree of cold necessary to preserve them, by means of a "close chamber," in which they are to be placed, and a "freezing mixture having no communication with the atmosphere of the preserving chamber."

If this result be reached by the means designated, in any way substantially the same with that described, having the feature of the non-contact of the freezing mixture with the air of the preserving chamber, there is a clear invasion of the territory which the patentee has marked out and seeks to appropriate to himself.

It was earnestly maintained by the learned counsel for the appellees, that the essence of the invention is the creation of "a freezing atmosphere" in the preserving chamber.

To this there are several answers. There is nothing in the specification or claim to warrant the proposition. The direction is that "the fish are to be packed closely." This implies clearly that as many fish are to be put into the preserving chamber as it can be made to contain.

Atmospheric air is itself an agent of decay, and in all such cases it is important to preclude, as far as possible, its presence and contact. "If air be absolutely excluded, putrefaction ceases, and the result is the preservation of the substance in some circumstances, perhaps in all." 3 Ure's Dic. of Arts, 548. "On this principle is founded Appert's process, by which easily decomposible articles of food and drink, such as meat, fish, vegetables, milk, etc., are preserved for years, viz: by packing them in air-tight bottles or soldered tin cans, heating the vessels for several hours in boiling water, and keeping them carefully closed." 2 Watts' Dic. of Chem., 625. The patentee is to be presumed to have known this property of air.

The patent is for "a new and useful improvement" in the art to which it relates. It was issued under the act of July 4, 1836. The rights of the parties are to be considered in the light of that act. The defense relied upon in the answer is the want of novelty, and several instances of prior use and knowledge, with the requisite circumstances of time, place, and persons, are alleged.

We deem it sufficient to consider one of them. On the 17th of August, 1842, a patent was issued to John Good "for a corpse preserver." The apparatus, as described, was an outer case with a close-fitting lid. The case was made double, there being a partition to within four or five inches, more or less, of the top of the outer one, leaving a space between the two of several inches, which was to be filled with ice. There was a false bottom with holes in it in the inner compartment. It rested upon ledges, which kept it four or five inches above the bottom. The intervening space was a receptacle for ice. The corpse was despoited upon the false bottom; a tray was placed over it and under the lid; the tray was four or five inches deep, used to contain the freezing mixture, and had a flange to prevent the mixture from escaping. Proper outlets were provided for the passage of the water from the melting ice. There was no communication between the tray containing the freezing mixture and the inner compartment containing the body. Swartz, an intelligent and unimpeached witness, was examined on the 15th of October, 1869. He testified that he was an undertaker, and had used the apparatus for about twenty years—sometimes with ice under the false bottom, and sometimes without it. In either case he applied a sufficient degree of cold to prevent putrefaction before interment. He thought the bodies were sometimes frozen, but was not certain. The material point in his business was the prevention of decay for the time being, and that was always accomplished.

Here was the application of the requisite degree of cold exactly in the manner called for in the specification of the appellee.

This is hardly denied; but it is insisted that the process was never applied by the witness to the preservation of fish and meats.

The answer is, that this was simply the application by the patentee of an old process to a new subject, without any exercise of the inventive faculty, and without the development of any idea which can be deemed new or original, in the sense of the patent law. The thing was within the circle of what was well known before, and belonged to the public. No one could lawfully appropriate it to himself and exclude others from using it in any usual way for any purpose to which it may be desired to apply it.

This is fatal to the patent. Ames *v.* Howard, 1 Sumner, 487; Howe *v.* Abbot, 2 Story, 194; Bean *v.* Smalwood, id., 411; Winans *v.* B. & P. R. R., id., 412; Hotckiss *v.* Greenwood, 11 How., 266.

There is another view of the case that may properly be taken.

Evidence of the state of the art is admissible in actions at law under the general issue without a special notice, and in equity cases without any averment in the answer touching the subject. It consists of proof of what was old and in general use at the time of the alleged invention. It is received for three purposes, and none other: to show what was then old, to distinguish what was new, and to aid the court in the construction of the patent.

Of private and special facts, in trials in equity and at law, the court or jury, as the case may be, is bound carefully to exclude the influence of all previous knowledge. But there are many things of which judicial cognizance may be taken. "To require proof of every fact, as that Calais is beyond the jurisdiction of the court, would be utterly and absolutely absurd." Gres. Ev. in Eq., 294. Facts of universal notoriety need not be proved. See Taylor's Ev., § 4, note 2. Among the things of which judicial notice is taken are the law of nations; the general customs and usages of merchants; the notary's seal; things which must happen according to the laws of nature; the coincidences of the days of the week with those of the month; the meaning of words in the vernacular language; the customary abbreviations of Christian names; the accession of the chief magistrate to office and his leaving it. In this country such notice is taken of the appointment of members of the cabinet, the election and resignations of senators, and of the appointment of marshals and sheriffs, but not of their deputies. The courts of the United States take judicial notice of the ports and waters of the United States where the tide ebbs and flows; of the boundaries of the several States and judicial districts, and of the laws and jurisprudence of the several States in which they exercise jurisdiction. Courts will take notice of whatever is generally known within the limits of their jurisdiction; and if the judge's memory is at fault, he may refresh it by resorting to any means for that purpose which he may deem safe and proper. This extends to such matters of science as are involved in the cases brought before him. See 1 Greenleaf's Evidence, p. 11; Gresley's Ev., supra, and Taylor's Ev., § 4 and post.

In The Ohio L. & T. Co. *v.* Debolt, 16 How., 435, it was said to be "a matter of public history, which this court cannot refuse to notice, that almost every bill for the incorporation of companies" of the classes named is prepared and passed under the circumstances stated. In Hoare *v.* Silverlock, 12 Adolphus & Ellis, 624, N. S., it was held that where a libel charged that the friends of the plaintiff had "realized the fable of the frozen snake," the court would take notice that the knowledge of that fable existed generally in society. This power is to be exercised by courts with caution. Care must be taken that the requisite notoriety exists. Every reasonable doubt upon the subject should be resolved promptly in the negative.

The pleadings and proofs in the case under consideration are silent as to the ice-cream freezer. But it is a thing in the common knowledge and use of the people throughout the country. Notice and proof were therefore unnecessary. The statute requiring notice was not intended to apply in such cases. The court can take judicial notice of it, and give it the same effect as if it had been set up as a defense in the answer and the proof were plenary. See M. & A. Glue Co. *v.* Upton, 6 Patent Office Gazette, 843, and Needham *v.* Washburn, 7 id., 651—both decided by Mr. Justice Clifford upon the circuit. We can see no substantial diversity between that apparatus and the alleged invention of the appellee. In the former, as in the apparatus of the appellee, "the freezing mixture" has "no contact with the atmosphere" of the chamber where the work is to be done. If the freezer be full, and the preserving chamber be full, there would be room for but little air in either. If either were only partially full, the vacuum would be filed with that substance. The cold is generated by the same materials, and applied under the same circumstances. If the cream were taken out of the freezer and fish put in, there would be, in all substantial respects, the same apparatus, process, and result. If the preserving chamber were as tight as the freezer, either might be convertibly used for the purpose of the other.

"The preservative effect of cold, and especially of dry cold, is well known and exemplified in the keeping of meat and fruit in ice-houses. Animals have been found undecomposed in the ice of Siberia which belong to extinct species, and which must have been embalmed in ice for ages." Tit. "Antiseptic," 1 Amer. Encyclo., 570.

Artificial freezing is usually applied to water and articles of food. "There are two general methods of effecting it, viz: by liquification and by vaporization and expansion. The method by liquification is performed by freezing mixtures, which are formed by mixing together two or more bodies, one or all of which may be solid. They are used together in vessels having three or more concentric apartments—an inner one containing the article to be frozen; one eccentric to this containing the freezing mixture, provided with some contrivance for agitation; one, again, outside of this, filled with a non-conductor of heat, as powdered charcoal, gypsum, or cotton wool; and sometimes one between them for holding water." Tit. "Freezing," 7 id., 474.

Here the principle and substance of the appellee's claim are set forth as belonging to the general domain of knowledge and science. It is known that Lord Bacon applied snow to poultry to preserve it. He said the process succeeded "excellently well." The experiment was made in his old age, imprudently, and brought on his last illness.

Examined by the light of these considerations, we think this patent was void on its face, and that the court might have stopped short at that instrument, and without looking beyond it into the answers and testimony, *sua sponte*, if the objection were not taken by counsel, well have adjudged in favor of the defendant.

These views render it unnecessary to consider the exceptions to the master's report.

The decree of the circuit court is reversed, and the cause will be remanded, with directions to dismiss the bill.

U. S. DIST. COURT, D. OF OREGON.

OPINION Nov. 24, 1875.

THE ELIZA LADD.—*In Admiralty.*

The materials which constitute a ship become one as soon as she leaves the ways and her keel strikes the element for which she was originally designed.

A contract to furnish a ship with the means of propulsion or to change the mode of her propulsion after she is launched and afloat, is not a contract to build a ship, and is a maritime one.

Opinion by DEADY, J.

The amended libel in this case was filed October 18, 1875, and alleges, substantially, that the Eliza Ladd is a domestic vessel, propelled by steam, of the burden of 118.47 tons, and was enrolled at Portland on August 31, 1875, and is employed in navigating the waters of

the Wallamet; that she was launched at Portland, near Smith's mill, in October, 1874, and on May 28, 1875, she made a voyage, in tow of another vessel, to the foot of Stark street, and there took on her boilers, engines, and machinery, the same having been in the ferry boat Portland No. 1, and from thence, on June 1, 1875, made a voyage in like manner to the libelant's works at Albina, on said Wallamet river; that on June 1, 1875, the libelant, The Oregon Iron Works, a corporation duly formed under the laws of Oregon, and engaged in business at Albina, was employed by the owner and claimant of said vessel—Joseph Knott—to furnish the material, in addition to the boilers, engines, and machinery aforesaid, and perform the labor necessary to fit, equip, and furnish said vessel for such sum as the same should be reasonably worth; that between said last mentioned date and August 18, 1875, said libelant performed said contract, and that the reasonable value of the materials and labor furnished by libelant in so doing is $1,498 in lawful money of the United States, and that no part of said sum, except $13.84, in old iron, has been paid libelants.

The claimant excepts to the libel, that the contract described therein is not a maritime one, and that this court has no jurisdiction to enforce the supposed lien incident thereto.

It is admitted that according to the ruling of the Supreme Court in People's Ferryboat *v.* Beers, 20 How., 393, and Roach *v.* Chapman, 22 How., 129, a contract to build or construct a ship, is not a maritime one, and therefore not within the admiralty jurisdiction of the United States. This rule is founded upon the assumption that such a contract is one "made on land to be performed on land." On the other hand it is admitted that, by the general maritime law of the civilized world, a contract to build a ship is a maritime contract, because it has relation to a ship as the agent or vehicle of commerce upon a navigable water. Ben. Ad., §§ 213, 264.

Under the law of the cases above cited, it is not always easy to determine what is a maritime contract. In the case in 20 Howard the contract "was for work done and materials employed in constructing the *hull* of a new steam ferry boat," while the case in 22 Howard was for furnishing "boilers and engines" to be placed in a steamboat at the time and place of the construction of the hull.

It is well established that a contract to furnish work and materials to be employed in making *repairs* on a vessel is a maritime contract. The St. Lawrence, 1 Black, 522; Peroux *v.* Howard, 7 Pet., 324. And in such cases, even if the vessel is a domestic one, if the local law gives the material man a lien, it may be enforced in the admiralty. The General Smith, 4 Whea., 438; The Lottawana, 21 Wall., 579.

Now repairs include all alterations and additions made to a vessel, short of destroying her identity. "A ship is always the same ship, although the original materials of which it was composed may, by successive repairs and alterations, have been in the course of time entirely changed." Ben. Ad., § 223

Suppose the Eliza Ladd to have been built and used as a barge, and that afterwards her owner had concluded to use her as steam ferry or tug boat, and for this purpose should make a contract with A B to put the necessary boilers and machinery into her, such an agreement would doubtless be a maritime contract. And yet a contract to build a steam ferry or tug boat outright would not be, under the decisions cited, a maritime contract.

My own impression is that any contract made to equip, fit or furnish a vessel after she is *launched and afloat*, is a maritime contract It is not in the language of 20 Howard, *supra*, "a contract made on land to be performed on land," but one made with reference to a ship already in existence and floating upon the element for which she was originally designed. Such a contract is to be performed on water as much as an ordinary contract of affreightment or repairs.

When the contract to build includes the fitting, furnishing and equipping also, it may be said, that as it is an entirety and not divisible, and the principal feature of it—the building and launching the hull—being non-maritime, it gives character to the whole of it.

When the contract set up in the libel was made the Eliza Ladd had been launched eight months, and for aught that appears was in the same condition she is now, as to her capacity for changing place or carrying freight and passengers, less the machinery necessary to propel her by steam. She was then, it appears to me, a ship, within the definition in Benedict's Ad., § 215—"a locomotive machine adapted to transportation over rivers, seas and oceans."

She was certainly a machine—an artificial contrivance, and one capable of locomotion or change of place, as is shown by the two short voyages she made before the performance of this contract; nor does it make any difference whether she was "propelled by the wind, the tide or paddles, by steam, by animals or by the human arm, or towed by another vessel," (Ben. Ad., 217) so that she floated in and moved through the water. Being of 118 tons burden she was also adapted to the transportation of freight and passengers so far as she had capacity for locomotion.

Separate pieces of timber or iron, or both being put together in a certain form, so as to float upon the water and transport or bear up freight or passengers, may become a ship. At what point of time is this change accomplished? I am inclined to think that the correct answer to this question is suggested in the brief for the libelant, and that it is "at the moment when she leaves the ways and her keel strikes the element for which she was originally designed." That is the moment of her birth as a ship, and the occasion when a name is usually bestowed on her. Thereafter all contracts to equip, furnish or repair this machine have direct reference to a vessel *in esse* with capacity for locomotion and transportation on navigable waters, and are, therefore, maritime.

Although a contract to build a ship is in fact a maritime one, under the rule laid down in 20 and 22 Poward, *supra*, it is to be otherwise regarded in this court. The difficulty is to determine what is included in building a ship—the contract for which, says the court, is not maritime, because it is "made on land to be performed on land." But even under that rule it seems safe to say, that a contract made after a vessel is launched and afloat, to furnish her with a particular means of propulsion as sails or steam paddles, or to change the mode of her propulsion is a maritime contract. Certainly it is not a contract to be performed on land; neither is it a contract *to build*, any more than any contract for repairs.

Athough this is a domestic vessel, and this work and materials were furnished in her home port, yet the libelant has a lien for the amount of his claim under § 17, p. 656 of the Oregon Code, and the contract being a maritime one, the lien may be enforced in the admiralty.

The exception is overruled.

JOHN W. WHALLY, for libelant.

E. C. BRONAUGH, for claimant.

SUPREME COURT OF ILLINOIS.

OPINION FILED NOV. 4, 1875.

REUBEN C. RUTHERFORD et al. *v.* MARY ANN MORRIS et al.

Appeal from Adams.

CONTESTED WILL—EFFECT OF PROBATE IN COUNTY COURT—EFFECT OF VERDICT OF JURY IN CIRCUIT COURT UPON ACTION OF CHANCELLOR—EVIDENCE AS TO CAPACITY CONSIDERED—WHAT CONSTITUTES CAPACITY—UNDUE INFLUENCE—ISSUE OUT OF CHANCERY—SENILE DEMENTIA—OLD AGE DOES NOT DISQUALIFY A PERSON FROM MAKING A WILL—PREVIOUS DECLARATIONS OF TESTATOR—EFFECT TO BE GIVEN TO THE EVIDENCE OF EXPERTS CONSIDERED—IN THIS CASE THE EVIDENCE OF SIXTY COMMON-SENSE WITNESSES, NEIGHBORS OF THE TESTATOR, WAS TAKEN IN PREFERENCE TO THAT OF THE EXPERTS.

[Continued from page 95.]

This will was not made when the testator was sick or *in extremis*, but at a period when the strength of his mind was equal to the purpose to which it was then applied. This is not, and cannot be disputed.

But it is said the disposition of the property is so unjust as to inspire a conviction; it was the product of undue influence, and the devices therein are so contrary to his previously expressed determination in that regard as to justify such conviction. Is this so? Who better than a father, laboring under no delusion, can appreciate the deserts of a child? Who can control such an one in the testamentary disposition of his property? This Court has said it is not uncommon that a father, in disposing of his property, is quite apt to lean in favor of those around him and in hourly and daily communication with him. His right to be so influenced none can question, and his caprices, no matter how apparently unjust, if they do not amount to insane delusion, and are not the result of undue influence, courts cannot disturb. Carmichael *v.* Reed, 45 Ill, 108. In Uhlich *v.* Muhlke, 61 ib., 499, it was said that children have no legal claim to property of living parents; that all parents have a right to judge who are the proper objects of their bounty, and if free from insane delusion or *senile dementia*, may give their property to aliens to their blood.

In Hauser *v.* Harris, 42 ib., 425, it was held that ever since the introduction of the practice of making wills, it has been universally conceded that the testator may dispose of his property by will as he pleases, and that no child has any natural right to the estate of his father. To the same effect in Clearwater *v.* Kimler, 43 ib., 272, which turned upon the execution of a deed, it being alleged, no consideration had been paid, the grantees being his son-in-law and daughter. The grantor having made them the recipients of his bounty, the other children had no right to complain.

How natural and how common it is for a father, in disposing of his property, to leave to the child who has been with him in his decline, and a member of his household—the sunshine of his home—and who married to a man highly appreciated by the father, is rearing a family of her own, under his own eyes, and who have nothing, that he should give them the largest share of his estate. The elder in this case had been absent from the home circle more than thirty years—had united in marriage with a gentleman possessed of a competent fortune, and whose wants were all supplied. Is it not natural the father, under such circumstances, should give to the youngest a greater share of his estate, and who has the right to question such a disposition of it?

The charge that there was a want of mental capacity, or undue influence used, is a mere pretense, not sustained by any single fact, or combination of facts in the case. That the testator in 1845 and in 1849 expressed an equal fondness for his children, and said he would make them equal, or if he made no will the law would do so, amounts to nothing. Suppose the deceased had in either of those years, or at any time previous to the 3rd of May, 1866, made a will according to those declarations, by which all his children were placed on equal grounds, would that prevent him from revoking the will for any cause deemed by him sufficient? His declaration can have no more force than a will actually executed, the power to change which cannot be denied. The youngest daughter did not marry until 1854, and on that event a new horizon was opened to his view; new hopes, new objects were created, such as influence every man in making a testamentary disposition of his property. No one can allege, with any semblance of truth, that the dispositions made by this will are so unjust as to force the conviction of *senile dementia*, or delusion in the testator. Appellee was well provided for. Charles Warren received as much as he would have been entitled to under the statute. The other children of Mrs. Warren were absent in the South, and do not seem to have possessed the confidence of the testator. It is apparent, that without improper influence being charged, he left his property as most sensible men would have left it under the same circumstances. But whether or not, the testator, being on the 3d of May, 1866, of good sufficient disposing mind and memory, and under no undue influence, had the clear right to dispose of his property by will as in his judgment seemed right, and no court or jury can change its destiny. Heuser *v.* Harris, supra. Giving to the evidence of the experts all the weight it can fairly claim, it is so completely overshadowed by the testimony of more than sixty practical, observing, sensible men, near neighbors and familiar acquaintances of the testator, and so opposed to science and our own observation, that we cannot hesitate a moment in giving to the latter a great preponderance. Contesting a will, it is only necessary to produce a few "experts" to give their understanding of mental capacity to a jury, and who may be incapable of diagnosing disease of the brain, and let it be supposed by the jury that injustice has been done by the testator, that he has not made "a fair divide," the beneficiaries have but little chance.

The jury trying this case would never have found the verdict they did had they been properly instructed by the court, and improper evidence excluded. In cases like this, all experience teaches us that juries will not be slow to set aside a will if it does not comport with their ideas of right and justice, and therefore is there an ever pressing necessity that they should be properly instructed, as to the law of the case, and no improper or irrelevant testimony allowed to go to them tending to draw their attention from the true issues in the case.

Appellants complain that certain instructions asked by them were refused. We will not particularize, but we are satisfied some of them, and the most important, were embraced in other instructions, given for them, and others presented propositions of law which, correct in themselves, the court might refuse to give without the imputation of error. But giving or withholding them, when we look at the instructions given for the appellants, could have been of no benefit or harm.

Complaint is made that the court instructed the jury for appellees. Of this we are satisfied. In cases like this, a court cannot be too careful in giving instructions. Here the only questions for the jury were: Was the testator, at the time the will bears date, of such mental capacity to attend to the ordinary affairs of life? Was the will the result of the undue influence of Reuben C. Rutherford? for this is the charge in the bill. The testimony was mainly directed to the points. The court gave to the jury this instruction: "If the jury believe from the evidence that the said John P. Robbins long prior to May 3, 1866, entertained a settled and long-cherished purpose to divide his property equally among his heirs-at-law, and if the jury further believe from the evidence that such instrument in writing, dated May 3, 1866, read in evidence and claimed by the defendants, Reuben C. Rutherford and Rebecca Maria Rutherford, to be the said Robbins' last will and testament, was not in accordance with such previous intentions of the said Robbins, that these facts should be taken into consideration by the jury in determining whether such instrument in writing was the will of the said Robbins, and also in determining whether the said Robbins was of sound mind and memory at the time of the execution of said instrument."

The objections to this instruction are so obvious as scarcely to need mention. In the first place, there is no evidence on which to base it in the latitude of expression. No witness proved the testator had entertained a settled and long-cherished purpose to divide his property equally among his heirs-at-law. All the evidence tending in that direction is the testator's answer to George Arrowsmith and one other when talking about the cholera in 1839, and about John Sharp making his will, Robbins replied, "Sharp had no children, but he had, and he served them all alike, and that the law made a good enough will for him." This falls far short of proof of entertaining such a settled and long-cherished purpose to divide his property equally or any fixed purpose whatever, and should not have been given. But it was wrong so to tell the jury, or to permit evidence of that character to go to the jury against the objection of proponents, for a previous intention to dispose of property in a particular way, no matter how fixed, is wholly immaterial. A person has been known to change the draft of his will many times—make a will and alter it in many particulars; it is wholly in his power, and he is not concluded by any thing he may have done or said prior to the execution of the will sought to be established. It does not matter, so all the authorities hold, what a testator may have said or done anterior to making his last will, as to his intention to dispose of his property. If he had made a will in 1849, executed in due form, giving his property according to our rule of de-

scents, in a case of intestacy, no one will contend for a moment that he became trammeled thereby, and could not make a different disposition of his property. The proposition is absurd. Nor was the jury to be told as in the last branch of the instruction, if the will propounded was not in accordance with these previously expressed declarations, they should consider them in order to determine, if the writing presented was the last will of Robbins, and also for the purpose of determining the soundness of his mind and memory when he made the will. The propositions are more objectionable than the other; it was not a subject for consideration for the jury at all, for every man has an undoubted right to change his mind in regard to almost all matters, and especially as to the disposition of his property. A re-marriage or death in the family may cause a necessity for a change. Various circumstances may conspire to change a preconceived intention of a testator, and this instruction tells the jury, if we understand it, that such a change is a work of unsoundness of mind and memory, or of undue influence, which is not so understood. This instruction should not have been given. The ninth instruction in the modified terms in which it appears should not have been given, for the declarations made by the testator twenty years before he made his will, have nothing to do with making the will, nor does it tend to prove undue or other influence.

It was equally erroneous to give the fifteenth instruction for appellees. Besides being well calculated to mislead the jury, it is open to the objection urged to the eighth and ninth instructions, and embraces elements not recognized by any rules of law applicable to such cases. It is as follows:

"That in determining the question as to whether said alleged will was or was not procured to be executed by means of undue influence exercised over the said Robbins at the time of the execution of the same, as alleged in complainant's bill, it is the right and duty of the jury to consider all the evidence before them, as to the time and circumstances under which the same was made, the age and mental condition (as to strength and enfeeblement) of said Robbins, the relations at the time of said Reuben C. and Rebecca M. Rutherford to said Robbins, the feelings entertained by said Robbins towards all those persons naturally entitled to his affection and bounty, the declarations previously made by said Robbins as to his intention and purpose in regard to the final distribution of his property, the character of the provisions of the alleged will as to equity or inequity among the devises therein, and all the facts and circumstances in evidence in this case."

What have the jury to do with "the equity or inequity" of a testamentary disposition of property, made by one of sound mind and memory, and of sufficient mental capacity? This court, and all respectable courts have held that a proprietor may devise his property to whomsoever he pleases, if he be at the time of making a will, of sufficient mental capacity to transact ordinary business, and to manage the ordinary affairs of life, and making a will is of no higher order. The authorities heretofore referred to are full on this head. "The equity or inequity" of devises by a competent testator, is not a subject of inquiry by a jury, unless it may be on the point of undue influence, and on that it can have but little, if any, weight, all proof being wanting of undue influence being exercised to produce this "inequity."

The jury are in effect told, as the principal beneficiary under this will, being the daughter and son-in-law of testator and living with him in his family as members thereof, opportunities were afforded them of exerting an influence over the testator by which he was induced to change his mind, as previously expressed in regard to the disposal of his property, *ergo*, they did exercise an undue influence over him by which they were inequitably preferred to his other children, and the jury shall so find.

We insist, as there was a total want of evidence of undue influence, at the time of executing the will, or at any other time, exerted over the testator in any manner or form, the inequality of his testamentary disposition cannot be urged as proof of undue influence. If this was not so, no will ever made could stand if a supposed inequity exists in its various devises. The instruction was well calculated to draw the attention of the jury from the true issues in the case. Had the testator mental capacity sufficient to make a will? Was the proposed will made by the undue influence of Reuben C. Rutherford? These were the only issues, and the mere fact, that the principal beneficiaries were a part of the testator's family, is no evidence whatever they used any influence to cause the will to be made in their favor.

It was held, in Broomfield *v.* Broomfield, supra, that evidence showing that the testator, in his ordinary affairs, acted under the advice of the devisee, and was influenced by that advice, is not sufficient to establish the claim that he used undue influence in procuring the execution of the will. The instructions should not have been given.

When we consider the many different ideas entertained by different men of equity and justice in the various transactions of life, and the more especially in testamentary disposition of a large estate, how prone men are to question the justice of the latter, and how common the sentiment is that the children of the same parents "share and share" alike, it is quite easy to get the condemnation of a jury upon a will making an unequal disposition of the property. There is no authority for saying the "equity or inequity" of the testamentary disposition could be evidence of undue influence, or is a fit element for the consideration of a jury. Courts cannot be too careful in such cases in permitting evidence irrevalent and improper to go to the jury.

The instruction upon which we have commented substantially tell the jury that if the testator, years before the marriage of his daughter with Mr. Rutherford, had declared his intention to devise his property equally between his children, and, after the marriage, had changed his mind and devised the largest portion of it to Mrs. Rutherford, such disposition was inequitable, and the jury may find that such change and such disposition was brought about by the undue influence of Reuben C. Rutherford. This they are told in effect, when not a scintilla of evidence is produced that appellants had at any time a knowledge a will was to be made, or that it was in fact made, or any artifice, contrivance, or design of these parties, or by their instigation, to induce the testator to make a will. The influence their position gave them, as members of the family of the testator, and much beloved by him, was a legitimate influence, and no court or jury have a right to arraign a testator of mental incapacity for the inequality of his devises. But what is the proof of an undue influence on the part of Reuben C. Rutherford, for that is the issue? Absolutely nothing. Not a single fact or circumstance, save domestic relations, has been shown in evidence to establish it. There is a general concurrence in the testimony that up to 1869, three years after making the will, the testator was of sound mind and fine physical health; that up to this time he never manifested any signs of mental or physical debility, no defect of mind, memory or comprehension; was very intellectual, well read, had great power of discrimination, in general intelligence far exceeding ordinary men, of a strong mind, with very great strength of will; when he made up his mind was firm, persistent, and immovable against all opposition. To say that John P. Robbins was not of sufficient capacity to make the will in question, or was influenced unduly by others to make a will not his own, is saying what this record does not show. Who, in Quincy, up to 1869, would have had the temerity to intimate even that John P. Robbins was not of sound mind? Would Dr. Bassett dared to have so reported? Who could then have been found who entertained the notion that he could be unduly influenced by anybody? Not one, save, perhaps, the appellees in this case.

John P. Robbins was a marked and noted man among the citizens of Quincy, near which he lived for a third of a century, and his large circle of acquaintances, without a single exception, men of sense, observation and judgment, all testify he was a man of strong mind and will up to 1869, and it is proved that the attack of paralysis in that year did not wholly incapacitate him. No living man, save Dr. Bassett, questions his mental capacity, and his testimony, as has been shown, is not satisfactory. In such a case the testimony of a man claiming to be an "expert," is worth but little when placed alongside the testimony of more than sixty witnesses who knew the testator intimately, and far better than the doctor did, and who had his theories to support.

The verdict of the jury is clearly against the evidence. Valuable property honestly devised should not be lost to the devisee on such testimony as this record affords. In reviewing the whole case and the judgment rendered thereon, we cannot but regard it as another illustration of the proposition that there is nothing so absurd in *fact* but that it can be supported by some amount of evidence, and nothing so perverse in *law* but that in can be maintained with some show of authority.

We are satisfied the great preponderance of evidence is against this verdict, and that the court misdirected the jury to the prejudice of appellants.

For the reasons given, the verdict must be set aside, the decree rendered, and by direction of a majority of the court, the cause remanded for further proceedings consistent with this opinion.

WALKER, C. J.—I concur in holding that the instructions eight and fifteen, given for appellees, are erroneous, and for that reason the decree should be reversed, but I express no opinion on the weight of the evidence.

SEPARATE OPINION BY SCOTT, M'ALLISTER AND SCHOLFIELD.

We concur in reversing the decree of the court for these reasons:

First—The eighth instruction given at the instance of appellees is objectionable in singling out, and thereby giving undue prominence to particular portions of the evidence.

Second—Appellee's fifteenth instruction is obnoxious to the same objection as the eighth, and also to the further objection that it authorizes the jury to take into consideration the equitable or unequitableness of the provisions of the will as a test of mental capacity, thus to some extent making them the judges of the law, as well as the fact.

Third—The evidence fails to sufficiently satisfy us that the testator, at the time he made the will in controversy, was of unsound mind and memory, within the legal meaning of those words, or that he acted under undue influence as is charged.

Inasmuch as the case must go before another jury, we deem it unnecessary to express any further opinion upon the question discussed in argument by the respective counsel.

CRAIG, J., dissenting.

SKINNER & MARSH, and LAWRENCE, CAMPBELL & LAWRENCE, and WILLIAM MCFADON, for the appellants.

WHEAT, EWING & HAMILTON, JACKSON GRIMSHAW and H. L. WARREN, for appellees.

ILLINOIS SUPREME COURT.

The following head-notes to recent cases were prepared by Hon. NORMAN L. FREEMAN, Reporter:

Clingeman et al. vs. *Hopkie.*

SALE UNDER JUSTICE'S TRANSCRIPT.

1. *Filed after death of the debtor.* — The filing of the transcript of a judgment recovered before a justice of the peace in the Circuit Court after the death of the defendant and the issue of an execution thereon, confers no right on the crediior to levy upon and sell lands of the deceased defendants, or to redeem from a prior sale, as a judgment creditor, and a sale of land in either case will be void and may be attached collaterally.

ADMINISTRATION.

2. *Remedy of judgment creditors.*—Where a judgment is not a lien on the land of the defendant at the time of his death, the creditor can only collect his debt in the due course of administration, and his judgment has no preference or priority over any other creditors holding ordinary demands.

3. *Execution cannot issue within one and then not without notice.* — When a judgment is a lien upon the land of the defendant before his death, no execution can be issued thereon before the expiration of one year after the defendant's death, and not then without three months notice to the executor or administrator as required by statute, or without a revivor by *scire facias*. A levy and sale in violation of these requirements is void and passes no title.

REDEMPTION.

4. *Effect of, by one having no right.* Where a redemption of land sold under a decree of foreclosure was made after the death of the debtor by a judgment creditor whose execution was void, and who had no right to levy and sell under the same, and the redemption money was accepted and acted upon as valid by the prior creditor, it was *held* that the acceptance operated to extinguish the prior sale the same as if the redemption had been properly made, and re-invested the heirs-at-law of the deceased debtor with the title to the land, and that they were not precluded from contesting the title claimed by such redeeming creditor by sale under his execution.

CHANCERY JURISDICTION.

5. *Remedy at law.* The loss of a justice's transcript filed in the circuit court, under which a sale of land was made, and under which a party claims title, affords no ground for equitable relief against the prosecution of an action of ejectment against him, as the remedy at law is complete by motion, on notice, in the circuit court to supply and restore the transcript.

Reitz et al. v. *The People for use, etc.*

ATTACHMENT.

1. *Sufficiency of affidavit.* Where the affidavit of a foreign attachment fails to state the place of residence of the defendants, or that on diligent inquiry the affiant is unable to ascertain the same, it will be in compliance with the statute and when judgment is by default the objection will be good on appeal or error.

2. *Sheriff's return of levy.* The statute requires that the sheriff's return of the levy of an attachment shall state that the property levied on is that of the defendant, or was levied on as his property.

JUDGES.

3. *Holding court for another on request.* When the placita of a record shows that a judge of another circuit presided at the trial it will be presumed that he did so by request of the proper judge whose duty it is to hold courts in such county. It would be well for the placita to show such fact, but it is not indispensable it should.

NOTES OF DECISIONS OF THE SUPREME COURT OF MICHIGAN.

OCTOBER TERM, 1875.

BY HENRY A. CHANEY, ATTORNEY AT LAW.

Michigan Central v. *Lantz.*

Error to Kalamazoo. Reversed with costs and new trial ordered. Opinion by MARSTON, J.

The charter provision permitting the Michigan Central Railroad Company to charge as warehousemen for the storage of goods left in its depots beyond a certain length of time applies not only to goods delivered by them directly to the final consignee, but to goods transferred to another carrier, as intermediate consignee, for further transportation. [Act 43 of 1846, § 16.]

The proviso in § 16 of the charter of the Michigan Central Railroad Company, that the company shall be responsible only as warehousemen for goods in deposit in any of its depots "awaiting delivery," refers to goods that are awaiting delivery to another carrier, as well as to goods destined to some final consignee on the line of the road itself.

Michigan Central v. *Dolan.*

Error to Jackson. Reversed with cos's and new trial granted. Opinion by CAMPBELL, J.

Notice to a person acting in a very humble or inferior capacity is not notice to his employer.

Employers, whether corporations or individuals, are not liable for the negligence of their servants, causing injury to fellow employees, unless these injuries arise out of the neglect of the employers.

Employers are bound to have safe rules of business, use care in selecting their immediate agents, and remove such persons or change such regulations as they believe to be unfit.

Employers have a right to trust that an agent or officer carefully chosen will use good judgment in making his appointments and doing his own duties, and to rest in that belief until, in the exercise of the general vigilance which devolves on them, they find they have been mistaken.

CHICAGO LEGAL NEWS.

Lex vincit.

MYRA BRADWELL, Editor.

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We call attention to the following opinions, reported at length in this issue:

Powers of Consuls.—The opinion of the Supreme Court of the United States, by Bradley, J., as to the powers incident to the office of Consul. The questions discussed in this opinion are of general interest.

Patent—When Void.—The opinion of the Supreme Court of the United States, by Swayne, J., holding a patent void on its face because the principle and substance of the patentee's claim belonged to the general domain of knowledge and science, it is also stated in such a case of what facts the court will take judicial notice. In this opinion, Judge Swayne beautifully describes the process of preserving meats by freezing.

Ship—What Constitutes—Contract to Build.—The opinion of the United States District Court for the District of Oregon, by Deady, J., holding that the materials which constitute a ship become one as soon as she leaves the ways, and her keel strikes the element for which she was originally designed; that a contract to furnish a ship with the means of propulsion or to change the mode of her propulsion, after she is launched and afloat, is not a contract to build a ship, and is a maritime one.

Real Estate Case.—The opinion of the Supreme Court of Michigan, by Graves, J., deciding several interesting questions relating to the title of real estate.

U. S. S. Court Adjourned.—The Supreme Court of the United States adjourned on Friday, the 17th inst., until Monday, January 3rd.

The College of Law.—The incidental lectures before the Union College of Law, during the first two and a half months of the present term, have been as follows: By Emery A. Storrs, two lectures, one on "Legal Definitions" and one on "Magna Charta"; by James P. Root, four lectures on "The Constitution of Illinois," one on "Corporations," and one on "Taxation and Eminent Domain"; by Obadiah Jackson, one on "The Practice in Tax Cases"; by John Borden, one on "Executions and Judgment Liens"; by Josiah H. Bissell, two on "Bankruptcy," and one on "Trust Deeds and Mortgages in Illinois"; by Judge Forrester, one on "The Statutes of Mortmain and Uses," one on "Reversions and Remanders," and one on "Powers"; by Leonard Swett, one on "How a Young Lawyer should go to work to become Eminent in his Profession"; by George Gardner, one on "Abstracts of Title"; by A. M. Pence, one on Limitations on the Jurisdiction of Courts"; by C. C. Bonney, one on "Legal Maxims and Principles," one on "The Relation of Counsel and Client," one on "Office Practice," and one on "Court Practice"; by Prof. Cumnock, one on "Elocution"; by Floyd B. Wilson, one on "Elocution," and one by W. C. Lyman on "Elocution"; by Prof. Denslow, twelve lectures on "Justinian's Institutes of the Roman Law," fifteen on "Criminal Law," and five lectures of a course on "Political Economy"; by Dr. N. S. Davis, twelve lectures of a course of twenty on "Medical Jurisprudence." The above lectures are in addition to the regular daily instruction of students, in the text-books by the Faculty, consisting of Judges Booth, Trumbull and Doolittle, and Profs. Hurd and Denslow. We doubt if any other school of legal instruction in the United States has afforded so diversified or thorough a course of instruction during the same period.

DIRECT THE JUDICIAL FORCE.

There are judges enough in the State of Illinois to dispose of all the cases brought in the State, within a reasonable time, if the cases were properly distributed among them. If Chief Justice Scott, of the Supreme Court, had the power to assign judges and distribute cases according to the wants of the different localities, the crowded dockets of some of our circuit courts could soon be cleared, and kept clear without any additional expense to the State. In England the Lord High Chancellor commands and directs in such matters as a general would his army. In order that our readers may form a correct idea of his power, and how he exercises it, we give the following order, entered by him in the chancery division of the high court of chancery on the 10th of last month:

Whereas, from the the present state of the business before the Master of Rolls and the Vice-Chancellor Sir Richard Marlins and Sir James Bacon, respectively, it is expedient that a portion of the causes set down to be heard before the Master of the Rolls and the Vice-Chancellor Sir Richard Marlins should be transferred to the book of causes for hearing before the Vice-Chancellor Sir James Bacon: Now, I, the Right Honorable Hugh MacCalmont Baron Cairns, Lord High Chancellor of Great Britain, do hereby order that the several causes set forth in the 1st and 2d schedules hereunto subjoined, be accordingly transferred from the books of causes standing for hearing before the Master of the Rolls and the Vice-Chancellor Sir Richard Malins, to the book of causes for hearing before the Vice-Chancellor Sir James Bacon. And I do further order that all causes so to be transferred (although the bills in such causes may have been marked for the Master of the Rolls and the Vice-Chancellor Sir Richard Malins, respectively, and notwithstanding any orders therein made by the Master of the Rolls and the Vice-Chancellor Sir Richard Malins, respectively, or their predecessors) shall hereafter be considered and taken as causes originally marked for the Vice-Chancellor Sir James Bacon; provided, nevertheless, that no order made by the Master of the Rolls and the Vice-Chancellor Sir Richard Malins, respectively, or their predecessors, in any such causes shall be varied or reversed otherwise than by the Court of Appeals. And this order is to be drawn up by the registrar, and set up in the several offices of the Chancery Division of the High Court of Justice.

UNITED STATES SUPREME COURT.

PROCEEDINGS OF.

Thursday, Dec. 9, 1875.

On motion of J. H. B. Latrobe, Simeon E. Baldwin, of New Haven, Conn., was admitted.

On motion of T. O. Howe, Charles G. Williams, of Janesville, Wis., was admitted.

On motion of J. D. McPherson, Charles Beaston, Jr., of Baltimore, Md., was admitted.

No. 67. Caleb Ives and George B. Green v. Milton A. Hamilton, executor, etc. The argument of this cause was continued by H. H. Wells and J. H. B. Latrobe for defendants, and concluded by Charles J. Hunt for plaintiff.

No. 69. The Twin Lick Oil Company of West Virginia v. William Marbury. The argument of this cause was commmenced by J. D. McPherson for appellants, and continued by Walter S. Cox for appellee.

Adjourned until Friday at 12 o'clock.

Friday, Dec. 10.

On motion of George W. McLeary, Thomas J. Henderson, of Princeton, Illinois, and A. J. Baker, of Centerville, Iowa, were admitted.

On motion of M. J. Southard, William C. Gaston, of Philadelphia, Pa., was admitted.

On motion of J. D. McPherson, T. C. Sears, of Ottawa, Kansas, was admitted.

No. 69. The Twin Lick Oil Company of West Virginia v. William Marbury. The argument of this cause was continued by W. S. Cox and W. D. Davidge for appellees, and concluded by Chas. Beasten, Jr., for appellant.

No. 70. David H. Mitchell v. Board of County Commissioners, Leavenworth, Kansas, et al. This cause was submitted on printed arguments by R. M. & Quinten Corwine and J. W. English for plaintiff. No counsel appearing for the defendants.

No. 296. (Substituted for No. 71.) Ira G. Munn and George L. Scott v. The People of the State of Illinois. Set for argument immediately after the cases assigned for the 11th January next.

No. 72. George A. Kibbie v. Samuel Dittoe and Amos Dunn. This cause was submitted on printed arguments by W. C. Goudy for plaintiffs, and by T. G. Frost for defendant.

No. 73. John S. Wills et al. v. H. B. Claflin et al. This cause was submitted on printed arguments by W. C. Goudy for plaintiffs, and by C. Bently for defendants.

No. 74. Ann Kittredge, widow, etc. v. Olivia C. Race and her husband. This case was argued by C. W. Horner for plaintiff, and submitted on printed arguments by E. T. Merrick for defendants.

No. 75. James H. Woodford et al. v. The Canastota Bank. This cause was argued by George H. Williams for plaintiff, and submitted by B. F. Chapman for defendant.

No. 76. John W. Butterfield v. George Usher. This cause was submitted on printed arguments by Enoch Tollen for appellant, and by R. T. Merrick for appellee.

Adjourned until Monday at 12 o'clock.

Monday, Dec. 13.

On motion of Geo. H. Williams, J. W. Douglass, of Washington, D. C., was admitted.

On motion of T. J. D. Fuller, Melvin F. Stephens, of Fulton, N. Y., was admitted.

No. 52. R. K. Sewell, administrator, etc. v. J. W. Jones et al. Appeal from the Circuit Court of the United States for the district of Maine. Hunt, J., declared the opinion of the court, reversing the decree of the Circuit Court with costs, and remanding the cause with directions to enter a decree in favor of the defendant. Dissenting, Clifford, J.

No. 3. (Original.) The State of Florida v. E. C. Anderson et al. Bradley, J., delivered the opinion ordering decree and perpetual injunctions against the defendants.

PARTNERSHIP—DISSOLUTION—JUDGMENT IN FOREIGN STATE.

No. 42. Hall & Lybrand v Lanning et al. Error to the Circuit Court for the northern district of Illinois. Opinion by Bradley, J. This was an action of debt brought on a judgment rendered in New York against the plaintiffs in error as partners. Lybrand questioned the judgment, alleging that he had not been served with process and did not appear, and that he was not a partner with Hall at the date of the judgment and had not been for more than six months before. The decision below was that the judgment was conclusive against Lybrand, notwithstanding his plea and his non-residence in New York. It is here held that after the dissolution of a copartnership one of the partners in a suit brought against the firm has no authority to enter an appearance for other partners living out of the State, and who have not been served with process, and that a judgment against all partners founded on such an appearance may be questioned by those not served with process in a suit brought thereon in another State and will not bind them. Reversed. Dissenting, Waite, C. J., Strong, J., Hunt, J.

No. 44. Phillips & Holby Construction Company v. Mark T. Seymour et al. In error to the Circuit Court of the United States for the northern district of Illinois. Justice Miller delivered the opinion, reversing the judgment of the Circuit Court with costs, and remanding the cause for further proceedings in conformity with the opinion of this court.

FRAUDULENT PREFERENCE—EVIDENCE OF CO-CONSPIRATOR.

No. 58. Nudd and Noe v. Burrows, assignee, etc. Error to the Circuit Court for the district of Illinois. Opinion by Swayne, J. This was an action by the defendant, here assignee in the bankruptcy of one Emmons, to recover certain money and property received of the bankrupt by the plaintiffs in error. The claim was that the property received was stock bought largely on credit at a time when Emmons was hopelessly insolvent, and that this fact was at the time known to the defendants, and that the transaction amounted to a fraudulent preference of creditors. The court below found the allegation true, having admitted as evidence the declarations of Emmons concerning the purchase of the stock, and the payment to the plaintiffs in error, notwithstanding the declarations were not made in the presence of either of them or brought to their knowledge. The court here affirm the judgment, sustaining the theory of the assignee that the evidence was competent, being the declarations of a co conspirator.

No. 57. The First Unitarian Society, of Chicago, v. H. F. Faulkner et al. In error to the Circuit Court of the United States for the northern district of Illinois. Clifford, J., delivered the opinion, affirming the judgment of the Ciriuit Court with costs and interest.

No. 21. George C. Roberts v. William F. Ryer. Appeal from the Circuit Court of the United States for the southern district of New York, and No. 46. George C. Roberts v. Joseph Buck, Jr. Appeal from the Circuit Court of the United States for the district of Massachusetts. Waite, C. J., delivered the opinion, affirming the decrees of the Circuit Courts in these causes with costs.

No. 75. James H. Woodford et al. v. The Canastota National Bank. In error to the Circuit Court of the United States for the northern district of New York. Waite, C. J., announced the decision of the court, affirming the judgment of the Circuit Court with costs and interest, on authority of Kennedy v. Gibson, 8 Wall., 498, and Farmers and Mechanics National Bank of Buffalo v. Dearing, decided at the present term.

No. 50. Isaac A. Bressler v. Nelson Maxson et al. In error to the Supreme Court of the State of Illinois. Waite, C. J., announced the decision, dismissing the writ of error for want of jurisdiction, on authority of St. Clair v. Lovingston, 18 Wall., 628, and Moore v. Robbins, 18 Wall., 588.

No. 759. The County of Warren v. George O. Marcy. No. 760. The County of Warren v. Augustus T. Post. No. 761. The County of Warren v. The Portsmouth Savings Bank. Waite, C. J., announced the decision, denying the motions to dismiss these causes.

No. 871. The Mayor, etc., of Memphis v. M. E. Ensminger, etc. Appeal from the Circuit Court of the United States for the western district of Tennessee. On motion of E. L. Stanton, docketed and dismissed with costs.

Waite, C. J., announced to the bar that the court will adjourn on Friday next to the third of January, 1876.

No. 180. M. M. Welton v. The State of Missouri. This cause was submitted on printed arguments by James S. Botsford and S. M. Smith for plaintiff, and by A. H. Buckner for defendant, under the twentieth rule.

No. 440. Daniel Webster v. C. W. Upton, assignee. This cause was submitted on printed arguments by E. Van Buren for plaintiff, and by L. H. Boutell for defendants, under the twentieth rule.

No. 8. (Original.) Ex parte A. J. Ambler, petitioner. Motion for mandamus submitted on printed arguments by G. W. Paschal for petitioner.

No. 868. Board of County Commissioners of Douglas County et al. v. The Union Pacific Railroad Company. Motion to advance this cause was submitted on printed arguments by J. M. Woolworth for appellants.

No. 77. Thomas A. Osborne et al. v. The United States. This cause was submitted on printed arguments by R. M. & Q. Corwine, J. W. English, Henry Board and C. H. Armes for the plaintiffs, and by E. S. Brown for defendants.

No. 78. Charles R. Tyng et al. v. Moses H. Grinnell. Continued.

No. 68. Mercy S. Marsh v. George M. Lancton. Dismissed with costs.

No. 80. Henry M. Nebblett v. James E. McFarland. This cause was submitted on printed arguments by W. Alexander Gordon for appellant, and by J. A. Campbell, E. M. Hudson and Walter Fearn for appellee.

No. 81. Joseph Moore v. The United States. The argument of this cause was commenced by Jos. Casey for appellant.

Adjourned until Tuesday at 12 o'clock.

Tuesday, Dec. 14.

On motion of W. W. Wilshire, B. C. Brown, of Little Rock, Arkansas, was admitted.

On motion of E. A. Storrs, U. P. Smith, of Chicago, Ills., was admitted.

On motion of T. F. Bayard, Joseph J. Davis, of Lewisburg, N. C., was admitted.

No. 81. Joseph Moore v. The United States. The argument in this cause was continued by Assist. Atty. Gen. Smith for appellee, and concluded by James Casey for appellant.

No. 82. Gilbert Woodruff et al. v. Benjamin T. Hough et al. This cause was argued by H. K. Whiton for plaintiff, and John N. Jewett for defendants.

No. 83. J. Sherman Hall et al. v. John Weare. This cause was argued by E. A. Storrs for plaintiffs, and submitted on printed arguments by Penn Clarke for defendant.

No. 74. Henry B. Lewis et al. v. The Michigan Central Railroad Company. Passed until tomorrow.

No. 85. The New Lamp Chimney Company v. The Ansonia Brass and Copper Company. This cause was argued by J. M. Martin for plaintiff, and submitted by D. D. Lord for defendant

Adjourned until Wednesday at 12 o clock.

Wednesday, Dec. 15.

On motion of Mr. Phillips, Dudley M. Du Bois of Washington, Georgia, was admitted.

On motion of Ossian Ray, George A. Bingham, of Littleton, New Hampshire, was admitted.

On motion of W. P. Lynde, F. W. Cotzhausen, of Milwaukee, Wis., was admitted.

On motion of H. E. Paine, Richard H. Chittenden, of Brooklyn, N. Y., was admitted.

No. 84. Henry B. Lewis et al. v. The Michigan Central Railroad Company. This cause was argued by E. A. Storrs for plaintiffs, and U. P. Smith for defendant.

No. 86. Robert Dow v. David Humbert et al. This cause was submitted on printed arguments by E. Mariner and M. H. Carpenter for plaintiff; no counsel appearing for defendants.

No. 87. David C. Sawin v. D. G. Kenney et al. Passed.

No. 88. James Dunlop et al. v. John Dymond et al. Postponed to the foot of the docket.

No. 39. Charles Watts v. The Territory of Washington. This cause was argued by Assist. Atty. Gen. Smith for defendant, and submitted on printed arguments by Nathaniel Wilson for plaintiff.

No. 91. The Grand Trunk Railway Company of Canada v. R. M. Richardson et al. The argument was commenced by Ossian Ray for plaintiff.

Adjourned until Thursday at 12 o clock.

RELIGIOUS TOLERATION.

The Jews, persecuted everywhere else, were in New Netherland protected from insult, and it is to the credit of both the Dutch and English successors in the colony that there is no stain of blood on them based upon condemnation for religious opinions.

Although it must be admitted that the Dutch were honest, humane, and just, hospitable, kind, and friendly to their neighbors, equally with the grim New Englanders and the haughty Virginians, with both of whom they traded, their town being a sort of trading *entrepot* for both colonies, and besides that they were not deficient in matters of taste and refinement, still, when Mr. Gerard claims for them that they were "the leading people on this continent in civil and religious freedom, in commercial enterprise, and in culture, he lays himself open to contradiction from those who would claim that Maryland and Rhode Island ought not to be forgotten as pioneers in religious freedom; that culture and commercial enterprise marked the progress of each colony as it emerged from its first struggle with the wilderness and savage foes.—*Legal Trials of the Dutch Period, in New York Sun.*

We have received the following opinion through the courtesy of the law firm of BONNEY, FAY & GRIGGS, of this city:

SUPREME COURT OF MICHIGAN.

OCTOBER TERM, 1875.

GEORGE LIGARE *v.* JAMES SEMPLE and others.

Appeal from Delta.—In Equity.

1. Defendants purchased of complainant a large quantity of land, giving for part of the purchase price two *conditional* notes, secured by mortgage on the lands; by the conditions of the notes, one was not to become due and payable until the complainant should obtain a release of a certain "*apparent right of dower*" existing on some of the lands, or until such "apparent right of dower should otherwise cease to exist"; and the other was not to become due and payable until the complainant should "*clear up*" the taxes and tax-titles standing against the lands. *Held*, that the court, being called upon to administer the doctrines of equity, would look at the essence and substance of the transaction, and only require such performance of the conditions as would give the defendants a fair, marketable title. *Held*, further, that the court would look into the facts of the case to see if there was any real or "apparent right of dower" at the time the notes were given, and would not require complainant to obtain a release of that which did not exist.

2. Under the statutes of Michigan, a woman who resides with her husband out of the State at the time the husband alone conveys lands within the State, has no contingent or *inchoate* right of dower in the lands so conveyed, and the facts being conceded, she has no "apparent right of dower."

3. A married woman cannot be made a party to a foreclosure suit in a case like this, for the purpose of litigating her supposed inchoate right of dower, nor were there any other legal proceedings open to complainant as between him and such married woman to test the matter.

4. There being no right of dower, nor "apparent right" at the time of the transaction: *Held*, that the failure of complainant to obtain a release was no defense to the note.

5. *Held*, that in determining the question whether the tax-titles were extinguished, the court must act upon the evidence given; would not speculate upon possibilities, but determine from the evidence; and if, upon the proof, any tax-titles that were standing against the lands at the time of the transaction appeared to be extinguished, whether through the agency of the complainant or otherwise, they must be considered out of the way.

6. One who is a tenant, in common with others, of lands, can acquire no title adversely to his cotenants, by buying the lands for taxes levied thereon while he was such co-tenant. Nor will the purchase by him in the name of others create any title in such third persons adverse to his cotenants.

7. *Held*, that the purchase by complainant of tax-titles, for taxes levied after he had parted with his interest in the lands, *prima facie* cut off all prior tax-titles, and "cleared up" such prior titles, so as to satisfy the condition of the second note.

8. Where the condition had not been entirely performed before the filing of the bill, but complainant appeared on the hearing to be then able and willing to perform: *Held*, that he should have a reasonable time to do such things as were found still undone, on which performance he should be allowed to foreclose his mortgage.

Opinion by GRAVES, J.

On the 22d of March, 1867, the complainant deeded to defendants, Semple, Lynch and McDonald, the undivided one-half of certain described parcels of land, situated in the counties of Delta, Menominee and Marquette, the area of the whole parcels being more than seventeen hundred acres. At the same time, complainant and his wife being separate and respective owners of other tracts in the same counties, amounting to more than three thousand three hundred acres, joined in deeding them also to the same parties. The agreed purchase price for the transfers was $42,000, and of this sum $32,000 was to be secured by the personal obligations of the grantees, and their mortgage on the premises. Of the undivided half-interest mentioned, the most of it had been deeded to complainant May 28, 1864, by Elijah Peacock and wife and one Joseph Peacock, the latter being married, but his wife not having joined. This fact that Mrs. Peacock was not a party to the deed to complainant was known when the latter deeded to the three defendants, and at the same time it was also understood that there were outstanding tax titles against some portions of the land.

In this state of things, and after some parley respecting Mrs. Peacock's real and seeming rights, and concerning the tax titles, the particulars of which may be waived for the present, the securities for the $32,000 purchase money were drawn, executed, and delivered, and two of the personal obligations were framed as follows:

"$8,000. Escanaba, Delta Co., Mich., March 22, 1867. On or before the first day of August, in the year 1869, for value received, we jointly and severally promise to pay to the order of George Ligare the sum of eight thousand dollars, with interest at seven per cent. per annum from date, *it being understood by the payers and payee of this note that the sum of money to be paid by this note, or any part thereof, shall not become due or payable until the payee hereof shall, at his own expense, obtain a release of an apparent right of dower that exists in the person of Margaret Peacock on some of the lands for which this note is given as part payment, or said apparent right of dower shall otherwise cease to exist.*

JAMES SEMPLE.
JOHN LYNCH.
JOHN S. MCDONALD."

"$3,000. Escanaba, Delta Co., Mich., March 22, 1867. On or before the first day of August, 1869, for value received, we jointly and severally promise to pay to the order of George Ligare the sum of three thousand dollars, with interest at seven per cent. per annum from date.

The amount of money called for in this note shall not be payable until the said Ligare shall, at his own expense, clear up the taxes and tax titles standing against the lands for which this note is given in part payment.

JAMES SEMPLE.
JOHN LYNCH.
JOHN S. MCDONALD."

Some time after these obligations were given, and prior to August, 1869, complainant claimed that, in truth, Mrs. Peacock had no right of dower when his deed was given to defendants, and that the payment of the $8,000 was not rightly subject to be deferred on account of any right in her. The defendants, on the other hand, insisted that payment could not be required of them until what they called her apparent right was, in some way, released or removed; and, subsequently, the precise time not appearing, they offered $13,000 on the obligation, but subject to the proviso that it should be made to appear, by abstract or otherwise, that the conditions appended to the obligations had been carried out.

Finally, the two securities remaining unpaid, the complainant, on the 20th of June, 1872, filed this bill to enforce payment, by foreclosure, and also to subject the lands for taxes alleged to have been paid by complainant to protect his mortgage security.

The three makers of the mortgage and of the foregoing instruments were made defendants, and with them were joined the other parties, in character of subsequent purchaser incumbrancers, or otherwise.

All answered, and set forth, as final ground of defense, that the conditions attached to the obligations had not been performed, and hence, that no part of the money had yet fallen due.

Proofs were taken, and, the cause coming on upon final hearing, the court below dismissed the bill, and complainant appealed.

On the hearing, in this court, the cause was elaborately argued on the part of complainant, but was submitted by defendants on a printed brief. The basis of the defense was combated on different grounds, but it is not deemed needful to examine all the propositions made.

The defense to the obligation for $8,000 may be first considered, and it seems scarcely necessary to say that this court, called on to administer the doctrines of equity in a case of this nature must look at the essence and substance of the transaction and endeavor to guard against any construction likely to infringe any settled principle of the court.

It is well in approaching the question to notice somewhat the positions occupied by the parties and also some other facts. The complainant desired to sell the real property interest in question, and the three defendants were anxious to buy it. The purchase price was agreed upon, and this was considered fair if the defendants received what they bargained for. The money specified in this obligation is a portion of that price, and if withheld is so much taken therefrom. If it is withheld whilst the defendants hold a title free from legal objection, it is in effect so much forfeited to them out of the consideration. They are allowed to retain a large amount of complainant's property without compensation. What complexion does the transaction wear in regard to any right in defendants to withhold this $8,000? The restriction does not touch the existence or justness of the debt. It looks merely to the postponement of payment, and the impediment named is an outstanding apparent right of dower in Mrs. Peacock. When the three defendants made the obligation, they well knew that Mrs. Peacock was a resident of Illinois and not of this State at the time her husband deeded to complainant. This is shown by the answer and by the depositions of McDonald and Lynch, and the latter swears that the record of title showed it.

They further swear that their counsel informed them that in truth Mrs. Peacock had no right of dower because she lived out of the State, but that she had an apparent right, and Lynch testifies that the want of her signature to the deed was the circumstance which produced the apparent right.

McDonald further testifies that the condition was added because the question of dower was a subject of doubt among them all, and that the course adopted was taken to enable the matter to be then closed up, and to allow until the notes should be due to clear up the record. He says, "all we expected was for them to give us a perfect title with a record that was clear. Didn't expect to quibble about little and unnatural things; wanted a title that was good to keep or good to sell."

Lynch says "all parties agreed there was an apparent right of dower which existed in Mrs Peacock. All we wanted was to be satisfied that we had a good, fair title; we wanted the records to show this." Semple says, "the phrase, apparent right of dower, meant, as I understood, when Mr. Ligare made his title clear, the note was to be good. To make the title clear Mr. Ligare was to get Mrs. Peacock to sign the deed or to clear it up in some other way. The word apparent was put there to cover a supposed right which might exist."

The fair deduction from the defendants' explanation, is that they were to be made satisfied that Mrs. Peacock had no right of dower, and satisfied that the state of the record did not imply that she had. Accepting this view, they were bound to be satisfied on reasonable evidence, and are not at liberty to close their eyes against law and fact, and arbitrarily insist that they are not satisfied.

It is noticeable that Ligare tried to get Mrs. Peacock to give a release and that she refused. That she could not be compelled to make such a paper is too plain for argument, and we are not aware of any legal proceeding open to Ligare to make it less apparent that she has any right.

When defendants' counsel informed them she had no right at all they were certainly correct. The facts were all understood. This is admitted. And it was just as certain in view of those facts that no contingent right remained outstanding on her account, as it would have been if it had been known she had died in the life-time of her husband.

The precise point was not directly in judgment in Pratt *v.* Tefft, 14 Mich., 191, but it was strongly intimated. It was there held that in case a woman should reside *here* with her husband at the time of his conveyance, and thereafter should move away, and reside abroad at the time of his death, she would lose all right of dower in land so conveyed, and this was put upon the ground that the statute contained a negative implication against any right in her in case of her non-residence at her husband's death. Admitting this construction to be correct, the legislative purpose is much plainer to withhold the right in case she resides abroad when her husband conveys. The estate he has once absolutely conveyed, he cannot be seized of at his death, and the woman, if a non-resident, is only allowed a right of dower in lands of which her husband dies seized.

It is true, he may become seized anew or rather of a new estate in the same lands, and may die so seized, but in such case the second seizin and estate would not be identical with the first but separate and distinct, and any right of dower as regards the last would have no legal connection whatever with the first. If the woman is a non-resident at the time her husband conveys absolutely, and divests himself entirely of his seizin and estate, there can be nothing for the right of dower to attach to.

She is a non-resident and the estate and seizin are gone, and the same estate and seizin can never return.

Mrs. Peacock then, in fact, had no right of dower. The circumstance showing she had none was known. One of defendants swears that the record disclosed it. She had no apparent right in any proper sense, and of course no right subject to be released. There was as absolutely no more appearance of a right on her account, than there would have been if she had died the day after her husband's deed to complainant. Such being the case, the substance and essence of the transaction require nothing more. In no just sense is there any apparent right on account of Mrs. Peacock, and it would be very absurd for a court to say that complainant ought not to have his money until something which does not exist is made to cease to exist. The equity depends upon the existence or non-existence of the thing, and not upon fruitless subtleties.

There are other considerations springing from equitable analogies which lead to the same final conclusion, but the case does not require their presentation.

We cannot assent to the notion advanced by the learned counsel for defendants, that it is incompetent to find in this suit that Mrs. Peacock has no shadow of right inasmuch as she is not a party. It would have been irregular to have joined her as a party in this case in order to raise a litigation with her on this matter. Chamberlain *v.* Lyell, 3 Mich., 448; Merchant's Bank and Thompson, 55 N. Y., 7; Lewis *v.* Smith, 9 N. Y., 502.

And yet we have a complete case between complainant and defendants, and the point concerning Mrs. Peacock's right is as between such parties directly raised, and if as between them the court is powerless to decide, the consequence must be that no judicial settlement as regards the rights of the actual litigants can ever be had.

The difficulty suggested would be the same in principle if in a separate proceeding against Mrs. Peacock she had been finally adjudged to be without right. Because in such a state of things the adjudication would have to be introduced here when she is not a party. As the case is constituted with all the governing facts admitted, the statute decides, and there is no room for argument, no room for question as between these parties, a contrary opinion would require the court to insist upon the bringing in of the assignor of a mortgage in a fareclosure by the assignee when the admitted facts conclusively demonstrate that in point of law the assignment is absolute and complete.

Upon the whole we think no defense is made out on this record against the claim based on the obligation given for eight thousand dollars.

We next come to the resistance made to the foreclosure in respect to the obligation entered into for the payment of the three thousand dollars of the purchase money. The restrictive clause of that obligation declared that the money should not be payable until the payee should, at his own expense, *clear up* the *taxes* and tax titles standtng against the lands, for which the instrument was given in part payment.

This is not very plain or definite. The end to be accomplished was the clearing up, and in what that was to consist the parties did not explain if there was any distinct notion on the subject in their minds. No mode of action was suggested, and we can only suppose that the course was meant to be left to Ligare's discretion.

The parties were mutually eager to trade, and the oral testimony given by the defendants, who made the bargain with complainant, tends to show what we should infer without it, that nothing unfair or technical or unreasonable was intended or expected. All were business men and disposed to act upon practical business principles. No sharp advantage was thought of, nor any overreaching contemplated.

The three defendants were seeking to secure the fair marketable title in the undivided half of numerous tracts, and against this interest there were many traces more or less distinct of tax interests. They well understood that this was not an unusual thing, but common experience in regard to lands throughout many parts of the State, and especially in lumber and mining districts and in the region where the lands in question lie. They also knew that quite commonly indications of standing tax interests are really fallacious and liable to be dissipated by examinations and inquiry.

They were likewise aware that it sometimes happens that marks exist of an old tax sale, and yet the holder can not be found. As it was, time was lacking for investigation. Under these circumstances the arrangements in question were made, and it should be construed and applied in an equitable spirit. To enforce it in any extreme sense would be harsh and unreasonable, and

would disappoint what we must think to have been the true purpose. If the judgment of the court comes short of what the defendants consider right, it must be remembered that the terms they dictated in the paper on being applied to the subject matter, are greatly wanting in clearness and precision.

It can hardly be imagined that if successful in getting a good marketable title, one not liable to be defeated on account of prior taxes, the defendants were still to be excused from paying the purchase money.

The stipulation as to taxes and tax titles was framed expressly to apply to such as were then standing against the interest for which the note was given in part payment, and whatever signs there were of taxes or tax titles, if in fact the taxes or tax titles so suggested were not then standing against the property, they were not made subject to be cleared up. And if without the aid of defendants, any taxes or tax titles which were standing at the time complainant deeded, have been since extinguished or been made to be not standing against the interest deeded, they have been cleared up within the spirit of the transaction. If any remain still outstanding, though subject to complainant's control, they ought to be considered in shaping the disposition of the case.

All of these matters must be decided upon the evidence given. If upon the proof, it turns out that any indicated taxes or tax titles were not standing against the land, giving the proof on the subject its due bearing and operation, then, for the purpose of this case, such indicated taxes or tax titles must be considered as out of the way. And if, upon the proof thus construed and applied it appears that any which were standing against the deeded property have, since the deed, been extinguished or caused to be not standing, through other means than the defendant's, they must be considered for the purpose of this case as *cleared up*.

We cannot speculate upon possibilities. We can only deal with the issues in the case upon the evidence given in the case, and we must look at this evidence according to its nature and aptness. There may be something beyond the record, but we cannot assume that there is. We may as well in any other case as in this, step aside and conjecture a state of things not disclosed to us.

It seems best to enter into some details even at the risk of being tedious.

[A review of the several conveyances here made sets forth:

That, January 28th, 1856, Joseph Peacock and wife deeded to complainant the undivided one-half of a portion of the lands claimed to be affected by the tax titles:

That, Oct. 28th, 1862, Joseph Peacock deeded to Elijah Peacock the undivided half of a portion of those contained in the above mentioned deed, together with others, also claimed to be covered by tax titles:

That, May 28th, 1864, Elijah Peacock and wife and Joseph Peacock deeded to complainant the undivided half of all the lands not deeded to him before:

That, Dec. 14th, 1866, Joseph Peacock and wife and Elijah Peacock and wife conveyed by warranty deed, to the defendants, Semple, Lynch & McDonald, the undvided half of the lands owned jointly by the Peacocks and complainant, which included all the lands against which defendants claimed there were outstanding tax titles: and

That, March 22d, 1867, complainant and wife, by deed of warranty, conveyed to the same defendants the undivided half of the same lands, and received the $3,000 obligation above set forth for a part of the purchase money.]

The lands to which the restriction in it relates comprise twenty-three parcels in Delta county, three in Menominee, and eight in Marquette county.

In tracing them, it will be most convenient to follow the plan of complainant's counsel, and number them from one to thirty-one, giving to number sixteen four parcels. Following this arrangement, the parcels numbered from one to twenty, inclusive, lie in Delta; from twenty-one to twenty-three, inclusive, in Menominee, and the remainder in Marquette.

Before proceeding, however, with this list, it is proper to premise that it appears, from the evidence, and especially by the deposition of Joseph Peacock, who was called and sworn for defendants, that S. Q. Perry and Elijah Peacock, who seem to have bid in several parcels, for different years, acted, in so doing, for Joseph Peacock, and that in substance and effect their purchases were his purchases.

[The court here reviews condition of the several parcels upon which tax titles were claimed to be outstanding at the time of the conveyance from complainant to defendants, with the following result:

The parcels numbered 1, 2, 4, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, and 17, had been purchased by one C. W. Butler, at sundry tax sales, before conveyance by complainant, and Butler had since then quitclaimed to complainant, who offered to turn over the interest acquired from Butler to defendants. Held sufficient.

The parcels numbered 1, 3, 4, 5, 8, 11, 12, 19, 20, 21, 22, and 23, had been purchased for taxes of 1859, and some other years prior to complainant's conveyance, by S. Q. Perry; but the court held, under the proofs, that the purchases made in the name of Perry were really the purchases of Joseph Peacock, who was, at the time of acquiring such tax titles, a part owner of the land; that Peacock and complainant, being tenants in common at the time, and Perry's purchase being the purchase of Peacock, the purchase was, in effect, a payment of the tax, as against complainant, and not an acquisition of an interest. Page *v.* Webster, 8 Mich., 263; Butler *v.* Porter, 13 Mich., 292. Therefore, no tax title interest was outstanding at the time of filing the bill, on account of the Perry purchases.

Complainant and Joseph Peacock had, before the sale by complainant, bid off certain of the lands for taxes of various years, and Elijah Peacock, brother of Joseph Peacock, had bid off some. The greater part of them had been so bid off while the parties held the lands as tenants in common, and all of them had, since such purchases, been conveyed by the two Peacocks and complainant to defendants. *Held*, therefore, that no tax titles were outstanding on account of these purchases.

The parcels numbered 21, 22, 23, 24, 26, 27, 28, and 29, were sold for taxes of sundry years to various persons prior to the sale by complainant. Since complainant's conveyance, the same parcels had been sold for taxes of several years, and complainant had acquired the title of the purchasers at such sales, and offered in his bill to turn them over to defendants. The court say "these later purchases are presumptively sufficient to cut off the purchases by White and others, and 'clear up the taxes and tax titles,' and the theory of complainant's case is understood as contemplating that use of them."

The parcels numbered 30 and 31 had been purchased by different persons for taxes of several years, but later tax titles had been purchased by one of complainant's counsel, which were offered to be turned over to defendants. *Held* sufficient to presumptively cut off all former titles.

The court concludes the opinion as follows:]

This examination doubtless might have been greatly abridged, and probably with advantage. But the nature of the case induced me to think it safer to set out descriptions and repeat dates, statements, and explanations, than to attempt a shorter and less tedious course.

As it is, the view shows, not of course with the certainty of demonstration, not in a way to exclude possibilities, but with such degree of moral certainty as the case admits of, such reasonable certainty as is afforded by such proofs as have been put in, and on which a decision must be based, if any decision is made.

First—That, as to several parcels, no taxes or tax titles were standing when the mortgage was made.

Second—That, as to others, there were prima facie tax title interests outstanding at that time, but which were "cleared up" before the bill was filed.

Third—That, as to others still, there were prima facie outstanding tax title interests which are now susceptible of being "cleared up" by proper transfers by complainant and his counsel. Mr. Ball, and that, without such transfers, tax titles will be still standing.

Some strong objections to the defense, and going to the validity of the tax proceedings in the three counties for a number of years, have not been considered.

They reach a great way beyond the cause, and the decision now called for does not imperatively require their solution.

The complainant was entitled to foreclose on account of the first obligation, and he appears to be now in a situation to meet the requirement in the restrictive clause of the second. He was, apparently, not in such situation when the bill was filed.

Under the circumstances, and by analogy to the rule in cases of specific performance, which allows relief if the party is able to make a good title before final decree (3 Par. on Con., 381 and notes, last ed.; Foy on Sp. Per., 2 Am. ed., p. 413, §§ 871, 872, 873), it appears to me that complainant should have reasonable time to cause to be transferred to his mortgagors, subject to his mortgage, the Ball tax title interest hereinbefore mentioned, and reasonable time for himself to transfer to his mortgagors, subject to his mortgage, the tax title rights and interests which he obtained from Butler by the deed or deeds mentioned of May 24th, 1872, and such as he obtained by the deed or deeds from the State mentioned of April 22d, 1873, and such as he acquired by the deed or deeds from Butler, referred to, of September 24th, 1870, and those he got by the deed or deeds from Walton of June 8th, 1872, and by deed or deeds of April, 1873, as Walton's assignee, and those he obtained by the deed or deeds of June 10th, 1872, on account of the Bishop purchase.

In case these transfers are made, I think he should be allowed to foreclose on account of both obligations, but ought not to recover interest on the second subsequent to the first day of August, 1869.

In case of failure to make, or cause to be made, these transfers, then I think his bill should stand dismissed as to the second obligation, but without prejudice. In either event he should be allowed to foreclose, as to the first obligation, for principal and interest.

The claim on account of subsequent taxes, paid, as was said, to protect the mortgage, is understood to be waived. If not, there would be much difficulty in drawing any distinct line between tax matters of that sort, relating to the undivided half in question, and those needful to meet the necessities of the restriction in the obligation.

If the court below had decreed for complainant on the eight thousand dollar demand, I should have thought differently from what I do now upon the question of costs. As the case is situated, I am of opinion that the decree of the Circuit Court should be reversed, and that a decree should be entered here in conformity with the views here stated, and allowing complainant the cost of both courts, and that the case should be remanded for further proceedings.

D. H. BALL, Marquette, Mich., and C. C. BONNEY, Chicago, for appellant.

HUGHES, O'BRIEN & SMILEY, Grand Rapids, Mich., for appellees.

TRUSTEE'S SALE.—MAGDALENA ZAREMBA and Anthony B. Zaremba, of the city of Chicago, county of Cook and State of Illinois, by their certain trust deed, dated February 19th, 1874, and filed for record in the recorder's office of Cook county on February 19th, 1875, and recorded in book 315 of records, on page 409, conveyed to the undersigned, as trustee, lots 13, 14, 15, 16 and 17 in block 1, in Cook's subdivision of that part of the east half of the northwest quarter of section 21, township 40 N., R. 13, east of 3rd P. M., to secure the payment of a promissory note, of even date therewith, for four hundred dollars, payable one year after date thereof, with interest thereon at ten per cent. per annum from date, to the order of Joseph Papik.

And whereas, default has been made in the payment of said note and interest thereon, and the legal holder has applied to me as such trustee, to sell said premises to pay said note and interest thereon.

Now, therefore, in pursuance of the power in me vested by said trust deed, I shall sell the said premises, at public auction, for cash to the highest bidder on Wednesday, the 12th day of January, A. D. 1876, at one o'clock in the afternoon of said day, at the southeast corner of the court house square, in the city of Chicago, being the corner of Washington and Clark streets in said city, and all right, title, equity of redemption, and homestead rights of said grantors, their heirs and assigns therein.

Chicago, Dec. 11, 1875.

12-15 FRANK NOWAK, Trustee.

M. F. HEENAN,
Attorney.

CHANCERY NOTICE.—STATE OF ILLINOIS, county of Cook, ss. Superior court of Cook county. December term, A. D. 1875. Michael Engleman, Simeon Babcock, and E. Nelson Salling, vs. James Bradbury and Charles W. Weyl.—Mechanic's Lien.

Affidavit of the non-residence of James Bradbury, one of the defendants above named, having been filed in the office of the clerk of the Superior court of Cook county, notice is hereby given to the said James Bradbury, that the above named complainants heretofore filed their petition for mechanics' lien in said court, on the chancery side thereof, and that a summons thereupon issued out of said court against the above named defendants, returnable on the first day of the term of the Superior court of Cook county, to be held at the court house in Chicago, in said Cook county, on the first Monday of December, 1875, as is by law required, and which suit is still pending.

JOHN J. HEALY, Clerk.

M. F. HEENAN, Compits. Solr. 13-16

TO ATTORNEYS.

The Trust Department of the *Illinois Trust* and *Savings Bank* was organized to supply a want of long standing in the *West*. A responsible *Corporation* which, unlike individuals, does not die, but has perpetuity; which will receive on deposit moneys *of Estates, or in litigation awaiting settlement*, or which, from any reason, cannot be invested or loaned on *fixed time*, and *receive and execute trusts*, and invest money for estates, individuals and corporations.

All deposits in trust department of the *Illinois Trust and Savings Bank* draw 4 *per cent.* interest, and are payable on five days notice. Negotiable certificates are issued when desired. Deposits in Savings Department draw 6 *per cent.* interest upon the usual regulations.

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L. B. SIDWAY, *Prest.* — JNO. B. DRAKE, *2nd V. Prest.*

H. G. POWERS, *V. Prest.* — JAS. S. GIBBS, *Cashier.*

(9-34)

TRUSTEE'S SALE.—WHEREAS, JAMES L. McKeever and Mary A., his wife, by their certain trust deed, dated the first (1st) day of June, A. D. 1874, and recorded in the recorder's office of Cook county, Illinois, in book 366 of records, at page 457, conveyed unto the undersigned, William C. Ives, for the purpose of securing the payment of a certain promissory note for the sum of fifteen hundred dollars, in said trust deed set forth, the following described premises, situated in the county of Cook and State of Illinois, to wit:

The east half (½) of the east half (½) of lot numbered nine (9), in block one (1), in Cleaverville addition to Chicago, being a subdivision of part of the north half of the northeast quarter of section three (3), township thirty-eight (38) north, range fourteen (14), east of the third principal meridian, in trust, to wit: upon the trusts specified in and created by said trust deed, to which reference is hereby made.

And whereas, default has been made in the payment of said note, both of the principal and interest, which said default still continues.

And whereas, William T. McKeever, the legal holder of said promissory note, has applied to the undersigned to sell the said premises and otherwise to execute the trusts created by said trust deed.

Now, therefore, public notice is hereby given, that I, William C. Ives, as trustee named in said trust deed, in pursuance of the power and authority in me vested by the said trust deed, will, on Thursday, the sixth (6th) day of January, A. D. 1876, at ten (10) o'clock A. M., of said day, at the east door of the two doors opening into Adams street, of the court house situated at the southeast corner of LaSalle and Adams streets, in the city of Chicago, Cook county, Illinois, sell at public auction, to the highest and best bidder, for cash, the said premises hereinbefore and in said trust deed described, and all the right, title, benefit, interest and equity of redemption of the said James L. McKeever and Mary A. McKeever therein.

Chicago, Dec. 3d, 1875.

11-14 WILLIAM C. IVES, Trustee.

O. R. BROUSE,
Attorney, 83 Clark Street.

ESTATE OF MARY McNULTY, DECEASED—Notice is hereby given to all persons having claims and demands against the estate of Mary McNulty, deceased, to present the same for adjudication and settlement at a regular term of the county court of Cook county, to be holden at the court house, in the city of Chicago, on the third Monday of February, A. D. 1876, being the 21st day thereof.

Chicago, December 3d, A. D. 1875.

11-16 FANNIE McNULTY, Executrix.

MORAN, ENGLISH & WOLF,
Attorneys, N. W. corner Adams and LaSalle Streets.

ESTATE OF JAMES KILLEEN, DECEASED.—Notice is hereby given to all persons having claims and demands against the estate of James Killeen, deceased, to present the same for adjudication and settlement at a regular term of the County court of Cook county, to be holden at the court house in the city of Chicago, on the second Monday of January, A. D. 1876, being the 10th day thereof.

Chicago, November 24th, A. D. 1875.

THOMAS CLARKE, Administrator.

MORAN, ENGLISH & WOLF, Attys. 10-15a

WOODBRIDGE & BLANKE,
Attorneys, No. 108 Dearborn Street.

ESTATE OF JOHAN JACOB SCHMIDT, DECEASED.—Notice is hereby given to all persons having claims and demands against the estate of Johan Jacob Schmidt, deceased, to present the same for adjudication and settlement at a regular term of the County court of Cook county, to be holden at the court house, in the city of Chicago, on the third Monday of February A. D. 1876, being the 21st day thereof.

Chicago, December 9th, A. D. 1875.

LORENZO C. HOMMES.
Administrator, with the will annexed.

WOODBRIDGE & BLANKE, Attys. 12-17a

ESTATE OF JOHN GARRITY, DECEASED.—Notice is hereby given to all persons having claims and demands against the estate of John Garrity, deceased, to present the same for adjudication and settlement at a regular term of the County court of Cook county, to be holden at the court house, in the city of Chicago, on the third Monday of February A. D. 1876, being the 21st day thereof.

Chicago, December, A. D. 1875.

MARGARET GARRITY, Administratrix.

AVERY & COMSTOCK, Attys. 12-17

WHERRAS, BENJAMIN P. HINMAN, BY HIS certain deed of trust, dated the fourth day of November, A. D. 1874, by him duly executed, acknowledged and delivered, on the 11th day of December, A. D. 1874, and filed for record in the recorders office of Cook county, Illinois, on the 11th day of December, A.D. 1874, and duly recorded therein in book 384 of records, on page 548 did convey unto the undersigned, as trustee, all the following described lot, piece, or parcel of land situate in the village of Blue Island, in the county of Cook and State of Illinois, to wit:

The east half of the southwest quarter of section thirty (30), township thirty-seven (37), north range fourteen (14) east of the third principal meridian. Also the north twenty-five (25) acres of the west half of the southwest quarter of said section thirty (30), township and range aforesaid, excepting, however, the right of way of the Chicago, Rock Island and Pacific Railroad Company over said first mentioned tract of land, to secure the payment of three certain promissory notes of even date with said trust deed made by said Benjamin P. Hinman, for the sum of fifteen thousand eight hundred and thirty-seven dollars and ninety-six cents (15,837.96) each, and each of said notes payable in one, two and three years from the date thereof, respectively, and each of said notes bearing interest at the rate of eight per centum per annum payable annually, and each payable to the order of Ernst Uhlich, Christian Kruger and John Sorgenfrei, trustees and executors of the last will and testament of Ludwig Kruger, deceased.

And whereas, it is, in and by the terms of said trust deed, among other things provided, that in case of default in the payment of the said promissory notes and interest or either, or any part thereof, according to the tenor and effect of said notes, or in case of the breach of any of the covenants and agreements in said trust deed contained, then, on the application of the legal holder of said promissory notes, or either of them, it should be lawful for the undersigned to sell and dispose of said premises, and all the right, title, benefit, and equity of redemption of the said Benjamin P. Hinman, his heirs and assigns therein, either in mass or in separate parcels, as the undersigned might prefer, at public auction, at either of the doors of any building which might be occupied or used as a court house, in the city of Chicago, in the State of Illinois, or on said premises, for the highest and best price the same will bring in cash, thirty days' previous notice of such sale having been given by publication, once in each week, for four successive weeks, in the Chicago Legal News, or in any newspaper at that time published in said city of Chicago; to adjourn such sale from time to time, and for such time as might be thought expedient, and to make, execute, and deliver to the purchaser or purchasers at such sale, good and sufficient deed or deeds of conveyance for the premises sold, and out of the proceeds of such sale, after first paying all costs of advertising and sale, commissions, attorney's fees, and all other expenses of this trust, and all moneys advanced for taxes and other liens or assessments, with the interest thereon, to pay the principal and interest on said notes.

And whereas, it is further provided in said trust deed, that in case of default in the payment of said promissory notes, or either of them, or interest, as aforesaid, or of a breach of any of the covenants or agreements in said trust deed contained, the whole of said principal of said promissory notes, and the interest thereon to the time of sale, may at once, at the option of the legal holder thereof, become due and payable, and the said premises be sold, in the manner and with the same effect as if the said indebtedness had matured.

And whereas, default has been made in the payment of both principal and interest due on the first mentioned of the said promissory notes, to wit: the one due in one year from the date thereof, and also default has been made in the payment of the first installment of interest due on each of the said two other mentioned promissory notes, and said principal and interest still remains wholly due and unpaid; and the legal holders of the said notes, to wit: the trustees and executors aforesaid, having elected to declare all of said notes due and payable, and having made application to the undersigned, the trustee in said trust deed named, and requested him, as such trustee, to sell and dispose of said premises under the power in said trust deed and for the purposes therein stated.

Now, therefore, public notice is hereby given, that in pursuance of said trust deed, and by virtue of the power and authority to me granted in and by the same, I, the undersigned, will, on Thursday, the 13th day of January, A. D. 1876, at the westernmost door of the two north doors of the building now used as a court house, situate on the southeast corner of Adams and LaSalle streets, in the city of Chicago, in the State of Illinois, at the hour of ten o'clock A. M. of that day, will sell at public auction for the highest and best price the same will bring in cash, all and singular the premises above and in said trust deed described, and all the right, title, benefit and equity of redemption of the said Benjamin P. Hinman, his heirs or assigns therein.

Dated Chicago, November 11th, A. D. 1875.

12-15 FREDERICK W. FORCH, JR., Trustee.

TRUSTEE'S SALE.—WHEREAS, SPARROW M. Nickerson, by his certain trust deed bearing date September 21st, A. D. 1870, and filed for record in the office of the recorder of Cook county, Illinois, on the 23d day of September, A. D. 1870, and recorded in book 613 of deeds, on page 337, did convey to me in fee the land hereinafter described, for the purpose of securing the payment of the promissory note of the said Nickerson, given for purchase money for the said land, bearing even date with the said deed for the sum of $34,238, payable to the order of Matthew Laflin in five years from the date thereof, with annual interest at 8 per cent., and whereas the said original trust deed and the record thereof were afterwards, on the 9th day of October, A. D. 1871, totally destroyed by fire, and thereupon the said Nickerson did execute and deliver to me a duplicate of such original trust deed, which was filed this day for record in the said recorder's office, and whereas there is due to the said Matthew Laflin the sum of $17,624.62, and interest thereon at ten per cent. from November 23th, A. D. 1874, for the principal and interest on said note and for the taxes advanced by him on said land, and he has directed me to proceed to enforce the provisions of said trust deed, to make the sum so due.

And whereas, it was and is provided in said original and duplicate deeds, that if default should be made in the payment of the sums secured as aforesaid, that then I should be empowered to sell and dispose of the said lands and all the right, title, benefit and equity of redemption of the said Nickerson, his heirs and assigns therein, at public auction, for the highest and best price the same would bring in cash, at the place hereafter named, and on the notice hereby given.

Now, therefore, in pursuance of the powers in me vested by said deeds, I hereby give notice that on the 14th day of January next, at ten o'clock A.M., at the north door nearest LaSalle street of the present court house of Cook county, on the corner of Adams and LaSalle streets, in Chicago, I shall sell, at public auction, to the highest bidder, for cash, all those parcels of land situated in the county of Cook and State of Illinois and known and described as the undivided one-half of the northeast quarter of section five (5), and the undivided one-half of all that part of the southeast quarter of section five (5), which lies north of the centre of the Illinois & Michigan Canal (excepting or reserving the waters of said Canal and a strip of land 90 feet wide lying north of said canal) and the undivided half of the east half of the southwest quarter of section five (5), (excepting and reserving the canal and its waters and a strip of land 90 feet wide on each side thereof,) and the undivided half of all that part of the east half of the northwest quarter of section eight (8), which lies north of the centre of said canal, (excepting and reserving such canal and its waters, and a strip 90 feet wide on the north side thereof, all of said lands being situate in township thirty-eight (38), north of range thirteen (13), east of the 3d P. M., and all the right, title, benefit and equity of redemption of the said Nickerson, his heirs and assigns therein, and will apply the proceeds as is in said deeds directed.

Dated December 11th, 1875.

LYCURGUS LAFLIN, Trustee, etc.

SLEEPER & WHITON, Attys. 12-16

JOHN P. AHRENS,
Attorney, 108 LaSalle Street.

TRUSTEE'S SALE.—WHEREAS, JAMES RYAN, of the city of Chicago, in the county of Cook and State of Illinois, by his trust deed, dated the twenty-eighth day of October, A. D. 1873, and filed for record on the fourth day of February, A. D. 1874, in the recorder's office of said Cook county, and recorded therein in book 311 of records, on page 336, conveyed to Henry Waller, as trustee, the premises hereinafter described, to secure the payment, as therein specified, of three certain promissory notes made by the said James Ryan, bearing even date with said trust deed, payable to the order of Henry H. Walker, in one, two and three years respectively from the date thereof, at his office in Chicago, Illinois; said notes being for the sum of five hundred sixty-six and 66-100 dollars each, and bearing interest at the rate of eight per cent. per annum, payable annually; which said notes were afterwards duly indorsed by the said Henry H. Walker, and were given for purchase money for the said premises hereinafter described.

And whereas, it was, ameng other things, provided in said trust deed, that in case of default in the payment of said notes, or either of them, or any part of principal or interest due thereon, then, on the application of the legal holder of said notes, it should be lawful for said trustee to sell and dispose of said premises at public auction, at either door of the court house, in the city of Chicago in the State of Illinois, for the highest and best price the same would bring in cash, thirty days' notice of such sale having been first given in one of the newspapers published in said city of Chicago; to adjourn such sale from time to time, and for such time as may be thought expedient, and to make and deliver to the purchaser at such sale a good and sufficient deed of conveyance for the premises sold.

And whereas, it was further provided in said trust deed, that if default should be made in the payment of said notes or interest as aforesaid, the whole of said principal of said promissory notes and the interest to the time of sale should, at the option of the legal holder of said notes become due and payable, and said premises might be sold as if the said indebtedness had matured.

And whereas, default has been made in the payment of the principal of the first two of said promissory notes, and of the interest on all of said notes from the date thereof, the whole amount now due on said notes being the sum of sixteen hundred and ninety-nine 98-100 dollars, with interest thereon at the rate of eight per cent. per annum from October 28th, A. D 1873.

And whereas, the legal holder of said notes has elected to declare the whole of said principal of said promissory notes, and the interest thereon, to be due and payable, and application having been made to the said trustee by said legal holder of said notes, to sell said premises under and according to the provisions of said trust deed, for the purpose of paying said indebtedness and costs of proceedings.

Now, therefore, public notice is hereby given, that I shall sell at public auction, for cash, to the highest and best bidder, at the north door nearest to La Salle street of the court house on Adams street, in the city of Chicago in the State of Illinois, at eleven o'clock A. M., on Wednesday, the 12th day of January, A.D. 1876, the said premises, to wit:

Lot thirty-seven (37), in Walker's subdivision of all that part lying north of Blue Island avenue of block seven (7), of Laughton's subdivision of the west half of the northwest quarter of section thirty (30), township thirty-nine (39) north, range fourteen (14) east of the third (3d) principal meridian, in the city of Chicago, county of Cook and State of Illinois, together with all the right, title, benefit and equity of redemption of the said James Ryan, his heirs and assigns therein.

Chicago, Dec. 11th, 1875.

HENRY WALLER, Trustee.

JOHN P. AHRENS, Atty. for trustee. 12-16

TRUSTEE'S SALE.—WHEREAS, DANIEL CALLAghan, of the city of Chicago, county of Cook and State of Illinois, by his trust deed, dated the sixth day of August, A. D. 1873, and filed for record on the seventh day of August, A. D. 1873, in the recorder's office of said Cook county, and recorded therein in book 303 of records, on page 139, conveyed to Gwynn Garnett, as trustee, the premises hereinafter described, to secure the payment of three certain promissory notes, made by said Daniel Callaghan, bearing even date with said trust deed, payable to the order of Edward C. Waller, one of said notes being for the sum of six hundred dollars, payable in one year after date thereof; the other two notes being for the sum of eight hundred dollars each, payable respectively in two and three years after date thereof: all of said notes bearing interest at the rate of eight per cent. per annum, payable annually at the office of said Waller, in Chicago, which said notes were afterwards duly indorsed by said Edward C. Waller, and were given for purchase money for the said premises hereinafter described.

And whereas, it is among other things provided in said trust deed, that in case of default in the payment of said notes or either of them, or any part of principal or interest due thereon, then on the application of the legal holder of said notes, it shall be lawful for said trustee to sell and dispose of said premises, at public auction, at either door of the court house, in the city of Chicago, in the State of Illinois, as may be specified in the notice of such sale, for the highest and best price the same will bring in cash, thirty days' notice of such sale having been first given in one of the newspapers published in said city of Chicago; to adjourn such sale from time to time as may be thought expedient, and to make and deliver to the purchaser at such sale, good and sufficient deed of conveyance for the premises sold.

And whereas, it is further provided in said trust deed, that in case of default in the payment of said promissory notes or interest as aforesaid, the whole of said principal of said notes and the interest to the time of sale, shall, at the option of the legal holder of said notes become due and payable, and the said premises may be sold as if the said indebtedness had matured.

And whereas, default has been made in the payment of the principal of the first two of said notes, and of the interest on all of said notes from the date thereof, the whole amount now due on said notes being the sum of twenty-two hundred dollars with interest thereon at the rate of eight per cent. per annum, from August 6, A. D. 1873.

And whereas, the legal holder of said notes has elected to declare the whole of said principal of said notes and the interest thereon to be due and payable, and application having been made to the said trustee by the legal holder of said notes, to sell said premises under and according to the provisions of said trust deed for the purpose of paying said indebtedness and costs of proceedings.

Now, therefore, public notice is hereby given that I shall sell at public auction, for cash to the highest and best bidder, at the north door nearest to LaSalle street, of the court house on Adams street, in the city of Chicago, in the State of Illinois, at eleven o'clock A. M., on Tuesday the eleventh day of January, A. D., 1876, the said premises, to wit:

Lot number twenty-two (22), in the subdivision of block number one (1), of Samuel J. Walker's Dock Addition to Chicago, being a subdivision of all that part lying north of the West Branch of the South Branch of the Chicago river, of the east half of section number thirty (30), township thirty-nine (39) north, range fourteen (14), east of the third principal meridian, in the city of Chicago, Cook county, and State of Illinois, together with all the right, title, benefit and equity of redemption of the said Daniel Callaghan, his heirs and assigns therein.

Chicago, December 11, 1875.

GWYNN GARNETT, Trustee.

JOHN P. AHRENS, Attorney for Trustee. 12-16

ESTATE OF HENRY H. TAYLOR, DECEASED.—Notice is hereby given to all persons having claims and demands against the estate of Henry H. Taylor, deceased, to present the same for adjudication and settlement at a regular term of the county court of Cook county, to be holden at the court house, in the city of Chicago on the third Monday of February, A. D. 1876, being the 21st day thereof.

Chicago, December 8th, A. D. 1875.

HENRY F. EAMES,
HENRY W. KING and
ALBERT KEEP, Executors.

WALKER, DEXTER & SMITH, Atty. 12-17a

TRUSTEE'S SALE.—WHEREAS, LORENZO R. Smith conveyed to me in fee simple, as trustee, as hereinafter set forth, by deed dated April 8th, 1873, that parcel of land in Cook county, State of Illinois, to wit:

The west half of the southeast quarter of the northwest quarter of section five (5), in township thirty-eight (38) north, range thirteen (13) east of the third principal meridian, to secure the payment of the promissory note of said Smith, of even date with said deed, in the sum of twelve thousand dollars, payable to the order of Sparrow M. Nickerson, three years from date thereof, with interest at the rate of eight per cent. per annum, payable annually, said note given for the purchase price of the premises hereinbefore described, which deed was recorded in the office of the recorder of said Cook county in book 224 of records, on page 545.

And whereas, said deed was upon trust that in case of default in payment of said note and interest at maturity, it should be lawful for the grantee therein, as trustee, to sell and dispose of said premises, at public auction, for cash, to the highest bidder, at the north door of the building then in use as a court house in the city of Chicago, in the State of Illinois, four weeks' previous notice of such sale having been given of the time and place of such sale, by advertisement in the Chicago Legal News, and to make and execute a deed to the purchaser.

And whereas, said deed was upon further trust, that in case of default in the payment of said note, or the interest to accrue thereon, as aforesaid, then the whole of the principal sum of said note, and the interest to the time of sale should at once, at the option of the legal holder of said note, become due and payable, and that the said premises might be sold in the manner and with the same effect as if the said indebtedness had matured.

And whereas, default was made in the payment of the two installments of interest which fell due on said note on the 8th days of April, A.D. 1874 and A.D. 1875, respectively,

And whereas, the legal holder of said note has elected to declare the principal sum thereof due and payable by reason of such default, and has made application to the undersigned to execute the trusts and powers of said deed, to make the money, principal and interest, due on said note.

Now, public notice is hereby given that I, L. C. Paine Freer, trustee, etc., will, in pursuance with said powers and trusts and said application sell, at public auction, for cash, to the highest bidder, at the most westerly of the two north doors on Adams street of the building now used as a court house in said city of Chicago, standing on the southeast corner of Adams and LaSalle streets on the tenth day of January, A. D. 1876, at ten o'clock in the forenoon of said day, all or such portion of said parcel of land as may be necessary to make the money due on said note, the principal sum and the interest to the day of sale.

L. C. PAINE FREER, Trustee.

Chicago, December 11, 1875. 12-15

TRUSTEE'S SALE.—WHEREAS, BENJAMIN L. Honore and Laura V. Honore, his wife, of the city of Chicago, in the county of Cook and State of Illinois, by their trust deed, dated the eleventh day of March, A.D. 1872, and filed for record on the thirteenth day of March, A. D. 1872, in the recorder's office of said Cook county, and recorded therein in book 68 of records, on page 11, conveyed to Julius Rosenthal, as trustee, the premises hereinafter described, to secure the payment as therein specified of a certain promissory note, made by H. H. Honore, bearing even date with said trust deed, for the sum of four thousand dollars, payable to the order of F. A. Hoffman, cashier, four months after the date thereof, with interest at the rate of ten per cent. per annum.

And whereas, it was, among other things provided in said trust deed, that if default should be made in the payment of the indebtedness secured by said trust deed, whether of principal or interest, on the day on which the same should become due and payable, it should be lawful for the said trustee to sell and dispose of the said premises, and all the right title, benefit, and equity of redemption of the said Benjamin L. Honore and Laura V. Honore, their heirs and assigns therein, at public auction, at either door of any building which might be occupied as a court house in said city of Chicago, as should be specified in the notice of such sale, for the highest and best price the same would bring in cash, at least twenty days' public notice having been previously given of the time and place of such sale, by advertisement in one of the newspapers published in said city of Chicago, and to make, execute and deliver to the purchaser at such sale a good and sufficient deed of conveyance for the premises sold, and to adjourn such sale from time to time at his discretion.

And whereas, default has been made in the payment of said principal indebtedness, and interest thereon from July 1, 1873, being also due and unpaid, the whole amount now due being the sum of four thousand dollars, with interest thereon from July 1, 1873, at the rate of ten per cent. per annum.

And whereas, application has been made to the said trustee, by the legal holder of said note, to sell said premises under and according to the provisions of said trust deed, for the purpose of paying said indebtedness and costs of proceedings.

Now, therefore, public notice is hereby given that I shall sell at public auction, for cash, to the highest and best bidder, at the north door nearest to LaSalle street, of the building occupied as a court house on Adams street, in the city of Chicago, Illinois, at twelve o'clock, noon, on Wednesday, the fifth day of January, A. D. 1876, the said premises, to wit:

Lots four (4), five (5), and the south half of lot three (3), in subdivision of west one acre of lot eight (8) of Lavinia & Co.'s subdivision of the south quarter of the northeast quarter of section ten (10), township thirty-eight (38) north, range fourteen (14), east of the third (3d) principal meridian, in the county of Cook and State of Illinois, together with all the right, title, benefit and equity of redemption of the said Benjamin L. Honore and Laura V. Honore, their heirs and assigns therein.

12-15 JULIUS ROSENTHAL, Trustee.

HOLDEN & MOORE,
Attorneys, 152 Dearborn Street.

NOTICE.—STATE OF ILLINOIS, COOK COUNty, ss. Superior Court of Cook County. December Term, A. D. 1875. Orville E. Atwood vs. Russel Cole and Katie G. Cole. Scire facias to foreclose a mortgage.

Affidavit, that Katie G. Cole, one of said defendants, hath gone out of this State, and, on due inquiry, cannot be found within this State, and that the place of her residence is at present at Cambridge, in Washington county, in the State of New York, and that upon diligent inquiry, any other place of her residence cannot be ascertained, having been filed in the office of the clerk of said court,

Notice is hereby given to said Katie G. Cole, that the said Orville E. Atwood, heretofore sued out of the clerk's office of said court, a writ of scire facias, to foreclose a mortgage, which was executed by Russel Cole and the said Katie G. Cole to the said Orville E. Atwood, which said writ of scire facias was returnable to the December term, A. D. 1875, of said court, at the court house, where said court is held in the city of Chicago, in said Cook county.

Now, unless you, the said Katie G. Cole, shall personally be and appear before said Superior court at said court house, in said city, on the first day of a term thereof, to be holden at said court house in said city, on the first Monday of February, A. D. 1876, and plead to the said writ of sciri facias, or set up a defense thereto, the said court will proceed to give judgment, with costs, for such sum as may be due by said Russel Cole and Katie G. Cole, upon the mortgage upon which the said writ of scire facias issued. And the mortgaged premises, namely:

The north half of the east half of the southwest quarter of section twenty-two (22), in township thirty-seven (37) north, in range thirteen (13), east of the third principal meridian; also, all that part of the west half of the southwest quarter of said section twenty-two (22), lying east of the Calumet Feeder, as the same was located and existed at the date of said mortgage deed, which was August 1st, A.D. 1872, said lands being in said Cook county, will be sold to satisfy any judgment the said Orville E. Atwood may recover in said action.

Chicago, Ill., Dec. 14th, 1875.

JOHN J. HEALY, Clerk.

HOLDEN & MOORE, Plf's Attys. 13-16

MORTGAGEE'S SALE.—WHEREAS, MARY L. Burpee and George W. Burpee, of the county of Cook and State of Illinois, on the first day of December, 1874, executed, acknowledged and delivered to the undersigned, mortgagee, their certain mortgage deed of the date aforesaid, and filed for record in the recorder's office of Cook county, Illinois, on the 16th day of December, 1874, and duly recorded in book 365 of records, on page 599, by which said mortgage they did grant, bargain, sell and convey unto the undersigned, Oscar W. Cady, of Champaign county, Illinois, the following described real estate, situate in said county of Cook, Illinois, to wit:

Lot fourteen (14), in block twenty-six (26), in Irving Park, being a subdivision of the southeast quarter of section fifteen, township forty, range thirteen, east of the third principal meridian, and the north half of the northeast quarter of section twenty-two (22), same township and range, to secure the payment of one promi-sory note, of even date therewith, by the said parties to the undersigned, Oscar W. Cady, for the sum of ($1,873.09) eighteen hundred and seventy-three and 09-100 dollars, with interest at ten per cent. per annum, payable annually, due in three years from the date thereof, payable at the banking office of Gardner, Curtiss & Burpee, Urbana, Illinois.

And whereas, it is provided in said mortgage, that if default in the payment of said note be made, either of principal or interest, according to the tenor and effect thereof, then the whole of the principal and interest secured by said note shall thereupon, at the option of the said Oscar W. Cady, become immediately due and payable, anything in said mortgage or note to the contrary notwithstanding; and the said Oscar W. Cady, his legal representatives or attorney, after having advertised such sale 30 days in a newspaper published in Chicago, and by posting up written or printed notices in the county where said premises are situate, may sell said premises, or any part thereof, and all right and equity of redemption of the said Mary L. Burpee and George W. Burpee, their heirs, executors, administrators or assigns therein, at public vendue, to the highest bidder, for cash, upon the premises, at the time appointed in such advertisement, and to make, execute, and deliver to the purchaser deeds for the conveyance in fee of the premises sold, and apply the proceeds of such sale to the expenses of sale, and to the payment of said note, rendering overplus, if any, to the said mortgagors.

And whereas, default has been made in the payment of all the interest due on said note, and the undersigned, Oscar W. Cady, having elected to declare, and has declared, the whole of said note, both principal and interest, due and payable, by reason of such default.

Now, therefore, public notice is hereby given, that, in pursuance of the provisions of said mortgage, on Thursday, the 20th day of January, 1876, at the hour of ten o'clock A. M. of said day, upon the premises aforesaid, at Irving Park, in said Cook county, Illinois, I shall sell for cash, at public vendue, to the highest bidder, the premises in said mortgage described, and all the right and equity of redemption of the said Mary L. Burpee and George W. Burpee, their heirs, executors and administrators or assigns therein.

Dated December 8th, 1875.

12-16 OSCAR W. CADY, Mortgagee.

G. GILBT. GIBONS,
Attorney, 49 Major Block.

ADMINISTRATOR'S SALE.—NOTICE IS HEREBY given, that the undersigned, administrator of the estate of Justus F. Harwood, deceased, in pursuance of an order of the County court of the county of Cook, in the State of Illinois, in a certain cause in said court pending, wherein the undersigned, as such administrator, is petitioner, and Elvira W. Harwood, Martha Crafts, Judith M. Graves, Fordice M. Harwood, Theron D. Harwood, and Norman V. Elithorpe, are defendants, will, on Wednesday the eleventh day of January, A. D. 1876, at the hour of one o'clock, P. M. of said day, sell, upon the premises, the following described real estate, to wit:

Lot fourteen (14), in block one (1), in Flournoy's resubdivision of Jones & Patrick's addition to Chicago, being a subdivision of that part of the east half of the southwest quarter, and of the west one and thirty seven one-hundredths (1 37-100) chains of the southeast quarter of section eighteen (18), in township thirty-nine (39), north of range fourteen (14), east of the third principal meridian, lying northwesterly of the Southwestern Plank Road, and being in said county of Cook, and State of Illinois, to the highest bidder, for one-fifth in cash and the balance of purchase price upon a credit of twelve months, the purchaser to give his note bearing ten per cent. interest per annum, with good personal security and a mortgage upon the premises, for the payment of such balance.

DICKSON E. GRAVES,
Administrator of the Estate of Justus F. Harwood, deceased.

G. GILBT. GIBONS, Atty. 12 15p

ESTATE OF JOHN M. COUNTER, DECEASED. Notice is hereby given to all persons having claims and demands against the estate of John M. Counter, deceased, to present the same for adjudication and settlement at a regular term of the County court of Cook county, to be holden at the court house, in the city of Chicago, on the third Monday of February, A. D. 1876, being the 21st day thereof.

Chicago, December 10th, A. D. 1875.

ANTON NEUMAN, Administrator.

G. G. GIBONS, Atty. 12-17a

ESTATE OF JAMES A. HAHN, DECEASED.—Notice is hereby given to all persons having claims and demands against the estate of James A. Hahn, deceased, to present the same for adjudication and settlement at a regular term of the County court of Cook county, to be holden at the court house, in the city of Chicago, on the third Monday of February, A. D. 1876, being the 21st day thereof.

Chicago, Dec. 10th, A. D. 1875.

E. P. HALL and
H. S. HAHN, Executors.

G. G. GIBSON, Atty. 12-17a

EDWIN F. BAYLEY,
Attorney.

COMMISSIONER'S AND TRUSTEE'S SALE.—State of Illinois, county of Cook, ss. In the Superior court of Cook county. John A. Tyrrell and George Scoville, complainants, vs. Robert C. Thompson, Emily Thompson, Margaret M. Turner, in her own right and as administratrix of the estate of Thomas J. Turner, deceased; Thomas E. Turner, Louisa Turner, Jane S. Hair, Samuel G. Hair, Alida Putnam, James E. Putnam, Jane Armstrong, and Thomas C. Moore, defendants.—In chancery.

Notice is hereby given, that by virtue of a decree of sale made in the above entitled cause at the November term of the Superior court of Cook county, the undersigned, as trustee named in the deed of trust described in the bill of complaint filed in said cause, and as special commissioner appointed by said decree, will, at one o'clock in the afternoon, on the fourth day of January, A. D. 1876, on the premises in said decree and hereinafter described, offer for sale and sell at auction, to the highest bidder, for cash, sub-lot number two of William E. Mortimer and George Tapper's subdivision of lots five and six, and the west twenty feet of lot four, in J. B Walker's subdivision of the west half of block sixty-two, in the Canal Trustees' subdivision of section seven, township thirty-nine, north range fourteen, east of the third principal meridian, situate in the city of Chicago, county of Cook and State of Illinois.

Chicago, Dec. 11, 1875.

GEORGE SCOVILLE,
Trustee and Special Commissioner.

EDWIN F. BAYLEY, Complts. Solr. 12-15

ESTATE OF PHILIP B. AYER, DECEASED.—Notice is hereby given to all persons having claims and demands against the estate of Philip B. Ayer, deceased, to present the same for adjudication and settlement at a regular term of the County court of Cook county, to be holden at the court house, in the city of Chicago, on the third Monday of February, A. D. 1876, being the 21st day thereof.

Chicago, December 7th, A.D. 1875.

JOHN M. AYER and
EDWARD E. AYER, Executors.

ASAY & HIRST, Attys. 12-17a

CHICAGO LEGAL NEWS.

SATURDAY, DECEMBER 25, 1875.

The Courts.

UNITED STATES SUPREME COURT.

No. 27.—OCTOBER TERM, 1875.

THOMAS J. SEMMES, claimant of six lots of ground, plaintiff in error, *v.* THE UNITED STATES.

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

CONFISCATION—OPENING DECREE—RIGHTS OF PURCHASER—EFFECT OF PARDON ON PROCEEDING — PRESIDENT'S PROCLAMATION.

1. POWER TO AMEND.—That the alleged preliminary defect is one of form, and that the power to amend all process returnable to the Circuit Court is vested in that court as fully as it is in the Supreme Court.

2. REVERSING DECREE.—That the decree of the Circuit Court ought not to be reversed for a defect of form in the process, which is amendable by the express words of an act of Congress.

3. EFFECT OF AMNESTY PROCLAMATION.—That it is not correct to suppose legal proceedings against the property of the respondent were dismissed by the amnesty proclamation, or that the amnesty proclamation provided for the restoration of all rights of property to persons engaged in the rebellion; on the contrary the proclamation contains the express exception as "to property with regard to slaves," and "in cases of legal proceedings under the laws of the United States."

4. THE DECREE IN THIS CASE.—That the decree in this case was entered before the amnesty proclamation, and was not affected by it.

5. JURISDICTION.—That complete jurisdiction of this cause was vested in the Circuit Court by virtue of the writ of error, and the Circuit Court having reversed the second decree of the District Court, might proceed to pass such decree as should have been passed by the subordinate court, and if a decree confirming the sale was necessary, it was competent for the Circuit Court to pass such a decree.

6. PROCEEDINGS UNDER ACT — PARDON —That such proceedings under the confiscation act in question are justified as an exercise of belligerent rights against a public enemy, and are not in their nature a punishment for treason, consequently confiscation being a proceeding distinct from and independent of the treasonable guilt of the owner of the property confiscated, pardon for treason will not restore rights to property previously condemned and sold in the exercise of belligerent rights as against a purchaser in good faith and for value.—[ED. LEGAL NEWS.]

Mr. Justice CLIFFORD delivered the opinion of the court.

Proceedings *in rem* were instituted in the District Court, on the seventh of August, 1863, under the confiscation act of the seventeenth of July in the same year, against certain real property of the respondent, which proceedings resulted, on the fifth of April, 1865, in the condemnation of the property described in the libel. On the eleventh of the same month a writ of *venditioni exponas* was issued, commanding the marshal to sell the property, on the eighteenth of the same month; but the marshal did not sell the same on that day, for the reason, as appears by his return, that the best price bid at the time and place of the sale did not amount to two-thirds of the appraised value of the property, and for the reason stated the marshal with drew the property from sale and again advertised the same for sale, as directed by the prior order of the court.

Two lots of land were embraced in the libel and the decree of condemnation which, in fact, were not the property of the respondent. Accordingly the true owner of the same in the meantime, to wit, on the second of May, 1865, filed a petition in the same court, setting forth his right to the two lots in question, and stating that they were improperly advertised for sale by the marshal, and prayed the court to open the decree to allow him to assert his title.

Consent in writing to that effect having been given by the district attorney, the court subsequently entered a decree opening the decree of condemnation *for the purpose* of enabling the petitioner to submit to the court his claim to those lots, as evidenced by the proofs on file. Pursuant thereto the court, on the thirty-first of May, in the same year, rendered judgment restoring those two lots to the intervenor, as claimed in his petition.

Such correction of the decree of condemnation having been made, the return of the marshal shows that he sold the residue of the lots condemned, in pursuance of the second advertisement, to E. W. Burbank, for the amount specified in the record, and that he paid the money over to the clerk of the court.

On the fourth of March, 1868, the respondent having first suggested that the decree of condemnation had been opened and that a portion of the property libeled had never been condemned by any subsequent decree, moved the court to set aside the default against him, and for leave to file his claim and answer. Hearing was had on the motion, and the court ordered that the purchaser of the property should be made a party to the rule. Burbank, the purchaser, accordingly appeared and filed an exception to the rule, that his rights as purchaser could not be questioned in such a form of proceeding, and offered in evidence the deed of the marshal and the decree of condemnation, together with the writ of *venditioni exponas*. Both parties were again heard, and the court, on the fifteenth of April, in the same year, over ruled the exceptions of the purchaser and set aside the default of the respondent, and granted him leave to file his claim and answer.

Leave to that effect having been granted, the respondent filed his answer, alleging his ownership of the property, the insufficiency of the allegations contained in the libel, and denied that the president ever authorized the seizure of his property, and averred that he had been pardoned by the president, and that he was included in the general amnesty proclamation. Proofs were introduced, and the court, on the twenty-seventh of June following, entered a final decree, dismissing the libel and restoring the property to the respondent, upon the payment of all costs.

Proper steps were taken, in behalf of the United States, to sue out a writ of error, and the cause was by the United States removed into the circuit court, where the decree of the district court was in all things reversed, and a decree entered in favor of the United States that the decree of condemnation originally pronounced by the district court stand and remain in full force and effect, and that the sale made by virtue thereof do stand confirmed. Whereupon the respondent sued out a writ of error and removed the cause into this court.

Certain formal errors are assigned as follows, which will first be considered:

1. That the writ of error from the Circuit Court to the District Court was made returnable on the first Monday of December, instead of the first Monday in November, as it should have been; and because the writ of error was not returnable in accordance with the order allowing the same, nor according to the citation.

2. Errors affecting the merits are also assigned, as follows: (1) That the President had, by his proclamation of amnesty, dismissed all proceedings against any person or his property, engaged, or in any manner implicated, in the rebel lion. (2) That the original decree having been opened the property of the respondent could not be sold at all, as there was no subsisting decree of condemnation. (3) That the sale to the purchaser was null because it was not made on the day specified in the writ of *venditioni exponas*. (4) That the circuit court had no authority to confirm the sale to the purchaser. (5) That the special pardon as well as the amnesty proclamation entitle the respondent to a restoration of his property in case the sale by the marshal is null and void.

1. Evidently the alleged preliminary defect is one of form, and it is equally clear that the power to amend all process returnable to the circuit court is vested in that court as fully as it is in the supreme court, and the express provision is that the supreme court may allow an amendment of a writ of error when there is a mistake in the title of the writ or a seal to the writ is wanting, or when the writ is returnable on a day other than the day of the commencement of the term next ensuing; and by the true construction of the provision upon the subject the same power of amendment is vested in the circuit and district courts in all cases where the process is returnable in those respective courts. (17 Stats. at Large, 197; Hampton *v.* Rouse, 15 Wall., 686.)

Grave doubts are also entertained whether the supposed error would avail the respondent, even if no such act of Congress had been passed, as it appears that the copy of the writ lodged with the clerk of the district court was cor rect, and that the transcript of the record of the case was actually made out, returned, and filed in the circuit court before the commencement of the term of the circuit court next ensuing. Such being the fact the better opinion is that the supposed defect is now wholly immaterial.

Suppose, however, it is otherwise, still the court here is of the opinion that the decree of the circuit court ought not to be reversed for a defect of form in the process which is amendable by the express words of an act of Congress, unless it appears that the alleged defect may have injured the complaining party or that he would have been prejudiced if the defect had been amended.

2. Nor is it correct to suppose that legal proceedings against the property of the respondent were dismissed by the amnesty proclamation, or that the amnesty proclamation provided for the restoration of all rights of property to persons engaged in the rebellion. On the contrary, the proclamation referred to contains the express exception "as to property with regard to slaves" and "in cases of legal proceedings under the laws of the United States." (15 Stats. at Large, 700.)

Suffice it to remark that a decree of condemnation in due form of law was entered in this case nearly two years and a half before the amnesty proclamation was issued, which shows to a demonstration that the property in controversy in this case falls within the exception contained in that proclamation, which is all that need be said upon that subject.

3. Sufficient appears in the record to show that the decree was never opened except for the special purpose of allowing the true owner of the two specified lots to file his claim and answer to that part of the libel, as authorized in the written stipulation signed by the district attorney. Argument to show that the true owner of those lots, without such consent in writtng, would have been remediless, is unnecessary, and it is equally certain that the court could not open the decree three years after it was entered for any other purpose than that specified in the written stipulation, and the record shows that it never was attempted to be opened for any other purpose. Viewed in the light of the actual facts disclosed in the record, the assignment of error in that regard is utterly destitute of merit.

4. Properties condemned as forfeited to the United States under the aforesaid act of Congress become the property of the United States from the date of the decree of condemnation. (12 Stat. at Large, 591, sec. 7.)

Judgment of forfeiture was rendered in this case on the fifth of April, 1865, and the land in question became from that date the property of the United States, and it may well be contended that from that time it could not concern the respondent whether the proceedings of the marshal in selling the same were regular or irregular, as the title to the land was lost to him when it became vested in the United States. He now contends that the sale is null, because it was not made on the day named in the writ of *venditioni exponas*, to which the United States make answer that he cannot be heard to raise that question, as his title was divested by the decree of condemnation; but it is not necessary to rest the decision upon that ground, as it is well-settled law that the marshal in the exercise of a sound discretion, may adjourn the sale in such a case to another day, and the court is of the opinion that the circumntances disclosed in the record were of a character to fully justify the marshal in the course which he pursued. (Blossom *v.* Railroad, 3 Wall, 209; Collier *v.* Whipple, 13 Wend., 229; Requa *v.* Rea, 2 Paige, 339.)

5. Beyond doubt the original decree of the district court was eomplete and correct, and it is doubtless true that the decree of the circuit court reversing the second decree of the district court and adjudging that the first decree of the district court should stand and remain in full force and effect would have been sufficient without any decree confirming the sale by the marshal, but even if the decree confirming the sale be regarded as an act of supererogation, it cannot render invalid what would have been valid without it.

Complete jurisdiction of the cause was vested in the circuit court by virtue of the writ of error, and the circuit court having reversed the second decree of the district court, might "proceed to pass such decree as should have been passed" by the subordinate court, and it follows that if a decree confirming the sale was necessary it was entirely competent for the circuit court to pass such a decree. (1 Stat. at Large, 85.)

6. Such proceedings under the confiscation act in question are justified as an exercise of belligerent rights against a public enemy, and are not in their nature a punishment for treason. Consequently, confiscation being a proceeding distinct from, and independent of the treasonable guilt of the owner of the property confiscated, pardon for treason will not restore rights to property previously condemned and sold in the exercise of belligerent rights, as against a purchaser in good faith and for value. (Miller *v.* U. S., 11 Wall., 267; Confiscation Cas., 20 Id., 92; Gay's Gold, 13 Id., 351.)

By the seizure of the property the district court acquired jurisdiction to pass the decree of condemnation. All of the proceedings prior to and in the sale of the land were regular and the assumption of power by the district court, nearly three years subsequently, to restore the land, was wholly unauthorized and was clearly error. Nor did the opening of the decree as to the two lots, not owned by the respondent, afford any justification for the action of the court in restoring the residue of the property, as it is settled law that a judgment may be good in part and bad in part—good to the extent it is authorized by law and bad for the residue. (Bigelow *v.* Forest, 9 Wall., 339; Day *v.* Micou, 18 Id., 156; Ex parte Lange, 18 Id., 163.)

Much discussion of the special pardon is unnecessary, as it contained the provision that the respondent should not "by virtue thereof" claim any property or the proceeds of any property that had been sold by the order, judgment, or decree of a court under the confiscation laws of the United States. Authorities to show that a pardon may be special in its character or subject to conditions and exceptions are quite unnecessary, as they are very numerous and are all one way.

Decree of the circuit court is affirmed.

UNITED STATES SUPREME COURT.

No. 33—OCTOBER TERM, 1875.

WILLIAM H. SCUDDER, plaintiff in error, *v.* THE UNION NATIONAL BANK, of Chicago.

In error to the Circuit Court of the United States for the Northern District of Illinois.

ACCEPTANCE OF BILL BY PAROL — WHAT LAW GOVERNS AS TO ACCEPTANCE—WHAT AS TO PAYMENT.

1. MATTERS BEARING UPON EXECUTION.—That matters bearing upon the execution, the interpretation and validity of a contract, are determined by the law of the place where the contract is made.

2. MATTERS CONNECTED WITH ITS PERFORMANCE. That matters connected with the performance of a contract are regulated by the law prevailing at the place of performance.

3. MATTERS RESPECTING THE REMEDY.—That matters respecting the remedy, such as the bringing of suits, admissibility of evidence, statutes of limitation, depend upon the law of the place where the suit is brought.

4. THE LAW IN ILLINOIS.—That there is no statute of that State requiring an acceptance of a bill of exchange to be in writing, or that prohibits a parol promise to accept a bill of exchange; and its Supreme Court hold that a parol promise to accept a bill is an acceptance thereof.

5. CONTRACT TO ACCEPT IN THIS CASE. — That the contract to accept in this case was not only made in Illinois, but the bill was then and there actually accepted in Illinois, as perfectly as if Mr. Scudder had written an acceptance across its face and signed thereto the name of his firm. The contract to accept the bill was not to be performed in Missouri. It had already by the promise been performed in Illinois. The contract to pay was to be performed in Missouri, but that was a different contract from that of acceptance. —[ED. LEGAL NEWS.]

Mr. Justice HUNT delivered the opinion of the Court.

It is not necessary to examine the question whether a denial of the motion to set aside the summons can be presented as a ground of error on this hearing. The facts are so clearly against the motion that the question does not arise.

Nor does it become necessary to examine the question of pleading, which is so elaborately spread out in the record. The only serious question in the case is presented upon the objection to the admission of evidence, and to the charge of the judge.

Upon the merits, the case is this: The plaintiff below sought to recover from the firm of Henry Ames & Co., of St. Louis, Missouri, the amount of a bill of exchange, of which the following is a copy, viz:

"$8, 125.00. CHICAGO, *July* 7, 1871.

"Pay to the order of Union National Bank eight thousand one-hundred and

twenty-five dollars, value received, and charge it to the account of

LELAND & HARBACH.

"To Messrs. Henry Ames & Co., St. Louis, Mo."

By the direction of Ames & Co., Leland & Harbach had bought for them and, on the 7th day of July, 1871, shipped to them at St. Louis 500 barrels of pork, and gave their check on the Union bank to Hancock, the seller of the same, for $8,000.

Leland & Harbach then drew the bill in question and sent the same by their clerk to the Union bank (the plaintiff below) to be placed to their credit. The bank declined to receive the bill unless accompanied by the bill of lading or other security. The clerk returned and reported accordingly to Leland & Harbach. One of the firm then directed the clerk to return to the bank and say that Mr. Scudder, one of the firm of Ames & Co. (the drawees), was then in Chicago and had authorized the drawing of the draft; that it was drawn against 500 barrels of pork that day bought by Leland & Harbach for them and duly shipped to them. The clerk returned to the bank and made this statement to its vice-president, who thereupon, on the faith of the statement that the bill was authorized by the defendants, discounted the same and the proceeds were placed to the credit of Leland & Harbach. Out of the proceeds the check given to Hancock for the pork was paid by the bank.

The direction to inform the bank that Mr. Scudder was in Chicago and had authorized the drawing of the draft, was made in the presence and in the hearing of Scudder, and without objection by him.

The point was raised in various forms upon the admission of evidence, and by the charge of the judge, whether, upon this state of facts, the firm of Ames & Co., the defendants, were liable to the bank for the amount of the bill. The jury, under the charge of the judge, held them to be liable, and it is from the judgment entered upon that verdict that the present writ of error is brought.

The question is discussed in the appellant's brief, and properly, as if the direction to the clerk had been given by Scudder in person. The jury were authorized to consider the direction in his name, in his presence and hearing, without objection by him, as made by himself.

The objection relied on is that the transaction amounted at most to a parol promise to accept a bill of exchange then in existence. It is insisted that such a promise does not bind the defendants.

The suit to recover upon the alleged acceptance, or upon the refusal to accept, being in the State of Illinois, and the contract having been made in that State, the judgment is to be given according to the law of that State. The law of the expected place of performance, should there be a difference, yields to the *lex fori* and the *lex loci contractus*.

In Wheaton on Conflict of Laws, § 401 p, the rule is thus laid down: "Obligations, in respect to the mode of their solemnization, are subject to the rule *locus regit actum;* in respect to their interpretation, to the *lex loci contractus;* in respect to the mode of their performance, to the law of the place of their performance. But the *lex fori* determines when and how such laws, when foreign, are to be adopted, and in all cases not specified above supplies the applicatory law."—(Miller *v.* Tiffany, 1 Wall., 310; Chapman *v.* Robertson, 6 Paige, 634; Andrews *v.* Pond, 13 Peters, 78; Lanusse *v.* Baker, 3 Wheat, 147; Adams *v.* Robertson, 37 Ill. R., 59; Ferguson *v.* Fuffe, 8 C. & F., 121; Bain *v.* Whitebarre R. C., 3 H. L. Cas., 1; Scott, *v.* Pilkington, 15 Abb. P. R., 280; Story Conflict Law, 203; 10 Wheaton, 383.)

The rule is often laid down that the law of the place of performance governs the contract.

Mr. Parsons, in his treatise on notes and bills, uses this language: "If a note or bill be made payable in a particular place, it is to be treated as if made there, without reference to the place at which it is written or signed or dated."—(p. 324.)

For the purposes of payment, and the incidents of payment, this is a sound proposition. Thus, the bill in question is directed to parties residing in St. Louis, Mo., and contains no statement whether it is payable on time or at sight. It is in law a sight draft. Whether a sight draft is payable immediately upon presentation, or whether days of grace are allowed, and to what extent, is differently held in different States. The law of Missouri, where this draft is payable, determines that question in the present instance.

The time, manner, and circumstances of presentation for acceptance or protest, the rate of interest when this is not specified in the bill, (Young *v.* Harris, 14 B. Munro, 556; Parry *v.* Ainsworth, 22 Barb., 118,) are points connected with the payment of the bill, and are also instances to illustrate the meaning of the rule, that the place of performance governs the bill.

The same author, however, lays down the rule that the place of making the contract governs as to the formalities necessary to the validity of the contract. (p. 317). Thus, whether a contract shall be in writing, or may be made by parol, is a formality to be determined by the law of the place where it is made. If valid there the contract is binding, although the law of the place of performance may require the contract to be in writing. (Dacosta *v.* Hatch, 4 Zabriskie R., 319).

So when a note was indorsed in New York, although drawn and made payable in France, the indorsee may recover against the payee and indorser upon a failure to accept, although by the laws of France such suit cannot be maintained until after default in payment. (Aymar *v.* Shelden, 12 Wend., 439).

So if a note, payable in New York, be given in the State of Illinois for money there lent, reserving ten per cent. interest, which is legal in that State, the note is valid although but seven per cent. interest is allowed by the laws of the former State. (Miller *v.* Tiffany, 1 Wall., 310; Depeau *v.* Humphrey, 20 Martin, 1; Chapman *v.* Robertson, 6 Paige, 634; Andrews *v.* Pond, 13 Peters R., 65).

Matters bearing upon the execution, the interpretation, and the validity of a contract, are determined by the law of the place where the contract is made. Matters connected with its performance are regulated by the law prevailing at the place of performance. Matters respecting the remedy, such as the bringing of suits, admissibility of evidence, statutes of limitation, depend upon the law of the place where the suit is brought.

A careful examination of the well-considered decisions of this country and of England will sustain these positions.

There is no statute of the State of Illinois that requires an acceptance of a bill of exchange to be in writing, or that prohibits a parol promise to accept a bill of exchange. On the contrary a parol acceptance and a parol promise to accept are valid in that State, and the decisions of its highest court hold that a parol promise to accept a bill is an acceptance thereof. If this be so, no question of jurisdiction or of conflict of laws arises. The contract to accept was not only made in Illinois, but the bill was then and there actually accepted in Illinois, as perfectly as if Mr. Scudder had written an acceptance across its face and signed thereto the name of his firm. The contract to accept the bill was not to be performed in Missouri. It had already by the promise been performed in Illinois. The contract to pay was, indeed, to be performed in Missouri, but that was a different contract from that of acceptance. (Nelson *v.* First Nat. Bk., 48 Ill., 39; Mason *v.* Dousey, 35 Ill., 424; Jones *v.* Bank, 34 Ill., 319.)

Unless forbidden by statute, it is the rule of law generally that a promise to accept an existing bill is an acceptance thereof, whether the promise be in writing or by parol. (Wynne *v.* Raikes, 5 East., 514; Bk. of Ireland *v.* Archer, 11 M. & W., 383; How *v.* Loring, 24 Pick., 254; Ward *v.* Allen, 2 Met., 53; Bk. *v.* Woodruff, 34 Vt. R., 92: Spalding *v.* Andrews, 12 Wright, 411; Williams *v.* Winans, 2 Green (N.J.), 339; Storer *v.* Logan, 9 Mass., 56; Byles on Bills, § 149; Barney *v.* Withington, 37 N. Y. R., 112; see the Illinois cases cited supra.)

Says Lord Ellenborough, in the first of these cases, "a promise to accept an existing bill is an acceptance. A promise to pay it, is also an acceptance. A promise, therefore, to do the one or the other, *i. e.*, to accept or certainly pay, cannot be less than an acceptance."

In Williams *v.* Winans, Ch. J. Hornblower says: "The first question is whether a parol acceptance of a bill will bind the acceptor, and of this there is at this day no room to doubt. The defendant was informed of the sale and that his son had drawn an order on him for $125, to which he answered it was all right; he afterwards found the interest partly paid and the evidence of payment indorsed upon it in the handwriting of the defendant. These circumstances were proper and legal evidence from which the jury might infer an acceptence."

It is a sound principle of morality, which is sustained by well-considered decisions, that one who promises another, either in writing or by parol, that he will accept a particular bill of exchange and thereby induces him to advance his money upon such bill, in reliance upon his promise, shall be held to make good his promise. The party advances his money upon an original promise, upon a valuable consideration, and the promissor is, upon principle, bound to carry out his undertaking. Whether it shall be held to be an acceptance, or whether he shall be subjected in damages for a breach of his promise to accept, or whether he shall be held to be estopped from impeaching his word, is a matter of form merely. The result in either event is to compel the promissor to pay the amount of the bill with interest. (Townley *v.* Sumdel, 2 Peters, 170; Boyce *v.* Edwards, 4 Ib., 111; Goodrich *v.* Gordon, 15 John. R., 6; Scott *v.* Pilkington, 15 Ab. P. R, 280; Ontario Bk. *v.* Worthington, 12 Wend., 593; Bissell *v.* Lewis, 4 Mich. R., 450; Williams *v.* Winans, 2 Green, 389.)

These principles settle the present case against the appellants.

It certainly does not aid their case that after assuring the bank, through the message of Leland & Harbach, that the draft was drawn against produce that day shipped to the drawees, and that it was drawn by the authority of the firm, (while in fact the produce was shipped to, and received and sold by them,) and after the bank in reliance upon this assurance discounted the bill, Mr. Scudder should at once have telegraphed his firm in St. Louis to delay payment of the draft, and by a subsequent telegram should have directed them not to pay it.

The judgment must be affirmed.

D. W. MIDDLETON,
C. S. C. U. S.

JOHN H. THOMPSON for plaintiff in error.

MELVILLE W. FULLER, for defendant in error.

U. S. DIST. COURT, D. OF MINN.

OPINION NOV., 1875.

In Re CRAMER, a bankrupt.

FRAUDULENT PREFERENCE.

Held, that although in case of actual fraud, a preferred creditor might prove for a moiety, he can do so only when he has fulfilled the requirements of section 5,084, and made a surrender of the advantage obtained by the preference. In this case there is no actual fraud, and if the claimants had surrendered their advantage before suit and perhaps before judgment, proof would have been allowed of their whole debt.—[ED. LEGAL NEWS.]

Kiefer & Heck, creditors of the bankrupt, made a settlement with him just previous to his bankruptcy, and received in full credit for their account certain merchandise and notes to the full value of their claim.

The assignee in bankruptcy demanded the property from Kiefer & Heck, and upon a refusal to deliver, commenced a suit against them, alleging a fraudulent conveyance and preference, contrary to the terms of the bankrupt act.

Upon a trial before a jury, the assignee recovered a judgment. Kiefer & Heck now seek to prove their claim before the register. Objection is made by the assignee, and the matter comes before the court for settlement.

J. B. & W. H. SANBORN, for claimant.
ROGERS & ROGERS, for assignee.

NELSON, J.—Section 5,021 of the revised statutes authorizes the recovery by the assignee of all property received by a person having reasonable cause to believe that a debtor was insolvent, and knowing that a fraud on the bankrupt act was intended.

Section 5,128 defines the fraudulent preferences forbidden by the act; and section 5,084 declares under what circumstances and when a creditor who has received a fraudulent preference may prove the claim on account of which the preference is made or given.

The latter section forbids proof of a claim on account of which a preference is given until the creditor first surrenders to the assignee all property or advantage received under such preference.

I think in the light of these sections, inasmuch as judgment has been entered in favor of the assignee, in the suit brought against Kiefer & Heck, and the fraudulent preference clearly established, they are debarred from proving their claim. The assignee has been compelled to seek the aid of the court to recover the advantage sought to be obtained by these creditors; they contested his right to recover, and being defeated have constructively made themselves a party to the fraud, and the *locus pœnitentiæ* has passed; the payment of the judgment is not a compliance with the terms of section 5,084.

Although in case of actual fraud a preferred creditor might prove for a moiety, he can do so only when he has fulfilled the requirements of section 5,084 and made a surrender of the advantage obtained by the preference. In this case there is no actual fraud, and if these claimants had surrendered their advantage before suit, and perhaps before judgment, proof would have been allowed of their whole debt.

The right of these creditors to prove a claim represented by a note for $76, is not seriously contested. The objection of the assignee is sustained except to that extent.

Ordered accordingly.

CIRCUIT COURT OF COOK CO., ILL.

OPINION DECEMBER, 1875.

INTERNATIONAL BANK *v.* SAMUEL J. WALKER.

USURY—EVIDENCE—PRODUCTION OF BOOKS—WHAT WILL EXCUSE FROM—PENALTY.

1. The complainant filed a bill to foreclose several trust deeds against the defendant, Walker, given to secure money loaned to him. Walker claimed that there was usury in the transactions, and asked to have the complainant produce its books to show that fact. This was resisted on the ground that if produced they would have a tendency to expose the bank to the liability of the penalty for usury, etc. *Held*, that the bank should not be compelled to produce its books, unless the defendant in some legal form should agree to waive the forfeiture for usury, and upon such an agreement being made, the complainants will be compelled to produce its books.

2. The objection that if the books were produced they could be used in evidence on a proceeding against the bank for a forfeiture of its charter considered.—[ED. LEGAL NEWS.]

Opinion by WILLIAMS, J.

The complainant having filed a bill to foreclose certain trust deeds against Samuel J. Walker, given to secure the indebtedness due to it for money loaned to Walker, and having made many parties claiming interests in the incumbered property, co-defendants with said Walker, these defendants have answered, setting up their respective defenses, and the defendant, Walker, has also filed a cross-bill for affirmative relief. Several other suits in reference to the subject matter of the litigation have, by the agreement of parties, been consolidated with the complainant's suit and the causes have been referred by stipulation to the master to take testimony with leave to either party to apply to the court for further directions. In the proceedings before the master, Mr. Lowenthal, president of the International Bank, was introduced as a witness on complainant's behalf, and upon his cross-examination it appeared that on the books of the bank an account had been kept with Walker in which discounts were entered; that upon the back of the negotiable paper discounted by the bank for Walker, were entries indicating extensions of such paper, and that the bank books contained entries of moneys paid at the time of making such extensions, and also in reference to the collaterals taken of Walker by the bank upon the making or extension of the loans. The witness having been previously served with a *subpœna duces tecum* was then requested upon the part of Walker and others to produce the bank books, which he declined to do for the reason that "if produced they would have a tendency to expose the International Bank as well as those claiming under the bank in these suits upon the notes of Samuel J. Walker, sold and transferred by the bank to them, to the penal liability of usury or forfeiture of the sum taken by them or contracted for with said Walker, and would have the tendency to subject said bank and said parties claiming under it to such penalty or forfeiture of usury, and would have a tendency to furnish evidence whereby the franchises and charter of said bank might be forfeited on account of such usury."

The question now to be determined is,

whether the excuse for the non-production of its books upon the part of the complainant, is a valid one in law.

The general rule in regard to the limitations of a discovery of evidence may be stated to be, that no discovery will be compelled in any case where such discovery would have a tendency to subject the party to punishment of any kind or to any extent, or to expose him to a forfeiture or penalty. And in the event of an answer having such a tendency, the witness may refuse to answer, not only as to the principal fact but as to every incidental fact which may form a link in the chain of evidence going to establish the criminal act or the forfeiture. Adams' Equity, 2, 3; Mitford's Equity Plead., 193 to 197; 2 Phillipps on Ev., 937, and other cases.

Story in his work upon equity pleadings, at section 575, and in subsequent sections, states the rule thus: "The defendant shall not be obliged to discover what *may* subject him to a penalty or forfeiture, and not what *must* only. This doctrine seems founded on the great principles of constitutional right. * * * It constituted one of the first objections to the court of Star Chamber, that in criminal informations it compelled the party accused to answer upon oath to the accusation; and thus in arbitrary times became an instrument of gross oppression and injustice. But the court of chancery has always steadily refused to compel any man to criminate himself, and by analogy to disclose any fact which will subject him to a penalty or forfeiture; and it has assisted in carrying into complete effect the benign maxim of the common law above alluded to. So that it is the just boast of Lord Hardwicke that the general rule, established with great justice and tenderness in the law of England, is fully recognized and acted on in courts of equity, that no person shall be obliged to discover what may tend to subject him to a penalty or punishment, or to that which is in the nature of a penalty or punishment. * * * The doctrine is not confined to cases where the question or answer has a direct tendency to criminate the defendant or to expose him to a penalty or forfeiture, but it goes further and protects him from answering any question which may form a link in the chain by which such a case is to be established."

No rule can be laid down as to the extent to which collateral questions may involve the objection that their answer tends to expose the party to a forfeiture or penalty. As said by Story, "in many cases the line of distinction may be very clear between the questions which are within the reach of the objection and those which are without it. But in others the line must be extremely obscure; and the rule to be applied must rest upon the exercise of a sound discretion under all the particular circumstances of the case before the court." Story on Pl., sec. 578.

Lord Eldon said: "I have looked into all the cases and I find the distinctions between questions supposed to have a tendency to criminate, and questions to which it is supposed answers may be given, as having no connection with the other questions, so very nice, that I can only say the strong inclination of my mind is to protect the party against answering any question, not only that has a direct tendency to criminate him but that forms one step towards it." Paxton *v.* Douglass, 19 Vesey, 228.

The Vice Chancellor in Green *v.* Weaver, 1 Sim., 426, said "that the rule of a court of equity is, that a man shall not be compelled to answer any facts which may tend to criminate him or subject him to penalties or forfeitures, is undeniable."

Neither does the rule recognize any difference "between the forfeiture of a thing vested and a disability to take a thing inflicted as a penalty. Nor is the protection limited to the party himself, but it extends to parties claiming under him, whether they are devisees or are purchasers, for they are entitled to the same privileges, and take the estate under the same circumstances." Story on Pl., sec. 583.

The statute of this State has provided, in the absence of any express agreement relating to interest, that it shall be six per cent.; but parties may contract in writing for 10 per cent. If a greater sum shall be taken than allowed by statute, the party contracting to receive such excess shall forfeit the excess, and be allowed to recover only the principal loaned.

Is the loss of interest a forfeiture or penalty within the meaning of the law?

The word "forfeit" is used in the statute as applicable to such loss.

Webster defines the verb forfeit thus: "to lose, or lose the right to, by some fault, offense or crime; to render one's self by misdeed liable to be deprived of; to alienate the right to possess by some neglect or crime; as to forfeit an estate by treason." Burrill, in his Law Dict. (Art. Forfeit) defines the verb forfeit thus: "to lose what belongs to one by some fault, misconduct or crime." "Forfeiture (he says) involves not only of loss by the delinquent party, but of transfer or surrender to some other, whether it be an individual or the State." He defines forfeiture to be "the loss of what belongs to one by some fault, misconduct or transgression of law." Penalty, when spoken of in the text books and opinions in connection with forfeiture as exempting a party from discovery, may be regarded as a synonym of the latter word. Forfeiture is one of the definitions given by Webster of the word penalty. That each refers to pecuniary in contradistinction from personal punishment is obvious from the connection.

The text books and reports generally assert, first, that no discovery can be compelled where it would have a tendency to subject the party to "punishment" (*i. e.* personal punishment) "or to a forfeiture or penalty" (*i. e.* pecuniary loss and punishment.)

As thus used, "forfeiture and penalty" both pre-suppose the existence of property or right in the thing lost, and that the loss is the fault of the person who suffers it. A person cannot be properly said to have lost that which was never his; in which he had no property and to which he had no right, and it would in no sense be pecuniary punishment to deprive one of what did not belong to him. It might perhaps be true that in a case where no illegal interest had been actually paid to and received by the lender, but where he had come into court to recover his principal and the stipulated but illegal interest as a gross sum, that he might be compelled by the production of his books, or in some other way, to show the usurious contract. If this might be done it would be for the reason that as one statute prescribes only the loss of interest upon a usurious contract, and leaves the principal intact, that the lender never had any right to any interest, and therefore could not properly be said to forfeit anything.

Interest not having been recoverable at common law, springing only out of express or implied contracts therefor, and every contract which is in defiance of law being void, it might be argued, as it has been in this case, that in a State where the statute prescribes only the loss of interest, it leaves the lender who seeks to collect a debt tainted with usury, with no contract whatever for interest. In such a case it might be plausibly insisted that the only contract for interest being an illegal and void contract, the lender never acquired any rights under it, and therefore had nothing to lose or to forfeit and might be compelled to make discovery.

Though I am not prepared to assert that such is the law, as applicable to a suit upon a usurious contract where no part of the usury has been paid, and have found no case which fully sustains such a position; yet the position can be sustained by a strong argument, and is in part supported by the cases of Austin *v.* Burgess, 36 Wis., 191, and Dill *v.* Ellicott, Taney's C. C. R., 233. But the case at bar does not present such a question, or presents it connected with other questions. The books of the International Bank show a series of transactions with Walker running through several years. Negotiable paper to the amount of hundreds of thousands of dollars has been discounted by the bank for Walker. Much of it was short paper and has been paid, and the particular transaction closed. Upon this and also upon the unpaid paper, it is claimed that a large amount of illegal interest has been actually paid by Walker and received by the bank, and it is for the reason that the books tend to show usury paid by Walker and received by the bank upon this paid and unpaid paper, that the bank refuses to produce them. A party paying usury may recover it from the person to whom it is paid in a suit for money had and received, but he can recover only the illegal interest he has paid. The lender is entitled to retain the principal and his legal interest. If, then, in the case at bar, the bank has received, upon the securities discounted by Walker, illegal interest, and that fact is shown by its books, it can not recover for the legal interest, even though it may have been paid by Walker and accepted by the bank; but the whole amount paid must be applied upon the principal sum. To the extent, therefore, of the legal interest there would be a forfeiture by the bank, in case its books disclose the receipt by it of illegal interest It would be a loss, by the fault of the bank, of what it has in its possession, of what is rightfully its, of what it could not be deprived, in case a suit was instituted against it by Walker. Such a loss comes within all the definitions of forfeiture and penalty, either by lexicographers or law writers.

If a lender comes into court to recover upon a usurious contract, the court will not aid him to violate the law, and if the defendant establishes, by competent evidence, the fact of usury, the court will give the plaintiff or complainant what the law has declared he shall have, and no more. On the other hand, if the borrower comes into court asking relief by discovery from the defendant (the lender), the court will require him to tender or offer to the lender, before compelling a discovery, the principal and legal interest, on the ground that he who seeks equity must do equity.

The rule is the same where the defendant having set up the defense of usury, seeks to establish that defense by testimony extorted from the other party. If he can establish his defense of usury without the complainant's evidence, he can have the full benefit of the law; if not, he must do equity before he demands equity. These principles are settled by the following cases and many others: Livingston *v.* Harris et al., 3rd Paige, 528. In this case the chancellor says: "In accordance with these two principles, it had become the settled law of the court of chancery, previous to the adoption of the Rev. Stat., that a defendant was not bound to answer a bill seeking discovery as to the usurious transactions, where a disclosure of the usury would or might subject him to a forfeiture or loss of the whole or any part of the money actually lent *or the legal interest thereon.*"

Blockway *v.* Copp, 3 Paige, 543; Rogers *v.* Rathbun, 1 John. Chy., 367; 1st Story's Equity Juris., sec. 301, 302; 2 Jones, Equity (N.C.), 62; Masters et al. *v.* Plenty. In the case of Hogshead et al. *v.* Baylor, 16 Gratton, 99, an action was brought at law against the makers and indorsers of a promissory note, to which they pleaded *nil debet* and usury, and under the statute of Virginia, filed interogatories seeking to establish their defense. The parties seeking the evidence where defendants who had not come voluntarily but had been brought involuntarily into court, they desired to establish their defense by the plaintiff's evidence. In these respects that case and the case at bar are similar. The law of Virginia then in force made it a forfeiture of the interest and not of the principal to take usury. In that respect the law of Virginia and Illinois are identical. They only differ in that the lender was compelled to pay the costs of his action. Both statutes allowed him to recover the principal.

The court in that case held "that as long as the defendants in the court below insisted on their defense of usury the plaintiff in the action was not bound to answer the interrogatory, and so give evidence which on the plea of usury might invalidate the note." Pye *v.* Butterfield et al., 5 Best and Smith, 828.

This was an ejectment case, and the plaintiff sought to have the defendant answer interrogatories where the answers might subject him to a forfeiture of a lease. The chief justice, in delivering the opinion of the court, said: "But whether fettered or left free to exercise our judicial discretion, we ought to abide by the principle on which this branch of jurisprudence has been for centuries administered in courts of equity. It is clear from the decisions of those courts which have been cited, and the expressions used by eminent text-writers, that it is a fixed rule that no bill of discovery will be allowed when the answers may have the effect of forfeiting the estate. * * * Courts of equity have exercised no discretion when a case falls within the rule. The present case is within it, and therefore we ought not to allow the plaintiff to administer these interrogatories in violation of the principles so established."

Taylor, in his work on evidence, after stating the rule that answers having a *tendency* to expose the witness to a penalty or forfeiture of any nature whatever will not be compelled, states that the rule is of great antiquity and was even recognized by Jeffries when it told *against* the prisoner, and prevails in law and equity. He adds that numerous authorities might be cited which clearly establish that, if the fact about which the witness is interrogated form but *a single remote link* in the chain of testimony which *may* expose him to a penalty or forfeiture, he is not bound to answer. 2 Taylor on Ev., secs. 1308, 1309.

The rules applicable to oral testimony are equally applicable to the production of books and papers, even when a statute exists requiring such production. 2 Blatch. C. C. R., 301, Finch *v.* Rikeman. In this case the court denied the motion for the production of defendants' books, on the ground that their production would expose defendants to a penalty.

I know of no rule of law more firmly settled or more constantly and rigidly enforced by courts than the general rule that no party shall be obliged to give evidence, the tendency of which shall expose him to a penalty or forfeiture.

The rule may have been more rigidly enforced because of the disfavor with which English chancery and common law judges have for the last 200 years regarded the inquisitorial proceedings of the Star Chamber, but it is certain that it conforms to the spirit of the common law which protects the citizen from being forced to become his own accuser or to furnish evidence against himself. American courts have been as jealous of protecting the liberty of the citizen in this regard as the courts of England. I am aware that the present case is one in which, in consequence of the many conflicting interests of the parties to the several suits which have been consolidated; the application of the rule is attended with difficulties, but I see in this no reason why the rule should be ignored.

If Walker was sole defendant, he having set up in his answer the defense of usury, and also filed his cross-bill, the application of the rule to him would be easy. It may also be applied to the other parties litigant. It is for the parties to determine whether or not they can establish the defense of usury without the aid of the books of the bank. If they can, then the complainant can recover his principal and no more, and all payments of interest go to the extinguishment of the principal. If the parties must resort to the help of complainants' books to establish the usury, then the books can only be had by them upon the condition that such parties as are in a position to take advantage of the forfeiture of interest, waive such forfeiture, and such of them as are liable upon the indebtedness, offer to pay what, if any, principal may be found due upon a final hearing of this cause, from them to the International Bank, with legal interest upon the same. What that legal rate shall be, whether six or ten per cent., it is not necessary now to determine. It has been earnestly urged in argument that as these books were necessary to establish the defense of Walker and the persons claiming under him, upon other points than that of usury, that they should be admitted notwithstanding they disclosed usury. But however necessary the evidence sought might be to the defendant, I have not been able, after a very thorough and exhaustive examination of the text books and reports, to find a single authority that will authorize the court to compel its production by any party who may be exposed thereby to a forfeiture or penalty.

The repugnance of courts to compelling any party to furnish evidence against himself which would expose him to punishment, forfeiture or penalty, has overridden every other consideration, and caused them to adhere invariably to the rule as above set forth. In the words of an English chief justice, before quoted: "Courts of equity have exercised no discretion when a case falls within the rule." I can have no doubt that the defendant, Walker, is within the rule, and all the other parties to the

record who claim under him, to whom the benefit of the forfeiture would ensue. And the bank can insist upon the right of having the forfeiture waived, even though it has parted with the negotiable papers upon which usury was paid. Story's Eq. Plead., 583; Woodworth *v.* Huntoon, 40 Ills., 138.

The second point upon which the production of the books was resisted was that the proof of usury would expose the bank to the action of quo warranto for the forfeiture of its franchises.

I have not been able carefully to examine the authorities cited upon this point, but I do not see how the books could furnish evidence in this suit which could be used against the bank upon a trial of a quo warranto. The testimony in this case could not be used in the quo warranto case. The books, in order to furnish evidence against the bank in the quo warranto case, would have to be again introduced in that case, and such introduction could not be compelled. Again, the fact that the production of evidence would expose one to a civil suit is no reason why its production should not be enforced, and a quo warranto is now regarded as a strictly civil proceeding, resorted to for the purpose of testing a civil right. High's Extraordinary Leg Rem., 435, sec. 603.

Besides, I have found no usury case where evidence in reference to the transaction was not compelled upon the party who was entitled to claim the forfeiture, agreeing to waive it. In this case, the complainant has offered to produce its books, notwithstanding the objection on the ground of being exposed to a Quo Warranto, provided it could receive the principal and legal interest. I therefore deem it unnecessary to go into a further examination of this question. In case of a waiver of the forfeiture by the parties interested in it, in some legal form, I shall compel the production of the books. In the absence of such waiver, I shall allow defendants to make out their defense by their own testimony, unaided by a compulsory discovery from complainant. There will be no more hardship in their case than has fallen to the lot of hundreds of litigants whose names are to be fonnd in our reports. The rule, though it often results in benefiting usurers and others, who have been guilty of illegal practices, was not made for them, but in furtherance of justice and in the promotion of personal liberty. If, like the statute of frauds, it sometimes fails to promote justice, such exceptional cases will not authorize courts to ignore the well established law.

ROSENTHAL & PENCE for plaintiff.

JEWETT & ADAMS, B. D. MAGRUDER, WM. T. BURGESS, and E. C. LARNED, for defendants.

THROUGH the kindness of J. M. HAMILL, of the Bellville bar, we have received the following opinion.

SUPREME COURT OF ILLINOIS.

OPINION FILED JUNE 4, 1875.

THE ST. L. & S. E. R. CO. *v.* BRITZ.

INJURIES TO SERVANT CAUSED BY THE NEGLIGENCE OF FELLOW-SERVANT—NEGLIGENCE—SPECIAL VERDICT—GENERAL FINDING.

1. This was an action on the case by appellee against appellant to recover for injuries received while employed as a laborer on one of appellant's construction trains. The train on which he was ran into a passenger train standing on the track, and appellee was either thrown from the car by the effect of the collision, or he jumped from it to avoid anticipated harm, and was injured. The appellee having obtained a judgment in his favor, it is reversed, because there was error in giving an instruction as well as because the general verdict is inconsistent and not reconcilable with the facts specially found by the jury.

2. SPECIAL FINDING—NEGLIGENCE OF FELLOW-SERVANT—If, as the special finding shows, the injury to appellee could not have occurred if the train had been running at a proper speed and under full control as it approached the station, the converse must be true that he received his injuries in consequence of the train not being run at a proper rate of speed and under full control, as it approached the station. How this could be, and yet the fellow-servants of appellee be without fault, is to the court incomprehensible; that for negligence in managing the engine or the brakes, appellee is not entitled to recover, there being no claim made or proof that appellant was guilty of negligence in selecting its employees to whom those duties were assigned.

3. RULE OF THIS COURT.—That it is the rule of this court that although the negligence of the defendant may have been the prime cause of the plaintiff's injury and his negligence is not slight, and that of the defendant gross, when compared with each other, he cannot recover.

4. EMPLOYEE—RISKS OF SITUATION.—That when an employee, after having an opportunity of becoming acquainted with the risks of his situation, accepts them, he cannot complain if he is subsequently injured by such exposure.—[ED. LEGAL NEWS.]

Opinion by SCHOLFIELD, J.

This was an action on the case by appellee against appellant for injuries received while employed as a laborer on one of appellant's construction trains. The train on which appellee was employed was used in hauling gravel, and appellee's principal work was that of a shoveler, in loading and unloading the cars. In the performance of this work it was necessary that he should ride on the train from the places of loading to those of unloading, and, while thus engaged, on the evening of the 3d of April, 1873, the train on which he was ran into a passenger train standing on the track at French Village, and appellee was either thrown from the car, by the effect of the collision, or he jumped from it to avoid anticipated harm, and thus received the injuries complained of.

The jury found, by their general verdict, that the defendant was guilty, and assessed appellee's damages at $250. They also found specially, in response to interrogatories propounded to them, as follows:

"1st. Was the plaintiff injured by the negligence of any of his fellow servants on the construction train, including the engine-driver or engineer? Answer. No.

2d. If the construction train had been running at a proper rate of speed, and under full control, as it approached the station, could the injury to the plaintiff have occurred? Answer. No.

3d. Does it appear, from the evidence, that the engine-driver or engineer was competent for that business? Answer. Yes."

The only questions necessary to be noticed arise upon those special findings, and the giving of an instruction at the request of appellee.

If, as the special finding shows, the injury to appellee would not have occurred if the train had been running at a proper rate of speed, and under full control, as it approached the station, the converse must be true—that he received his injuries in consequence of the train not being run at a proper rate of speed, and under full control, as it approached the station. How this could be, and yet the fellow servants of appellee be without fault, is, to us, incomprehensible. The engineer had charge of the engine, and there is no evidence that it was so defective in its construction, or so badly out of repair, that he could not control it, nor is there any pretense that it was controlled by any one else. It was the duty of the laborers on the train to assist in braking when required; and, although appellee denies that he was employed for that purpose, and it does not appear that he was ever specially called on to assist in braking, still the evidence shows that he was employed generally as a laborer on the train; that the running of the train, and the control and direction of its employees, were under one boss or conductor, and that it was the habits of the shovelers to assist in braking when required.

The engineer, brakemen, and shovelers were co-servants of appellant, engaged in the same branch of service, and bound by the commands of the same supervisor. This was settled in C. & A. R. R. Co. *v.* Keefe, 47 Ill., 108. The only difference in this respect between that and the present case is, there the principal employment of the laborers was handling railroad iron, while here it was shoveling gravel. In that case the laborer was injured through the negligence of the engineer in giving the proper signal before backing the train; and it was held that was one of the perils contemplated in his employment by the company. The court said:

"If his (the plaintiff's) duties attach him to the train as a part of its personal equipment, then his branch of service is not independent in any such sense as to exempt him from the general rule in regard to co-employees, in case he should be injured through the carelessness of the engineer." It was also said, in the same case: "In Horner *v.* I. C. R. R. Co., 15 Ill., 550; Ill. C. R. R. Co. *v.* Cox, 21st Ill., 20, and Moss *v.* Johnson, 22 ib., 633, this court, upon a full examination of the subject, and in conformity with the great current of authorities, held that one servant cannot recover against the common master for injuries resulting from the carelessness of a fellow servant, if the master has not due diligence in their selection." See, also, Chicago & Alton R. R Co. *v.* Murphy, 53 Ill., 496.

For negligence, then, in managing the engine or the brakes, appellee is not entitled to recover, there being no claim made or proved that appellant was guilty of negligence in selecting its employees to whom these duties belonged.

But it is claimed that appellant was negligent in not providing proper brakes for each of the cars, and the court, at the instance of appellee, instructed the jury upon this point as follows:

"The court instructs the jury that it is the duty of the railroad company, the defendant in this suit, when persons are carried upon its roads, to provide good and safe machinery, and keep the same in good order, while used in operating their road. And if, from the evidence, the jury believe that before and at the time of the accident complained of in the declaration, the defendant knew, or by reasonable diligence could have known, that its cars were not in proper order, that is, the brakes on the train of cars on which plaintiff was riding at the time of the accident, and that the injury to the plaintiff would not have occurred had said brakes been in proper order, then the jury must find for the plaintiff."

This instruction is entirely too broad and excludes from the jury the consideration of important evidence essential to the correct determination of the rights of the parties. There was evidence tending to show, but as to the weight of which we express no opinion, that plaintiff received his injuries solely in consequence of his carelessness in jumping from the train, contrary to the remonstrances of the conductor. It is familiar law in this court, that although the negligence of the defendant may have been the prime cause of the defendant's injury, yet if by the exercise of due care he might have avoided receiving the injury, and his negligence is not slight and that of the defendant gross, when compared with each other, he cannot recover. Yet this hypothesis, fairly presented to the jury by the evidence, is entirely excluded by this instruction, and it is made their duty to find for the plaintiff, however grossly negligent he may have been, upon the single hypothesis that the injury would not have occurred if the brakes had been in proper condition. This was a circumstance to be considered in determining the comparitive negligence of the parties, but not necessarily a controlling one, for many other hypothesis can be conceived without which plaintiff could not have received his injury, but which have nothing at all to do with the question of relative negligence, as, for instance, if the appellant had not had a railroad or had not had a construction train, or had not had it employed at the time and place it was, or had not employed appellee to work on it, he certainly could not have received that particular injury.

There was also evidence tending to show that appellee had been familiar with the defective condition of the brakes for some time; that he made no complaint to the officers of appellee on that account and freely continued to work and ride on the train with full knowledge of whatever peril was thereby occasioned. If this was true, then he cannot recover for any injury he may have received on account of such defective condition of the brakes, for the rule as stated by an eminent text writer is, "when an employee after having the oportunity of becoming acquainted with the risks of his situation accept them, he cannot complain if he is subsequently injured by such exposure. Wharton on negligence, § 214; see also Mass *v.* Johnson, *supra*; Jewell *v.* I. C. R. R. Co. 46 Ill., 99; Wright *v.* N. Y. Cent. R. R. Co., 25 N. Y., 564; Hayes *v.* The Western Trans. Co., 3 Cushing, 270. An instruction which assumes, as this does, to be in itself a complete statement of a case which, under the law, entitled the party to recover, must state fully all that need be proved, so that if there were no other evidence there could be no question as to the rights of the parties. The language of the instruction warranted the jury in laying aside all other instructions and considering the case upon it alone, and this they doubtless did.

For error in giving this instruction, as well as because the general verdict is inconsistent and not reconcilable with the facts specially found by the jury, the judgment is reversed and the cause remanded.

Reversed and remanded.

NOTES OF DECISIONS OF THE SUPREME COURT OF MICHIGAN.

OCTOBER TERM, 1875.

BY HENRY A. CHANEY, ATTORNEY AT LAW.

De Yoe v. *Jamison.*

Error to Allegan. Affirmed with costs. Opinion by COOLEY, J.

Where A neglects to make a payment by a day named, for goods taken from him under a judgment in replevin, and his adversary, B, seeks to collect it afterward, B thereby waives what right he may have had to a forfeiture of A's right to recover possession on making the payments.

Niles v. *Muzzy.*

Error to Berrien. Affirmed with costs. *Per curiam.*

The mayor or councilman of a municipality is not bound by his official position to give to the latter his professional services as a lawyer without charge.

Conrad v. *Long.*

Error to Wayne. Affirmed with costs. Opinion by CAMPBELL, J.

A stipulation in a will for the separation of husband and wife as a condition to the enjoyment of an estate, is void as against public policy.

A devise of an estate in remainder to a woman on condition of her ceasing to live with her husband, the property to go to another if she continues to live with him until her death, gives an estate clear of conditions. It provides for a forfeiture on breach of condition, but does not state a condition precedent.

An estate cannot vest and lapse from time to time according to circumstances.

Where a husband conveys his own title, and his wife's right of dower is not involved, the deed is good as against him, even though the certificate of acknowledgment does not conform to the law concerning deeds of married women.

An action of ejectment is defeated only by a conveyance of the legal title.

St. Johns v. *McFarlan.*

Appeal from Ionia. Affirmed with costs. Opinion by MARSTON, J.

Courts of chancery have no jurisdiction to restrain the threatened violation of a municipal ordinance unless the act amounts to a nuisance.

The erection of a wooden building within municipal fire limits is not of itself a nuisance.

Bird v. *Perkins.*

Error to Lenawee. Affirmed with costs. Opinion by COOLEY, J.

Defects in the proceedings under which a village government has been formed should be pointed out in a direct proceeding instituted on behalf of the State, and the State itself may be precluded from raising objections after the corporate government has been fairly established with general acquiescence. A private party can not collaterally question the assumption of municipal corporate powers which are not disputed by the State.

Where the resolution of the proper municipal board in appointing a marshal in place of one who has resigned, recites the resignation, and a person of the name of the one who is appointed signs the office bond, and begins to discharge his duties without opposition, these facts show his prima facie right to the office, even if the resignation of his predecessor is not proved.

An assessment roll is not made invalid by the omission of the dollar mark before the figures showing the valuation of property, when the meaning is plain; nor by an imperfect description of land which can be identified beyond question.

Where a new tax warrant is issued to a collecting officer after the old one has been extended and while it is still in force, the new one is nugatory. If either is valid, it is enough for his protection.

Process fair on its face is sufficient to protect the officer serving it against any illegalities but his own.

An officer who has levied on property is not necessarily a trespasser ab initio in keeping it a little longer than is necessary to giving notice and making sale. If the detention is lawful, the expense of it is a lawful charge; if not, the excess may be recovered in a proper action.

CHICAGO LEGAL NEWS.

Lex vincit.

MYRA BRADWELL, Editor.

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We call attention to the following opinions, reported at length in this issue:

Parol Acceptance—Law of Place of Acceptance—Law of Place of Payment.—The opinion of the Supreme Court of the United States, by Hunt, J., holding, in the absence of any statute to the contrary, that a parol acceptance, or a parol promise to accept a bill of exchange, is valid; that matters bearing upon the execution, the interpretation, and the validity of a contract are determined by the law of the place where the contract is made. Matters connected with its performance are regulated by the law prevailing at the place of performance. Matters respecting the remedy, such as the bringing of suits, admissibility of evidence, statutes of limitation, depend upon the law of the place where the suit is brought; that a careful examination of the well-considered decisions in this country and in England will sustain these positions.

Confiscation Proceedings—Amnesty Proclamation—Pardon.—The opinion of the Supreme Court of the United States, by Clifford, J., as to the validity of a confiscation proceeding commenced in 1863, and holding that such proceeding was not affected by the amnesty proclamation or the subsequent pardon of the owner of the property at the time it was condemned.

Fraudulent Preference.—The opinion of the United States District Court for the District of Minnesota, by Nelson, J., stating upon what conditions, in case of actual fraud, a preferred creditor will be allowed to prove his debt for a moiety.

Usury — Discovery — Production of Books.—The opinion of the Circuit Court of this county, by Williams, J., holding where a bank filed a bill to foreclose several trust deeds, and the defendant claimed that the books of the bank would show that the transactions were usurious and asked to have them produced in evidence, that the bank should not be compelled to produce its books unless the defendant would agree in some legal way to waive the penalty for usury. The questions involved in this case are important. Judge Williams has given them a very careful and thorough consideration.

Injuries to Servants Caused by the Negligence of Fellow Servants.—The opinion of the Supreme Court of this State, by Scholfield, J., as to the rule of law where one servant is injured by the negligence of a fellow servant, the duty of a corporation in selecting its servants, and the doctrine of comparative negligence.

Bank—Deposit—Confederate Money—Settlement.—The opinion of the Supreme Court of Tennessee, by Nicholson, C. J., where a depositor in a bank in Memphis, during the rebellion, received notice from the bank to come and withdraw his deposits, and went in accordance with such notice, and was compelled to take Confederate money or nothing and settled, receiving his balance in such funds. The question of the validity of such settlement is passed upon by the court.

Rates of Postage on Third-class Matter.—The opinion of the United States Circuit Court, at New York City, by Johnson, J., in a case brought against the postmaster of that city to compel him to send a book at the old rates, holding that a bill establishing rates of postage is not to be regarded as a bill for raising revenue within the meaning of the Constitution, and that the bill increasing the rates of postage on third-class matter was constitutionally passed.

JUDGE DICKEY.

The Honorable Theophilus L. Dickey was on Tuesday elected judge of the Supreme Court of this State, for the seventh judicial district, to fill the vacancy occasioned by the resignation of Judge McAllister. Judge Dickey was born on the 2d of October, 1811; his father was the Rev. James H. Dickey, a presbyterian minister of the old school. The judge graduated at the Miami University, at Oxford, Ohio, in 1831. He was married in 1831, when but twenty years of age, to Juliet Evans, the daughter of an extensive land-owner. The judge, for about three years after his marriage, was a successful school-teacher. He is one of the oldest settlers of the State, having moved to Macomb, McDonough county in the winter of 1834-35. Here he met Cyrus Walker, an able lawyer, who persuaded him to study law. He was admitted to the bar of this State in 1835, and practiced law in Macomb for a year and a half. It is worthy of remark that his old law preceptor, Cyrus Walker, died last Saturday, at the age of 85, only four days before the elevation of his former student to the Supreme Bench. It requires no words of ours to tell the Illinois bar who Judge Dickey is. He has been one of them for over forty years; he has in that time held many positions of trust both civil and military, all of which he has filled with marked ability, and performed their duties with unflinching honesty. No taint rests upon his name. In 1836 he removed to Rushville and practiced law there for three years. In 1839 he settled in Ottawa, and for a time practiced with Lorenzo Leland. In 1846, at the commencement of the Mexican war, he organized a company of which he was appointed captain. The company was attached to the first regiment of Illinois volunteers. The judge having returned from the Mexican war, resumed his practice and was elected judge, in 1848, of the Circuit Court then comprising twelve counties. At the end of four years he resigned the position of judge and resumed his practice. In 1854 he moved to Chicago and practiced law here for four years. He then returned to Ottawa and practiced law with Gen. W. H. L. Wallace and his son Cyrus Dickey, until the war broke out in 1861. Soon after the battle of Bull Run, Judge Dickey raised a regiment of cavalry, got authority to appoint all his own officers, and in less than forty days had his regiment of 1,200 in the field, ready for service. He served in the army with distinction until 1863, when, his health failing, he resigned, returned to Ottawa, and resumed the practice of the law with John B. Rice as a partner. In 1866 he was the Democratic candidate for Congress for the State at large. He was appointed Assistant Attorney General of the United States in 1868, and held that position for a year and a half, when he resigned and went to Florida. Returning he practiced law for three years in Ottawa. In December, 1873, he again moved to Chicago, and practiced law with Hon. Barney G. Caulfield, until 1874, when he was appointed Corporation Counsel by Mayor Colvin, which position he resigns to accept that of Supreme Judge, to which he has just been elected. Judge Dickey is a polite, agreeable gentleman, and an able lawyer. He has filled the office of Circuit Judge, Assistant Attorney General of the United States, Corporation Counsel, and of Captain and Colonel in two wars, with ability and to the entire satisfaction of the public, and we predict that he will make an able, efficient and popular judge of the Supreme Court.

Recent Publications.

Reports of Cases Argued and Determined in the Supreme Judicial Court of New Hampshire. John M. Shirley, State Reporter. Volume LIV. Concord: Published by Josiah B. Sanborn. 1875. Sold by E. B. Myers, Law Bookseller, Chicago.

The judges of the Supreme Court of New Hampshire are experienced and able jurists, and as a consequence their opinions are exhaustive and of general interest to the American bar. In fact we know of no court that bestows more labor upon its opinions or cites more authorities. We have upon former occasions remarked that its opinions were in many cases too long. In this volume we see slight evidences of reform in this respect. Mr. Shirley very justly takes rank among the first of American reporters. We hope the printer may display a little more taste and exercise more care in the forthcoming volumes. Any lawyer of general practice possessing the means may very profitably add the New Hampshire reports to his library.

Reports of Cases Argued and Determined in the Supreme Court of the State of Kansas. By W. C. Webb, Reporter. Vol. XIII. Containing cases decided at the January and July terms, 1874. Topeka, Kansas. George W. Martin: Kansas Publishing House. 1875.

The mechanical execution of this volume is exceedingly creditable to the young State of Kansas. In Comm'rs of Neosho Co. *v.* Stoddart, p. 20, it is held that neither the District Court, nor the sheriff, nor both together, have power, without the consent of the County Commissioners, to contract for the county, or to create an indebtedness against the county for matting placed, or to be placed, upon the floor of the court-room; that the County Commissioners alone possess such power, and they alone can create such indebtedness. In Edwards *v.* Crume, p. 348, it was held where a minor son who lives with his father, and is under the father's control, commits certain wrongful acts, but where the said acts have not been authorized by the father, are not done in his presence, have no connection with the father's business, are not ratified by the father, and from which the father receives no benefit, that the father was not liable in a civil action for damages for such wrongful acts. In Giltenan *v.* Lemert, p. 476, it is held that a party in the rightful possession of real estate, claiming title thereto, has such an interest therein, although his title may be ever so defective that he may maintain an action to quiet his title and possesssion as against any adverse claimant whose title is weaker than his, or who has no title at all. Orders for this volume should be addressed to D. Dickinson, State Librarian, Topeka, Kansas.

Married.

Davis—Swayne.—One of the most notable events that has transpired in legal circles for a long time was the marriage, on Wednesday evening last, of Miss Sallie Worthington Davis, daughter of our much esteemed and honored Judge, David Davis, of the Supreme Court of the United States, at his residence in Bloomington, to Mr. Henry Stuart Swayne, of Toledo, O., son of Judge Swayne, associate judge with the bride's father. At the hour appointed for the ceremony the spacious parlors were filled by the invited guests, many of whom were attired in costly toilets in the height of fashion.

Among the distinguished guests were Justice Swayne and wife, and three brothers of the groom: H. Osburne, General Freight Agent of the Toledo, Wabash & Western Railroad; George W. Melmine and family, of Toledo; the Hon. John Wentworth and his daughter Roxanna; the Hon. Wirt Dexter; the Hon. N. K. Fairbank; the Hon. T. Lyle Dickey; the Hon. H. W. Brown, clerk of the United States Court, Chicago, and lady; the Hon. John D. Stewart and lady; the Hon. John A. Jones, clerk of the United States Court, Springfield; Philo J. Beveridge and lady; Mrs. Parsons, of New York, daughter of Justice Swayne; the Hon. C. H. Moore and family; the Hon. John D. Bishop and lady; the Rev. John Maclean and lady, of Clinton; H. P. Tracy and lady, of Elmwood; Miss Fannie Scranton (daughter of the late J. D. Scranton), of Scranton, Pa.; Misses Fannie and Emma Betts, of Bloomington, cousins of the bride; the Hon. Jesse W. Fell, of Normal; the Hon. Adlan E. Stevenson, Congressman from the Bloomington District; the Hon. W. D. Griswald of the Ohio and Mississippi Railroad; D. D. Walker and lady, of St. Louis; Gen. Gridley, of Bloomington; William J. Bond and lady, of Chicago.

The wedding ceremony was performed by the Rev. Samuel B. Taggart, pastor of the First Presbyterian Church of Bloomington, assisted by the Rev. John McLean.

The presents were many and valuable. At the close of the reception the happy couple departed for a wedding tour through the South, including Washington. May the union of the children of these distinguished jurists be lasting and happy.

The Supreme Court of Illinois.—The January term of this court will commence at Springfield on Tuesday, January 4th. We understand the docket is large. The place of Judge McAllister, on the bench, will be filled by Judge Dickey. We have a large force of compositors, and are prepared to print briefs and abstracts for this term of the court with the greatest dispatch.

New Law Books.—We call attention to the advertisement of Callaghan & Co., on the last page of this issue, of new law books. We have examined the advance sheets of Cooley on Taxation as they passed through the press. The work is exhaustive and thorough. The text is fully equal to the learned author's work on Constitutional Limitations. The notes show an industry and thoroughness in the examination and citation of authorities seldom found in any law treatise.

JUSTICE'S TRANSCRIPT—JUDGMENT LIEN—APPEAL.

To the Editor LEGAL NEWS:

The opinion of the Circuit Court of Cook county, (ROGERS, J. presiding) in re Perkins *v.* Paul, 7 LEGAL NEWS, p. 79, is so important in its consequences that I may be pardoned for discussing it.

The motion before the court was to set aside the record of the transcript in the Circuit Court, upon the ground that the case had been appealed within the 20 days allowed by law. The court overruled the motion, because the filing of the transcript is a statutory right given to the judgment creditor to acquire an additional lien, and that the courts have no right to interfere with it; in fact recognizing the validity of the lien but reprobating the practice as "a little sharp." I purpose, with due deference to the judge, to show, first, that the recording of such a transcript does not establish a lien, and second, that the court has the power to quash the writ issued upon such transcript judgment by the circuit court, if not to vacate the record thereof. For the purpose of judging whether such a judgment is a lien, we must examine the different sections of "the justice act" *pari passu*. We find that—

1. Appeals within 20 days from the entry of judgment may be had except on judgment confessed.

2. When proper appeal bond is filed within that time, either before the justice or with the clerk of "the appellate court," all proceedings are "suspended."

3. No execution can issue in any civil case until after the expiration of 20 days from the date of judgment, unless oath is made to the belief that the debt will be lost unless execution shall issue immediately; but no sale can be had within the 20 days nor shall the execution deprive the party of the right to appeal.

4. Executions can only be levied on personal property and are returnable in 70 days.

5. The real property of a defendant not exempt from execution, shall be bound from the date of the filing of a transcript of the judgment in the clerk's office, "as provided in this act."

6. When it shall appear by the return of an execution, that the defendant has not personal property sufficient to satisfy the judgment and costs, *it shall be lawful for the justice to certify to the clerk of the Circuit Court a transcript which shall be filed by the clerk and the judgment shall thenceforward have all the effect of a judgment of said court and execution shall issue as in other cases.*

7. The transcripts shall be recorded by the clerk in a book and must contain a copy of the process, original and final, the return of the officer thereon, and a copy of the docket in the case, duly certified.

To argue that these several provisions, construed together, allow an execution to be *returned* within the 20 days, the filing of a transcript and a lien consequent thereon, will bring about the following absurd result: A. recovers a judgment; he "swears out" an immediate execution, and procures some constable to make a return (whether bona fide or otherwise does not matter) within 20 days, "that the defendant has not personal property sufficient to satisfy the judgment and costs within his county." A. brings his transcript to the clerk, who files it; the lien on real estate is secured, and execution issues from the circuit court to the sheriff of the county. The judgment thus recorded has *the effect of a judgment* of the Circuit Court, and the costs are increased by requiring six dollars to be paid to the clerk for filing the transcript. B. perfects his appeal within 20 days. The suit is tried *de novo*, and the appellant loses again; a judgment is entered against him and thus we have two judgments for the same cause of action; one by recording the transcript and the other after trial. But before the case is tried *de novo*, the debtor's property has been sold by the sheriff, new costs have been made, and if the case happens in Cook county, the time of redemption will have passed before the appellant can prove by a trial *de novo* that the appellee has no cause of action.

Then chancery will be sought as a remedy, and perhaps the property has passed into the hands of a third person who bought at the execution sale. Again, it is possible that upon appeal a judgment may be rendered against appellee upon a set-off; then there would be a judgment against each party.

Thus I might multiply the absurdities and wrongs by recital. And in the face of all this wrong, the court abdicates its power to restrain the execution or set aside the transcript-judgment. Whatever may be the power of the court in setting aside a judgment, which the court did not render, there can be no doubt of the power to restrain the sheriff, the officer of the court, from enforcing an execution issued upon a judgment which has "all the effect of a judgment of the Circuit Court."

It needs no citation of authorities to prove the doctrine that an execution in the hands of the sheriff may be stayed for good cause appearing to the court. The statute (Practice Act, sec. 64 Hurd's Rev., page 782) provides for such a practice even in vacation, until the further order of the court. When, after judgment in the circuit court, an appeal is perfected during the term, the court will grant an order to stay an execution already issued. Why not stay the execution upon a transcript-judgment, after an appeal is perfected from the judgment of the justice? But this is but a partial remedy, for the judgment still remains as a cloud, although the appealing party be successful upon the trial, for there is no statutory provision authorizing the clerk to satisfy such a judgment, nor has the court the power to compel the losing party to enter satisfaction of the transcript-judgment, nor does the judgment against the appellee work a reversal *eo instanti* of the transcript-judgment. If the legislature had intended that such a transcript could be recorded within the 20 days, it is reasonable to suppose that some provisions of law would be found in the Justice Act to obviate the absurd result from having several judgments upon the same cause of action. The case is unlike the reversal of a judgment by the supreme court; upon the filing of the remanding order of the Supreme Court the judgment is vacated upon the record. It may safely be conceded that the framers of the law never intended such absurd results and the statute should not receive such an interpretation, if any other can reasonably be entertained. The statute does not in terms say that no transcript shall be recorded within the 20 days, but when the several sections are read together, an adverse conclusion is inevitable.

It may be argued that the clerk is a mere ministerial officer and *must record* the transcript if required. Must he not inspect the transcript to see if it is in the form prescribed by the statute? If he sees the return of an execution within the twenty days, may he not refuse to record it? The statute brings to his notice, that an appeal may be perfected in his office within twenty days, whereupon he shall issue a supersedeas enjoining the justice and constable from proceeding any further, yet the clerk may issue his execution upon the transcript-judgment, while the justice and constable are enjoined.

Since I investigated this subject I have found the case of Pardon *v.* Dwire et al., 23 Ill., 572, wherein a transcript-judgment rendered within twenty days was ruled upon, but the point as to its validity upon the point at bar, was not made by the parties or the court. In that case judgment was rendered on June 20, 1848, execution was sworn out on the same day and returned, "no property found;" the transcript was filed on June 26th, 1848, but (for some reason unexplained) was not recorded until May 7, 1849.

If the practice is legal, then a serious wrong has been discovered which ought to be obviated by legislation. A refusal by the clerk to record such transcript within twenty days, might be tested by mandamus and decided by the Supreme Court at the January term, 1876.

Respectfully,

ADOLPH MOSES.

THE SECRET BALLOT.

The decision of the Hon. Jameson on the secrecy of the ballot, has, in the language of Lord Bacon, come home to every man's business and bosom, to judge from the criticism which that decision has undergone. We wish to take no side in the logomachy, but we ask leave to point out a few logical errors that have crept in the discussion, dictated, perhaps, by party bias or prejudice.

The critic, page 86, present volume LEGAL NEWS, says, numbering the ballot is the only means by which fraudulent votes can be identified, forgetting that the same means will identify honest votes, and that pretense of fraud furnishes the means of destroying the very elements which make the ballot desirable—destroying the ballot itself. For ballot, be it repeated, means absolute secrecy. See Macaulay's Speeches and Essays of Sidney Smith; the latter arguing against the ballot, says: *It must not be forgotten that in the ballot concealment must be absolutely compulsory.* (Essay on ballot.) Again, in the same criticism we find a comparison (of constitutional provisions), between "the ballot and the guarantee of the free exercise and enjoyment of religious opinion," with the following comment: "He (every individual) should be protected on the witness stand and everywhere from a voluntary disclosure of his religious belief." We think he has this protection, 1 Green. Ev., § 370 and note, "the burden of proof is on the party producing the witness." The witness himself is never questioned in modern practice as to his religious belief. Swift Dig., 730. It is not allowed even after he has been sworn. 2 B. & B., 284. Not because it is a question tending to disgrace him, but because it would be a personal scrutiny into the state of his faith and conscience foreign to our institutions. No man is obliged to avow his belief. 1 Conn., 66. But it has never been contended either by the Hon. Jameson or Buskirk, that the individual voter has any better protection under the law than the individual professor of creed; you may challenge the one, and you may by proof aliunde prove the other. The protection is equivalent; and inquisitorial process unconstitutional in either; and Mr. Phillip, in his work on evidence, says: "Probably deeming it a less evil that the solemnity of an oath should in few instances be mocked by those who feel not its force and meaning, than that a citizen should in any case be deprived of the benefit and protection of the law on the ground of his religious belief." But what is the natural conclusion of the critic's logic? Because one man suspected of having voted fraudulently, therefore the vail of secrecy shall be taken from the vote of every citizen in the State (district), and by parity of reasoning, because one man suspected of infidelity, the whole sect shall be subjected to inquisitorial process. This is exactly what the critic's logic amounts to.

Again the critic says: "Judge Jameson thinks that the object of the Constitution is to protect the individual after the vote is cast, from persecution." "It seems to me that the only object of the vote by ballot is to protect the State," etc. Now it appears to us that if the judge does, he is correct. The error in this proposition lies in the ambiguity of the terms, *individual* and *State*. See Mill's Syst. of Logic, title Ambiguity and Fallacy, and answer what is a State if not the aggregate of individuals. A great political philosopher of our day says: "The works of Aristotle, Plato and Cicero are mainly occupied with the discussion of the question, *Who shall govern?* The safety of the State is their principal problem. The safety of the individual is one of our greatest." Lieber, Civ. Lib. and Self-Gov., p. 47. And on page 40, the same author says: "The term State means a society of men; that is, of beings with individual destinies and responsibilities, from which arise individual rights, that show themselves the clearer and become more important as man advances in political civilization."

Again the critic says: "It seems absurd to seek for a definition of a word a hundred or a thousand years ago, when it has a present meaning well understood." Understood by whom? But to follow up. He says: "Words are forever changing their signification, and we are never confined to any period of time for their definition." We are aware that language is not made, but, as Sir James Mackintosh says, "grows." The transition of language is founded on association, and words and terms become a different meaning in the course of time, that is, when the common attributes of a thing have been ascertained and specified, the name which belongs in common to the resumptive objects, acquire a distinct instead of a vague connotation, and become susceptible of definition. Such was the case when the term *ballot* became to be applied to secret voting. If this law of language I have stated correctly, then it follows that, if we take the attribute "secrecy" from the word ballot, it becomes utterly meaningless. But courts have their distinct rules of construction; yet a court has no arbitrary power to change the meaning of a word, nor can a court take cognizance of a change of words until such a change is universally, or at least generally recognized, which fact, upon principle of law, would have to be affirmatively proved by the party who seeks to benefit thereby.

However, Mr. Spence says: "The word 'ballot' does not carry with it the idea, but only the opportunity of secrecy"; yet does not the opportunity give rise to the idea, and is not secresy the only important and essential ingredient of the ballot? Sidney Smith says: "It would never do to let one man vote openly and another secretly. There must be a plain opportunity for telling an undiscoverable lie," (he wrote against Grote's measure of voting by ballot) "or the whole invention is at an end."

If we then settle on secresy as the correct meaning of the word ballot, the legislature has no right to use the word ex-officio in a different sense, unless their definition is expressly given. The legislature may and often does err, and their acts depend, according to the authority cited by Mr. Spence, (and which no one will call in question) entirely upon their reasonableness and public acquiescence; or else their acts and authority would be doubtful and as spurious as the acts of the Æcumenical Council that voted infallibility to the Pope. Nor is the language of the legislature a standard criterion; they say, for instance, R. S., '74 p. 489: "Any agent of any deceased person"; but the rule of law is, *That the death of the principal operates, per se, as the revocation of the agency.*

With reference to the construction of statutes spoken of in the paper in question, we are inclined to think that, so far as the authorities cited by the author have any bearing on the question, they support the Judge's opinion; but we must bear in mind the rule, that statutes must be construed pari materia; and that the enactment of a statute is not per se an amendment of the Constitution. The Constitution of 1818 provided for an amendment of the manner of voting viva voce, and therefore proves nothing in the present issue of secret voting by ballot, and is but surplusage. One word more about Webster's definition of the word ballot and we will go no further, having already occupied too much space. Webster had to go to the same sources to find the meaning of a word that others have to go to find the meaning of the same word, and with all deference to the giant mind of the illustrious lexicographer, when once found that the definition of a word as given by him, if not full enough or not correct, then it is not heresy to dissent from even the highest authority. We should not bow to an error, and though Webster be its author or though it have the sanctity of Scripture.

WM. M. STANLEY.

SUPREME COURT OF TENNESSEE.

NASHVILLE, FEBY. 6, 1875.

G. M. FOGG *v.* THE UNION BANK.

DEPOSIT—CONFEDERATE MONEY—SETTLEMENT—DURESS, COERCION AND UNDUE INFLUENCE.—Where it appeared that the testator, who had for many years been a depositor in the branch of the Union Bank of Tennessee at Memphis, had, during the pending of the civil war, and while Memphis and West Tennessee were under Confederate military rule, and the courts were suspended, received notice from said branch bank to come and withdraw his deposit; and that the testator declined the persistent offer of the bank to pay him the amount of his deposit in Confederate money, but waived and delayed the matter for eight days and then received the money under protest; and that there was a general public excitement on the subject of Confederate money, but the testator was not compelled to withdraw his deposit, nor did he act under a sense of impending danger produced either by threats of the bank or fears that he would incur the penalty of any military order. *Held*, (reversing the decree of the court below) that there was in the transaction no ground on which to hold that there was duress, coercion, or undue influence on the part of the bank, and the settlement made at the date of the withdrawal of the deposit was allowed to stand.—[*The Commercial and Legal Reporter.*]

NICHOLSON, C. J., delivered the opinion of the court.

The original bill was filed on the 31st of July, 1865, for the purpose of having the business of the Union Bank settled and closed up, in the Chancery Court at Nashville. The cross-bill was filed on

June, 26, 1869, by the executor and executrix of Wm. H. Long, deceased, for the purpose of setting aside a settlement made by Wm. H. Long with the branch bank of Memphis, on the 28th of March, 1862, upon the allegation that the settlement was procured by duress, coercion, and undue influence. The Union Bank demurred to the cross-bill upon the ground that no such duress, coercion and undue influence was alleged as could authorize the court to set aside the settlement. The demurrer having been overruled, the bank has appealed.

The controlling question in the case is, whether the facts alleged in the bill constitute such duress, or coercion, or undue influence as entitles complainants in the cross-bill to have the contract of settlement, which they admit was made on the 28th of March, 1862, set aside. The facts alleged in the bill, on which the question arises, are as follows: Wm. H. Long, the testator, died on the 4th of May, 1867, in Madison county, Tennessee, where he lived, aged about seventy years; that for many years before his death he was much enfeebled in body and troubled in mind, in consequence of the effects of old age and the late civil troubles; that he had been for many years a depositor in the branch of the bank at Memphis, and that on the 28th of March, 1862, he had on deposit $31,656.34, and that a settlement appears on the books of the bank of that date, showing a withdrawal of his deposit, but which settlement their testator made under duress, coercion and undue influence, as will appear fully in the further statements and allegations of their cross-bill. After referring historically to the policy of the Confederate government in resorting to the issuance of treasury notes, as a means of prosecuting the late war, and in forcing the currency into circulation, if necessary, by military force, complainants alleged that in consequence of this settled policy, and the active co-operation of the military, a popular clamor and intense excitement were gotten up before the close of 1861, against all persons who refused to take the Confederate money; and that this feeling was particularly intense and bitter in the western part of the State; and that it was reported and believed in all business circles that Gen. Beauregard, then commanding a department including West Tennessee, issued, some time about the last of 1861, a military order requiring everybody in his department to take Confederate money under penalty of heavy fine and imprisonment for a refusal; and that soon after the reported issuance of this order, several persons were arrested and carried to Jackson, in Madison county, Tenn., and some of them imprisoned for refusing to take the money; and that the courts of the country had in the meantime been suspended; and by a military order of March 10, 1862, L. D. McKissick was appointed provost marshal and civil governor of the city of Memphis, and so continued until some time after the battle of Shiloh, in April, 1862; and that during this period the vigilance committee at Memphis were actively engaged in hunting down and bringing to punishment all persons who discredited or refused to take Confederate money; and that the terror and apprehension thus engendered in the public mind was well known to the testator when he was required to go to Memphis and withdraw his deposit. Complainants allege that somewhere about the 20th of March, 1862, when the excitement about the Confederate money was nearly or quite at its highest point, their testator received a notice from the said branch bank to come to Memphis and withdraw his deposit; that he was very much disinclined to go, because he had the charge of his three daughters and no male member of his family at home, but upon the advice of his friends that it would be safest and best, he went. Complainants allege that on his arrival at the bank he was required to withdraw his deposit at once and to receive it all in Confederate money, which for the time he declined and attempted to waive or delay the matter; that the bank persistently demanded the withdrawal of the deposit in that description of money, and that their testator protested against taking it, but demanded payment in the notes of said bank, and this was kept up for several days; that their testator, seeing no way to waive or longer delay the matter, and fearing the results of a positive refusal, did, still under protest, on the 28th of March, 1862, withdraw his deposit from said branch; that having in the meantime induced said bank, on his repeated assurances that Confederate money would be wholly worthless to him, to let him have some small amount in other money, he received from said bank $3,656.34 in the notes of southern banks, and the balance, $28,000, in worthless Confederate notes; that he left said Confederate money in Memphis with an officer in the Bank of West Tennessee, who has recently informed complainants that he carried the money south and invested part of it in Confederate bonds and had the balance in packages just as he received them, which bonds and packages will be filed with the papers in this cause. Complainants alleged that soon after the close of the war their testator engaged an attorney to file a bill or take necessary steps to collect the amount due him from the bank, but said attorney died before instituting proceedings; and that he spoke to two others to undertake his case, and they agreed to do so, but for various causes intervening they did not get ready to begin suit in the lifetime of testator.

Assuming the allegations of the bill to be true so far as they state facts, the question is, do they show that the testator made the settlement and withdrew his deposit from the bank on the 28th of March, 1862, in consequence of duress, coercion and undue influence? In 2 Greenl. Ev., § 301, it is laid down that "by duress, in its more extended sense, is meant that degree of severity, either threatened and impending, or actually inflicted, which is sufficient to overcome the mind and will of a person of ordinary firmness." This definition of duress was adopted in the case of Brown *v.* Pierce, 7 Wall., 214. In the case of McSwan *v.* Miller, decided at Knoxville, at September term, 1867, Judge Hawkins said: "The controlling question is, was the threat of such a character as, under the circumstances surrounding the parties at the time, sufficient to overcome the mind and will, or, in other words, to destroy the free agency of a person of ordinary firmness." In the unreported case of Hillis *v.* Wood, decided at Nashville, December term, 1870, this court said: "To make the defense of duress effective, there must be something more than a mere possibility that there may be danger of arrest. The apprehension of danger must be based upon threats or other evidence of impending danger calculated to awaken the real fears of a man of ordinary nerve." And in Rolling *v.* Cate, 1 Heisk., 102, this court said: "To hold that every citizen who possessed or received Confederate treasury notes, under some general or indefinite apprehension that his failure to recognize the currency would give offense to the government, or any of its officers, acted under duress, and that his action can now be repudiated and disowned, would open the flood-gates of litigation and unsettle all dealings and transactions in this State, in which the currency was employed. Nothing short of duress in its legal sense can invalidate executed contracts." The question whether the testator of the complainants made the settlement and withdrew his deposit under duress or coercion, must be determined by applying the facts to the rules laid down in the authorities referred to. The controlling question is, did the testator make the settlement and receive the deposit under such apprehension of impending danger, in view of all the surrounding circumstances, as deprived him of his free agency?

In determining this question, it is proper to look to the age and condition of the testator, as well as to his personal character, so far as the same is in proof. He died in 1867, at the age of seventy; he was consequently sixty-five years of age in 1862. It is not shown that he was then enfeebled by anything else than age, nor was it shown that he was not a man of ordinary firmness. We are assured that there was intense excitement in the public mind in consequence of the rumored issuance of a military order requiring all persons to receive Confederate money; but it is not alleged that any such order had in fact been issued, nor is it alleged that the testator had such information or belief.

It is alleged that there was a vigilance committee at Memphis enforcing the order as to Confederate money, but it is not alleged that testator knew of such committee, or that he was in any way interfered with by that committee. We are left to assume or to conjecture that the testator acted with a knowledge and under the influence of these causes of excitement in the public mind. It does not appear, after testator reached Memphis, that he was in any way influenced or controlled by the alleged terror there prevailing; no such allegation is made. It appears that when he called for his deposit the bank was ready to pay in Confederate money, but testator refused to receive it; yet it is not alleged that the bank made any threats of resorting to the military, or even alluded to the fact that there was any military order on the subject. Testator refused to receive the Confederate money, and the bank declined to pay any other money. Testator left and returned and renewed the negotiation for eight days, and finally received $28,000 in Confederate notes, and $3,656 in Southern notes. But it is not alleged that during these eight days of negotiation, during which testator was refusing to receive Confederate money, any officer of the bank ever intimated to him that by so refusing he was endangering his personal liberty, or that any member of the vigilance committee ever interfered to subject him to punishment for his refusal. Nor is it alleged that testator was in any way compelled to withdraw his deposit. He manifestly had his election to receive his deposit in Confederate notes or to let it remain and take the risks. He exercised his election to let it remain, for eight days, and being unable to make any better contract with the bank, he took $3,656 in Southern notes and the remainder in Confederate notes. We can see in the transaction no evidence that testator acted under a sense of impending danger, produced either by threats of the bank or fears that he would incur the penalty of any military order.

Applying the rules of law already cited to the facts of the case, and giving full force to the fact that testator was an old man of sixty-five years, and that there was a general public excitement on the subject of Confederate money, we are unable to see in the transaction any ground on which to hold that there was duress, coercion, or undue influence on the part of the bank. We are, therefore, of opinion that the chancellor erred in overruling the demurrer, but the same ought to have been sustained and the bill dismissed, which is now done.

U. S. CIR. COURT AT NEW YORK CITY.

OPINION FILED MONDAY, DEC. 6, 1875.

UNITED STATES *Ex Rel.* IVAN C. MICHELS *v.* THOMAS L. JAMES, postmaster of New York.

INCREASE OF POSTAGE ON THIRD-CLASS MATTER.

Held, that a bill establishing rates of postage is not to be regarded as a bill for raising revenue within the meaning of the Constitution, and that the bill increasing the rates of postage on third-class matter was constitutionally passed.—[ED. LEGAL NEWS.]

Opinion of the court by JOHNSON, J.

The question upon the merits presented in this case is, whether a clause of the act of Congress, approved March 3, 1875, entitled an "Act making appropriations for sundry civil expenses of the government for the fiscal year ending June 30, 1875, and for other purposes, is or is not constitutional. The clause referred to increases the rate of postage upon third-class matter from one cent for two ounces to one cent an ounce. The ground of fact on which it is claimed that this clause was not constitutionally enacted is that the clause originated in the Senate and was not an amendment to a bill for raising revenue, originating in the house of representatives. The provision of the constitution which is claimed to render invalid the clause in question is this:—"All bills for raising revenue shall originate in the house of representatives; but the senate may propose or concur with amendments as on other bills (Constitution, art. 11, sec. 7, subd. 1); certain legislative measures are unmistakably bills for raising revenue. These impose taxes upon the people, either directly or indirectly, or lay duties, imposts or excises for the use of the government and give to the persons from whom the money is exacted no equivalent in return unless it be the enjoyment in common with the rest of the citizens of the benefits of good government. It is this feature which characterizes bills for raising revenue. They draw money from the citizens, they give no direct equivalent in return. In respect to such bills it was reasonable that the immediate representatives of the taxpayers should alone have the power to originate them. Their immediate responsibility to their constituents and their zeal and regard for the pecuniary interests of the people, it was supposed would render them especially watchful in the protection of those whom they represented. But the reason fails in respect to bills of a different class. A bill regulating postal rates for postal service provides an equivalent for the money which any citizen may choose voluntarily to pay. He gets the fixed service for the fixed rate or he lets it alone, as he pleases and as his own interests dictate. Revenue beyond its cost may or may not be derived from the service and the pay received for it; but it is only a very strained construction which would regard a bill establishing rates of postage as a bill for raising revenue within the meaning of the constitution.

This broad distinction existing in fact between the two kinds of bills, it is obviously a just construction to confine the terms of the Constitution to the case which they plainly designate. To strain those terms beyond their primary and obvious meaning, and thus to introduce a precedent for that sort of construction, would work a great public mischief. Mr. Justice Story, in his Commentaries on the Constitution (sec. 880), puts the same construction upon the language in question, and gives his reasons for the views he sustains, which are able and convincing. In Tucker's Blackstone, only so far as authorities have been referred to, is found the opinion that a bill for establishing the post office operates as a revenue law. But this opinion, although put forth at an early day, has never obtained any general approval, but both legislative practice and general consent have concurred in the other view. Another question has arisen which has some similarity with that under discussion, and which, unless adverted to, might give rise to misapprehension. Thus, in United States *v.* Bromley, 12 How., 88, the question was whether an act of Congress which gave a writ of error in any civil action brought by the United States for the enforcement of the revenue laws, embraced within its meaning an act to reduce rates of postage, and to prevent frauds on the revenue of the post office department. It was held that the latter act was within the meaning of the former, a revenue law of the United States, and that the writ of error could be sustained. The court says: "Revenue is the income of a State, and the revenue of the post office department, being raised by a tax on mailable matter conveyed in mail, and which is disbursed in the public service, is as much a part of the income of the government as moneys collected for duties on imports." All this may be conceded without involving the conclusion that such a law is an act for raising revenue.

The case of Warner *v.* Fowler, 4 Blatchford, C. C. R., 341, though involving other statutes, was put substantially upon the same ground as the preceding case. It was an action against a postmaster for non-delivery of certain letters. The defendant claimed that in delaying them he acted under the laws in relation to the post office department, and that he was entitled to have the suit removed to the United States Circuit court under the statute, as being for an act done under the revenue laws of the United States. This claim was sustained by Judge Ingersoll, holding the circuit court in this district. The decision was, in my opinion, correct, upon the ground that while the post office laws are revenue laws within the meaning of the statutes cited, they are not laws for raising revenue within the provisions of the Constitution. The motion should be denied.

AGENCY—JOINT PRINCIPALS.

The power of authorizing another to do a certain act or to ratify an unauthorised assumption of authority may be vested either in a single individual or in a number of individuals. It may be vested in a single individual in either of two cases; and these are where no other than that person can act as principal, and where he, in common with others,

exercises a power of appointing agents. It is a fundemental rule of the law of agency that whatever a person may do in his own right he may do by means of an agent. Hence it follows that if one of several principals may of his own right act on behalf of the other principals, he may appoint an agent to act on their joint behalf. The power of joint principals to appoint an agent to act for all the principals is, then, a question of authority. One of several principals has clearly no such power where each of them has a distinct interest in the subject matter, unless the others consent. In order, however, to put the matter more clearly, it will be well to say a few words of the several varieties of joint principals.

Where more than one person has an interest in any chattel, they are either tenants in common, joint tenants or partners. With respect to joint tenants and tenants in common, the general rule is that one joint tenant or one tenant in common has no implied authority to appoint an agent to act for the other coowners. Joint tenants, it is said, are seised *per my et per tout*, they have only a right to a moiety respectively. Hence, if all joined in a feoffment, each gave but his part (Bac. Alr. Estates, K. 6).

The effect of a notice to quit given by one of several joint tenants who have joined in a demise was for some time warmly disputed. The question appears to have been first definitely raised in Right *v.* Cuthell (5 East 491), though, owing to the informality of the notice given in other respects, the opinion expressed by Lord Ellenborough was not a necessary part of the *ratio decidendi*, inasmuch as the notice to determine the lease was signed by two only of the three executors, there being a proviso in the lease that either landlord or tenant or their executors, in case they wished to determine the lease, should give notice in writing under his or their respective hands. Hence there was not a sufficient compliance with the terms of the proviso.

In Goodtitle *v.* Woodward (3 B. & Ald. 689), which was decided in 1820, the question came again incidentally before the Court of King's Bench. A notice to quit was given by an agent, who professed to act on behalf of all the joint tenants who had granted the lease. At the time of giving the notice he had authority from some only of the joint tenants The others subsequently ratified his conduct, and Abbott, C. J. was of opinion that the occupier, having received notice to quit, purporting to be given on the part of all the lessors, had then such a notice as he could act upon with certainty at the time it was given. Thus the learned judge decided the case by an application of the doctrine of ratification. It is submitted that this application of the doctrine is erroneous, though the decision itself may be well supported by the reasoning in Doe *v.* Summersett (1 B. & Ad. 135). This case, which was decided in the same court in 1830, fully raised the question whether a notice to quit, signed by one of several joint tenants on behalf of the others, will determine a tenancy from year to year or to all. The court, over which Lord Tenterden presided, decided in the affirmative. It would seem that his Lordship had modified the opinion expressed in Goodtitle *v.* Woodward (*sup.*) respecting the applicability of the doctrine of ratification in such cases. The Attorney General contended that the notice was valid, on two grounds—(1) that the adoption of the notice by the other lessor was equivalent to a prior command, and (2) that a notice to quit by one of several joint tenants put an end to the tenancy as to all. The court thought that the latter ground was right, nothing being said of the former. The reasoning of the judgment is worthy of notice. Where joint tenants join in a lease, each demises his own share (Co. Litt. 186*a*), and each may put an end to that demise, as far as it operates upon his own share, whether his companions will join him in putting an end to the whole lease or not: Doe *v.* Chaplain (3 Daunt, 120); so that upon a notice to quit by one of several joint tenants, no doubt his part might be recovered if there has been a separate demise. But though upon a joint lease by joint tenants each demises his own share, this is not the only operation of such a lease. Joint tenants are not only seised of their respective shares *per my*, but also of the entirety *per tout* (Litt. 288). Upon a joint demise by joint tenants upon a tenancy from year to year the true character of the tenancy is this, not that the tenant holds of each the share of each so long as he and each shall please, but that he holds the whole of all so long as he and all shall please; and as soon as any one of the joint tenants gives a notice ty quit, he effectaully puts an end to that tenancy. The tenant has a right upon such a notice to give up the whole, and, unless he comes to a new arrangement with the other joint tenants as to their shares, he is compellable so to do. If upon such a notice the tenant is entitled to treat it as putting an end to the tenancy as to the whole, the other joint tenants must have the same right. It cannot be optional on one side, and on one side only (*per Curiam*, Doe *v.* Summersett, *sup.*) This decision will render any further recourse to the reasoning in Goodtitle *v.* Woodward (*sup.*) unnecessary; but it will be noticed that the effect of the terms of the judgment in Doe *v.* Summersett (*sup.*) is so wide as to make it immaterial whether the notice is given in the names of all the joint tenants, or simply in the name of a single joint tenant. Proceeding, then, upon the principle that whatever one may do in his own right he may do by an agent, the reasoning of the court in this case would support the proposition that one of several joint tenants, of his own will and by means of his agent, without professing to act on behalf of the other joint tenants, may put an end to the whole tenancy, provided either the lessee or other lessors so will. Whether this proposition would be supported in its entirety has not been determined. Subsequent authorities, so far as they go, are not consistent with it. (See Doe *v.* Hughes, 7 M. & W. 139; Alford *v.* Vickery, C. & M. 280; and see Doe *v.* Foster, 3 C. B. 215.) However, there can be no doubt that if the agent of one of several joint tenants, who have granted a demise from year to year, is authorised by his principal to give notice to quit in the name of all the joint tenants, the notice is so far valid as to enable either the lessee or other lessors to act upon it.

Several principals may employ the same agent without incurring a joint liability, in other words without becoming liable as partners. In Lindley on Partnership (p. 59. Vol. I.) the learned author has pointed out with great clearness the salient distinctions between coownership and partnership. The distinctions are of value in an examination of the law of agency, because one partner, as such, is an agent, real or implied, of the others. Unlike partnership, coownership is not necessarily the result of agreement, nor does it necessarily involve community of profit or of loss. So true is it that partnership is a branch of the law of agency, that when a person is sought to be made liable on the ground of his being a partner, the true test is whether or not he has constituted the other alleged partner his agent in respect of the partnership business. (Buller *v.* Sharp, L. Rep. 1, C. P. 36; 35 L. J. 105, C. P.) So, too, one of several tenants in common has no power as such to appoint an agent for the others.

It will be sufficient to cite but a few cases in support of the above propositions. In Coope *v.* Eyre (1 H. Bl. 39), decided in 1788, E. employed a broker to buy a quantity of oil, and agreed with the other defendants that they should have aliquot parts of it when purchased. E. was the only purchaser known to the plaintiffs, and entire credit was given to him alone. The purchases were made on speculation. The price of oil fell, and E. failed. The plaintiffs then brought an action to recover the price of the oil from all the defendants. A majority of the court held that E. alone was liable for the amount. The cases put by Justice Gould, show the relation of the parties. A man goes into Yorkshire to buy as many horses as he can collect, or a limited number, and agrees with a friend that he shall have two; or a man is about to buy a tun of wine, and agrees that a friend shall have a hogshead. It surely cannot be contended that this could make the friend in either supposition a joint contractor, to subject him upon failure of the other to pay for the whole bargain. In an earlier case it had been laid down by Lord Mansfield that it would be most dangerous if the credit of a person who engages for a fortieth part, for instance, should be considered as bound for all the other thirty-nine parts: (Hoare *v.* Dawes 2 Doug. 371.) Gibson *v.* Lupton (9 Bing. 297) is a later decision of the Court of Common Pleas. A and B. ordered an undivided parcel of goods; each was to pay for his own share. The freight and charges were actually so paid, and the cargo upon its arrival was equally divided before it was warehoused. No partnership had existed between them antecedent to this period. The strongest fact in support of the contention that the defendants purchased on their joint account was the plaintiff's reply to the original order, signed by both defendants that a purchase had been made on their joint account. On the other hand, it was provided in the same order that payment was to be made by each of the defendants. Upon these facts it was held that the defendants were not jointly liable for the whole amount.

In Nicholson *v.* Ricketts (1 L. T. Rep. N. S. 54; 2 Ell. & Ell. 497). a decision of the Court of Queen's Bench in 1860, the defendants, merchants in London, entered into a contract with S. and Co., merchants at Buenos Ayres, for the purpose of carrying on certain exchange operations. S. and Co. were periodically to draw bills on the defendants to be accepted by them, then put the proceeds in the bank, and so profit by the rate of exchange. S. and Co. were also periodically to remit and redraw other bills on the defendants to the same amount; the proceeds of this operation to be applied to a common fund, it being agreed that there should be a community of profit and loss between them. S. and Co. drew bills on the defendants and sold them, in conformity with the arrangement; but the defendants refused to accept them. The present action was brought to establish the liability of the defendants upon the bills, on the ground that there was a partnership existing between S. and Co. and the defendants. The Court was unanimous in giving judgment for the defendants. It is a well known principle of the law of partnership that, in order to bind a partnership by an act done by another member of the partnership in the way of drawing or accepting a bill, such partner must have an express or implied authority so to bind his fellow partner. In ordinary cases of mercantile partnership there is no need of such express authority, as the laws implies it. So, also, if from the nature of the constitution of the partnership it is apparent that drawing bills by the members was intended thereby, by law the authority so to do will be implied. Although there was a partnership in one sense, S. and Co. had no authority to bind the defendants with the obligation of accepting these bills, still less to hold out to the world that they had authority to do so (per. Cockburn, C. J. *ib.*) Hence where A. B. and C. are in partnership and arrange that C. shall draw bills in his own name on A. and B., it cannot be said that C.'s signature to such bills binds the others: (see per Crompton, J. *ib.*, and *Re The Adansonia Fibre Company (Limited); Miles and Co's claim* (31 L. T. Rep. N S. 9; L. Rep. 9 Ch. App. 635; 43 L. J. 732, Ch.) Part owners by the joint employment of a ship become partners in respect of the adventure: (Bovill *v.* Hammond, 6 B. & C. 149.) But one part owner cannot, without the common consent of the owners, insure the shares of the other part-owners, so as to make the insurance a charge upon the joint proceeds, unless the ship is partnership property: (Lindsay *v.* Gibbs, 28 L. J. Ch. 692; Hooper *v.* Lusby, 4 Camp. 66.)—*The London Law Times.*

Bouker v. *Charlesworth.*

Error to Wayne. Reversed with costs and new trial ordered. Opinion by COOLEY, J.

In a law suit involving the title to land, the plaintiff is not estopped from contesting the validity of certain foreclosure proceedings under which the title has been obtained, by his failure to raise that question in a former suit brought by him in chancery to set aside the mortgage as invalid.

One who fails to have a judgment set aside for fraud, is not debarred from contesting at law a void execution sale by not having put it in issue in his chancery suit.

A complainant may, if he chooses, make distinct controversies on the same matter, the subjects of separate suits.—[*Supreme Court of Michigan, October Term.*]

THE BAR ASSOCIATION DINNER.—The second annual dinner of the Bar Association will be held at the Grand Pacific on next Thursday evening. The last annual dinner was the most notable and finest meeting of the bar ever held in this city. We have no doubt the present will be equal to it.

UNITED STATES SUPREME COURT.

PROCEEDINGS OF.

Thursday, Dec. 16, 1875.

On motion of P. Phillips, William D. Shipman, of New York city, and Wallace Pratt, of Kansas City, Mo., were admitted.

On motion of J. W. Johnson, James H. Gilmore, of Marion, Va., was admitted.

No. 546. Frederick Meyer et al., assignees, etc. v. Max Hellman, assignee, etc. This cause was submitted on printed arguments by William Forrest for plaintiffs, and by Adam A. Kramer for defendants, under the twentieth rule.

No. 91. The Grand Trunk Railway Company of Canada v. R. M. Richardson. The argument of this cause was continued by Ossean Ray of counsel for plaintiffs, and by H. E. Paine for defendant, and concluded by J. A. Bingham for plaintiffs.

No. 97. (Substituted for No. 93). John Miller et al. v. Louis Ehlers. This cause was argued by F. W. Cotzhausen for defendant, and submitted by M. H. Carpenter for plaintiffs.

No. 94. The Mutual Benefit Life Insurance v. Hattie B. Tisdale. This cause was argued by Edward Stanton and F. T. Frelinghuysen for plaintiffs, and submitted on printed arguments by George Crane for defendant.

No. 95. The City of Memphis v. The United States, ex rel. Talmadge E. Brown. Continued.

Adjourned until Friday at 11 o'clock.

Friday, Dec. 17.

On motion of George W. Paschal, Henry F. Severns, of Kalamazoo, Mich., was admitted.

No. 588. The United States v. Archibald McKee et al. This cause was submitted on printed arguments by Solr. Gen. Phillips for appellants, and by W. Penn Clarke for appellees, under the twentieth rule.

No. 843. Joshua Converse v. The City of Fort Scott. This cause was submitted on printed arguments by G. C. Yeaton for plaintiff, and by A. L. Williams for defendant, under the twentieth rule.

No. 93. Maria A. N. Pollard v. Jacob Lyons. This case was argued by A. G. Riddle and Joseph H. Bradley for plaintiff, and by W. S. Cox for defendant.

No. 98. Reuben Wright v. Jonas M. Tebbetts. This cause was argued by George W. Paschal for plaintiff, and by R. D. Mussey for defendant.

Adjourned until Monday, the 3d of January next, at 12 o'clock.

ESTATE OF CATHARINE WEISHAAR, DECEASED.—Notice of final settlement. To Mary Millar and John Kirwan, heirs at law of said decedent. You are hereby notified that the undersigned administratrix of said estate, will, on Monday the tenth day of January, A. D. 1876, exhibit to the County Court of Cook county, Illinois, her accounts for a final settlement of said estate, when and where you can attend if you see fit.

ANN CRIMIN,
Administratrix.

FRANK J. CRAWFORD, Attorney. 11-14

CHICAGO LEGAL NEWS.

SATURDAY, JANUARY 1, 1876.

The Courts.

We are under obligations to JOHN JOHNS, Jr., of the Richmond, Va., bar, for the following opinion:

UNITED STATES SUPREME COURT.

No. 37.—OCTOBER TERM, 1875.

ANNIE KNOTTS, CARRIE KNOTTS AND EDWIN KNOTTS, infants, by their next friend, EMILY J. KNOTTS, Appellants,

v.

FRANKLIN STEARNS, executor of C. J. BALDWIN deceased, VIRGINIA V. BALDWIN AND MARY F. BALDWIN.

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

GUARDIAN'S SALE—POSTHUMOUS CHILD—INVESTMENT IN CONFEDERATE MONEY.

1. JURISDICTION.—That the Circuit Court of Richmond had jurisdiction to order the sale.

2. RIGHTS OF A POSTHUMOUS CHILD.—Where a father died leaving two minor children and a widow, and the guardian of such children commenced proceedings to sell the real estate of the deceased and a posthumous child was born after the commencement of such proceedings, who was not made a party: *Held*, that it was no cause for setting aside the sale, because the posthumous child was not made a party.

3. That the posthumous child did not possess until born, any estate in the real property of which his father died seized, which could affect the power of the court to convert the property into a personal fund, if the interest of the children then in being, or the enjoyment of the widow's dower-right, required such conversion. Whatever estate devolved upon him at his birth, was an estate in the property in its then condition; that property had then ceased to be realty; it had become by the sale converted into personalty.

4. SALE—ORDERING FUNDS INVESTED IN CONFEDERATE MONEY.—*Held*, that the decree ordering the sale of the property and directing the investment of the proceeds in Confederate money, was not invalid, because of the direction of the investment of the proceeds in Confederate money. It was a lawful proceeding, and is not to be construed as in aid of the rebellion. This case is distinguished from that of Horn *v.* Lockhart.—[ED. LEGAL NEWS.]

JOHN JOHNS, Jr., for the appellants, made the following points:

1. The Circuit court of Richmond city, Virginia, during the recent civil war, in 1863, had no legal authority to make the decrees for the sale, and the confirmation of sale, of the house and lot in the suit instituted for that purpose by the guardian of two of the infants. Code of Virginia, 1860, ch. 128, § 1, 2, 3, 4.

2. Such decrees, even if binding on the two infants whose guardian filed the bill, is not binding on the third, who was not named in the bill, nor a party to the proceeding. Code of Va., 1860, ch. 128, § 1.

3. The court had no authority to sell the house and lot as it did, and the sale was a nullity, being in aid of the rebellion. Horn *v.* Lochkart, 17th Wallace, 570–580; Sprott *v.* U. S., 20th Wallace, 459–464–465.

4. Whether or not before the sale and investment in Confederate bonds, the court was authorized to act duly in the premises, as against the two infants represented by guardian, its ratification of the investment in Confederate bonds as against the infant not named in the proceedings, was in direct aid of rebellion, and the deed to the purchaser was null and void.

Mr. Justice FIELD delivered the opinion of the Court.

This suit was brought to set aside a sale and conveyance of certain real estate situated in Richmond, Virginia, of which one Edwin Knotts died seized, made in 1865, under a decree of the circuit court of that city, and to compel a delivery of the property to the possession of the plaintiffs. The decree for the sale was obtained upon a bill filed for that purpose by the guardian of the infant children of the deceased, to which his widow was made a a party. The property sold consisted of a house and lot, which, with a few articles of household furniture, constituted the entire estate of the deceased. The house was at the time much out of repair; so much so that in its then condition it could not be rented, and neither the widow nor the children had any means to repair it. Nor had they any other estate to which they could look as a source of support. The widow was entitled to dower in the property, and it was incapable of partition according to the respective rights of the parties. It was, therefore, manifestly for the interest of all of them that the property should be sold, and the proceeds converted into a fund which would give to them some income. The circuit court of Richmond was invested with jurisdiction under such circumstances, upon a proper showing of the facts, to decree a sale of the estate of the children. A law of the State expressly conferred the jurisdiction, and authorized its exercise upon a bill filed by the guardian for that purpose, if it was clearly shown, independently of admissions in the answer, that the interest of the infants would be promoted by the sale, and the court was satisfied that the rights of others would not be violated by the proceeding (Code of Virginia of 1860, chap. 128.) The widow consented to the decree so far as her interests were concerned, and it is only with reference to the estate of the children that any inquiry into the validity of the sale can now be had.

The greater part of the papers and entries in the suit in the circuit court of Richmond was destroyed by the fire which occurred on the third of April, 1865, the day on which the city was occupied by the army of the United States; but their absence was in a great degree supplied by the testimony of the counsel of the guardian, under whose advice the suit was brought and conducted. That testimony and copies of the decrees preserved show that the proceedings were regularly taken in accordance with the provisions of the statute and the practice of the court. The bill was filed by the general guardian, and the widow and children were made parties defendants; they all appeared to the suit, the children by a special guardian ad litem appointed by the court. A reference was had to a commissioner to ascertain the facts required by the statute to authorize a sale; his report showed the condition of the property, and that the interest of all parties would be promoted by its sale, and that no rights of any other person would be violated thereby. The report was accepted and approved and a decree for the sale was accordingly made, which was entered on the 13th of March, 1863. The sale under it was had on the 5th of April following, when the testator of the defendant Stearns became the purchaser for the sum of $13,800 cash. The sale was approved and a deed of the property ordered and executed to the purchaser.

The widow gave birth to a posthumous child in May following the death of her husband, and the validity of the decree is assailed because this unborn child was not made a party nor its interests specifically considered in the previous proceedings in the suit.

The decree, after ordering a sale of the property, also provided for the investment of the proceeds in bonds or stock of the Confederate States, or of any State belonging to the Confederacy, or of the city of Richmond. The proceeds were invested in bonds of the Confederacy, and the investment was approved by the court. It is now contended that the decree of sale was invalid because of the direction for the investment of the proceeds, and the subsequent approval of the investment made, the counsel of the appellants insisting that aid was thus directly given to the rebellion.

These two grounds constitute the principal objection to the decree. Neither of them, in our judgment, affects the validity of the sale.

The posthumous child did not possess, until born, any estate in the real property of which his father died seized, which could affect the power of the court to convert the property into a personal fund, if the interest of the children then in being, or the enjoyment of the dower right of the widow required such conversion. Whatever estate devolved upon him at his birth was an estate in the property in its then condition. That property had then ceased to be realty; it had become by the sale converted into personalty. All that was then required for the protection of his interest in it was the appointment of a guardian to take possession of his proportion, and such a proceeding was had. A guardian was appointed, and upon a supplemental bill the original decree was so far modified as to provide for the child having an equal interest in the fund obtained with the other children.

But there is another answer to the objection. Assuming that the child, before its birth, whilst still *en ventre sa mere*, possessed such a contingent interest in the property as required his representation in the suit for its sale he was thus represented, according to the law which obtains in Virginia, by the children in being at the time who were then entitled to the possession of the estate. Parties in being possessing an estate of inheritance are there regarded as so far representing all persons who, being afterwards born, may have interests in the same, that a decree binding them will also bind the after-born parties. In the case of Franklin *v.* Davis, which is reported in the 18th of Grattan, this subject is elaborately and learnedly considered. In that case a trust estate, created for the benefit of a man and his wife during their joint lives, and the life of the survivor of them, and of their children living at the death of the survivor, and of the descendants of such of the children as might be then dead, had been sold by a decree of the circuit court of Richmond, rendered in a suit for that purpose brought by the surviving widow, in which the children were made parties, but in which no one appeared to protect the interests of any of their descendants; and the court held that the sale was valid, and that the descendants of any child dying in the life-time of the surviving widow were bound by the decree, on the ground that the children were to be considered as representing before the court any of their descendants who might upon their death become entitled under the trusts of the deed.

The statute of Virginia, as additional security against improvident proceedings for the sale of an infant's estate, requires that all those who would be heirs or distributees of the infant, if dead, shall be made parties. This requirement was met in the case under consideration, for upon the death of either child the mother and other child would have been its heirs and the distributees of its estate.

With the investment of the proceeds of the sale the purchaser under the decree had no concern. A purchaser at a judicial sale is not bound in any case to see to the application of the purchase money. That is under the control of the court, and the title of the purchaser is not affected, however unwise or illegal the disposition of the money.

The case of Horn *v.* Lockhart, 17 Wallace, 570, which is invoked by the appellants, lends no support to their pretensions. That was was the case of an executor in Alabama seeking to escape an accounting and payment to legatees of proceeds of property of the estate in his hands sold previous to the war, and retained by him for years after he had been called to a final account by the probate court of the State, by alleging a voluntary investment of the proceeds in bonds of the Confederate government. Those bonds were issued for the express purpose of raising funds to carry on the war then waged against the United States. The investment was, therefore, held to be illegal, because it constituted a direct contribution to the resources of the Confederate government, thus giving aid and comfort to the enemies of the United States; and the character of the transaction in this respect was not deemed to have been changed by the fact that the investment was authorized by the existing legislation of the State, and was approved by the subsequent decree of its probate court. A voluntary proceeding in aid of a treasonable organization could not be thus freed from its original unlawfulness.

There is no analogy between that case and the one at bar. Here no action is sought to be upheld which was taken in aid of the insurrectionary government. The sale in question was not made with any reference to that government, but solely to raise a fund which would yield an income for the support of the widow and children, and was, therefore a lawful proceeding.

The widow and the guardian were not compelled to take the bonds of the Confederate government; they were allowed the option of investing in such bonds, or bonds of any of the States of the Confederacy, or bonds of the city of Richmond. Having deliberately selected the securities of the insurrectionary government in which to place their money, it would be a strange thing if complaints could now be heard from them against the title of the purchaser of the property, who had nothing to do with the disposition of the money, on the ground that the court did not preserve them from the folly of that investment.

We perceive no error in the decree of the court below, and it is accordingly affirmed.

UNITED STATES SUPREME COURT.

No. 45.—OCTOBER TERM, 1875.

SARAH ANN JACKSON (NOW SARAH ANN DORSEY), appellant, *v.* SIMON JACKSON.

Appeal from the Supreme Court of the District of Columbia.

MARRIED WOMAN'S EARNINGS—SEPARATE PROPERTY—LAND PURCHASED BY WIFE—EFFECT OF DIVORCE ON WIFE'S PROPERTY.

In this case the land in controversy was purchased by the wife with money which she had, previous to her marriage, given to her by her father. The buildings erected thereon were constructed partly with such money and partly with her subsequent earnings. The deed of the land was taken in her name; the contract for the house was made by her alone with the builder. At the date of the marriage, and when the land was purchased and the improvements were made, the common law governed in the District of Columbia as to the rights of married women to the personal property possessed by them previous to their marriage. By that law the money that the wife possessed and her subsequent earnings belonged to her husband. But the husband being free from debt at the time, it was competent for him to allow her to invest them for her own use, so as to be beyond his reach and control: that the divorce decreed was not of itself a sufficient reason for restoring to the husband any rights to the property thus settled upon the wife. The decree of the District Court, so far as it awards any portion of the property in controversy to the husband, and directs a conveyance by the wife, is reversed.—[ED. LEGAL NEWS.]

Opinion of the court by FIELD, J.

The land in controversy in this case was purchased by the wife with money which she had previous to her marriage, given to her by her father. The buildings erected thereon were constructed partly with such money and partly with her subsequent earnings. The deed of the land was taken in her name; the contract for the houses was made by her alone with the builder; the policy of insurance upon the buildings was executed to her, and she paid the taxes upon the property. It is true, at the date of the marriage, and when the land was purchased and the improvements were made the common law governed in the District of Columbia as to the rights of married women to the personal property possessed by them previous to their marriage, and not secured by a settlement or contract to their separate use, and as to their subsequent earnings. By that law the money which the wife then possessed and her subsequent earnings belonged exclusively to her husband. They vested as absolutely in him as though the money had been originally his, and the earnings were the proceeds of his own labor and industry. This harsh rule of the common law was founded upon the idea, that as the husband was bound by the marriage to support the wife and the rest of the family, he was entitled to whatever she possessed or subsequently acquired, which was available for that purpose; a rule which would have had some good ground for its existence, had it only applied when the money or earnings of the wife were necessary for that purpose. But becoming absolutely the property of the husband they were subject to his disposal without regard to the necessities of the family, and might be taken from them at the suit of his creditors. They partook of the condition and were subject to the fate of his separate property.

But though the money which the wife in the present case had at her marriage, and her subsequent earnings must be regarded as the property of the husband, it was competent and lawful for him to allow her to invest them for their own use, so as to be beyond his reach and control. Being at the time free from debt he could have taken whatever money she had, whether given to her or earned by her own labor, and purchased with it the land in controversy and received the deed in her name. The investment would then have been an advancement for her benefit, a voluntary settlement upon her. And the subsequent application of her earnings to the construction of improvements would have equally been a legal disposition of them. The improvement of property settled upon the wife is not forbidden to the husband, if not made with a fraudulent intent and the moneys used for that purpose do not interfere with any rights of existing creditors.

The law on the subject of post-nuptial settlements of this character is well settled and will be found stated in numerous adjudications of the American courts.

(Picquet *v.* Swan, 4 Mason, 444; Haskell *v.* Bakewell, 10 B. Monroe, 206.) The doctrine of resulting trusts, arising where a conveyance is taken in the name of one person and the consideration is advanced by another, has no application to investments of this kind. Such trusts are raised by the law from the presumed intention of the parties, and the natural equity that he who furnishes the means for the acquisition of property should enjoy its benefits. But no presumption that a personal benefit was intended to the party advancing the funds for a purchase in the name of another, can arise where an obligation exists on his part, legal or moral, to provide for the grantee, as in the case of a husband for his wife, or a father for his child. The circumstance that the grantee stands in one of these relations to the party, is of itself sufficient evidence to rebut the presumption of a resulting trust, and to create a contrary presumption of an advancement for the grantee's benefit. (Murless *v.* Franklin, 1 Swans., 17; Grey *v.* Grey, 2 Swans., 597; Finch *v.* Finch, 15 Vesey, 50; Guthrie *v.* Gardner, 19 Wend., 414; Perry on Trusts, Secs. 143 and 144.)

The case of Sexton *v.* Wheaton, (8 Wheaton, 229.) which arose in the District of Columbia, is a determination of this court upon the points here presented. There the husband had purchased a house and lot within the district and taken the conveyance in the name of his wife, and afterwards improvements were made upon the property. Subsequent creditors having obtained judgment against him, filed a bill to subject the property to its payment, contending that the conveyance to the wife was fraudulent and void as to them, and praying that if the conveyance was sustained the wife might be compelled to account for the value of the improvements. But the court held, Mr. Chief Justice Marshall delivering its opinion, that the husband at the time being free from debt, the conveyance to the wife was to be deemed a voluntary settlement upon her, which not being made with any fraudulent intent, was operative and binding against subsequent creditors; and that the improvements upon the property stood upon the same footing as the conveyance itself, they being made before the debts were contracted. The Chief Justice observed that it would seem to be a consequence of that absolute power which a man possesses over his own property, that he might make any disposition of it which did not interfere with the existing rights of others; that such disposition, if it were fair and real, would be valid, and that the limitations upon this power were those only which were prescribed by law. The Chief Justice then proceeded to show that the law only limited this power when its exercise impaired the rights of existing creditors, and that a voluntary settlement by a husband in favor of his wife could not be impeached by subsequent creditors, unless it was made to defraud them.

The present case is one much stronger than the case cited, for here there are no creditors complaining. It differs from the one cited in that the investment was made directly by the wife instead of being made through the husband, but we do not perceive in this fact any valid objection to the legality of the transaction. There can be no doubt that she acted with his approval. Fifteen years of acquiescence in her holding the land in her name and in making improvements thereon with her earnings, ought to be deemed satisfactory evidence of his original authorization of the investments. The amount paid for the land was only three hundred dollars, less than one-sixth of the sum received from her father, and the whole cost of the improvements for the fifteen years was only about two thousand dollars; and it does not appear that any third parties have been in any respect prejudiced by the investments or have ever questioned their validity.

The divorce decreed was not of itself a sufficient reason for restoring to the husband any rights to the property thus settled upon the wife. That was granted for cruel treatment, and whatever may be the power of the court over the property of parties upon the dissolution of the marriage relation, there was no call for its exercise in a case like the present.

The decree of the Supreme Court of the district, so far as it awards any portion of the property in controversy to the husband, and directs a conveyance by the wife to him, must be reversed; and it is so ordered.

Mr. Justice DAVIS dissenting.

I agree to the legal propositions advanced by the court, but, in my opinion, the evidence in this case does not warrant the application that has been made of them.

It would serve no useful purpose to discuss the evidence, in order to show that it is so, and I shall, therefore, content myself with saying, that it justified the conclusion reached by the court below, that the property should be divided between the parties. As the appeal only brought up the question of property rights, I am not at liberty to consider the merits of the decree for divorce.

A. G. RIDDLE for plaintiff.

WM. A. MELOY and FRANCIS MILLER for defendants.

WE have received from the law firm of GOODWIN, LARNED & TOWLE, of this city, the following opinion:

U. S. CIR. COURT, N. D. OF ILL.

OPINION DECEMBER 7, 1875.

MARTIN T. CALKINS *v.* THEOPHILUS F. BERTRAND et al.

PATENT—RE-ISSUE—INFRINGMENT.

1. CLAIM ON A RE-ISSUE.—That the law of 1836 has been construed to authorize a patentee to claim on a re-issue whatever shall clearly appear to have been a part of his original invention as described or shown in his original specifications, drawings or models.

2. THIS CASE—INFRINGEMENT.—That the re-issue by which Gerber, as assignee of the Smith patent, was allowed to amend his specifications so as to secure the joint "M" as an element in his device or in the Smith device, and to cover the idea of jointing between the evener and the neck-yoke as a specific element in his invention, is a valid re-issue under the patent law as it then stood; and that having obtained the re-issue, and covering now the ground occupied by the defendants, the complainants are entitled to recover.—[ED. LEGAL NEWS.]

Opinion by BLODGETT, J. This is a bill in equity for gains, profits and damages, and final injunction against the defendants for an alleged infringement of a re-issued patent "*for an improvement in cultivators*," granted to Julius Gerber, April 26th, 1870, upon an original patent issued to Imlus R. Smith, dated April 24th, 1860.

The answer denies that Smith was the first inventor of the improvement described and claimed in the original Smith patent, and as re issued, and also insists that the re-issued patent is not for the same invention as that described in the original patent. The defendants also deny that they infringed the plaintiff's patent even if its validity is conceded or established.

The drawings attached to the original Smith patent showed a cultivator frame mounted on wheels and fastened to the tongue at a point forward of the evener.

This frame worked freely above the axle, the axle gauging the depth which the shovels could run into the ground, The claim was for the combination of this frame as constructed with the wheels and tongue by the joint "M," as shown and specified. In the re-issue to the complainant Gerber, he was allowed to amend his specifications in several particulars, the most material of which is, that "*the auxiliary frame is hinged or otherwise loosely attached to the main frame at a point between the evener and the neck yoke, by means of which great length of beam is obtained, and more purchase in the side motion.*" * * * "*By means of the long swing obtained by bringing the beam of the auxiliary frame forward of the evener, the difference between the movements of the front and rear shovels, is rendered relatively less.*"

His general claim in 1860 was for the idea of mounting this cultivator frame upon wheels so that the operator could ride upon the wagon frame without his weight resting upon the cultivator frame, and operate the cultivator frame from his seat or platform. The patent was for the combination of the cultivator frame and the wagon frame together, connecting them by the joint "M." He did not seem to realize that there was any very special merit in bringing the beam forward to the point where he coupled it to the tongue; at least he makes no mention of it in his specification, as a novel or useful element in his machine. It was, however, found by experience that this cultivator, by reason of the long swing which it had in its beam, was much more readily manipulated and handled than any other which had been produced, and therefore the cultivator seems to have come into somewhat general use, and finally the owners of the patent surrendered it, and obtained a re issue covering, as a specific device, this idea of coupling the beam forward of the evener so as to secure a long swing as the essential element in the invention.

The claim of the re-issued patent is as follows: "First. An auxiliary frame carrying two or more shovel standards on each side as shown, when said frame is hinged to the pole between the evener and neck-yoke, as described for the purposes set forth."

There is no doubt but what Smith's original model shows that he hinged his plow beam forward of the evener. The evener as shown in the original model, and it is also shown in the drawings. And Gerber therefore had the right, as the assignee of Smith's patent, to cover that feature of the Smith invention by the re-issued letters patent. And it seems, too, that the Patent Office took the same view of the matter, and gave him what he claimed.

This re-issue was made on the 26th of April, 1870, and while the Patent Office was acting under the law of 1836 as amended up to the act of 1861, so far as related to the matter of re-issues. This law has been construed to authorize a patentee to claim on a re-issue whatever shall clearly appear to have been a part of his original invention as described or shown in his original specifications, drawings or models. There are ample authorities upon that point construing the act of 1836 with amendments up to 1861 in that regard, and giving the inventor the right to a re-issue where the new claim is clearly justified by his drawings or specifications or models, or either, and allowing him to amend his specifications if necessary so as to cover more fully what, upon experience, has proven to be a meritorious part of his invention. Battin *v.* Taggert, 17 How., 74; Gallahue *v.* Butterfield, 10 Blatch., 232; Wheeler *v.* Clipper Co., 6 Fisher, 1; Seymour *v.* Osborne, 11 Wallace, 544. It seems clear from the proofs in this case that as wheel cultivators came into use, the value of the long swing to the beams, in the practical working of the machine, became more apparent, and hence the owners of the Smith patent sought and obtained this re-issue for the purpose of covering this special feature in the original Smith machine.

The defendants contend that the re-issued patent is void because the distinguishing feature, the location of the joint forward of the evener, is not patentable. They urge that hinging forward of the evener instead of back of it, produces no new result; that no definite point is fixed and no directions given as to the point where the joint is to be placed. The evidence, however, seems to me to show that the "*long swing*," obtained by the hinging of the beam forward of the evener is a new and useful result.

The machines of Ganse and Whitehall shown in the proofs, which ante-date the Smith patent, show the shovel-beams hinged back of the evener, producing a jerky motion and rendering it almost, if not wholly, impossible to guide the shovels so as to avoid hills out of line, or stones, roots or other obstacles in the direct line.

The suggestion that this is not a change of result, but is only a change in degree, is, I think, not sustained by the proof. The long radius, in other words, secures a practicable cultivator which can be guided along the side of a crooked row of plants so as to avoid disturbing them, while the short beams would seem to be practically useless except in straight, or nearly straight rows. This is a practically new result and the proper subject of a patent as such. The objection that the first claim of the patent is void for uncertainty, because the precise location of the joint is not described or fixed in feet or inches, seems to me untenable. The amended specifications say: "This auxiliary frame is hinged, or otherwise loosely attached to the main frame at a point between the evener and neck-yoke, by means of which great length of beam is obtained and more purchase in the side motion." * * * * * * * * * *

"When two shovels are employed upon each side of the auxiliary frame, the rear set are necessarily wider apart than the front set, and as they swing in the arc of a larger circle, they move relatively over more ground.

"In the ordinary cultivator, this difference of relative movement is quite marked, and consequently there is danger, when the front shovels are swung aside to avoid irregularly planted hills, of the rear shovels interfering with the wheels or the adjacent rows.

"By means, however, of the long swing obtained by bringing the beam of the auxiliary frame forward of the evener, the difference between the movements of the front and rear shovels is rendered relatively less, and the difficulty referred to obviated." * * * *

"The easy but limited side motion of the auxiliary frame enables the driver to so control its action as to cultivate with safety those crops which have been irregularly planted, or which may have come up in other than straight lines."

Here the direction is to make the swing long enough to secure the desired result, and enables a person of skill who understands the result to be attained, to construct a machine embodying the principle, and this is all the certainty required by law.

So that when you consider these specifications, together with the idea that the end to be obtained is the "*long swing*," it seems to me there is sufficient in the specifications to notify a party who attempts to construct a cultivator as to the length of beam to be adopted. It does not say that the joint "M" shall be three feet six inches or five feet six inches forward of the evener, or that it shall be eight feet back of the point where the neck-yoke connects, but it says, it shall be far enough forward to secure that easy motion, that facility of handling, and that long radius which will secure ease of handling, and not bring the rear shovels in contact with the wheels, while it will move the forward shovels far enough to avoid the hills out of line or any inequality in the surface of the ground, such as a root or a stone, or a stump.

The next point made by the defendants is, that the complainant's machine is constructed upon a different principle than that of a swinging machine; that it is intended to act by a rocking and not by a swinging motion. There seems no doubt that the original Smith machine was intended to rock upon the saddle "P," but provision was also made for swinging, that is, there is play enough between the ploughs and the frame "O" to allow of a swing or side motion.

Now, I think there is no doubt, from the proof, that Mr. Smith, in his orignal patent, intended to not only swing his cultivator frame, but that he also intended to avoid small obstructions by rocking the plough beam upon this pivoted point, this saddle; and any one at all familiar with ploughing knows that a plough is very readily guided by rocking. that is, by tipping the top a little to the right or left. Now, the least tipping of a plough, we all know, causes the plough to run, as the ploughmen say, "to" or "from the land," and the tipping or the rocking of this frame, so that one set of shovels shall run deeper into the ground than the other, would, of course, cause the frame itself to swing to the side, because it would increase the draft on one side and relieve it on the other. So that the rocking motion of itself would cause the swinging motion. The moment that you rock the shovel enough to secure inequality in the hold upon the ground upon one side more than the other, you would of course produce a swinging motion if your plough was moving forward in straight lines, and undoubtedly this was one of the ideas in the mind of this inventor.

While the rocking motion is provided for in the original patent, nothing is said about it in the re-issued patent, and I can see no reason why the complainant is not at liberty to hang or suspend his auxiliary frame under the axle as well as to mount it on or over the axle. This point is not raised in the case, and I do not intend to decide it. Certainly the complainant leaves himself at liberty to rock or swing his shovels, or do both, as shall be deemed best in practice, by means of the joint "M" between the evener and the neck-yoke.

Now upon the question of infringement: I do not see that there can be any doubt that if Smith was the first to invent the "*long swing*," to be secured by jointing the beam to the pole between the evener and the neck-yoke, and is entitled to a patent for the idea, then the

defendant's machine infringes the complainant in this particular.

I have here a model of the defendant's machine which has the plough beam jointed to the pole between the evener and neck-yoke and suspended under the axle, and operated by means of handles, the driver beiug seated upon a seat which is but an extension of the tongue or pole to the rear of the axle. Here we have provision for the long swing by the joint between the evener and the neck-yoke and the essential element of the complainant's device is manifestly in defendant's machine.

Both machines are limited in their side motion by the wheels, and the wheels must necessarily be so near together as to run freely between two rows straddling one.

I therefore come to the conclusion that the re-issue by which Gerber, as the assignee of the Smith patent, was allowed to amend his specifications so as to secure the joint "M" as an element in his device or in the Smith device, and to cover the idea of jointing between the evener and the neck-yoke as a specific element in his invention, is a valid re-issue under the patent law as it then stood; and that having obtained the re-issue and covering now the ground occupied by the defendants, the complainants are entitled to recover.

It will be necessary to make a reference in this case unless counsel agree upon the matter of damages.

S. A. GOODWIN and G. W. FORD for complt.

WEST & BOND for deft.

U. S. DIST. COURT, D. OF OREGON.

TUESDAY, Nov. 30, 1875.

ROBERT W. JONES *v.* THE OREGON CENTRAL RAILWAY COMPANY.—*Action at Law.*

Section 866 of the R. S. gives the courts of the U. S. power to grant a *dedimus* to take the examination of a witness whenever in their judgment it may be necessary to prevent a failure or delay of justice; and §§ 863-4-5 of said R. S., relating to taking depositions *de bene esse* have no application to the granting or execution of said *dedimus*.

The mode of issuing and executing a *dedimus* granted in pursuance of said § 866 is regulated by "common usage" or practice, which usage or practice, as to this court, is prescribed by § 807-8-9 of the Or. Civ. Code, relating to taking depositions on commission; and title 7 of chapter 9 of said code, relating to taking depositions *de bene esse* does not apply.

A person appointed to execute a *dedimus* represents the court and not the parties; and his commission should contain full directions as to the manner of its execution, as set forth in § 809 of the Or. Civ. Code.

In certifying the deposition to the court it is not necessary for the commissioner to state when or where the examination of the witness was taken, nor by whom it was reduced to writing, or that the witness was "cautioned" before being sworn.

A witness examined under a *dedimus* should be sworn according to the law of the forum from whence it issued.

Section 860 of the Or. Civ. Code having provided that an affirmation may be made by any person in place of an oath, a *dedimus* which authorizes the commissioner to administer an oath to a witness, is well executed in this respect, when it appears from the return thereto that the witness was duly affirmed.

A return to a *dedimus* need not show *how* a witness was sworn or affirmed, so that it states substantially that the witness was *duly* sworn or affirmed; nor is it material whether the facts required to be stated in such return are stated in the introduction or conclusion of the examination, so that they are plainly referred to and included by the commissioner in certifying the deposition as a part of the proceeding and return.

DEADY, J.

The defendant moves to suppress the deposition of Charles S. Hinchman, taken at the instance of plaintiff herein, for the reason that the witness does not appear (1) "to have been cautioned, sworn or affirmed according to law;" nor (2) "to have been examined upon the interrogatories attached to the commission;" and that said deposition does not appear (1) to have been "taken, returned and certified according to law;" nor (2) "taken, certified and returned in accordance with chapter 9 of the Code of Oregon and the practice of this court."

On May 7, 1875, a *dedimus potestatum*, or commission, was issued by the clerk of this court to Samuel L. Taylor, of Philadelphia, giving him power to cause Charles S. Hinchman "to come before" him "at certain days and places to be appointed" by such commissioner, "and then and there" to take the examination of said "Hinchman on his corporal oath as a witness" in the above entitled cause upon the direct and cross interrogatories thereto annexed; and also "to reduce such examination to writing and certify and return the same annexed" to such commission "in a sealed envelope directed to the clerk" of this court "with all convenient speed."

This commission was issued under § 866 of the R. S., the same being the final proviso of § 30 of the judiciary act of 1789, and §§ 807 to 809, inclusive, of the Or. Civ. Code.

The examination of the witness was returned to this court in a sealed envelope on October 12, and published by order of the court on November 11. From the return, which is annexed to the commission, it appears that the deposition of the witness was taken in pursuance of the commision at the office of the commisioner in Philadelphia, on the 15th and 20th days of July, 1875, the witness being first "duly affirmed according to law to testify the truth, the whole truth, and nothing but the truth." It also appears that the witness, being so affirmed, did depose, in answer to the several interrogatories annexed to the commission, as stated in the deposition. So much appears from the statement of the commissioner preceding and introductory to the answers of the witness to the direct and cross interrogatories. The examination is signed by the witness and then follows a certificate of the commissioner, from which it appears that the witness pursuant to said commission came before him "on the days above specified," at 3 P. M. of each day, and "being duly affirmed according to law did testify in the above case *as is found above*;" and that the deposition was by him reduced to writing and subscribed in his presence.

This motion appears to have been made under the apprehension that the provisions of § 30 of the judiciary act of 1789, now §§ 863-4-5 of the R. S., regulating the taking of depositions *de bene esse* apply to the examination of a witness upon a *dedimus potestatum* as authorized by the proviso to said § 30, now § 866 of the R. S., and that title 7 of chapter 9 of the Or. Civ. Code applies to depositions taken upon a commis ion as well as to those taken *de bene esse*.

But this is a mistake. Neither §§ 863-4-5 of the R. S., nor Title 7 aforesaid, is in any way applicable to a deposition taken upon a *dedimus* or commission. The argument for so applying Title 7 is founded upon the following clause in § 818 of the Or. Civ. Code: "A deposition taken, whether in the State or without, upon insufficient notice or otherwise, not substantially in conformity with the provisions of this chapter (C. 9), may be excluded from the case, unless," etc.

Title 6 of the same chapter provides for taking the deposition of a witness, out of the State, upon a commission. In such case it is only necessary for the return of the commissioner to show that he administered an oath to the witness and took his examination upon the interrogatories, or if there are none, in respect to the question in dispute, § 109 Or. Civ. Code. But Title 7 provides for taking depositions *de bene esse* upon notice, and in such case § 815 requires the officer to certify many details as to the taking of the deposition which are not required by § 809, in the case of depositions taken under a commission. Chapter 9 provides for two modes of taking depositions—the one upon commission, and the other upon notice. A deposition taken in either of these modes is taken "in *conformity* with the provisions of the chapter" when it is taken in *conformity* with the provisions or title of the chapter relating to the taking of *such* a deposition.

To hold that *all* the provisions of the chapter are applicable to a deposition taken under either mode, would not only violate the plain significance of the clause in question, but make the statute an impracticable absurdity. Why go to the trouble of providing for two different modes of taking depositions and then practically require them to be taken in the same manner in all cases—in effect in only one mode? It is not to be supposed that the legislature would provide different modes for taking depositions in the case of witnesses without or within the State and then declare that all the provisions applicable to either case should be complied with in the other; and there is nothing in the language of chapter 9 which gives the slightest countenance to such a conclusion. Therefore, it is not necessary that the return should show on what days or times the examination of the witness was taken, nor who reduced it to writing. The commissioner is the agent or officer of the court. Gilpens *v.* Consequa, Pet. C. C., 88. Power is given him to take the examination, and confidence is reposed in him that he will exercise this power according to the directions of the commission, which is his chart and guide.

Neither do the provisions of the R. S., relating to depositions taken *de bene esse*, apply to this deposition. In Seargent's Lessee *v.* Biddle, 4 Whea., 508, the Supreme Court held that depositions taken under a *dedimus* are not to be considered as taken *de bene esse*. To the same effect is the ruling in Nicholas *v.* White, 1 Cr. C. C., 50.

Therefore it is immaterial whether the witness was "cautioned" or not before being sworn, as required by § 864 of the R. S., in the case of depositions taken *de bene esse*. Neither is it material that the return should show anything more than that the witness was duly sworn or examined upon his oath duly administered. Where an *oath* is required by the commission, if the law declares that an affirmation is equivalent, an affirmation is sufficient. § 860 of the Or. Civ. Code provides that an affirmation may be made in place of an oath by any person who has conscientious scruples against taking the latter.

The commission being an act of this court, and the examination of the witness an exercise of judicial power through the intervention of its agent or officer, the commissioner, I think that the law regulating the proceeding in this court—the law of this State—controls the matter of *how* the witness should be qualified. On the other hand, if it should be held that the law of the place where the commission was executed would control in this respect, it can hardly be doubted, that an affirmation is equivalent to an oath in the quaker city of Philadelphia.

The objection that the witness was not examined upon the interrogatories, does not appear to be well founded in fact. As has been stated, the return shows that the witness deposed in answer to the first interrogatory as follows—giving the answer—and so on through all the series. This is found in the preamble or introduction to the deposition, and therefore it is contended that it is no part of the *certificate* to the deposition. Now the code, § 809 *supra*, does not require a certificate to be *appended* to the examination of the witness, but only that the commissioner shall "certify the deposition to the court." This is sufficiently done when he certifies that the *following* or the *foregoing* or *accompanying* is the examination of the witness given upon his oath or affirmation by me duly administered, in answer to the interrogatories annexed to the commission, *or as therein stated*. Keene *v.* Meade, 3 Pet., 1. In this case the certificate appended to the examination states that the witness "testified in the above case *as is found above*,"—that is, in answer to the interrogatories annexed to the commission. Indeed, the matter is too plain to waste words upon.

The power to grant a *dedimus* to take the examination of a witness is given to this court. "In any case where it is necessary, in order to prevent a failure or delay of justice," by § 866 of the R. S. It is to issue "according to common usage," which is construed to be the rule or law governing the practice of the court in this respect at the time. Lessee of Rhoades et al. *v.* Selin et al., 4 Wash. C. C., 723. In this case that law is found in §§ 807 to 809 inclusive of the Or. Civ. Code. The mode of issuing the commission and the authority and directions to be contained in it are prescribed by these sections, and it is to be executed accordingly. But the cases in which it may issue are not prescribed by the local law but by the U. S. Statute above cited. *When* it is necessary to grant a *dedimus* to prevent a failure or delay of justice, the court must determine either by a general rule or a special order in each particular case. It may become necessary to take the examination of a witness upon a *dedimus* as well within the State as without, and in such a case it would be done although the local law does not authorize it.

None of the objections made to this deposition are valid. It appears to have been taken in substantial conformity with the directions in the commission, and the motion to suppress it is disallowed.

JOSEPH N. DOLPH for motion.

WALTER THAYER and BENTON KILLIN contra.

ILLINOIS SUPREME COURT.

HEAD-NOTES TO RECENT CASES PREPARED BY HON. NORMAN L FREEMAN, REPORTER.

Onecia Hagebush v. *Willis A. Ragland.* Appeal from Washington.

BAILMENT.

1. *To whom loan made.*—Where a married woman requested of a party the loan of a horse to visit her brother, and about a week after her husband and son went for the same, and not finding the owner at home, the husband sent the son, who procured the animal which was used to make the visit, it was held that the jury were warranted in finding the loan was made to the wife, notwithstanding she may not have directed her son to get the animal, or may not have known that he had gone for it when he did.

2. *Degree of care required in case of a loan.*—Where an animal is borrowed without hire, the borrower is bound to use extraordinary care of the same, and for any failure of such duty resulting in injury to the lender, the borrower will be liable.

PARTY AT LAW.

3. *In suit against borrower.*—Where a wife borrows property which is injured before its return, she alone is liable to the lender, and it is not error in the court to allow a dismissal as to the husband, on appeal, when both have been sued before a justice of the peace. It would be otherwise if the husband was liable.

The Ohio and Mississippi Railway company v. *Samuel D. Noe.*—Appeal from Richland.

REPLEVIN.

1. *When demand and refusal necessary.*—The law is well settled that where a party obtains the possession of property lawfully, on a chose of replevin cannot be maintained to recover it until a demand has been made and the possession refused.

2. Where goods are shipped by rail, the railway company having obtained possession lawfully, will have a right to hold them until the freight actually due is paid and a demand is made. If too much freight is charged the owner should tender the proper amount before bringing replevin. The tender is too late after the suit is commenced.

Prentiss D. Cheney v. *The City National Bank of Chicago.*—Appeal from Jersey.

1. *Summons, Sufficiency of motion to quash.*—Where the first summons issued in a cause was returned "not found," and thereupon within ten days of the commencement of the term, an alias summons was issued returnable to the same term, which was served and the cause continued, and the defendant at the next term to which the cause was continued, moved the court "to quash the writ issued herein," which was overruled. *Held*, that the motion was defective in not specifying which writ was intended, and hence the question was not properly presented whether the second summons issued within ten days of the term should not have been made returnable to the next succeeding term.

2. *Plea.—Of incumbrance on land conveyed by warranty deed in action on note for the price.*—To an action upon a promissory note given for the purchase money of land, the defendant pleaded that the land was conveyed by warranty deed, with full covenants; that the land was not free of incumbrance, but was incumbered and charged with the payment of certain taxes amounting to $448.40, which had not been paid, but was still a lien upon the land; *Held*, that the plea was bad on demurrer, as it failed to show that the grantee had paid the incumbrance or had been disturbed in the possession of the land in consequence of the same.

3. *Failure of consideration.—Incumbrance on land sold*—Where the grantee of land, under a deed covenanting against incumbrances, discharged an existing incumbrance for taxes on the land, he may in a suit upon the note given by him for the purchase money, sustain a plea of partial failure of consideration.

4. *Remittitur.*—Where the plaintiff, after the adjournment of the court at which he recovers judgment for too large a sum, files a remittitur of the excess, and a similar one in this court on appeal, with a request that it be acted upon under sec. 82 of the practice act of R. S. of 1874, this court will allow the same, and thus cure the error, if any.

CAN A WOMAN PRACTICE LAW IN WISCONSIN?

THAT IS THE QUESTION THAT THE SUPREME COURT OF THAT STATE IS TRYING TO SOLVE.

Miss Lavinia Goodell, of Janesville, Wisconsin, was more than a year ago admitted to practice in the Circuit Court of that place, after a very thorough examination. She has, since her admission, been practicing in that city very successfully, and with the approbation of her brethren of the Janesville bar. In the course of that practice, one of the cases which Miss Goodell tried in the Circuit Court was taken to the Supreme Court, the parties desiring that Miss Goodell, who had tried the case in the court below with so much ability, should follow it into the Supreme Court. On the 14th of last month she appeared before the Supreme Court at Madison and made application for a license from that tribunal. I. C. Sloan, the assistant attorney-general, appeared with Miss Goodell, and moved that she be admitted, read her argument, and supported the same with a powerful speech. The following is the petition and argument of Miss Goodell:

To the Honorable the Judges of the Supreme Court of Wisconsin:

Now comes your petitioner, Miss R. Lavinia Goodell, a resident of Janesville, Wisconsin, over twenty-one years of age, and presents to your honors the certificate of A. W. Baldwin, clerk of the Circuit Court of the Twelfth Judicial Circuit of the State of Wisconsin, stating that at a term of said court, begun and held at the court house, in the city of Janesville aforesaid, on the 17th day of June, A. D. 1874, your petitioner was examined in open court; and that, it appearing that she was a resident of the State of Wisconsin, more than twenty-one years of age, of good moral character, and possessed of sufficient legal knowledge and ability, she was duly admitted by said court as an attorney and counselor-at-law; and moves your honors that an order of this honorable court may be entered, granting a license to your petitioner to practice as an attorney in said court.

Your petitioner respectfully suggests that the only quastion involved in her case—if indeed there be any question at all—is, whether the fact of her being a woman disqualifies her, under the laws of Wisconsin, or the rules of this honorable court, for receiving a license to practice as attorney in said court, and claims that she is not so disqualified.

The statute providing for the admission of attorneys reads as follows:

"No person shall hereafter be admitted or licensed to practice as an attorney of any court of record in this State except in the manner hereinafter provided.

"To entitle any such person to practice as an attorney in the Circuit Courts of this State, he shall be first licensed by order of one of the judges thereof, made in open court, and no such order shall be made until the person applying for such license shall have first been examined in open court, by the judge thereof, or examiners by him appointed, as to his learning in the law and ability to practice as such attorney, nor until such judge shall be satisfied that such person possesses sufficient legal knowledge and ability to entitle him to practice as such attorney, nor unless such person be a resident of this State, more than twenty-one years of age, and of good moral character. His residence and age must be made to appear by his affidavit.

"Any person licensed by order of the court, as provided by section two of this act, shall be entitled to practice as attorney in any court of record of this State, except the Supreme Court; and to entitle any person to practice as an attorney in the Supreme Court, he shall first be licensed by order of such court." Tay. Stat. II. pp. 1343-4.

There is nothing contained in these provisions which can be so construed as to debar a woman from the privilege of obtaining a license under them, unless it be the use of the masculine pronoun. But by the statute, relating to the rules of interpretation, it is provided that "every word importing the masculine gender only may extend and be applied to females as well as to males." Tay. Stat., I., p. 181. This rule of interpretation is followed in the construction of all the statutes, and there appears no reason why it should not be applied to the particular statute under consideration, as well as to the statutes generally. It has been so applied to the statute providing for notaries public, and defining their duties, under which your petitioner has been appointed and now holds the office of notary.

Nothing appears, then, in the laws of the State tending to disqualify an applicant for admission in consequence of her sex.

There appears among the rules of said court none modifying the statute of the State in this respect.

Your petitioner can foresee no argument against granting her the license requested, under the laws of Wisconsin and the rules of said court, excepting it be the one used in giving the opinion of the Supreme Court of Illinois in the matter of the application of Myra Bradwell, Sept., 1869, viz.: That the admission of women to the practice of law was without precedent, unknown to the common law, and not within the thought and intention of the legislature at the time the statute providing for the admission of attorneys to practice was enacted. In giving their opinion in this case, the learned judges say:

"It is to be further remembered that when our act was passed, that school of reform which claims for woman participation in the making and administering of the laws had not then arisen, or if here and there a writer had advanced such theories, they were regarded rather as abstract speculations than as an actual basis for action. * * * In view of these facts we are certainly warranted in saying that when the legislature gave to this court the power of granting licenses to practice law, it was with not the slightest expectation that this privilege would be extended equally to men and women. Neither has there been any legislation since that period which would justify us in presuming a change in the legislative intent."

Your petitioner claims that this argument, whatever may be said of its applicability to the case to which it was applied, is wholly inapplicable to the present case. The statute of Illinois providing for the admission of attorneys was enacted in 1845 or earlier, as it appears in the Revised Statutes of 1845. The statute of Wisconsin above quoted was enacted in 1861, when progressive ideas concerning the enlargement of the sphere of woman's industries were more widely known and adopted, and so may reasonably be presumed to have been within the minds of the legislators, at the time of its enactment. But even if this were a question of doubt, further legislation in the State of Wisconsin clearly indicates that whatever the intention of the legislators in 1861 might have been—if other than that expressed by plain and unequivocal language—their subsequent intention has been to include women in the provisions made for the admission of attorneys to practice in all the courts of record in this State. By enactment passed in 1867 (ch. 17) women are admitted to every department, except the military, of the State University, "under such regulations and restriction as the Board of Regents may deem proper." Tay. Stat. I, p. 521. This statute admits women to the law department of the State University, with the privilege of pursuing the course of study marked out for its students, and of graduating from that department. Whether the clause, "under such regulations and restrictions as the Board of Regents may deem proper" gives said board power to exclude women from the full legal course and the privilege of graduating or not, it certainly gives them power to allow to women students such full course of study and graduation, if they see fit to do so. Now, by statute passed in 1870, "all graduates of the law department" (of the State University) "shall be entitled to admission to the bar of all the courts of this State, upon presentation to the judge or judges thereof, certificate of such graduation." Tay. Stat, II, 1344. Thus, by express legislative enactment, women may be admitted to the bar of all the courts of the State of Wisconsin, by graduating from the law department of the State University. Can it have been the intention of the legislature to give the Board of Regents of the State University the power to admit women to the practice of law in the Supreme Court of this State, and at the same time to withhold that very power from the Supreme Court itself? Will this honorable court decide that it is deprived by the legislature of the power of admitting women to its bar, while at the same time the Board of Regents of the State University are endowed with that power, and can control the membership of the bar of this honorable court under circumstances in which it cannot itself control it?

Again, the statute provides for the admission of attorneys from the State of Illinois and other States, under certain restrictions which do not apply to the question of sex. (See Tay. Stat. II., pp. 1344–5, sections 39, 40). Accordingly, women may be admitted to the bar of the Supreme Court of Wisconsin from Illinois and other States in which they are now, or may hereafter become practicing attorneys. If the courts of other States have a power to procure the admission of women to the bar of this State, have not its own courts such power?

Again, the constitution of Wisconsin (Tay. Stat. I., p. 113) provides for the conduct of suits by a party or his attorney or agent. Under this clause of the constitution no court would have the right or power to refuse a woman as party or agent the right to conduct suit in court on her own behalf, or that of her principals.

The matter of the application and refusal of Myra Bradwell being the leading case in apparent opposition to the claim of your petitioner, will be briefly reviewed. (See LEGAL NEWS, Feb. 5, 1870).

Upon application made in 1869 to the Supreme Court of Illinois, Mrs. Bradwell was refused admittance, Oct. 6. 1869, on the sole ground that she was a married woman, and as such, under existing laws, was incapable of making contracts. Mrs. Bradwell filed a pointed brief, replying to the opinion of the court in a lengthy argument, the most pertinent point in which was that, by statutes enacted by the legislature of Illinois, in 1861 and 1869, giving to a married woman the right to hold property in her own name, to control her own earnings, and to sue and be sued, the disabilities asserted by the court to exist had been removed, and could no longer form a barrier to her admission to legal practice. The court, in giving its opinion upon the brief, while still denying Mrs. Bradwell's application, retreated from its former position—thus virtually conceding Mrs. Bradwell's point, and refused her application no longer on the ground of her disabilities as a married woman, but simply and solely on the ground of her being a woman. The learned judges, while virtually admitting that nothing in the language of the statute precluded the admission of women, laid down this rule:

That "in all other respects," (aside from the limitations of the statute) "it is left to our discretion to establish the rules by which admission to this office shall be determined. But this discretion is not an arbitrary one, but must be held subject to at least two limitations. One is, that the court shall establish such terms of admission as will promote the proper administration of justice; the second that it should not admit any persons or class of persons who are not intended by the legislature to be admitted, even though their exclusion is not expressly required by the statute."

No argument was made upon the first limitation enumerated, and the refusal to admit the applicant was based solely upon the second.

None of the arguments urged in opposition to the claim of Mrs. Bradwell for admission apply to the case now presented by your petitioner. Your petitioner is not a married woman, and under no disabilities. But even if she were married, the recent Legislature of Wisconsin, giving to married women the right to control their own property and earnings, and to sue and be sued, removes their disabilities to contract, as in the case of similar legislation in Illinois, and so removes the barrier supposed to have existed to their admission to legal practice. (See Tay. Stat. II., pp. 1195-6, and ch. 155, Laws of 1872.)

The inapplicability to the case of your petitioner, of the argument upon which the second refusal was based, has already been shown.

One of the limitations to the discretion left by legislation to the court, as specified by the Supreme Court of Illinois, was "that the court shall establish such terms of admission as will promote the proper administration of justice." No argument was made against the admission of women under this head, and your petitioner would respectfully submit that "the proper administration of justice" would be better promoted by the admission of women to the practice of law than by their exclusion, for these reasons among others:

1. That a class wholly unrepresented in the courts of justice, can never obtain full justice in such courts; and that when that class is so numerous as to include one-half the human race, the promotion of "the proper administration of justice" requires that they be represented.

2. That a union of the peculiar delicacy, refinement, and conscientiousness attributed to women, with the decision, firmness, and vigor of man, are not only desirable but necessary in promoting "the proper administration of justice" in our courts.

3. That in excluding women from the practice of law, an injustice is done the community, in preventing free and wholesome competition of the best existing talent.

4. That a great injustice is done to one half the community, by shutting them out arbitrarily from an honorable and remunerative field of industry for which many of them have both taste and ability.

Besides the case of Mrs. Bradwell, the only apparently adverse decision to the admission of women to the practice of law, within the knowledge of your petitioner, is that of Mrs. Belva Lockwood, who was refused admission to the Court of Claims, Washington, D. C., in 1874, solely on the ground of her disabilities as a married woman; an argument wholly inapplicable to the present case, as has already been shown. (See LEGAL NEWS, May 23, 1874.)

The following precedents are in favor of the admission of women:

Iowa.—In 1869, Mrs. A. A. Mansfield was admitted to the bar of Iowa under a statute providing that "any white male person" with the requisite qualifications should be licensed to practice; by virtue of a statute providing that "words importing the masculine gender only may be extended to females;" and the court held that the affirmative declaration that male persons may be admitted, is not an implied denial of the right to females. (See LEGAL NEWS, Feb. 5, 1870; Mrs. Bradwell's case).

Missouri, under a statute providing that "any person" possessing certain qualifications may be licensed, admits women. (See case of Miss Barkaloo, in LEGAL NEWS, Apr. 3 and Apr. 9, 1870). Miss Barkaloo was also admitted to the Supreme Court of Missouri.

Michigan, under a statute using the word "citizen" as the statute of Wisconsin uses "person," admits women to practice.

Maine, under a statute similar to that of Wisconsin, admitted Mrs. C. H. Nash to Supreme Court in 1872. (See LEGAL NEWS, Oct. 26, 1872).

District of Columbia.—Charlotte E. Ray was admitted about 1872, on graduating from Howard University.

Ohio, under a statute similar to that of Wisconsin, has, I learn, admitted a woman to practice.

The Federal District Court of Illinois has admitted women. (See LEGAL NEWS, May 23, 1874).

Illinois and Iowa have recently made legislative provision for the admission of women.

All of which is respectfully submitted.

LAVINIA GOODELL.

December 14, 1875.

The court reserved its decision. Chief Justice RYAN indicated by his remarks that he doubted the right of the court to grant the motion. His associates, however, gave no indication of their opinion. We can assure the Supreme Court of Wisconsin, should they hold that, under the statutes of that State, they have no power to admit Miss Goodell, that at the very next session of the legislature a statute will be passed which cannot be construed to deprive her of the right to admission to the bar upon equal terms with men. Miss Goodell comes from a family that was never known to give up when in the right. Her father is the celebrated abolition speaker and writer, "Goodell," who did battle for so many years in the crusade against slavery. The question is, shall Miss Goodell, who has spent years of her life in preparing herself for her profession, has passed the required examination, has a paying practice, be allowed to continue it, or be financially ruined because she is a woman?

CHICAGO LEGAL NEWS.

Lex vincit.

MYRA BRADWELL, Editor.

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We call attention to the following opinions, reported at length in this issue:

Guardian's Sale — Confederate Money—Investment — Posthumous Child.—The opinion of the Supreme Court of the United States, by Field, J., holding that a guardian's sale would not be affected by the birth of a posthumous child after the commencement of the proceedings, although not made a party; that the posthumous child did not possess, until born, any estate in the real property of which his father died seized, which could affect the power of the court to convert the property into a personal fund, if the interest of the children then in being required such conversion; that whatever estate devolved upon him at his birth, was an estate in the property in its then condition; that property had then ceased to be realty; it had become, by the sale, converted into personalty; that because the decree ordering the sale directed the money to be invested in Confederate money, did not affect the sale and was not void as aiding the rebellion. In the case of Botsford *vs.* O'Connor, 2 Chicago Legal News, the Supreme Court of this State held in a case very similar to the one under consideration, that the rights of a posthumous child in the lands of its deceased parent, could not be affected by the sale unless such child was made a party to the proceedings to sell. It would seem as if the rule as announced by the Supreme Court of this State is the safest to follow.

Married Woman's Property Rights upon Obtaining a Divorce.—The opinion of the Supreme Court of the United States, by Field, J., where a man and woman were married in the District of Columbia, and the wife purchased land with money which her father gave her previous to the marriage, and improved it partly with such money and partly with her subsequent earnings, notwithstanding the fact that at the time of the marriage and at the time of the purchase of such land and its improvement, the common law prevailed in the District as to the property rights of married women. *Held*, that the husband being free from debt at the time, it was competent for him to allow her to invest such money for her own use, so as to be beyond his reach and control, and that a divorce between the parties was not of itself a sufficient reason for restoring to the husband any rights to the property thus settled upon the wife.

Patent—Re-Issue—Infringement.—The opinion of the United States Circuit Court for the Northern District of Illinois, by Blodgett, J., holding that the law of 1836 authorizes a patentee to claim on a re-issue whatever shall clearly appear to have been a part of his original invention as described or shown in his original specifications, drawings or models.

Depositions for U. S. Court.—The opinion of the United States District Court for the District of Oregon, by Deady, J., as to the manner and practice of taking testimony by deposition, to be used in the Federal courts.

NOTES TO RECENT CASES.

AGENT—COMMISSIONS—LIABILITY.

In Pownall *v.* Bair, 23 Pitts. *Legal Journal*, the Supreme Court of Pennsylvania held that an agent is entitled to commissions only when he discharges his duty towards his principal; that any departure from this rule, whereby the principal is subjected to loss, renders the agent liable for the damages sustained, as well as forfeiture of all his commissions.

POWER OF CORPORATION—INTEREST ON STOCK.

The Supreme Court of Penna. held, in Pitts. & S. R. R. Co. *v.* Allegheny Co., 32 *Leg. Intel.*, 404, that the powers of a corporation must be found in its charter, or arise by necessary implication therefrom; that a railroad company, unless expressly authorized, has no power to contract to pay a certain interest on a portion of its stock; that all the stockholders are equally entitled to a dividend.

STATUTE OF FRAUDS—PAROL SALE OF GROWING TREES.

In Marshall *v.* Green, the English Court of Common Pleas, 33 L. T. Reps., N. S., 404, held that a sale, by parol, of growing trees, "to be got away as soon as possible," was not a contract for the sale of lands, tenements, or hereditaments, or any interest in or concerning them, within the meaning of the 4th section of the Statute of Frauds; that the parol license to enter and take the trees, being coupled with a valid sale of the trees, was irrevocable. The opinions delivered in this case contain a very thorough review of the authorities upon the important question under consideration.

STOCK COMPANY—ACTING DIRECTORS—FORFEITURE OF SHARES.

The judicial committee of the Privy Council, in the Garden Gully Mining Co. *v.* McLister, on appeal from the Supreme Court of the Colony of Victoria, 33 L. T. Reps., N. S., 408, held that, in a joint stock company, a valid call can only be made, and a valid forfeiture of shares, for non-payment of such call, can only be declared by directors properly appointed, in accordance with the rules of the company; and that a forfeiture declared by acting *de facto* directors, irregularly elected, must be held invalid.

BILL DRAWN AND INDORSED IN ONE COUNTRY, PAYABLE IN ANOTHER—RIGHTS OF INDORSEE AND DRAWER — CONTRACT BY WHAT LAW GOVERNED.

The English Court of Queen's Bench, in Bouquette *v.* Overmann et al., 33 L. T. Reps., N. S., 420, held, where a bill of exchange is drawn and indorsed in one country and payable in another, the rights and liabilities of drawer and indorsee are regulated by the law of the country where the bill is payable. It would seem that this opinion is, in principle, in conflict with the opinion of our Supreme Court in Barber *v.* Bell, also published in this issue.

BILL OF EXCHANGE—BANKRUPTCY OF DRAWER — PARTIAL PAYMENT — SET OFF OF DEBT DUE BY BANKRUPT DRAWER TO ACCEPTOR.

The opinion of the English Court of Common Pleas, in Thornton *v.* Maynard, 33 L. T. Reps., N. S., 433, that in an action by the indorsee of a bill of exchange against the acceptor, payment by the drawer is no defense, but only converts the indorsee into a trustee for the drawer of the amount of the drawer's payment. But when an indorsee sues under such circumstances (i. e., after having been paid or partially paid by the drawer), inasmuch as he sues in the character of trustee for the drawer, the acceptor is entitled to plead equitably, as a set-off, a debt due from the drawer to him, which would have been the subject of a good legal set-off in an action against him by the drawer; that the same rule holds good, although the drawer may have become bankrupt, and the indorsee have received a dividend from his estate in respect of the bill.

Probate of Will—Burden of Proof—Testimony of Experts.—We are under obligation to John M. Shirley, Reporter, for the following head-notes to the case of Hardy *v.* Merrill, decided Dec. 15, 1875:

The party who affirms that a will was duly and legally executed has the burden of proof and the accompanying duty to open and right to close; no matter in what form the issues may be drawn.

Upon an issue concerning the sanity of a testator, the opinions of nonprofessional witnesses, and who are not subscribing witnesses to the will, are admissible when founded upon thair knowledge and observation of the testator's appearance and conduct (overruling, in this point, Boardman *v.* Woodman, 47 N. H., 120, and State *v.* Pike, 49 N. H., 399.)

The leading opinion in this case was delivered by Foster, C.J., and is eighty pages in length, which excludes it from our columns. This decision makes the dissenting opinion of Doe, J., in Boardman *v.* Wirman, and State *v.* Pike, the law in New Hampshire and bring it into harmony with the law of every other State, if we except Texas, Maine and Massachusetts, and places the law and practice in New Hampshire back to where it was thirty years ago.

To Ill. Law Students.—We call the attention of persons desiring to be admitted at the term of the Supreme Court, which commences on Tuesday next, to the fact that the court has so changed the rule that instead of devoting Thursday and Friday of the first week of the term to the examination of applicants for admission to the bar, Thursday only of that week will be devoted to that purpose. Parties wishing to be admitted at this term will have to be examined on Thursday next.

The Sharswood Prize.—The alumni of the law department of the University of Pennsylvanis have appropriated the sum of fifty dollars annually, to be paid as a prize, know as the "Sharswood Prize," to be competed for by the graduating class in each year, for the best essay upon a given legal topic to be selected by the faculty. Is there not some society or rich member of the bar who will do as much for the graduating class of the Chicago College of Law? We shall be glad to announce the fact.

Mrs. Abaham Lincoln.—Mrs. Lincoln has been spending a few months very pleasantly with her sister Mrs. Edwards, at Springfield. She very appropriately on Christmas presented to Hon. Jesse K. Dubois, one of Mr. Lincoln's most intimate, personal and political friends, a gold-headed ash cane inscribed: "Cut from the birthplace of A. Lincoln, and presented by Dr. J. H. Rodman, of La Rue county." The cane was presented to President Lincoln during his lifetime, and is now given Mr. Dubois as a Christmas present.

Hon. W. C. Whitson, associate justice of the Supreme Court of Idaho, died suddenly at Omaha, Neb., Christmas night, of paralysis. He was on his way to Idaho.

THE CHICAGO BAR ASSOCIATION DINNER.

The Chicago Bar Association held its second annual dinner at the Grand Pacific hotel on last Thursday evening. The thanks of the members of the association are due to the committee, composed of Messrs. Ayer, Fuller, Smith, Williams and Hervey for the efficient manner in which they performed their duties. Mr. B. F. Ayer, the president of the association, presided, and by his easy and pleasing manner, contributed much to the enjoyment of the guests.

The following is a list of the invited guests seated at the grand table: On the right hand of the president were Chief Justice Scott, of the Supreme Court of the State; Judges Williams, Moore and Gary, of the courts of this county; the Hon. Leonard Swett, the Hon. J. Y. Scammon; Judge Blodgett, of the United States District Court; and Judge Lawrence. On the left of Mr. Ayer were Prof. David Swing, T. L. Dickey, Judge-elect of the Supreme Court; Atty. Gen. Edsall, Judges Rogers and Farwell, of the Circuit Court of Cook county; ex-Senator Doolittle, the Hon. Wirt Dexter and H. F. Waite.

The members included the following: District Attorney Reed, the Hon. H. F. Withrow, Gen. George W. Smith, M. F. Tuley, F. H. Kales, ex-Judge Harris, the Hon. J. P. Root, S. A. Goodwin, J. N. Jewett, U. P. Smith, W. C. Grant, J. C. Richberg, John A. Hunter, R. T. Lincoln, F. Q. Ball, Gen. B. C. Cook, Gen. Stiles, W. H. Barnum, T. M. Hoyne, the Honorable Grant Goodrich, E. B. Sherman, Joseph E. Smith, R. E Williams, Gen. J. H. Thompson, George E. Adams, A. T. Galt, A. N. Waterman, J. H. S. Quick, R. Waterman, Edwin Walker, W. J. Culver, Judge J. A. Wilkinson, E. W. Pattison of St. Louis, E. E. Mason, Norman Williams, A. H. Veeder, J. M. Dunning, Orrin Skinner, William Vocke, J. Patterson, Arthur Caton, C. E. Towne, H. J. Sheldon, C. M. Hardy, E. S. Isham, the Hon. Charles Hitchcock, Judge Bradwell, Thomas Dent, L. L. Bond, M. D. Hardin, W. M. Luff, O. K. A. Hutchinson, the Hon. Elliott Anthony, W. C. Goudy, J. I. Bennett, Henry W Bishop, Melville W. Fuller, J. P. Wilson, E. A. Small, B. D. Magruder, J. R. Doolittle: Jr., Assistant-District-Attorney Birch, Geo. Willard, Judge Sackett, H. T. Steele, Judge L. B. Otis, Robert Hervey, O. H. Horton, L. H. Bisbee, W. R. Page, J. L. High, George F. Harding, E. W. Evans, and J. E. Goodwin. A place was reserved among the invited guests for Judge Wallace, but, to the regret of the committee and bar at large, he was unfortunately absent. Mr. I. N. Arnold also, who had been invited, and who was expected to respond to the first toast, was unexpectedly kept away on account of sickness.

Letters of regret were read from the following:

Hons. Saml. F. Miller, David Davis, William Strong, J. P. Bradley, judges of the Supreme Court of the U. S.; Hon. H. H. Emmons, of Detroit, John F. Dillon, of Davenport, U. S. Cir. judges; Hons. S. A. Treat, St. Louis, Mo.; J. C. Hopkins, Madison; H. B. Brown, Detroit, Mich.; S. L. Withey, Grand Rapids, Mich.; J. M. Love, Keokuk, Iowa; C. E. Dyer, Racine, Wis.; W. Q. Gresham, Indianapolis, Ind., U. S. District Court judges. Hons. Sidney Breese, P. H. Walker, B. R. Sheldon, John Schol-

field, A. M. Craig, judges of Supreme Court of Ill.; Hons. B. F. Graves, Jno V Campbell, judges of Supreme Court of Mich.; Hons. John Pettit, A. C. Downey, judges of Supreme Court of Indiana; Hon. James G. Day, Hon. Austin Adams, judges of Supreme Court of Iowa; Hon. O. H. Browning, Quincy, Ill.; Hon. Wm. R. Morrison; Hon. S. S. Marshall, McLeanshoro, Ill.; Hon. R. G. Ingersoll, Peoria, Ill.; Norman L. Freeman, Esq., Springfield, Ill.; John H. Mulkey, Esq., Cairo, Ill.; G. V. W. Lathrop, Esq., Detroit, Mich.; Hon. James Grant, Davenport, Iowa; Hon. John M. Krum, St. Louis, Mo.; S. M. Breckenridge, Esq., St. Louis, Mo.; Jas. E. Withrow, Esq., St. Louis, Mo.

At the conclusion of the dinner Mr. AYER, the president of the association, arose and said:

REMARKS OF PRESIDENT AYER.

GENTLEMEN: In rising at this time to perform one of the duties which custom assigns to the chair, it is very far from my intention to inflict upon you a set or formal speech. There are many gentlemen present, and among them I am happy to see several eloquent and distinguished guests who have honored us with their company, to whose voices you will esteem it a privilege to listen. Before calling upon them, however, you will permit me to express the satisfaction I feel, and which I am sure is shared by you all, at meeting here this evening so large a number of my brethren of the bar. The arduous labors and responsibilities which devolve upon lawyers, and especially upon those actively engaged in the practice of their profession in a large city, allow them to give but a small portion of their time to recreation or social enjoyment. Their hours of leisure are comparatively few; their seasons of rest and vacation rare and fortuitous; their occupation severe and almost incessant. If any class of men are entitled to seek occasional relaxation from the cares and duties which press upon their time and strength, those of whom I am speaking may certainly claim that indulgence.

There is another thought upon this subject which may be briefly suggested. The cultivation of social intercourse among members of the bar, and the habit of coming together upon suitable occasions for the interchange of sentiments and civilities, are powerful agencies in sustaining the tone and character of the profession, in keeping up the *esprit du corps*, in encouraging loyal obedience and fidelity to the rules of honor and conscience on the part of those who are admitted to its privileges, and preserving the practice of the law from those degrading tendencies which sometimes threaten to bring scandal and reproach upon the administration of justice. The necessity of doing something to keep alive the social spirit of the bar had been long sensibly felt when this association was organized; and to revive and stimulate that spirit was one of the main objects sought to be promoted by it. Hitherto, it must be confessed we have not been very prodigal of our efforts in that direction, but I am happy to say the object has never been wholly lost sight of. Prompted by the generous sentiment to which I have alluded, we gave a year ago in the tasteful and commodious hall in which we are now assembled, our first annual dinner. The complete success which attended it led many of us to indulge the hope that a yearly festival of that kind might become a regular and permanent feature of the association; and this feeling which is still cherished, has found befitting expression in the excellent and well-arranged banquet with which we have been regaled this evening.

It only remains for me, brethren, before proceeding to announce the first regular toast, to tender to you one and all a cordial and fraternal greeting. We are gathered to-night around the social and festive board, animated by common feelings and sympathies, and bound to each other by ties of warm personal regard and friendship. I would also in your name extend to our honored guests a like sincere and hearty welcome. We welcome you, gentlemen, to our festivities with feelings of the deepest gratification. I hope the few hours we pass together may prove hours not only of relaxation but of keen enjoyment, and that the occasion may be hereafter remembered with pleasure and satisfaction by us all.

"The Supreme Court."

Mr. AYER then read the first toast, as follows:

THE SUPREME COURT OF THE UNITED STATES.—"I cannot conceive of anything more grand and imposing in the whole administration of human justice, than the spectacle of the Supreme Court sitting in solemn judgment upon the conflicting claims of the national and State sovereignties, and tranquillizing all jealous and angry passions, and binding together this great confederacy of States in peace and harmony, by the ability, the moderation, and the equity of its decisions."—*Kent.*

Judge DOOLITTLE then responded as follows:

MR. PRESIDENT AND GENTLEMEN: This is indeed an unexpected honor, to be called upon to respond to the toast of the Supreme Court of the United States. As the president has already said, until I came here I had no expectation that I should be called; but it is a subject upon which I cannot, when called upon, refuse to speak. And if what I have to say has no other merit, it will have at least that of brevity, which is sometimes said to be the soul of wit. Allow me to call your attention, sir, and you gentlemen, to my first introduction to that great tribunal. Imagine to yourselves a youth just fresh from the schools, imbued with that respect for the institutions of our country which every youth then was taught to cherish next to the sentiments he felt towards the God of Heaven. Entering that chamber forty years ago this very month, there sat the judges, clothed in their robes. The chamber was still. Not a voice was heard nor a whisper, except of the counsel who was speaking, and that counsel was Daniel Webster. It was in the case of the Charles river bridge. There was the great counsel, with his face lit up, beaming with every expression of the soul. Listening with deep interest to the great lawyer of the Constitution, Daniel Webster himself, you can imagine the effect upon a youth under such circumstances.

Gentlemen, the Judges of the Supreme Court of the United States are called upon to discharge all the highest duties which devolve upon the House of Lords. We inherit all that there is in English jurisprudence—all that has been developed in Centuries, and we have inherited something more. We have a written constitution, defining substantially the powers and the duties of the United States as a nation, and the powers and the duties of the several States as sovereign and independent communities, limited only by the Constitution. While our Supreme Court passes upon all questions arising between individuals and corporations, all questions growing out of commerce, railroads, and all the other questions which concern communities, it is called upon to discharge a much higher duty, I believe, than was ever devolved upon any judicial tribunal in the whole history of the world—to hold the balance of power between sovereign States, the United States as a sovereignty and as a nation, between us and all the world, and in many respects as between the States on the one hand and the States themselves; with their reserved rights and sovereign powers limited only by the Constitution itself. And this Supreme Court, this high tribunal, is called upon to hold this balance, to adjust these delicate and difficult questions—to decide where the powers of the Union begin, where they end—where the powers of the States begin, and where they end. Without this great tribunal, the balance-wheel of our system, our Constitution would have been a failure. While the Constitution itself, as a gentleman expressed it to me, might have constituted the skeleton, the frame, the bone, so to speak, consists of the constructions and decisions of the Supreme Court. This court has given life, muscle, and vitality to our Constitution and made it a living and a practical government. I cannot, therefore, conclude any better than by repeating the words of Chancellor Kent: "I cannot conceive of anything more grand and imposing in the whole administration of human justice, than the spectacle of the Supreme Court sitting in solemn judgment upon the conflicting claims of the national and State sovereignties, and tranquilizing all jealous and angry passions, and binding together this great confederacy of States in peace and harmony, by the ability, the moderation, and the equity of its decisions."

Judge DICKEY was also called upon to respond, and met with an enthusiastic reception. He spoke as follows:

MR. PRESIDENT AND BRETHREN OF THE ASSOCIATION: I feel not a little embarrassment in being called upon to address you on a subject of such grandeur and gravity, and especially after so eloquent an address as we have listened to from Senator Doolittle. I, too, have had my experience in my first observation of that dignified and imposing court. I first entered its hall some eighteen years ago, utterly inexperienced in the usage of Eastern courts, familiar only with our log court houses in the West, and I felt much diffidence in approaching it. Next to the imposing dignity and grandeur of the surroundings, I was impressed with the kindness and urbanity that pervaded the court and its offices. It was not long before I felt myself at ease, and during my experience of several years, I may say that I never found any court in which a lawyer would feel that his imperfections would not be criticised with severity. Illinois has contributed her share to the greatness of that court. In an after-dinner speech I suppose one may be allowed a little latitude, and it may not be amiss to call attention to the fact that Illinois has added largely in proportion to her age and population to the list of great men of the nation. In this connection, the Judge mentioned the names of Judge Young, Mr. Douglas, Mr. McDougall, Col. E. D. Baker, Judge Davis, John A. McClernand, all of whose names were greeted with applause.

The judge continued: I have been proud of Illinois, and especially have I been proud of the bar of Illinois. One word upon another subject, not at all germane to the subject, and I shall occupy your attention no longer. Our honored president has referred to the usefulness of this association in cultivating a high standard of work in the profession. I have been practicing and looking on in Illinois now for forty years. When I first thought of entering the profession, I met with Cyrus Walker, the best *nisi prius* lawyer I ever saw. He suggested I should study law, and I told him that my father had said it was a difficult thing to pursue that profession and strictly maintain his dignity. Mr. Walker threw himself back in his chair and in the most emphatic manner said: "I am an elder in the Presbyterian church; I have practiced law for twenty-five years, and I give you my word as a christian and a gentleman that I can keep my conscience as clear at the bar as at the plow-handle." Having removed that obstacle from my mind I entered upon the study of law, and, after an experience of forty years, I have no hesitation in saying that the practice of law, as it is condcted in the State of Illinois, is calculated to cultivate and elevate the standard of honor and integrity, and that, as a class, the members of the bar of the State of Illinois have a standing that is not second to any other employment or class of men upon the face of the earth. I have known some young men who have consented to enter the profession without having that obstacle removed from their minds as it was removed from mine, and under the belief that, in order to practice law successfully, it was necessary to be a little dishonest. And I have known such young men, by association with members of the profession, gradually and steadily educated up until they became men of firm integrity and high character. From my experience of forty years, I have no hesitation in saying that the practice of law as practiced in Illinois has a tendency to elevate the standard of morality as high, if not higher, than the pursuit of any other calling.

"Federal and State Judiciary."

The next toast was:

THE FEDERAL AND STATE JUDICIARY—While to the former pre-eminence may be ascribed in the weight of its influence, the authority of its decisions, and in the attractiveness of their materials, the true interests and the permanent freedom of this country requires that the jurisprudence of the individual States should be cultivated, cherished and exalted, and the dignity and reputation of the State authorities sustained with becoming pride.

JUDGE CATON, in response, spoke as follows:

MR. CHAIRMAN AND GENTLEMEN: Before I address myself to the sentiment which you have read, I think before this Bar I should vindicate myself and explain the cause of action I have against some of its officers, and it may be necessary to call upon some of those courts that you expect me to speak of in the course of what I have to say. I came here under a solemn promise that I should not be called upon to speak. And I will submit to you, sir, and to the gentlemen of this association, if I have not a cause of action for a breach of promise in being called upon at this time. The subject of your sentiment, however, Mr. President, is a serious one. The relations which are home to the community at large by the Supreme Court of the United States, and by the judiciary organizations of the several States are so important that surely no lawyer can have failed to have reflected more or less upon the subject. Their organization presents a complexity of system unknown to any other country, and their conflicting jurisdiction to a certain extent calls for a forbearance, a discretion, or a deliberate wisdon, to prevent lamentable clashings which, I venture to say, can be found in no other profession or calling of men. When you remember that the line between the jurisdiction of the Federal and of the State courts has never been and never can be defined, it is not difficult to see the tendencies and the temptations of the clashing between these several jurisdictions and the wonder is how they have not got into actual warfare. I only hope and trust that the same spirit of moderation and wisdom which has kept in harmony the wheels of those various institutions which still prevail. Let each one remember that it is better to concede something, to concede what is doubtful at least, rather than to insist upon what is doubtful, for in no other way can the harmony which is indispensable to the peace and security of this community be maintained between these two systems of jurisdiction. I assure you, sir, that during the whole course of my life the greatest apprehension that I have felt for the safety and the permanency of this government has been the danger of the conflicting jurisdiction of these two tribunals, the State and the national. And I tell you, sir, that whenever prejudice or jealousy enter into these courts, a collision will take place that will shake this government to its very foundations. I wish all my professional brethren would reflect upon this, and remember that all their influence should ever be exercised in such a way as to endeavor to harmonize these tribunals rather than to antagonize them. In conclusion, I wish to express the gratification which I feel at again meeting those who have come after me. I have long retired from the active practice of the profession. I have done what I could to maintain and to uphold it, and I am proud to see that those who are following the steps which I have trod are doing more than I would ever be able to do. I rejoice to meet you now, and I hope that I may have the pleasure of meeting you again and again.

Attorney General EDSALL responded as follows:

MR. PRESIDENT: The relations of the Judiciary and the Bar are of such nature that one cannot well exist independently of the other. Either, without the other, would find itself in the condition of Othello—its occupation gone.

Whatever therefore concerns the authority, dignity, or respect due the courts, whether State or Federal, is of especial interest to the Bar.

We all cheerfully assent to the sentiment just read, which ascribes to the Federal Judiciary a pre-eminence, by reason of the weight of its influence, the authority of its decisions, and the gravity of the questions confided to it for final determination. The Supreme Court of the United States is intrusted with higher functions than any other department of the government. The Executive, while he executes, must obey the laws enacted by Congress. The Congress must conform its action to the written Constitution, which constitutes the chart of its powers.

The ultimate authority rests with the Supreme Court of the United States to determine whether the Executive and Legislative Departments in their action transgress the fundamental law under which they all act. Not only so; it rests with that high tribunal to determine whether the legislation of the respective States is repugnant to the Federal Constitution, and in this regard it may exercise an appellate jurisdiction above the highest courts of the States.

Upon this court has devolved the delicate trust of guarding the Federal Constitution against the encroachments of all other departmants of the Government, both State and national, and at the same time it is the final judge of the extent of its own powers and jurisdiction. A seat upon the Bench of that court, by one qualified to fill it, is equal in dignity to any other official position under our Government.

Nevertheless, as high as are the functions of that exalted tribunal, under our system of government, its decisions constitute the supreme judicial authority but upon a limited class of subjects —upon those only which pertain to, or in some manner spring out of, the exercise of the powers conferred upon the Federal Government.

As to the subjects upon which the States possess the exclusive right to legislate, the judiciary of the States must be recognized as the highest authority in the construction and interpretation of such legislation. This is necessary to the harmonious working of our complex system of government.

In fact, the great mass of statutory law which protects us in our persons and property, regulates our domestic and social relations, and which furnishes the law controlling the principal commercial and business transactions of the country, lies chiefly within the domain of State legislation. Upon these vast interests, so far as regulated by statutes, the decisions of the highest courts of the respective States are, and should ever be, regarded as the ultimate judicial authority. Their interpretation of their own statutes and Constitutions should be received in every other judicial tribunal as a part of the law itself I need not say in this presence that, from the foundation of our government, this principle has been constantly recognized and acted upon by the Supreme Court of the United States.

If in some few instances it has been apparently disregarded, even there it will be observed that the rule itself has been asserted, but an effort has been made to show that the particular case did not fall within its principle.

Nothing would more certainly lead to jealousies, and even collisions, between the State and Federal authorities than that the same law should receive variant constructions in their different tribunals. This would virtually make the law of the case depend upon the forum in which the cause was litigated. This tantalizing uncertainty, and unseemly conflict, can only be avoided by the frank and cheerful recognition of the principle, by both the State and Federal courts, that the decisions of each involving simply the interpretation of the Constitutions and stututes of their respective governments shall be accepted as final and conclusive authority by all other courts. The respective powers of the legislative departments of the State and Federal governments thus become the measure of the supreme judicial authority of each.

While we thus recognize the pre eminence of the federal judiciary as the expositors of the powers conferred upon the national government, and concede to it the right to construe and enforce the limitations upon state authority imposed by the Federal Constitution, we have faintly brought into view the broad field of jurisprudence confided to the State Judiciary. It is commensurate with the legislative power of the state.

It is true, then, that "the true interests and the permanent freedom of this country require that the jurisprudence of the individual States should be cultivated, cherished and exalted; and that the reputation and dignity of the State courts be sustained with becoming pride."

Every member of the Bar has, and should feel, a personal interest in this matter. Our admission to, and right to practice in, the Federal courts was through the door of the State courts. We all must have first entered there.

No man ever very much advanced his own reputation by defaming his mother. No member of the Bar ever very much advanced his own professional standing by disparaging the just authority and dignity of the courts in which he has the privilege of practicing. We may without disparagement to either, accord to both the State and Federal courts the highest measure of our professional fealty, and sustain the authority of each in the discharge of their appropriate functions.

While the sight of the flag which represents our national existence, independence and power should ever inspire us with patriotic ardor, may we ever take equal pleasure in beholding the undiminished lustre of each particular star emblazoned like a jewel upon its ample fold.

Judge E. S. WILLIAMS was next called on, and responded as follows:

MR. PRESIDENT: The sentiment to which we have just listened alludes to the pre eminence of the Federal Judiciary in the weight of its influence, the authority of its decisions, and in the attraction of the materials of such decisions.

This pre-eminence is due in part to the nature of the jurisdiction exercised by the Federal Judiciary, and in part to the character of the men who have exercised that jurisdiction. The authority of the decisions of such courts is due to both causes combined.

The United States Supreme court will serve as my best illustration. It exercises a more extended original and appellate jurisdiction than any other court. To the enlarged jurisdiction of the English equity, common law, and admiralty courts, is superadded the power of passing upon the constitutionality of the laws of the general and State governments, so far as they may be made the subject of judicial controversy, and its judgments upon such questions are conclusive. The functions of the executive and legislative departments of the government are thus under the limited control of the judiciary, and so law is not the mere expression of the legislative will, but the constitutionally-expressed will, in the construction given to the Constitution by the Supreme Court. More than this: This court adjudicates upon the conflicting rights of sovereignties, and becomes *sub modo* an arbiter of the disputes of nations. In no other country is there any court of co-extensive jurisdiction. The courts at Westminster Hall are limited in their jurisdiction by the omnipotence of the British Parliament, and by the framework of the government. Not so with the Supreme Court of the United States; and it is in part the greatness of this jurisdiction that gives to the court, and all who preside therein, its and their dignity and pre-eminence of influence and authority.

The contemplation and study of great themes develops greatness in the student, provided he possesses the capacity to comprehend them. A judge, compelled by his official duties to pass upon great questions of constitutional law, and upon the conflicting questions which disturb contending sovereignties, must grow greater on account of the subjects of his thought.

But this pre-eminence of influence of which I have spoken is also due in large part to the character of the men who have presided in the Supreme Court. In that bright judicial galaxy that spans the dome of English jurisprudence, all the luminaries of which it is composed have not been fixed stars, shedding upon the beholder only a pure and benignant radiance. Comets have not infrequently appeared, creating apprehension, if not consternation, by their eccentric movements. Meteors have flashed, and as suddenly grown dim. Eminent judges have been found whose ermine has been sadly soiled by corruption. Some have quickly succumbed to the seductions of a licentious court, and have made themselves the servile instruments of despotism. Some have forgotten the legitimate limits of their jurisdiction, and have substituted arbitrary will for the proper exercise of judicial functions. These lapses from integrity may have been few as compared with those who have remained faithful to their high trusts, but that they have sometimes occurred cannot be denied.

Not so with that bright constellation of judicial luminaries who have shone upon the Bench of the Supreme Court,—Jay, Rutledge, Ellsworth, Marshall, Taney, Chase, Story, not to mention many more of the illustrious dead and the honorable living,—have by their personal endowments, by their wisdom, learning, and virtue, reflected honor upon the Court in which they presided, and the age in which they lived. Of these names two stand out in bold relief upon the pages of judicial history—Marshall and Story—the one pre-eminent for his wisdom, the other for his learning; both great in intellect and in virtue. Marshall, always clear in his instructions, concise and logical in his reasonings, and singularly correct in his conclusions; Story, learned as well as logical, both luminous and voluminous, always exhausting his subject and often his reader; surprising you by the extent of his research and a display of an inappreciable mass of foreign wealth. • I have spoken briefly of the Supreme Court and its Judges, not forgetting that they are only a small number among the eminent names of the Federal Judiciary. I have spoken of them as the representatives, and the most honored representatives, of the entire body of United States Judges, who, with a few exceptions, richly merit the respect and admiration of their fellow citizens.

The latter part of the sentiment you have read, Mr. President, is in these words: "The true interests and the personal freedom of this country require that the jurisprudence of the individual States should be cultivated, cherished, and exalted, and the dignity and reputation of the State sustained with becoming pride."

The obligation to do this is rendered all the more imperative on account of the very pre-eminence to which allusion has been had, and the sense of obligation is none the less because of the just pride we take in that pre-eminence. It has been said to be a fault of all Judges to err on the side of amplifying their jurisdiction. If so, it is no more a fault in the Federal than in the State Judiciary. The necessity referred to in the sentiment is not so much on account of any action of the Federal Judiciary as from the legislation of Congress.

The repugnance which has been felt by the loyal portion of our citizens for the last twenty years to the extreme State's rights doctrines so generally promulgated during that period at the South and which culminated in the late rebellion, has contributed to bring about a legislation upon the part of Congress which has not only largely extended the jurisdiction of the Federal courts, but has seriously curtailed the heretofore acknowledged and exercised jurisdiction of the State courts.

It cannot be denied that this centralization of power in the United States courts, to the prejudice of the State courts, is regarded with jealousy by some and by apprehension by others. Were it certain that the tendency of Federal legislation for the next decade would be the same that it has been for the past, such an apprehension would be well founded. But the movements of our body politic are oscillatory. When the political pendulum has reached the extreme, the good common-sense of the American people, like the unerring law of gravitation, draws it back in the opposite direction. It is not the first time in American history that the tendency to centralization of power in the United States courts has been manifested.

In the case to which I refer its manifestation was by the judicial, not the legislative power. It found expression in the decision of the United States Supreme Court, delivered at Philadelphia at the February term, 1794, in the case of Chisholm *v.* the State of Georgia.

That case decided that a State was amenable to the jurisdiction of that court at the suit of a citizen of another State, and the decision was acquiesced in, and the centralizing tendency it embodied and expressed became a part of the then governmental policy. But the pendulum had reached the extreme of its vibration in that direction, and the sober sense of the American people compelled the abandonment of that policy and the introduction of the present constitutional limitations of such power, and in the year 1798 the Supreme Court unanimously determined that no jurisdiction should be exercised by it in any case where a State was sued by a citizen or citizens of another State.

The disposition now manifested by Congress to extend the jurisdiction of the United States Courts to the detriment of the jurisdiction of State Courts, has not apparently actuated the judges of those courts. They have not sought to extend their own jurisdiction by strained interpretations of the law, but have (except in a few instances) only exercised the jurisdiction manifestly conferred by law. If there has been any reason for jealousy upon the part of State judges, it has been because of legislative, not judicial, enroachments. It is the manifest duty of every judge to exercise his constitutional and legitimate authority whenever it is rightfully invoked, even though he may deprecate the existence of the power in his court.

If in the meantime the American people shall manifest its hostility to the centralizing tendency of the legislative branch of the government so as to cause a return to the former law, the apprehensions of many will be quieted, and the United States Judiciary eased of a portion of their undesired and onerous labors. I close with this sentiment: The Federal Judiciary—honored and admired by all classes of the community, and most by their brethren of the Bar and upon the Bench of the State courts, for their ability, learning, integrity, and virtue—we can wish nothing better for them than that the record of their judicial acts in the future should equal the glorious record of the past.

JUDGE BLODGETT was called upon to respond, and met with a hearty reception. After a few preliminary remarks, he said: This assemblage is made up, I am glad to see, of judges and lawyers. We judges are not so much in the habit of talking as being talked to. Now my idea of good times for our profession, both for judges and lawyers, is not to make speeches. My idea is to get together and exchange mutual congratulation and good fellowship without speeches, because speech-making is our trade. I am called upon, however, to respond to the toast of the Federal and State Judiciary. The history of the former is interwoven with the entire history of the country; it speaks for itself. With regard to the latter, the State of Illinois may well be proud of its State judiciary. It may well be proud of its Supreme Court, of its decisions, which are cited as authority all over the United States and in foreign countries. It may well be proud, not only of the ability which has been displayed by its courts, but of the integrity of the courts. So far yet in the history of this State, no smirch or stain, I say it with pride, I say it as one whose life has been spent in this State, whoes destiny is cast in it—no stain rests upon the judiciary of this State. It is a thing of which we may well be proud. I hardly know how I can add another word of praise to the judiciary of the State.

"The Legal Fraternity."

The next toast was:

THE LEGAL FRATERNITY—It is theirs to strengthen the pillars of the temple of justice, and raise its august dome still higher in the skies.

The response to this toast was made by W. H. BARNUM, and was eloquent, exhaustive, and learned. He spoke of the sages of the bar in the palmy days of Greece and Rome, compared them with the present, and claimed that the members of the bench and bar of the present day were equal in ability, learning, and integrity to those of any age.

Professor SWING, who is held in such high esteem by the members of the bar, was next called upon. He said he was unaccustomed to speak to so many legal gentlemen, and felt more than ordinarily embarrassed. "It is your custom," he said, "to invite one clergyman to your banquets to enjoy the result of the comparison, and I suppose on the day of judgment you will expect to become one of the Lord's little ones for having once fed one of His children, and when he was hungry having taken him in and given him drink. It is very pleasant to sit and see so many of you, gentlemen, here, and to hear the sentiments of to-night in regard to the conception of the principles of justice. But I come here as a representative of the cloth, and I want to say a word or two regarding the two professions. They are part of the same profession, and both were concerned about the ideas of justice. It ought to be a rule that a lawyer should be compelled to go to church regularly to keep up with the discussions of the pulpit,

and conversely a minister ought not to be qualified to preach unless he had sat a year in the Supreme Court. The tendency of the two professions was to grow narrow. Every man started out with a determination to read widely, but he began to fall off rapidly, like the traveler who, being lost, came across a wagon-track and followed it, expecting to reach town, but the road first led to a farm-house, then to a pig-stye, finally changed into a squirrel-track, and then ran up a tree. Civilization was like the confluence of many rivers which descended from a mountain, and floating on that wave was man.

Mr. R. E. WILLIAMS, of Bloomington, followed, advocating the necessity of a pure and honorable Bar. The Roman Bar was one of the grandest that the world ever saw, but when it grew corrupt the whole civil structure fell. Even though the laws were not the best, as long as they were honorably and impartially administered they would be obeyed. An intelligent and honest Bar always furnished materials for a good judiciary. No dishonest or corrupt man could ever be selected for a judge. The law should be like the shadow of a rock in a dry land, which would be a refuge.

E. W. PATTERON, of the St. Louis Bar, and member of the Bar Association, followed. The legal profession, he said, had been maligned more, perhaps, than any other profession. There never was a man who knew so much but that he thought he could throw a slur on the legal profession. There was no profession where the tendency was so much toward honesty as in the legal profession, nor any in which there was less jealousy. When the millennium came there would be no need of ministers, nor doctors, but as long as order was heaven's first law there would be hundreds of lawyers needed to practice their profession.

The Hon. JOHN M. SCOTT, Chief Justice of the Supreme Court of Illinois, honored the Association by his presence, and being called upon, was received with repeated rounds of applause. After a few preliminary remarks, he said:

It is my duty and my pleasure to hear speeches from members of the Bar, but not to make them, but as I am on the floor now I join most heartily in the expressions that have been made with regard to the very great influence of the Bar upon the interests of society. Indeed, that subject cannot be magnified beyond its true merits. It has its influence in many and varied directions, and, silent though it is, it is none the less powerful and effective now than before. It exists to a much greater extent than the people are aware. The judicial opinions that are delivered by the judges, and become the rules that govern our great commercial transactions and all the relations of life, are often in a measure the direct product of the Bar. The line of thought of those opinions is blocked out in many instances by the lawyers who argue the cases, and who are often entitled to the credit of the opinion rather than the judge in whose name it is delivered. It is in that way that you have influence upon society and all that affects its most important interests. I did not intend even to say this much. I desire now to express the great gratification and pleasure I have experienced in meeting with so many members of the Chicago Bar Association, for whom I entertain the highest respect.

"Our Clients."

The next toast was "OUR CLIENTS.—Bis solvit qui cito solvit." The first response was by D. L. SHOREY, as follows:

An advocate who has good causes and respectable clients, says Quinctilliam, need not fear ingratitude.

Under the Roman law—as it still is under the English law—the honorarium was the reward which the client gave in gratitude for the service rendered, for no English or Roman law has ever given to an advocate a right to enforce his claim for legal service.

It is not certain that, for the honor of the profession, we have a better rule in the United States, where the law affects to measure a lawyer's invaluable legal service as accurately as it measures the value of a bottle of wine.

Nevertheless, the American lawyers, animated by a feeling that has governed their brother lawyers in other countries, rarely seek to enforce such claims in the tribunals before which they practice.

Sir John Fortescue, writing in 1642, says: "There is scant any man found in the realm skillful and cunning in the law, except he be a gentleman borne, and come of noble stock." This accounts, in part, I suppose, for the high sense of honor among English lawyers about the *honorarium*. I do not know that the lawyers of our time are all gentle born, as Fortescue would understand it; but the culture demanded of the profession in our day has a very mellowing effect upon the raw material; and I think on this occasion we may assume that by all accepted standards a good lawyer is a gentleman.

Now, the habits of a gentleman are a little—not much—expensive; and lawyers are not, and ought not to be, money-grabbers; and when they need a little money the modesty and delicacy with which they suggest their necessities gives great force to the sentiment I am responding to, *his solvit, qui solvit cit's*,

It does not follow, because a lawyer's service is not to be measured by a money standard, that therefore he is to ignore the duty to see to it that his client is duly grateful. I have no occasion to give these wary old lawyers any advice on that subject. But there are ways of giving impulse to the dullest brain. Even the old English lawyers contrived to convey a suggestion now and then to a client whose sense of gratitude was not well cultivated. In the time of George III. a troublesome case was laid before Sergeant Hill. The fee noted on the back of it was only a guinea. The Sergeant returned the case with a brief note that "he saw more difficulty in the case than under all the circumstances he could well solve." And when the case was returned to the Sergeant with two guineas noted on the back of it, he sent an answer that he saw nothing in the case to induce him to change his mind

In the view, then, I take of the sentiment, I suggest to all the learned lawyers to put it as a motto at the head of the bills they send out for collection. What I mean just now by learned lawyers — *circumspice*, Mr. President — is those who have forgotten the Latin they used to read. And the vulgar lawyers, if any there be, whose ill-fortune it is never to have read, and therefore never to have forgotten, the language which Tully spoke—let them put as a motto at the head of their bills the words translated into their vernacular—50 per cent. off for cash.

To make a further response Mr. R. BIDDLE ROBERTS was called on, and he replied by a very happy and humerous speech. He proposed to translate the maxim by the injunction, "Pay twice, and that quickly." He closed by an earnest appeal to the profession not to consider the pursuit of wealth as the only object, and suggested that the profession should not make the upper stations so narrow and so little to be sought; that judicial stations would be declined because they would not pay.

COL. U. S. COOPER also responded to the same toast in a brilliant speech.

In reply to a call from Col. Cooper, Gen. STILES made a few remarks on the standing of the legal profession in his usual happy vein, and resigned in favor of another gentleman, who declined to make himself heard.

"Young Lawyers."

The next toast was:

YOUNG LAWYERS—They will reflect in their characters, conduct, and success the treatment they receive from the profession and the courts.

It was responded to by Arthur J. CATON, as follows:

MR. PRESIDENT AND GENTLEMEN:—That the older lawyers are exceedingly considerate of the younger members of the profession, there could be no greater proof than you have given to-night. That we should be represented at a meeting like this, composed of the leading members of this Bar, the Judges of the State and Federal Courts, and embracing among its numbers men with national reputations, is a compliment that we as young lawyers appreciate.

That the older and more prominent members of the profession should take a personal interest in the young lawyer, and extend to him the hand of fellowship and encouragement, is indeed fitting, for he who commences the practice of the law enters upon a course of study, to explore whose many paths must be a continuous labor. There is before him an infinite field for research, and even at the close of an honored life he can only expect to become familiar with a portion of its truths. The lawyer must deem no labor too severe, if he hope for success, for, while the many pages of legal learning present a thousand lights to illuminate his path, they can afford no guidance unless personal application be made to each.

That young lawyers reflect in their characters, conduct and success the treatment they receive from the profession and the courts is evident, for while the character of every man is to some extent formed by circumstances. and success may depend upon those influences which surround him, it is especially true of the lawyer.

The history of the Bench and Bar shows that there is in the practice of the law a silent influence which begets a fraternal feeling, and fills each with a desire to help and sustain the others; as a result of this we have a stronger bond of union cementing us together, and more professional etiquette than is usually observed in other walks of life. When we consider the effect that this must have upon one coming early under its influence, we see to what extent young lawyers must reflect in their lives the treatment they receive from the courts and the profession. In no way can the influence of either the bench or the bar be so strongly and surely felt as it is in the characters of those they are to so great an extent forming.

We appreciate that no forbearance by the courts, nor assistance from the older practitioners at the Bar, can make a successful lawyer. That can only be the result of personal and diligent effort. I need not refer you to the commencement of your professional lives.

True it is, we have helps and aids that many of you knew not of; still the fear that a wrong step might be taken must have been the same with you as with us. Then yon appreciated the kindness of the courts and the encouragement of the profession.

Should I ask those to-night who have gained the greatest eminence upon the bench or at the bar what first gave them that honorable ambition, without which they could not have attained the position they now occupy, the answer of not a few would be that the example of men in the profession first demonstrated to them what measure of success was possible of attainment. Mr. President and Gentlemen, if, in the profession of the law, honor, integrity, and true manhood are found, it is due more than anything else to the influence the profession exerts upon the young lawyer.

And, in conclusion, I feel authorized to say, in behalf of those for whom I am called upon to respond, and who with me have but lately commenced professional life at this bar, that we are indebted to those who here occupy the bench, and to those who have long filled honored positions at this bar, for the excellent examples you have given. You have shown to what splendid success intense application, guided by the highest honor, may lead; we have your examples before us, suggesting the possibilities of the future, and when to this we add the kindly treatment we have always received at your hands, I am sure I but express the purpose of every young lawyer when I say that it shall be our great ambition to bring no reproach upon a profession that you have done so much to honor. And when you shall retire with many rewards to enjoy that repose which a well-spent life so richly deserves, that we may fill the places of trust as faithfully as you have done, shall be our constant effort.

The next speaker, in reply to the same toast, was Mr. J. J. HERRICK, who spoke as follows:

When the young lawyer fresh from his books assumes the duties of his profession, it is, as a rule, with honest and worthy purposes. The tendency of the study of the law as a theory is to strengthen these purposes, to develop the better part of his nature, and to arm him with the best principles of action. When, however, he enters upon the practice of the profession, he finds himself at once surrounded by other and opposing influences, "there are pitfalls at every step." Opportunity, apparent self-interest, the desire for victory, seem to press constantly upon him to swerve him from the line of integrity or duty.

In this position we young lawyers are met by the most delicate and difficult questions, such as these: What is my duty to my client? What should be my advice as a lawyer? Is this professional? Is this a fair use of legal process? Will my duty to my client justify this course? These questions meet us every day. They spring upon us by surprise. We may soon form tolerably clear ideas of duty and professional ethics in the abstract. But the difficulty of determining in practice the precise extent of a principle or the respective force of duties still remains. These questions must be met and answered. By the principles thus derived we will form our professional character and direct our professional conduct. For the solution of such questions we must look to the profession itself. As we have identified ourselves with it we naturally adopt its standard. The conduct of its menbers toward ourselves and the solution which they have given by their acts to similar questions are our precedents and examples, and according to the principles which appear to actuate and control their conduct toward ourselves, will we direct our conduct towards them, towards each other, and towards those that follow us. Consciously or unconsciously they will mold our professional character and conduct, and these in turn will direct and influence our success. In our character, conduct, and success will be reflected their lessons, their examples, their encouragement, their conduct toward us in the varying duties of the profession, their influence upon us as students, as advesaries, or as members of a common profession.

There is an unwritten law of professional honor and professional ethics, which is as much the heritage of the profession as the common law itself. It has made that profession honored and honorable in the past. It has not been preserved in books, but has been transmitted through the lives and characters of the members of the profession. From that source only can we acquire a knowledge of it. And only so far as we find it exemplified can we be guided by it, and preserve it in our character and conduct.

The legal profession has always been characterized by a liberal and generous spirit towards its younger members. It springs from a feeling of a common pursuit, and finds expression in words and acts of advice, of encouragement, and of kindness. The influence of these acts upon the success of the young lawyer cannot be overestimated. They arouse a new ambition, they smooth the rough paths, and create a new and deeper interest in the profession. This Association is, I believe, sir, in a great degree an outgrowth of this same spirit. Its best fruits will be gathered by those who are to-night the young lawyers, and its best results wil be realized when they, however unworthily, shall represent the profession and the courts. and shall illustrate in their character, conduct and success, its healthful influence.

This concluded the regular toasts. Mr. DEXTER, in answer to repeated calls, came forward and kept the party in a roar of laughter for about five minutes Mr. HERVEY was then called for but declined to respond. The association adjourned at one o'clock in the morning. The best of order prevailed during the entire evening.

EX-CHIEF JUSTICE CATON took the greatest interest in the inter-State rifle match which took place upon the range of the Chicago rifle club on Wednesday last. Although the weather was inclement and rainy, the judge remained upon the range the whole day.

DEATH OF O. H. MORRISON.—O. H. Morrison, of the firm of W. H. & O. H. Morrison, of Washington, D. C., the publishers of Wallace's reports, died on Friday of last week.

CHICAGO LEGAL NEWS.

SATURDAY, JANUARY 8, 1876.

The Courts.

UNITED STATES SUPREME COURT.

OCTOBER TERM, 1875.

LONG et al. *v.* CONVERSE et al.

In error to the Supreme Judicial Court of Mass.

WHEN A WRIT OF ERROR LIES FROM U. S. SUPREME COURT TO STATE COURT.

In this case a contest arose between a receiver of a railroad company, appointed by a State court, and the plaintiffs in error, for the possession of certain bonds and coupons, which said plaintiffs held and claimed as their own. Before the contest, the railroad company had been adjudged a bankrupt in the same State and assignees appointed. The State court decreed that the plaintiffs in error should deliver the bonds and coupons to the receiver. The assignees in bankruptcy consented to this decree. The present writ of error was brought to reverse this decree, and the court *held* that this is not a case "where any right, title, privilege, or immunity is claimed under any statute of the United States, within the meaning of section 709 of the U. S. Rev. Statutes," and dismissed the case for want of jurisdiction.—[ED. LEGAL NEWS.]

Opinion by WAITE, C. J.

On the 20th of July, 1870, a bill was filed in the Supreme Judicial Court of Massachusetts for the foreclosure of a mortgage executed by the Boston, Hartford and Erie Railroad Company, to secure the payment of certain bonds. The bill prayed a sale of the mortgaged property and the appointment of receivers Henry N. Farwell was named as one of the defendants, he being one of the trustees under the mortgage, and also one of the directors of the company. Process was served upon him July 21, 1870.

On the 2d of August, 1870, an order was made appointing receivers, with authority to take possession of all the property of the railroad company, including all moneys, credits, choses in action, evidences of debt, books, papers, and vouchers.

On the 1st of March, 1871, the railroad company was adjudged a bankrupt by the District Court of the United States for the District of Massachusetts, and on the 18th of the same month an assignment of its property, according to the provisions of the bankrupt act, was made to Charles S. Bradley, Charles L. Chapman, and George M. Barnard, as assignees. This assignment was made to include all the property of which the company was possessed on the 21st of October, 1870.

On the 20th of September, 1871, the receivers of the railroad company filed in the supreme judicial court their petition against George W. Long and John C. Watson, alleging, in substance, that when the order appointing them receivers was made, Farwell had in his possession, as one of the officers of the railroad company, certain coupons of bonds of the Hartford, Providence and Fishkill Railroad Company, and of bonds of the city of Providence, which were the property of the Boston, Hartford and Erie Railroad Company, and which, by the decree, he was ordered to deliver to them; that the railroad company had no right to sell or transfer the coupons or put them in circulation; that he had no right to the coupons or their possession; that notwithstanding this he had, subsequent to their appointment as receivers transferred to Long and Watson five hundred of the coupons of the bonds of the city of Providence; and that Long and Watson, at the time, had full knowledge of the rights of the railroad company, and that Farwell had no power or authority to make the transfer.

The petitioners asked that Long and Watson might be ordered to deliver the coupons to them, and restrained from collecting the money due thereon.

Long and Watson answered the petition, denying that Farwell, at the time of the appointment of the receivers, held the coupons in trust for the railroad company, and averring that he held them as collateral security for a debt owing to him by the Hartford, Providence, and Fishkill Railroad Company. Having no knowledge whether the Boston, Hartford and Erie Railroad Company had authority to sell the coupons or put them in circulation, they left the petitioners to make such proof of that fact as they might deem material. They admitted the transfer to them by Farwell after the appointment of the receivers, but denied any knowledge of the rights of the railroad company, and averred that they purchased them from Farwell in good faith, believing that he had the right to make the transfer.

Subsequently, on the 27th of June, 1872, they filed an amendment to their answer, setting up the bankruptcy of the railroad company, and the assignment to the assignees, and concluding as follows: "Wherefore these respondents submit that the said petitioners had not, at the date of the filing of said petition, if they ever had, any right to the possession of any of the property of the said Boston, Hartford and Erie Railroad Company, and particularly to the possession of the coupons in said petition alleged to be the property of the said company and in the possession of these respondents."

The cause was referred to a special master. Upon the coming in of his report exceptions were filed, and at the April term, 1872, an entry was made on the docket of the court, as follows: "Plaintiff's exceptions sustained. Decree for the receivers upon the evidence reported." The cause was then continued. On the 28th of August, 1872, the assignees in bankruptcy filed in the cause a paper addressed to the court, in which they represented that, "having read * * * the proposed decree of this court against George W. Long and John C. Watson, ordering them to surrender and deliver up to the receivers the coupons of the bonds of the city of Providence described in the petition against them, we do assent to said decree and to the delivery of the coupons to the receivers, as therein ordered."

Afterwards, on the 5th of May, 1873, a decree in form was entered by the court, in which it was "found as a matter of fact, and further ordered, adjudged and decreed, that the respondents, George W. Long and John C. Watson, took the interest coupons sought in this petition to be recovered of them, to-wit, etc., under circumstances which preclude said Long and Watson from claiming the right of holders for value in good faith, and that, as against the petitioners in said petition, said Long and Watson required no better title to said coupons than Henry N. Farwell himself had, and that said Farwell had no right or title to the same, and that the right to the possession of, and the title to said coupons are now in the petitioners, * * * notwithstanding the amended answer of said defendants and the alleged adjudication, in bankruptcy and subsequent assignment made therein." Thereupon, it was further decreed that the receivers recover of Long and Watson the money which it appeared they had collected during the pendency of the suit from the city of Providence, upon the coupons received by them from Farwell.

To reverse this decree the present writ of error has been prosecuted.

Our jurisdiction in this case depends upon the effect to be given to that provision of the judiciary act (Rev. Stat., 709) which authorizes this court to re-examine the decisions of the highest court of a state in certain cases, "where any title, right, privilege or immunity is claimed under" any statute of the United States.

Long and Watson did not claim under the assignees in bankruptcy. They set up the title of the assignees, not to protect their own, but to defeat that of the receivers. They claimed adversely to both the receivers and assignees. They did not even allege that the assignees had ever attempted to assert title. The contest was one originally for the possession of certain papers. The decree for money was given, because, pending the suit, the papers sought for had been exchanged for money, and the receivers were willing to accept the exchange. In the absence of the assignees from the case, the decree could have no effect upon their title to the coupons or money. If, when the demand was made upon Long and Watson by the receivers, they had surrendered the coupons, that surrender would have been a complete defense to a future action by the assignees, inasmuch as they had not before that time asserted their claim, either by demand or notice. The title of the assignees to the property would not have been defeated by the transfer. Whatever rights they had against Long and Watson could be enforced by an appropriate proceeding against the receivers. The whole effect of the surrender, so far as the assignees were concerned, was to transfer the custody of the property from Long and Watson to the receivers. In this case the transfer was not voluntary, but in pursuance of a decree rendered by a court of competent jurisdiction, with the assent of the assignees. Under such circumstances it is not easy to see how the assignees can proceed further against the parties who have only obeyed the commands of the court. Clearly their remedy, if they have any, is against the property in the hands of the receivers.

The second section of the act of 1867 (14 Stat. 485), which was in force when this writ of error was brought, and which has been substantially re-enacted in the revised statutes (Sec. 709), differs only from the 25th section of the judiciary act of 1789, so far as the provision now under consideration is concerned, in the substitution of the word "immunity" for "exemption." In the old act the words were "title, right, privilege, or *exemption;*" in the last, "title, right, privilege, or *immunity.*" This does not materially affect the rights of the parties in the present case. The words when used in this connection, and applied to the circumstances of this case, have substantially the same meaning.

The construction of this provision in the act of 1789, came before this court for consideration as early as 1809, in the case of Owing's Lessee *v.* Norwood, 5 Cranch, 344. That was an action of ejectment in a state court. The defendant, being in possession, set up an outstanding title in a third person under a treaty. The writ of error from this court was dismissed for want of jurisdiction. In the progress of the argument Chief Justice Marshall used this language: "Whenever a right grows out of, or is protected by a treaty, it is sanctioned against all the laws and decisions of the states, and whoever may have this right, it is to be protected. But if the person's title is not affected by the treaty, if he claims nothing under a treaty, his title can not be protected by a treaty. If Scarth or his heirs had claimed it would have been a case arising under a treaty. But neither the title of Scarth nor of any person claiming under him can be affected by the decision of this case." In Montgomery *v.* Hernandez, 12 Wheat, 129, a suit was brought in a state court by parties beneficially interested in a bond given to the United States by a marshall to secure the faithful performance of his official duties. The suit was in the names of the beneficiaries and not in that of the United States for their use. It was insisted that their could be no recovery, because the action should have been prosecuted in the name of the United States, and this was assigned for error in this court. But it was said "the plaintiff in error did not and could not claim any right, title, privilege, or exemption by or under the marshall's bond or any act of Congress giving authority to sue the obligors for a breach of the condition," and that the court had no jurisdiction of the case on that ground. Again, the same question was presented and elaborately argued in Henderson *v.* Tenessee, 10 How. 311, decided in 1850. That also was an action of ejectment in a state court, in which the defendant set up an outstanding title in a third person, under an Indian treaty, and there too, the writ was dismissed. In delivering the opinion of the court, Chief Justice Taney said: "It is true, the title set up in this case was claimed under a treaty. But to give jurisdiction to this court the party must claim the right for himself, and not for a third person in whose title he has no interest. * * * * The heirs of Miller appear to have no interest in this suit, nor can their rights be affected by the decision. The judgment in this case is no obstacle to their assertion of their title in another suit brought by themselves or any person claiming a legal title under them." To the same effect are Hale *v.* Gaines, 22 How., 149, 160, and Verden *v.* Coleman, 1 Black, 472. This must be considered as settling the law in this class of cases. And it seems to be decisive of this case. Long and Watson claim no title, right, privilege or immunity under the bankrupt law. Their obligation to account for the coupons in their hand is not discharged by the law. The title of the assignees can not be affected by the decree except through their consent. It follows, therefore, that this case must be dismissed for want of jurisdiction.

U. S. DIST. COURT, N. D. OF ILL.

JOHNSON et al. *v.* THE CITY OF CHICAGO et al.

THE CITY'S RIGHT TO TAX VESSEL PROPERTY.

1. TONNAGE—DUTY OF TONNAGE—That the tax in question is not a "duty of tonnage" within the meaning of the third clause of section 10 of the first article of the U. S. Constitution.

2. ASSESSED IN NAME OF VESSEL.—The objection that the tax is assessed in the name of the vessel and not in the name of the owner, under the circumstances in this case overruled.

3. JURISDICTION.—The jurisdiction of a court of admiralty in such cases stated.—[ED. LEGAL NEWS.]

Opinion of the court by BLODGETT, J.

This is a libel against George Von Hollen and the City of Chicago for possession of the schooner North Cape. The admitted facts are that said schooner was, on the 1st day of May, 1874, owned by the libelants, Jacob Johnson, Spier Amundson, and Nels Peterson—Johnson owning one-half, and the others each a quarter interest—Johnson and Amundson residing in the city, and Peterson at Lake View. Said vessel was registered, enrolled, and licensed under the laws of the United States in the office of the Collector of the Port of Chicago in the name of Johnson as owner, and was engaged at and since that time in the business of commerce upon the navigable waters of the United States between the port of Chicago and ports of other States, being a vessel of over 20 tons burthen. Between the 1st of May and the 1st of July, in the year 1874, said vessel was assessed by the assessor of the city of Chicago at the valuation of $7 000; said assessment being entered on the assessment-book in the following form:

"A complete list of all the taxable personal property of the South Division of the city of Chicago, Ill., according to the assessment-roll, as returned or revised by the Board of Assessors for the year 1874."

LIST OF VESSELS REGISTERED IN THIS DISTRICT AND NOT ENTERED.

Name of Vessel.	*Name of Owner.*	*Valuation.*	*Tax.*
North Cape.....	Jacob Johnson.	$7.000	.....

By an ordinance duly passed by the Common Council of the city of Chicago on the 9th day of November, 1874, a tax of 18 mills on the dollar was levied and assessed for the fiscal year 1874, on all real and personal property in said city at the valuation thereof shown by the assessment for that year as made by the city assessor. And on the 9th day of December, 1874, a warrant was issued to George Von Hollen, collector of said city, authorizing and directing him to collect said tax. The warrant was in the same form as the assessment as far as regards the description of the schooner, and name of owner and her valuation, with an additional column in which the tax was carried out and fixed at $126, which is 18 mills on her valuation. The warrant was in the usual form and directed the collector to collect the taxes assessed from the persons and property against whom the same was assessed. This tax remaining unpaid, the collector, on the 13th of September, 1875, levied upon and took possession of said schooner under the assumed authority of his said warrant, and held the same by virtue of said levy at the time of the filing of the libel in this case. It is also admitted that the practice of the city assessor in making assessments upon vessel property has been and is to assess the same to the owner or owners with their other personal property when the owners list or return the same to the assessor, but when the owners fail to return or list their vessel property, the vessel is assessed by name in the name of her owner as appears by the register in the office of the United States collector of customs of the port of Chicago.

It is claimed by the libelants that the levy upon this vessel was void.

First—Because this is a "duty of tonnage," within the meaning of the third clause of sec. 10 of the firs article of the Constitution of the United States.

Second—Because said assessment and warrant for the collection of said tax are void, for the reason that the assessment is against the vessel itself by name, and the warrant runs against the vessel and not against the owner.

On the part of the respondents, Von Hollen and the City of Chicago, it is urged, by way of demurrer to the libel, that a court of admiralty has no jurisdiction in the case made by the libel and facts in this case, and that the only remedy is to be found in the courts of law.

I do not find that this precise question

of jurisdiction has ever been raised and passed upon by the courts of this country or England. At least, neither my own examination nor the industry of counsel has discovered any direct authority bearing upon the question. Upon general principles, however, I am of opinion that admiralty has jurisdiction in a case of unlawful seizure of maritime property for taxes or duties. Kent says: "Admiralty possesses authority to decree restitution of a ship unlawfully withheld by a wrong done from the owner. In cases of illegal capture, bottomry, salvage, and marine torts, the admiralty courts in this country inquire into and decide on the rights and titles involved in the controversy." 1 Kent, 371. And the student of this branch of the law well knows that the tendency has been to enlarge the sphere of admiralty jurisdiction rather than to restrict it since Chancellor Kent's time. "Admiralty has jurisdiction of all torts upon and injuries to maritime property committed on navigable waters, when actions of trespass as in the case would be if committed upon land in other classes of property." 23 How., 213; 5 How., 464. So, too, Mr. Justice Story enumerates the following classes of cases as unquestionably falling within the jurisdiction of the admiralty courts, viz.: "Assault or other personal injuries, collision, spoilation and damage (as they are technically called), such as illegal seizures, or depredations on property; illegal dispossession, or withholding from the owner of ships, commonly called possessory suits; cases of seizure under municipal authority for supposed breaches of revenue or other prohibitory laws; and cases of salvage." 3 Story's Com. on Const., 527; Conkling's Ad., 21. In the case of the schooner Tilton, 5 Mason, 465, it was said by the same learned authority: "Suits in admiralty touching property in ships, are either petitory suits, in which the mere title to the property is litigated and sought to be enforced, or they are possessory suits, to restore the owner to the possession." The same point was held by the same learned judge in DeLoris *v.* Boit, 2d Gallison, 398. And it is a fundamental principle that admiralty has jurisdiction of petitory and possessory actions to recover ships when replevin would lie at common law. Benedict's Admiralty, 165, sec. 275.

Concluding, then, that this is a proper case for admiralty jurisdiction, the question is, Does the case made entitle the libelants to the relief prayed, or to any relief in the premises? The first point made by the libelants is, that the tax in question is a "duty of tonnage" laid specifically upon this vessel by the city of Chicago, and as such void, because not laid with the assent of Congress. What is the "duty of tonnage" meant to be prohibited by the Constitution of the United States? It is a well-known historical fact that nearly all European States and divers free cities and ports were in the habit of levying a tax upon all vessels entering their ports in proportion to their tonnage. And this was what was known to the maritime and commercial world at the time of the adoption of the Constitution as tonnage-tax, or duty of tonnage. The intention of the framers of the Constitution was not only to make commerce free between the States, but to prohibit the States from in any manner, of their own will or caprice, interfering with foreign commerce. A tonnage-tax is defined to be "a duty levied on a vessel according to the tonnage or capacity, without reference to where her owner resides. It is a tax upon the boat as an instrument of navigation, and not a tax upon the property of a citizen of the State." The duty of tonnage which the Constitution of the United States prohibited the States from levying is any duty or tax on a ship, as such, without regard to the residence of her owner, whether it be a fixed sum upon its whole tonnage or a sum to be ascertained by comparing the amount of tonnage with the rate of duty. When a ship, as an instrument of commerce, is required to pay a duty as a condition to her being allowed to enter or depart from a port, or load or unload a cargo, either upon her tonnage, her property, or as a license to her officers or crew. Gibbons *v.* Ogden, 9 Wheat., 1; The Passenger Cases, 7 How., 459; Steamship Company *v.* Port Wardens, 6 Wall., 34; State Tonnage Cases, F, 12 Wall., 212.

This tax does not purport to be levied upon this vessel according to her tonnage, but according to her valuation as property. It is a tax upon this ship as part of the taxable property of the city of Chicago, she being owned and registered here. This tax is not like a tonnage tax, imposed upon the ship as such, for the privilege of trading or taking shelter in this port, but treats the ship as property subject to a tax in this city.

The question of the liability of property in boats and vessels to be taxed by the State authorities, on valuation, as other property of the State is taxed, has been frequently discussed by the Supreme Court of the United States, and the power uniformly conceded.

In the Passenger cases, 7 How., 402, the court said: "A State cannot regulate foreign commerce, but it may do many things which more or less affect it. It may tax a ship or other vessel used in commerce, the same as other property owned by its citizens." So in the State tonnage cases, 12 Wallace, 212, the court said: "But ships and vessels owned by individuals, and belonging to the commercial marine, are regarded as the private property of their owners, and not as the instruments or means of the Federal government, and as such, when viewed as property, they are plainly within the taxing power of the States, as they are not withdrawn from the operation of that power by any express or implied prohibition contained in the Federal Constitution. Argument, therefore, to show that they may be taxed as other property belonging to the citizens of the State is hardly necessary, as the opposite theory is indefensible in principle, contrary to the generally received opinion, and is wholly unsupported by any judicial determination. Direct adjudication to support that proposition is not to be found in the reported decisions of this court, but there are several cases which concede that such a tax, if levied by a State, would be legal, and no doubt is entertained that the concession is properly made.

"Taxes levied by a State upon ships and vessels owned by the citizens of the State as property, based on a valuation of the same as property, are not within the prohibition of the Constitution, but it is equally clear and undeniable that taxes levied by a State upon ships and vessels as instruments of commerce and navigation are within that clause of the instrument which prohibits the States from levying any duty of tonnage without the consent of Congress; and it makes no difference whether the ships or vessels taxed belong to the citizen of the State which levies the tax or the citizens of another State, as the prohibition is general, withdrawing altogether from the States the power to lay any duty of tonnage under any circumstances, without the consent of Congress.

"Annual taxes upon property in ships and vessels are continually laid, and their validity was never doubted or called in question, but if the States, without the consent of Congress, tax ships or vessels as instruments of commerce, by a tonnage duty, or indirectly, by imposing the tax upon the master or crew, they assume a jurisdiction which they do not possess, as every such act falls directly within the prohibition of the Constitution.

"Prior to the adoption of the Constitution the States attempted to regulate commerce, and they also levied duties on imports and exports, and duties of tonnage, and it was the embarrassment growing out of such regulations and conflicting obligations which mainly led to the abandonment of the Confederation and to the more perfect union under the present Constitution."

In the light of these authorities I therefor conclude that this tax is not a "duty of tonnage."

I come now for a moment to consider the second objection to this seizure on the ground that this assessment and warrant are against the ship and not against the owner, and for that reason void. It was concluded on the hearing that ships and vessels are personal property, and such all the authorities define them to be. The law in this State in force at the time this assessment was made required the owners of all personal property to return each year to the assessor a schedule or list of all their personal property subject to taxation by a certain day to be fixed by the Assessor, and it was the duty of the assesor to fix the fair cash value thereof. (Rev. Stat., Chap 120, Sec. 24; Rev. Stat., Chap. 24, Secs. 249, 251, 252, and 253.) The twenty-fifth section of Chapter 120 prescribed the form of the schedule, and required, among other things, that it should distinctly set forth in the seventeenth item "every steamboat, sailing vessel, wharf boat, barge, or other water craft," etc. And by the thirteenth section of the same chapter it was provided that "All persons, companies, and corporations in this State owning steamboats, sailing vessels, wharf boats, barges, and other sailing craft, shall be required to list the same for assessment and taxation in the county, town, city, village, or district in which the same may belong or be enrolled, registered, or licensed, or kept when not enrolled, registered, or licensed."

Here is a plain and palpable duty imposed by law upon the owner of vessel property. It was admitted on the hearing that, between the 1st of May and 1st of July, 1874, a motion was sent to, or served upon, the owners of all vessels, as shown by the register of the port, requiring them to list their property as required by law. It is not contended that the interest of these libelants, or either of them, was scheduled in any list of taxable property returned by them or either of them to the assessor. In fact, it is admitted that the only tax assessed upon or against this property is the one now in question. Undoubtedly this vessel, being personal property, should be taxed against some owner. The general theory of our law does not allow of the assessment of the tax on personal property as an independent *res* or thing, as it may be assessed on real estate under certain circumstances,—although there are some features of our later revenue laws which seem to point to the idea that the legislature intended, even in regard to some classes of personal property, like bank shares, capital stock, and vessel property, to tax the thing itself without regard to any personal liability of an owner. But, notwithstanding these incongruities, the general principle running through our law, as it now stands and stood at the time the tax was levied, required the owner of vessel property to list it as personal property for taxation where it was subject to taxation, either by virtue of his residence or the enrollment and registration of the property. It is not necessary that I should decide what would be the duty of the owner of a vessel residing at one place when his vessel is enrolled or registered in another tax-district, as it is not claimed that these owners, or either of them, were taxed elsewhere for this vessel, and it is admitted that two of the owners, representing three-fourths of the property, resided in Chicago, and the vessel was registered or enrolled as owned by libelant, Jacob Johnson. Here it is admitted that the owners of this property made no returns of it to the assessor, and the assessor assessed it in the form and manner I have indicated. The assessment and warrant show the name of the vessel and the name of her registered owner, her valuation, and the tax; nor does it appear that Johnson or either of the other libelants made any return of other personal property. The position is, that this is a tax against the vessel, as such by her name—an assessment and warrant *in rem*, so to speak—instead of an assessment against her owners.

But I differ with the proctors for libelants as to the construction and effect to be given this assessment and warrant. True the owners might have returned their interest in this vessel in their list of personal property, and if they had done so it should and would have gone into their personal property assessment; but they neglected to do this, and left the assessor to search out this property, fix its ownership, and assess its value as best he could. The assessor has made an assessment in which the name of the owner, the description of the property, and its valuation, all appear. What more is requisite? and what else could the assessor have done under the circumstances? The warrant, like the assessment, shows the name of the owner, the description of the property, its value, and the amount of the tax. I know of no other legal requisites for a tax warrant; nor does it make any difference, in my estimation, that the description of the property is in the first column to the left hand, and the name of the owner in the second. It seems sufficient if these facts appear on the face of the paper.

This may have been, and, for aught that appears in this case, was, the only property for which Jacob Johnson was taxed in the year 1874. If his property was valued too high, or if he was taxed as sole owner of a piece of property when he was only part owner, the law provides a way in which he could by attending to it in apt time have had the assessment corrected; but it does not lie in his mouth, after neglecting his duty in regard to listing his property, and after allowing the time to pass within which the assessment, as made by the assessor, stood open for correction, to object to the assessment in these particulars, when it was his obvious duty to have made it right in the first instance or had it corrected in proper time,

The policy of our law is that all property shall bear its equal share of the burdens of the State and city government. A court of admiralty is essentially a court of equity, and unless the libelant shows that some plain legal or equitable right has been violated, or is in danger of being violated, relief will not be given in this court. This vessel was subject to taxation by the city of Chicago. She was registered in the name of Jacob Johnson, who was a resident of this city. He must, for the purposes of taxation, be presumed to be the sole owner. It is possible that if Johnson had, while the assessment was subject to correction, appeared before the proper tribunal and shown that he was only half owner, and asked to have the assessment corrected in that particular, it might have been done. But he failed to do this, and there is enough, as I think, upon the face of the assessment and warrant and upon the admitted facts, to show that the tax was properly assessed.

It may be said that Peterson, one of the libelants, and owner of a quarter interest in the property, did not reside in the city of Chicago, but resided at Lake View, and, therefore, his interest could only be taxed where he resided. My answer to that is, that Johnson appeared to be the sole owner of record, and officers charged with the assessment and collection of taxes are not required to look into the secret ownership of personal property. They do their duty when they assess the property against the apparent owners, as shown by possession or muniment of title. Take, for instance, a large wholesale or manufacturing firm in this city. There may be silent partners residing elsewhere, who have an interest in the goods, but the property is here, the firm, as a business entity, is here, and this, therefore, should be, and, under the law, is the place of taxation.

I come, then, to the conclusion that the tax complained of in this case is not a "duty of tonnage," and that the warrant under which this vessel is seized and held is so far good as to amount to a justification in this court of the seizure complained of. I do not say that it would be a justification in a court of law, for that question is not before me; but a court of admiralty, like a court of equity, looks into the substantial merits of the controversy, and I find this property subject to assessment in the city. That it was in form so assessed, and a warrant issued to the collector for the collection of the tax, and no reason is shown or made to appear why the tax should not be paid. If the property is taxed in the name of one owner instead of three, it is owing to the negligence of those owners in not returning their schedules, or calling for a correction of the books after the assessment was made.

The libel will, therefore, be dismissed with costs.

WE are indebted to JOSIAH H. BISSELL, official reporter of this district, for the following opinion:

U. S. CIR. COURT, S. D. OF OHIO.

OCTOBER TERM, 1875.

JOHN W. ANDREWS, EXR., *v.* JOHN W. GARRETT, survivor, et al.

REMOVAL OF CAUSE FROM STATE TO FEDERAL COURT.

1. A suit commenced and actually tried in a State court before the passage of the act of Congress of March 3, 1875, but in which a new trial had been granted, and which was pending after the passage of the said act, may be removed from such State court to the Circuit Court of the United States.

2. The condition of the suit, or the time it has been pending, makes no difference in the jurisdiction.

On the 25th day of March, A. D. 1867,

suit was brought by the plaintiffs against the defendants in the Court of Common Pleas of Muskinguin county, Ohio, to recover the sum of $10,000 deposited with the defendants by the plaintiffs as indemnity for acceptance by them for the accommodation of the Steubenville & Indiana Railroad Company, and which, by reason of certain facts set forth in the petition, the plaintiffs claim the defendants became liable to pay them. Attachments were issued upon this petition, and certain property was attached. On the 18th day of May, 1867, the defendants filed a motion to remove the cause into the Circuit Court of the United States, on the ground that the defendants were citizens and residents of the State of Maryland, and that the plaintiffs were citizens and residents of Ohio. Upon the hearing of the motion, it appeared that one of the plaintiffs was a citizen and resident of Ohio, one a citizen and resident of Illinois, and one a citizen and resident of Minnesota. The motion was overruled. Thereupon the parties proceeded to make up the issues in said Court of Common Pleas, and at the April term, 1873, a jury was empanneled and the case submitted to the court, and judgment rendered in favor of the defendants.

At the same term the plaintiffs were awarded a second trial, under the statute. Amendments were made to the pleadings, and the cause was continued from term to term until the November term, 1874, when a trial was had before a jury, and a verdict was rendered for the plaintiffs.

At the same term the verdict was set aside, and the cause was continued till the January term, 1875.

On the 25th day of January, the cause was again continued. At the same term, to wit: April 25th, 1875, the order of continuance was set aside; and, on the same day, a petition was filed by the defendants in the State Court, praying for a removal of the cause to the Circuit Court of the United States, under the provisions of the act of Congress of March 3d, A. D. 1875. Bond, with proper security, was filed. The grounds of removal were, that the defendants were citizens and residents of the State of Maryland, and that one of the plaintiffs was a resident of the State of Illinois, one a citizen and resident of Minnesota, and the other a citizen and resident of Ohio. This application was resisted upon the ground that the case did not come within the provisions of the act of March 3d, 1875, because not filed with the court at or before the first term at which the cause could be tried, and before the trial thereof. Upon the hearing of this petition the court, for the reasons that the action was triable and was actually tried in said court before the passage of the act of Congress, overruled said motion.

Afterwards, on the 12th day of May, 1875, the defendants filed in this court transcripts of the record and proceedings in said cause; and, afterwards, on the 6th day of October, a motion was filed in this court to strike the case from the docket on the ground of want of jurisdiction.

Mr. GRANGER, of Muskinguin county, and E. F. HUNTER, Esq., of Lancaster, for plaintiffs.

Senator THURMAN for the defendants.

SWING, J. The disposition of this motion involves the construction of the second and third sections of the act of Congress passed March 3, 1875. The second section of that act provides "that any suit of a civil nature, at law or in equity, now pending or hereafter brought in any State court where the matter in dispute exceeds, exclusive of costs, the sum or value of $500, and arising under the Constitution or law of the United States. * * Or in which there shall be a controversy between citizens of different States, etc., either party may remove said suit into the Circuit Court of the United States for the proper district. And when in any suit mentioned in this section, there shall be a controversy which is wholly between citizens of different States, and which can be fully determined as between them, then either one or more of the plaintiffs as defendants actually interested in such controversy may remove said suit into the Circuit Court of the United States for the proper district."

The third section provides "that whenever either party, or any one or more of the plaintiffs or defendants entitled to remove any suit mentioned in the next preceding section, shall desire to remove such suit from a State court to the Circuit Court of the United States, he or they may make and file a petition in such suit in such State court before or at the term at which said cause could be first tried, and before the trial thereof." * * —LEGAL NEWS, vol. 7, p. 217.

The remaining part of the section refers to the bond and proceedings upon it.

It is not denied that the amount involved in this case, and the citizenship of the parties, were within the requirements of the second section. The amount was over five hundred dollars. The controversy was between citizens of different States, and the suit was pending in a State court at the time of the passage of the act of Congress, possessing every element to authorize its removal to the Circuit Court of the United States.

The third section simply provided the *time when* and the mode in which the application shall be made for such removal, and the steps necessary to accomplish such removal. The mode is to be by petition to the State court, and the time is before or at the term at which said cause could be first tried, and before the trial thereof.

The facts found by the learned judge of the State court show that the petition was properly filed, and all the necessary steps taken in accordance with the provisions of the 3d section, and that the petition was filed before or at the term at which said cause could be tried, after the passage of said act of Congress. And if the term referred to be the term after the passage of the act, there can be no controversy in the case. The jurisdiction must be admitted. That Congress had the power to authorize the removal of the cause in its then condition can not be doubted. Insurance Company *v.* Dunn, 19 Wallace, 214. Did they, by the terms and the spirit of this statute, so authorize its removal? The language of the statute is, *any* suit *now* pending, in other words, all suits *now* pending of the requisites may be removed, and the length of time which the suit had been pending, or the condition it was in if no final judgment had been rendered, could make no possible difference in the reason which operated upon Congress to confer the jurisdiction, as is clearly shown in the reasoning of the court in the case of Insurance Company *v.* Dunn.

The *term* referred is the term at which *said cause*—what cause? The cause referred to in second section, to wit: any cause pending at the passage of the act could be first tried after the passage of the act, and not the terms, at which said cause could have been tried long before the passage of the act.

The motion will therefore be overruled to dismiss the petition for removal.

U. S. CIR. COURT, N. D. OF OHIO.

DECEMBER, 1875.

THE UNITED STATES *v.* HARRY CHASE et al.

SUIT ON COLLECTOR'S BOND—INTERNAL REVENUE—THE FIVE PER CENT. OF THE AMOUNT OF COUPONS TO BE DEDUCTED BY R. R. COMPANIES.

Opinion by WELKER, J. This was an action on an official bond, and the learned judge in substauce said:

The defendant Chase, was collector of Internal Revenue for the Tenth District of Ohio, and as such officer received from the Toledo, Wabash and Western Railroad Company the sum of $24,823,87, being 5 per cent, reserved by said company on the payment of their coupons in the months of August, October and November, 1867, under section 122, of the act of June 30, 1864, and amended by section 9 of the act of July 13, 1866, and which sum he failed to pay over to the government. The company did not make return to the assistant assessor of the district of the said amount of said five per cent tax, but did make out such return and handed it to the collector to be by him delivered to the assistant assessor, which was not certified by the oath of either its treasurer or president. The company on the 1st day of June, 1868, and at the time said return was handed the collector, paid to the collector the amount of said tax, and the collector gave the company a receipt therefor signed by him as such collector. The return so made by the company and handed the collector was never delivered to the assistant assessor. On the trial it was claimed by the defendants, who were sureties of Chase on his collection bond, that they were not liable, because the return of said company was not made to the assistant assessor as required by law, and that therefore there was no proper or legal assessment of said tax so as to make the payment thereof to the collector a receipt of public money by him for which the sureties are liable.

That it was a mere voluntary payment of said company to the collector, and not authorized by law.

Held, 1st. That the requirement of said section 122, that railroad companies shall deduct and withhold five per cent. of the amount of coupons, and pay the same to the government as a tax on such interest so received is a charge of a certain sum on the railroad company, and without assessment makes the company a debtor to the government for the sum prescribed.

2nd. That the collector was authorized to receive such tax without a return thereof having been made by said company to the assistant assessor as directed by said section.

3rd. That when the company made out and handed the collector to be given to the assessor a statement of amount of such reservation of five per cent. of interest received, it was such a fixing and acknowledgment of amount due the government, as made that amount received by the collector public money, and covered by the official bond of the collector, and for which sureties thereon are liable.

4th. That the Supreme Court of the United States *in re* Savings Bank *v.* United States, 19 Wallace 227, having decided that five per cent. undistributed earnings of said bank is a charge upon the bank, and without assessment, makes the bank a debtor for which a suit may be brought by the United States for its recovery, the principle of the decision applied to this case determines that the five per cent. due from the railroad company is such a debt due and payable to the United States, and that the collector being the only officer authorized to receive it, he having so received the same, it was public money in his hands.

Judgment for plaintiff for $35,725.65 and costs.

The case was argued by District Attorney WILLEY and Assistant Attorney SHERMAN for the United States; and by E. BISSELL and Geo. R. HAYNES and R. WAITE, for defendants.

SUPREME COURT OF ILLINOIS.

GEORGE CHANDLER, receiver, etc., *v.* JOSHUA BROWN.

Appeal from McLean.

INSOLVENT INSURANCE COMPANY—RECEIVER—POWERS OF—STOCKHOLDERS—DISCRETION.

1. That under the 25th section of the act concerning corporations, passed in 1872, it was incumbent on the plaintiff to clearly show a legal right to institute and carry on the suit. To this end he should show his appointment by a decree which is conclusive as against the defendant.

2. POWER OF RECEIVER.—The decree assumed to confer upon the receiver discretionary powers to compromise with the stockholders with regard to the payment of subscriptions. Each stockholder has a vested right in the contract for subscription of every other stockholder, and it is beyond the power of a court of equity to invest any person with a discretionary power to release it.

3. PARTIES—STOCKHOLDER.—That to conclude a stockholder under said 25th section, he must be made a party to the proceeding as it provides.—[ED. LEGAL NEWS.]

The opinion of the court was delivered by SCHOLFIELD, J.

This was an action of assumpsit by appellant, as receiver of the Lamar Insurance Company, against appellee, to recover the balance remaining unpaid on his subscription to the capital stock of that company. The declaration, after amendment, was composed of eight counts, but appellant subsequently entered a *nolle prosequi* to all but the first and second counts, and to these appellee demurred. The court sustained the demurrer, and the only question raised by his appeal is, was the demurrer properly sustained? So far as it is necessary to notice the allegations in these counts, they are the same.

It is, among other things, alleged that the company did acts authorizing a forfeiture, by permitting execution to be returned, "no property found," and by allowing executions to remain unpaid for more than ten days after demand, and that it did practically dissolve, leaving debts unpaid. That afterwards, the company being unable to meet its liabilities, certain persons, composing a firm, filed a bill, as well in their own behalf as in behalf of all other creditors of the company, against the company and others, in the Superior Court of Cook county, in which proceeding the court acquired jurisdiction of the company. That in said case the company was declared insolvent, its affairs ordered to be adjusted and closed up, and the plaintiff was appointed receiver of the estate of the company, in conformity with law, and was duly invested and clothed with all the property, assets, effects, rights, privileges and powers of said company. That plaintiff gave bond as receiver, and the company conveyed to him the money, property, assets and effects of the company, including the stock, bond or contract executed and delivered by the defendant to the company.

And a subsequent order of the Superior Court of Cook county is then recited, authorizing the plaintiff to collect from all who had not paid twenty per cent. on their subscription, the deficiency, so that all should be equal, and directing plaintiff to levy twenty per cent. more on the stock, and give notice of such assessment by publishing a notice in a newspaper published in Chicago, and mail a notice to each stockholder; that he first make a call of fifteen per cent., and if that be sufficient, on its payment, to surrender the obligation of the stockholder, and if it be not sufficient, that he make further calls until he secure sufficient for that purpose; that if any stockholder prove insolvent, the deficiency be made up by dividing the same among the solvent stockholders, and providing that the assessments of the plaintiff, when made, be valid, and authorizing him to sue for and collect the same, under the statute.

It is further alleged that he published a notice of the assessment in a newspaper published in Chicago, and a further order of the Superior Court of Cook county is recited, wherein it is said that the time for settlement allowed the plaintiff has expired; that a large number of the stockholders are willing to settle on just and equitable terms; that others refuse to pay either under the assessment or in any other way, and that the assessment of twenty per cent. was made for the purpose of equalizing the burdens, etc. And it is then ordered that all settlements made be ratified, and that the plaintiff be empowered to settle with others for such sums as he may deem equitable, and to surrender their obligations, etc. But in case plaintiff has to sue, he shall sue for and collect the entire amount unpaid on the stock, etc.

It seems to be conceded these proceedings were had under the twenty-fifth section of the "act concerning corporations, approved April 18, 1872, and in force July 1st, 1872," by which it is enacted as follows: "If any corporation, or its authorized agents, shall do, or refrain from doing, any act which shall subject it to a forfeiture of its charter or corporate powers, or shall allow any execution or decree of any court of record for a payment of money, after demand made by the officer, to be returned 'no property found,' or to remain unsatisfied for not less than ten days after such demand, or shall dissolve or cease doing business, leaving debts unpaid, suits in equity may be brought against all persons who were stockholders at the time, or liable in any way for the debts of the corporation, by joining the corporation in such suit; and each stockholder may be required to pay his *pro rata* share of such debts or liabilities, to the extent of the unpaid portion of his stock, after exhausting the assets of such corporation. And if any stockholder shall not have property enough to satisfy his portion of such debts or liabilities, then the amount shall be divided equally among all the remaining solvent stockholders; and courts of equity shall have full power, on good cause shown, to dissolve or close up the business of any corporation, to appoint a receiver therefor, who shall have authority by the name of the receiver of such corporation (giving the name) to sue in all courts, and do all things necessary to closing up its affairs as commanded by the decree of such court." 2d Gross, § 34, p. 106.

It can hardly admit of argument that to conclude a stockholder, by a proceeding under this section, it is indispensable that he shall have been made a party thereto, as it provides. He has a substantial interest therein, and is entitled to his "day in court."

It is incumbent on the plaintiff to show

clearly a legal right to institute and carry on the suit. To this end he should show his appointment by a decree which is conclusive as against the defendant.

This he has failed to do. It nowhere appears, either by the recitals in the decree copied in the several counts, or by distinct averment that the defendant was a party to this proceeding.

The decree is, in our opinion, objectionable also, in assuming to confer upon the plaintiff discretionary powers to compromise with the stockholders with regard to the payment of the subscriptions. Each stockholder has a vested right in the contract for subscription of every other stockholder, and we think it beyond the power of a court of equity to invest any person with a discretionary right to release it; at all events, it can not be done by a decree to which the stockholdors were not parties.

We see no error in the ruling of the court below, and its judgment will be affirmed.

Judgment affirmed.

SHUFELDT & BALL and GAPEN & EWING for appellant.

WILLIAMS, BURR & COPEN for appellee.

WE are indebted to R. A. D. WILBANKS, clerk of the Supreme Court at Mount Vernon, for the following opinion:

SUPREME COURT OF ILLINOIS.

OPINION FILED OCT. 14, 1875.

DEWITT C. BARBER *v.* JAMES BELL.

PROMISSORY NOTE—LIABILITY OF INDORSER—DEMAND—WHAT LAW GOVERNS.

This was a suit by Bell against Barber on an indorsed note given by Dawes & Co., payable to Barber, and by him indorsed before due to Bell. The note was payable at the Merchant's N. Bank, Cincinnati, O., and was indorsed in Illinois. The makers of the note were residents of Ohio, but had some property in Illinois. Extensions were given until 25th Dec., 1874, by consent of the parties to this suit and the makers of the note. This suit was instituted against appellant as indorser at the April term, 1875. *Held*,

1. That it was not necessary before a recovery could be had against the indorser to present the note at the place where it was payable by its terms.

2. That the note being indorsed in this State, the contract between the indorser and indorsee must be governed by the laws of this State.

3. The makers of the note being non-residents of the State when the note matured, the liability of the indorser became fixed.

4. That appellee was under no obligation to attach the property of the makers of the note in this State.—[ED. LEGAL NEWS.]

Opinion by CRAIG, J.

This was an action of assumpsit brought by James Bell, in the Circuit Court of Perry county, against Dewitt C. Barber, on an indorsed note given by E. C. Dawes & Co., payable to Dewitt C. Barber, and by him indorsed, before maturity, to the plaintiff.

The parties, by agreement, dispensed with a jury, and a trial was had before the court, which resulted in a judgment in favor of the plaintiff. The defendant, Barber, brings the record here by appeal.

The makers of the note resided in the State of Ohio, but the indorsement was made in Perry county, Illinois, where appellant resided. The note was executed Sept. 2d, 1872, due in six months. An agreement was, however, made in January, 1873, between appellant, appellee, and the makers of the note, by which the time of payment was extended twelve months, without prejudice to the rights of appellee, as indorsee. A further extension was given until the 25th of December, 1874, by consent of appellant. The makers of the note were not sued, but this suit was instituted at the April term, 1875, against appellant, as indorser. In two counts of the declaration it is averred that the makers of the note, when it matured, were not residents of the State, and have not been since. The other counts aver the insolvency of the makers, and that suit against them would have been unavailing. The note was payable at the Merchants' National Bank, Cincinnati, Ohio, and it is insisted by appellant that no recovery could be had against him without proof that the note was presented for payment at the place where, by its terms, it was payable.

The note was indorsed in this State, and the contract between the indorser and indorsee must be governed by the laws of this State. In this State the law is well-settled that appellee was not bound to aver or prove a demand of payment of the makers of the note at the place where it was payable, and it is not necessary to enter upon a discussion of the question. New Hope, Delaware, Bridge Co. *v.* Perry, 11 Ill., 467; Wood & Co. *v.* Merchants' Savings, 41 Ill., 267; Wilder *v.* DeWolf, 24 Ill., 190.

It is however urged by appellant, that as appellee used no diligence to collect the note from the makers, he is not liable as indorser. Under the statute of 1845 there are three contingencies under which the indorser may be held liable:

1st. Where the assignee, by the exercise of due diligence, prosecutes the maker to insolvency.

2nd. Where the institution of a suit against the maker would be unavailing.

3rd. Where the maker has absconded or left the State when the note falls due.

In Schuttler *v.* Piatt, 12 Ill., 418, it was held that if the maker of the note is beyond the limits of the State when the note matures, so that he cannot be subjected to our jurisdiction, the liability of the assignor becomes fixed. In that case as in the one before us, the makers of the note resided in another State, and that fact was known to the assignee of the note when he purchased, but the court held that such fact did not vary the liability of the indorser.

In Mason *v.* Bruton, 54 Ill., 350, was a case where the maker of the note resided in Wisconsin, the payee of the note indorsed it in Chicago. It was held that the assignee of the note was under no obligation to follow the maker out of the jurisdiction of our own State, but when the note became due, the fact that the maker of the note was in a foreign jurisdiction gave the assignee a right of action against the indorser. Whether the makers of the note resided out of the State when the note was given, or whether they left subsequent to the execution of the note can make no difference; in either event, the liability of the indorser is the same. It is, however, urged by appellant that the makers of the note had property within the State, and appellee was bound to attach the same.

It was in proof that Dawes & Co. had in the county of Perry some eight tons of railroad iron, worth about $60 per ton, which was in the possession of appellant, and a portion of it in use on a raiload.

In addition to this it was shown that Dawes & Co. had deeds of record for certain town lots, but whether they held a legal title to the property it does not appear. It was also shown that Dawes & Co. were largely indebted, that they owed appellant $15,000; that they had suspended payment; under such circumstances, had appellee attached, there is no probability that any portion of his debt could have been made. But we are of opinion that appellee was under no obligation to attach property of the makers of the note. When the note matured the makers were without the jurisdiction of the State; under the statute the liability of appellant, as indorser of the note, became fixed and appellee was not bound to incur the expense and risk of an action of attachment suit. The judgment of the Circuit Court will be affirmed.

DAVIS & HAMMACK for appellant.

GEORGE W. WALL for appellee.

WE are under obligations to JOB BARNARD, Esq, of the District of Columbia for the following opinion:

SUPREME COURT DISTRICT OF COLUMBIA.

OPINION DEC., 1875.—THE COURT SITTING IN BANC.

JOHN J. WEED AND WILLIAM PENN CLARK *v.* LEANDER M. BLACK.

CONTRACTS TO INFLUENCE LEGISLATION VOID.

1. That all contracts for services generally, in procuring legislation, are void from public policy, and it is the duty of the courts so to declare.—[ED. LEGAL NEWS.]

Opinion by A. WYLIE, J.

Previously to the 21st July, 1870, the defendant held certain claims against the government of the United States, generally known as Montana war claims, in regard to which the plaintiffs had rendered him certain services. But the claims had not been paid, or allowed by the government, and it became necessary to procure the passage of an act of Congress for that object. On the 15th July, 1870, Congress passed an act anthorizing the secretary of war to ascertain the expense incurred by the authorities of Montana territory in suppressing Indian hostilities, and the names of persons entitled to relief. The plaintiffs in this action had rendered active services in procuring the passage of that law, and evidence was given to prove that the act itself was drawn up by Mr. Weed, one of the plaintiffs.

The act having passed on the 15th of July, 1870, the following contract was entered into between the parties, on the 21st of the same month:

"Whereas, I have a claim against the United States for horses, equipments and supplies furnished by me to the territorial authorities of Montana Territory, and used in suppressing Indian hostilities in said Territory in the year 1867. And whereas, Weed & Clarke have been engaged in making efforts to secure the payment of said claim, and propose to continue such efforts until said claims are settled and paid:

Now, therefore, in consideration of the premises, and of the services heretofore rendered, and hereafter to be rendered, by said Weed & Clarke, in the prosecution of said claim, I do hereby agree to pay to them, the said Weed & Clarke, twenty per cent. of the amount collected by them on said claim, and I hereby agree that the amount herein specified to be paid to them shall be paid out of the moneys allowed and paid to me on said claim at the time I may receive the same.

And the said Weed & Clarke hereby agree to pay and discharge any claim or charge which may be made by Hon. J. M. Cavanaugh against said L. M. Black for services rendered by him in securing the payment of said claims.

Dated Washington, D.C., July 21, 1870.

(Signed) L. M. Black,
Weed & Clarke."

At the date of this contract, the Hon. J. M. Cavanaugh was a delegate from Montana in the Congress of the United States.

In pursuance of the act of Congress above referred to, Gen. Hardie was appointed by the Secretary of War to investigate these claims, and Weed appeared before him in December, 1870, as agent of the defendant. Part of the claims were allowed, and others suspended by Gen. Hardie.

On the 30th May, 1872, Black, the defendant, gave written notice to Weed & Clarke, that he had revoked their authority, for the reason that they had been negligent as to their duties in the business, and that he had employed other agents in their stead.

On the 3d of March, 1873, an act of Congress was passed directing payment of such of the claims as had been allowed by Gen. Hardie, which amounted to $55,613.25.

The verdict of the Circuit Court in this case was for $11,322.65—at the rate of twenty per cent. on this sum; but the plaintiffs having entered a remittitur for $4,075.69, a judgment was entered in their favor for the balance, $7,245.69.

The main question in the case was as to the validity of the contract; and the decision of that question was left by the court to the jury, as one of actual fraud, to be determined "upon proof."

On its face the contract was for a contingent fee, which was to be divided between the plaintiffs and the delegate named, for services to be rendered, or for services which had already been rendered, by all three, in procuring the allowance and payment of the claims, under authority of acts of Congress. One of these acts had already been passed, and one other at least had yet to be passed before the claims could be paid.

This question has been so often decided by the Supreme Court of the United States, that we must regard it as conclusively settled. All contracts for services, generally, in procuring legislation, are void from public policy, and it is the duty of the courts so to declare. "Agreements for compensation contingent upon success, suggest the use of sinister and corrupt means, for the accomplishment of the end desired. The law meets the suggestion of evil and strikes down the contract from its inception." See Marshall *v.* B. & O. R. R. Co., 16 How., 325; Tool Co. *v.* Norris, 2 Wall., 52; Trist *v.* Childs, 21 Wall., 441.

Honest contracts, however, whose character appears upon their face, are unaffected by the rule. If the terms of the contract be broad enough to cover services of any kind, whether secret or open, honest or dishonest, the law pronounces a ban upon the paper itself. Nor will honest services subsequently performed sanctify an unlawful contract. But contracts which provide for compensation in consideration of particular services to be rendered, such as the collection of evidence, the preparation of papers, or the delivery of arguments, in support of claims, are legitimate everywhere. Even these, however, would not be sustained, if employed as covers for actual frauds against the policy of the law.

These considerations are deemed sufficient to dispose of the present case, finally. The other points are of minor consequence and need not be considered.

The judgment should be set aside and a judgment entered in favor of the defendant, *non obstante veredicto*.

JOHN D. MCPHERSON & L. G. HINE, for plaintiffs.

WM. F. MATTINGLY for defendant.

LV. NEW HAMPSHIRE.

Through the kindness of JOHN M. SHIRLEY, official reporter, we have received advance sheets of the 55th volume of New Hampshire Reports, from which we take the following head-notes:

McIntire v. *Eastern Railroad*, p. 558.

REFERENCE LAW—PRACTICE.

A case having been referred by order of the court, and no proceedings having been had under the order until after the act of July 3, 1875, changing the law in regard to references, had been passed. *Held*, that the order should be rescinded, and the question of reference be determined by the court under the law as amended.

Brooks v. *New Durham*, p. 559.

ATTORNEY'S AUTHORITY TO REFER PENDING CAUSE.

An attorney of record, in an action which had been sent to a referee by order of court, signed an agreement in writing that the report of the referee should be final, and the agreement was entitled as of the term of the circuit court to which the report was to be made. *Held*, that his client was bound by such agreement.

Lang v. *Stockwell.*, p. 561.

SECRET TRUST—RESERVATION OF USE OF CHATTEL BY VENDOR.

Upon the sale of a chattel, it was agreed as part of the bargain that the vendor should still have the right to use the thing sold, in and about his business. *Held*, that such reservation, being inconsistent with an absolute sale, constituted a secret trust, from which fraud as to the creditors of the vendor was an inference of law; and that the actual intention of the parties would not be inquired into.

Chase v. *Boody.*, p. 574.

BAILMENT FOR HIRE—DEGREE OF CARE.

C. bailed to B. a horse, for hire, to convey him from D. to S. B., upon arriving at S., put up the horse in a proper place, and the next morning properly watered, fed, and cared for her, and left her, intending to return, and in fact returning, within a suitable time to care for her, but having reason to apprehend that A., sixteen years of age, would attempt to water the horse during his absence. A. turned the horse loose to water her, and the horse, in consequence thereof, became lamed. *Held*, that these facts showed no evidence of lack of ordinary care and prudence on the part of B., and that he was not liable to C. for the damages.

Vaughan v. *Morrison.*

PLEADING—EFFECT OF JUDGMENT DISCHARGING TRUSTEE IN ACTION BY ADMINISTRATOR OF THE DEFENDANT.

In an action of trover, the defendant filed a brief statement, alleging, in effect that before the bringing of this suit he had been summoned as trustee in certain actions commenced by one B. against the plaintiff's intestate, in which he was sought to be charged for the same property; that judgment was duly rendered in those suits, discharging him as such trustee; that the appointment of this plaintiff as administrator was procured by the same creditor, B., for the purpose of bringing the present action against him for the same property. *Held*, that the judgments in the trustee suits did not constitute a bar to the maintenance of the present action, by way of estoppel, inasmuch as neither the parties nor the issue were the same; and that the brief statement must be rejected.

CHICAGO LEGAL NEWS.

Lex vincit.

MYRA BRADWELL, Editor.

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We call attention to the following opinions, reported at length in this issue:

Writ of Error from U. S. Supreme to State Court.—The opinion of the United States Supreme Court, by Waite, C. J., as to when a writ of error will lie from the Supreme Court of the United States to a State Court, under section 709 of the Revised Statutes.

Tax—Vessel—Tonnage.—The opinion of the United States District Court for the Northern District of Illinois, by Blodgett, J., upon several interesting questions relating to the taxation of vessels by State authorities.

Suit on Official Bond.—The opinion of the Circuit Court of the United States for the Northern District of Ohio, by Welker, J., in an action brought by the United States on the official bond of a collector of internal revenue.

Removal of Cause from State to Federal Court.—The opinion of the United States Circuit Court for the Southern District of Ohio, by Swing, J., holding that a suit commenced and actually tried in a State Court, before the passage of the act of Congress of March 3, 1875, but in which a new trial had been granted, and which was pending after the passage of said act, may be removed from such State Court to the Circuit Court of the United States.

Insolvent Insurance Company—Receiver—Stockholder.—The opinion of the Supreme Court of Illinois by Scholfield, J., as to the rights and powers of a receiver of an insolvent insurance company, under the 25th section of the act of 1872, concerning corporations. The court is of the opinion that a court of equity cannot confer upon a receiver discretionary powers to compromise with the stockholders with regard to the payment of subscriptions; that each stockholder has a vested right in the contract for subscription of every other stockholder.

Note—Liability of Indorser—Property of Maker in State.—The opinion of the Supreme Court of this State, by Craig, J., where the firm of Dawes & Co., who resided in Ohio, gave their note to the appellant, Barber, who resided in Illinois payable at a bank in Cincinnati. Barber indorsed the note to the appellee, Bell. Dawes & Co. had property in Illinois. On a suit brought by Bell against Barber, as indorser, it was held that Dawes & Co. being absent from the State at the time the note matured, the liability of Barber, the indorser, became fixed; that in order to sustain an action by him it was not necessary that the note should have been presented at the bank where it was made payable; that the appellee was under no obligation to attach the property of the makers of the note in Illinois, and that as the note was indorsed in this State, the contract between the indorser and the indorsee must be governed by the laws of this State. In this connection we would refer our readers to an elaborate opinion of the Supreme Court of the United States in 8 Chicago Legal News, p. 105, stating what law governs the liability of parties to a note or bill when they are residents of different States.

Contract to Infuence Legislation.—The opinion of the Supreme Court of the District of Columbia, by Wylie, J., holding that all contracts for services generally in procuring legislation are void from public policy, and it is the duty of the courts so to declare.

NOTES TO RECENT CASES.

RIPARIAN RIGHTS—NAVIGABLE STREAM—MISSOURI RIVER.

The Supreme Court of Missouri, in Benson et al *v.* Morrow et al., 2 *Cent. Law Journal*, 798, held, that there are in Missouri no navigable streams, within the meaning of the common or civil law definition of this term; but the Missouri river having been declared a navigable stream by act of Congress, the doctrine of riparian property, as established with regard to non-navigable streams, is not applicable to this river.

ATTACHMENT OF SCHOOL-TEACHER'S SALARY.

The Kentucky Court of Appeals, 12 *Albany Law Journal*, 391, in Clark *v.* Lee's assignee, held that a school teacher who is to be paid by the city officers out of moneys set apart by law for school purposes, is an "employee of the State," and his salary cannot be attached. The court cites, approvingly, Tracy et al. *v.* Hernbuckle et al., 8 Bush., 336. We do not remember of any decision in this State upon the precise question, but we have no doubt it would be held that money due a school teacher for teaching could not be attached in the hands of a school officer.

PRESUMPTION OF DEATH FROM SEVEN YEAR'S ABSENCE.

It was held by the Supreme Court of Missouri, in McRee *v.* Coplin et al., 2 *Cent. Law Journal*, 813, that where an ancester died at St. Louis, in 1803, leaving several heirs, and among others a son, who then resided at New Orleans, a mere failure to hear of such son in St. Louis, the residence of the ancestor, for seven years after the death of such ancestor, no inquiries having been made in New Orleans, will not raise a presumption of law that the son died unmarried and without issue after the lapse of seven years.

DEFAMATION—PRIVILEGE—WITNESS—MILITARY COURT OF INQUIRY.

The English House of Lords, in Dawkins *v.* Rokeby, 36 L. T. Rep., N. S., 196, held the ordinary rule of law that a witness is absolutely privileged in what he says or writes in giving evidence before a court of justice, even if he has acted *male fide*, and with express malice, extends to a witness before a military court of inquiry, called in pursuance of the regulations of the army to inquire into matters of military discipline, though the witness be not examined on oath before such court. Lord Penzance said it is inexpedient on grounds of public policy to remit such questions as the truth and *bona fides* of a witness to the judgment of a jury.

RIGHT OF BURIAL—MANDAMUS.

The Philadelphia Court of Common Pleas, in Commonwealth *ex rel.* Boileau et al. *v.* Mt. Moriah Cem. Ass. of Pa., 33 *Leg. Intel.*, 464, held that a private claim to the right of interment in a cemetery lot will be enforced by mandamus; that a provision of the charter of a cemetery company, which prohibits the transfer of lots without consent of the managers, is binding upon grantees, and a transfer without such approval passes no title; that a lot holder who has executed and delivered a deed of transfer of his lot, unapproved as aforesaid, still has the right to order and compel an interment in such lot. We do not believe that a lot owner, who has by a deed duly executed and delivered, transferred his interest in the lot, can, because the managers of the cemetery did not consent thereto, still continue to direct who shall be buried in such lot. In this case the body refused burial by the officers of the cemetery, was that of a colored person.

SALE OF GOODS—CASH AGAINST BILL OF LADING.

The English Court of Appeal, in Ogg et al. *v.* Shuter, 33 L. T. Rep., N. S., 492, held that where, by the terms of a contract, the bill of lading is deliverable upon the vendee's fulfilling certain conditions, the shipper is entitled not only to retain possession of the goods under such bill of lading until those conditions are fulfilled, but also, in case of the vendee's default, to dispose of the goods.

Recent Publications.

American Commercial Law, Relating to Every Kind of Business, with Full Instructions and Practical Forms, Adapted to all the States of the Union. By Franklin Chamberlin, of the United States Bar. Hartford: Published by O. D. Case & Company. Chicago: A. H. Andrews & Co. 1875. Price in Law Sheep, $5.00. pp. 1,024.

This work is intended more for the business man than the professional lawyer. It gives the general principles of law regulating the various business transactions among men in this country, with many valuable forms. Among the subjects treated are, What is Law, Commercial Law, Property, Agency, Contracts, Sales, Liens, Negotiable Paper, Guaranty and Suretyship, Bailments, Partnerships, Corporations, Payment, Interest and Usury, Insurance, Bonds, Arbitration, Assignments, Collection of Debts, Mortgages, Landlord and Tenant, Marriage and Divorce, Husband and Wife, Parent and Child, Guardian and Ward, The Bankrupt Act, Copyright, etc., etc. While this book will not make "every man his own lawyer," by carefully reading and studying it, every business man will be able to avoid mistakes which would make him liable to long and expensive law suits..

High on Receivers.—We have had an opportunity this week of examining the advance sheets of the whole of the text of Mr. High's forthcoming work on the Law of Receivers, which is now passing through the press, and it is with much satisfaction we express our belief that it will prove to be the ablest of this distinguished author's works. We confess a feeling of pride in the evident fact that the legal profession in the West is producing a class of judges and authors, who, by their learning and ability bid fair to place their reputation on a level with the highest position attained by their predecessors of the last generation. Few are contributing more to this result than Mr. High.

His work on "Receivers" seems to us an improvement on his "Injunctions," which is now so popular with the profession. The same logical arrangement, the clearness and precision of statement, the patient and conscientious labor in the examination of every decision which could shed light upon his subject, which distinguished his former work, is apparent in this also, while the severe brevity of style has given place to a more graceful and flowing diction; there is less reluctance in the expression of individual opinion, where the authorities disagree; and the entire work gives evidence of a riper judgment and wider learning.

The chapters upon "Actions by and against Receivers," "Receivers of Corporations," and "Receivers over Railways," seem to us especially well-written and satisfactory, and in these days of financial embarrassment and "granger movements" will be welcomed heartily by the profession.

The appearance of the work is opportune, and unless we greatly mistake, it will materially enhance Mr. High's excellent and well-earned reputation.

The Law of Homesteads and Exemptions.—Soule, Thomas & Wentworth, the publishers, of St. Louis, announce as in preparation and soon to appear, a work on the Law of Homesteads and Exemptions, by Seymour D. Thompson, the able editor of the *Central Law Journal*. The publishers say, as the decisions on the subject of this work involve exclusively the construction of statutes which vary somewhat in the different States, these statutes will be fully set out in the foot-notes. The facts on which the various cases collated rests, will also be fully stated, and extensive quotations will be made from the reasoning of the courts. Mr. Thompson is a careful and laborious writer, and we have no doubt his work will be a valuable aid to the profession. We advise you, friend Thompson, not to let your publishers hurry you, but take your time and produce a book of which you will feel proud. Many a book has been ruined by over anxious publishers.

English Officers not all Honest.—If we may judge by the following, in the London *Law Times* of December 18th, jurors and officers attending them are no more honest in England than in America. The *Times* says: "A scandal was exposed at the Manchester Assizes on Monday. It seems to have been the custom of the officer in attendance on special jurors to demand from each of them one shilling out of the fee they received. This was brought to the knowledge of Mr. Justice Mellor, and his lordship, after remarking that the officer had no right to make any such suggestion, said that if it again occurred the man making the proposition should be dismissed forthwith." If this officer had been in some American courts he would have been locked up for contempt of court, and very properly.

Judge Walker.—The Jacksonville *Sentinel* says: "It seems to be generally understood that the Hon. Pinkney H. Walker, one of the justices of the Supreme Court, will be a candidate for re-election in this, the Fourth judicial district, at the expiration of his present term, in June next, and that there will be no competing candidate. This is as it should be. Judge Walker is an able and an honest judge, and the people could hardly afford to lose the benefit of his long experience on the bench."

It would be a fitting tribute to Judge Walker, after so many years of faithful, honest judicial labor, to re-elect him *without opposition*. We hope it may be done.

THE LAW OF CHARITABLE TRUSTS.

MR. TAYLOR'S LEGACY.

The law strongly favors gifts to charitable uses, and the courts have resorted to many ingenious devices and very refined constructions, in order to sustain them. A gift to charity will be held valid, which if to an individual, would be void, and where they are declared invalid it is upon the ground of such uncertainty, that the testator's intention cannot be ascertained and carried into effect.

And this policy of the law and of the courts commends itself to our sense of right. The world ever applauds its children, who have sacrificed themselves for the sake of their fellows, and no spectacle is more interesting or more affecting than that which is presented, when one who has accumulated a large fortune, by his own toil, devotes it to the good of mankind.

A recent notable instance in our city has given a public prominence to the subject not ordinarily manifested. Our papers have contained from time to time comments upon Mr. Taylor's legacy and suggestions as to what should be done with it, so that perhaps a few remarks in a legal journal, from a legal standpoint, may not be inopportune.

The first thing is to ascertain the meaning and intention of the testator. It is his will to which effect is to be given, and not the will or desire of others. His intention is to be gathered from his language.

The ninth section of his will is as follows:

"*Ninth*—All the rest, residue and remainder of my estate, whatsoever, that may remain, after fully providing for the payment of the debts, expenses, legacies, annuities and settlements, or other disbursements hereinbefore indicated or mentioned, according to the spirit of what I have written, I do give, devise, and bequeath to Henry W. King, Henry F. Eames, Albert Keep, Wirt Dexter, O. S. A. Sprague, Thomas M. Avery, Henry Keep, and Hamilton B. Bogue, all of the city of Chicago, and county of Cook, in trust, the same to be by them applied and devoted to the founding or endowing here, in the city of Chicago, upon a lasting basis, of such a charitable or other institution as in their opinion, or in the opinion of a majority of them, is most needed, and will do the most positive and enduring good and the least harm; provided, that if any or either of the nine trustees above named shall die before this will come into effect, or before a permanent organization of such proposed charity is effected, that the survivors shall have full power to select persons to fill vacancies in their number; and provided, further, that if the majority of said trustees shall be unwilling, or deem it expedient to organize a new charity, they may duly certify the same to my administrators and executors, who shall then pay over the same to the lawful managers or trustees of the Home for the Friendless in the said city of Chicago."

Here seems to be a disposition of the residue of his property to charity. He speaks of a "charitable institution," of a "proposed charity," and of a "new charity." Evidently "charity" was in his thoughts when these lines were written.

But in order that a testament may take effect, it is not only necessary that the testator should have wished to do a thing, but also that he should have expressed that wish. And if he has not expressed it, conjecture is not permitted to supply what the testator has failed to indicate. In the absence of disposition, the law provides how the succession shall go, with distinctness and clearness, and it would be unjust to change this, unless the intention of the testator is equally distinct and clear. 1 Jarman on Wills, 315.

No very accurate or precise definition of charity, in its legal sense, can easily be given. On the one hand, it does not mean all the good affections which men ought to bear towards each other; nor, on the other, does it mean simply relief to the poor. Lord Camden defined it, "a gift to a general public use, which extends to the rich as well as to the poor," but this fails in many essentials of a complete definition. The courts usually have recourse to the statute of 43 Elizabeth, c. 4, called the Statute of Charitable Uses, to ascertain what are charitable purposes, though they are not confined to it, but extends the definition to cases within its spirit. Charities, then, such as the law takes cognizance of, are those objects which are enumerated in the statute of Elizabeth, or which properly come within its spirit. If not of this character, however benevolent or praiseworthy they may be, the courts have no jurisdiction to enforce them.

The Supreme Court of Illinois have gone to a greater length than any other American authority in supporting charitable uses. In Hensen *v.* Harris, 42 Ill., 425, where a devise was made to an executor in trust to sell a farm and apply one-half of the proceeds to the school district in which the farm lay, the fund to be under control of a trustee to be elected by the people of the school district, the interest only to be used in schooling the children, the other half to go to the support of "the poor of Madison county," none to be used but the interest; on a bill filed by the next of kin claiming these provisions to be inoperative and void, it was *held*, that they were valid and within the letter and spirit of 43 Elizabeth, which statute is in force in Illinois; that whether a trustee be elected or not by the people, the bequest would not be lost, for the court would execute it *cy pres* by supplying a trustee; and that in the bequest to "the poor of Madison county," the paupers of the county were meant, and the County Court being the legal guardian of that class, could take the fund as trustee. The court say that charitable bequests are favored in law, and will receive a more favorable construction than will be allowed in gifts to individuals, and it matters not how uncertain the persons or the objects may be, or whether the persons who are to take an *in esse* or not, or whether the legatee is a corporation capable by law of taking, or whether the bequest can be carried into exact execution or not; in all such cases the court will sustain the legacy, and when a literal execution becomes inexpedient, the court will execute it *cy pres*.

It being clear, then, that the Supreme Court of Illinois will go a great ways to sustain charitable bequests, it remains to inquire what is the bequest in Mr. Taylor's will.

"To the founding or endowing here, in the city of Chicago, upon a lasting basis, of such a charitable, *or other institution*, as in their opinion, or in the opinion of a majority of them, is most needed, and will do the most positive and enduring good, and the least harm."

There is probably no authority that will sustain this clause as a charitable bequest. And if not charitable, then it is clearly void. Neither private charity nor benevolence is recognized by the courts. That the court may see to the execution of them, the charities must be public in their nature. Hence the courts have held that money devised "to be given in private charity" was void. Ommaney *v.* Butcher, Turn and Russ, 260. A leading case is Morice *v.* The Bishop of Durham, 9 Vesey, 399, where a bequest was made to the bishop of Durham to dispose of to *such objects of benevolence and liberality* as he should approve, and it was held that the bequest was not charitable and must go to the next of kin.

And in Story's Equity Jurisprudence, sec. 1158, the rule is laid down that "since the statute of Elizabeth, the court of chancery will not establish any trusts for indefinite purposes of a benevolent nature not charitable within the purview of that statute, although there is an existing trustee in whom it is vested; but it will declare the trust void, and distribute the property among the next of kin."

So that a mere benevolent intention appearing on the face of the will is not sufficient, but the devise must be absolutely to a charitable use. If the will does not clearly show that the devise is for charity and nothing else, it is void.

When there was a bequest to such charitable or *public purpose or purposes, person or persons*, as the trustees should, in their discretion, think fit, it was held void, because it was not limited to charitable objects. Sir J. Leach, vice-chancellor, said, that the testator had not fixed upon any part of the property a trust for a charitable use, and the court could not, therefore, devote any part of it to charity; he had given it to the trustees expressly upon trust, and they could not, therefore, hold it for their own benefit; the purposes of the trust being so general and undefined, they must fail altogether, and the next of kin become entitled.

In James *v.* Allen, 3 Merivale, 17, a gift to trustees to be applied and disposed of for and to such *benevolent purposes* as they might unanimously agree on, was held void.

A bequest for such *charitable or other purposes* as the trustees should think fit, was held void for uncertainty. Ellis *v.* Selby, 7 Sim., 352. Vice Chancellor Shadwell said: "The testator draws a distinction between charitable purposes and other purposes." "It is uncertain whether the trust was to be for charitable purposes, or for purposes not charitable. Then it is nothing more than if he had given an estate to A or B, which would be void." On appeal, 1 My. & Cr., 286, the chancellor, Lord Cottenham, said: In Morice *v.* The Bishop of Durham, Sir W. Grant lays down the rule in these terms: "The question is not whether the trustee may not apply it upon purposes wholly charitable, but whether he is bound so to apply it." And in James *v.* Allen, "if the property might, consistently with the will, be applied to other than strictly charitable purposes, the trust is too indefinite for the court to execute;" and he held that the bequest was too indefinite to be carried into effect.

So in the case of Williams *v.* Kershaw, before the same Lord Chancellor, 11 Cl. & Fin., 111, where there was a direction by a testator to his trustees to apply the residue of his personal estate to and for such benevolent, charitable, and religious purposes as they, in their discretion, should think most advantageous and beneficial, and for no other use, trust, intent, or purpose whatsoever, the bequest was held void.

The question then, is, is there such a discretion in the trustees, under this will, that they can apply this fund to a charitable institution or to some other institution? If so, the court cannot follow them to see that they properly administer their trust, and it is therefore void.

The language of the will is, shortly, "to the founding, etc., upon a lasting basis, of such charitable or *other institution* as, in the opinion of a majority of them, is most needed, and will do the most good and the least harm." Suppose the trustees should think that a School of Art was most needed, and would do the most good. Who can say them nay? Nevertheless that is not such a charity as the courts can administer. They have the right to found an institution *other* than charitable, by the very words of the bequest, and having that right or discretion, under the decisions above cited, the bequest to them is void. Almost the very language of Vice Chancellor Shadwell applies to this case: "The testator draws a distinction between charitable institutions and other institutions. It is uncertain whether the trust is to be for a charitable institution or for an institution not charitable. Then it is nothing more than if he had given an estate to" A or to B.

From these authorities it would seem that the trust is void for uncertainty, and the remaining inquiry is, whether the legacy falls into the estate, and goes to the next of kin at once, or whether there is sufficient in the will to indicate the "Home for the Friendless" as the object of the testator's bounty.

The language of the will is very obscure: "And provided further, that if the majority for said trustees shall be unwilling, or deem it inexpedient to organize a new charity, they may duly certify the same to my administrators and executors, who shall then pay over the same to the lawful managers or trustees of the "Home for the Friendless" in the said city of Chicago."

"They may duly certify the same" (the unwillingness to organize a new charity) to my administrators, who shall then pay over the same (what? the unwillingness to organize a new charity?) to the lawful managers," etc.

What is meant seems quite evident. The intention of the testator is that the Home for the Friendless shall receive his bounty, if no charity is organized by the trustees.

But the language of the will does not convey that meaning, nor any other rational one. How, then, would the courts read it?

The construction of a will depends upon the intention of the testator, to be ascertained from a full view of everything contained within "the four corners of the instrument," and where the intention is apparent, the court must give such a construction as will support it, even against strict grammatical construction of the words. Words may be omitted, supplied or transposed, to the extent of not absolutely making the will. Redfield on Wills, Vol. 1, chap. 9. This being so, and the intention of the testator being, that the Home for the Friendless should take, in default of a new charity being organized, it would seem as if the court should so read it. Nor would a failure of the trustees to exercise the naked power to certify the fact of a failure to the executors, affect the result. In the case of a charity the court would exercise this power, in default of its exercise by the trustees. "Charity is the essence and substance, and the mode only a shadow"; and rather than the "substance" should fail, courts will intrust themselves with the execution of the mode." Tiffany & Bullard on Trusts, ¶32.

From this very brief and summary review of the authorities, the conclusion seems to be, that the trust for a "new charity" must fail, because of its indefiniteness and uncertainty.

The testator intended, that if this charity proposed by him should fail, that the trustees for the Home for the Friendless should take the bequest. If the will conveys this intention, and the said trustees or managers are competent to take, then the bequest is determined to them. Otherwise it falls back into the estate and goes to the next of kin.

Chicago. J. N. C.

THE VOTE BY BALLOT.

IS IT A SECRET VOTE?

It would seem that everybody is not satisfied as to the *decided* meaning of the word "ballot," as it is used in the Constitution and laws of Illinois. The letter of Judge Jameson to State's Attorney Reed, containing an opinion on the subject of ballot numbering, published in the LEGAL NEWS of the 20th of last November, ought to have been allowed to stand unchallenged; for that opinion is, beyond all reasonable doubt or question, correct. Mr. A. M. Pence would undoubtedly have been excused for not essaying to demolish it; and if he had refrained, there would have been no occasion for Mr. Stanley to assist him to the glory of, etc. * * * But the zealous searcher after truth is irrepressible, and a man with an opinion opposed to somebody else's opinion, is very likely to be heard from.

Mr. Pence not only differs from Judge Jameson, himself, but in the first paragraph of his five column essay, published in the LEGAL NEWS of the 4th ult., he asserts that "grave doubts exist in the minds of many as to the soundness of the judge's views." And further, that "absolute conviction obtains on the part of a still greater number, that the opinion is without foundation." Were this really so, it would be a very unsatisfactory state of things, and Mr. Pence could not possibly be too prompt in setting matters right by the publication of his own well considered and sufficiently lengthy opinion on the subject. But it is to be hoped, in charity to the "many," and especially to the "still greater number," that Mr. Pence must be mistaken as to the "gravity" of the "doubts," and the "absoluteness" of the "convictions" which "exist in the minds," and "obtain on the part" of those "doubting" and "convicted" friends of his. And it might be well also, to indulge the hope that those "doubting" and "convicted" people are not *very* numerous. And it would be somewhat encouraging to be assured that Mr. Pence is again mistaken when he says, "it becomes useless to ascertain the name of the man who cast the [fraudulent] vote, if no method remains whereby it can be ascertained for whom he voted." Because there is a general impression that when the State's Attorney is instructed to draw an indictment for the crime of fraudulent voting, he finds it somewhat convenient to have the name of the alleged fraudulent voter so far "ascertained" that he can put it in the proper place in the indictment. And then, it is believed that a *fraud* in *voting* does not consist in voting any particular ticket, "regular" or "irregular,"

"straight" or "scratched"; but in voting at a time and place when and where the party so voting has no legal right to vote at all. A "fraudulent voter," might be defined to be "the wrong man in the right place."

Mr. Pence will no doubt be glad to find that there are a few more mistakes in his essay on what he is pleased to call "The Secret Ballot," a head-line, by the way, embracing the grave literary offence of tautology; for "the word ballot," Mr. Pence to the contrary notwithstanding, *does*, "by force of its own inherent character, [better say, "established and understood meaning,"] *ex necessitate rei* [the single, plain English word "always," better expresses the intended meaning] carry with it the idea of secrecy." And here is the feature—to use a mixed figure attributed to Lord Castlereagh — here is the "feature" upon which the error of Mr. Pence and his doubting, etc., friends, "hinges." Warned by the fate of the "western lawyer" who "romed with Romulus, and ripped with 'Ripides, and socked with Socrates, and canted with old Cantharides; yet knew nothing of the statutes of Dakota," Mr. Pence very properly declines going to either Greece or Rome to find the meaning of a common, long-established, unequivocal English word of two syllables, used in the Constitution, and in a recent statute of this State. A good standard English dictionary was the proper "authority" to consult. But Mr. Pence was so unfortunate as to make another mistake. He consulted the dictionary called "Webster's," and none other. He should have known better. "Our great lexicographer," was never supposed to be "quite accurate" by any one whose lexicographical opinion is entitled to respect. Richard Grant White, the highest American authority on "words and their uses," speaking of English dictionaries, says incidentally: "The noteworthy spectacle has lately been shown of the casting over of the whole etymological freight of a well known dictionary and the taking on board of another. For the etymological part of the last edition of Webster's American Dictionary, so called, Dr. Mahn, of Berlin, is responsible. When it was Webster's Dictionary, it was in this respect ridiculous, the laughing-stock of philologists, a just reproach to scholarship in this country, and even to the general intelligence of a people upon whom such a book could be imposed as authoritative. And now that it is relieved of this blemish, it is, in this respect, neither Webster's Dictionary, nor "American," but "Mahn's and German."

There is no such thing as a perfect or "quite accurate" dictionary, English or "American." Dr. Goodrich, assisted by Professor Mahn, and by other learned gentlemen, has succeeded in reconstructing "Webster," and in building up a very large dictionary, which the publishers still call "Webster's." It is said to contain several thousand words more than any other dictionary; and no one seems to question the truth of the advertisement. It is an improved dictionary beyond question; but it is susceptible of yet further improvement. It is very popular, and sells largely. It is, on the whole, a good dictionary; but it is not yet "quite accurate" in all respects, more especially in its definitions. Its defective definition of the word *ballot* is a notable instance of omission; a defect that in such a very large and unlimitedly pretensious "unabridged" dictionary, ought to be regarded as unpardonable.

Mr. Pence was right in consulting a dictionary, and it would be unreasonable to expect that he would have overlooked or forgotten Webster's, so called; but he was wrong in not consulting other dictionaries; and the quotations of any of his "authorities" other than that dictionary, was utterly idle. Not one of them is in point; while observations anent the questions of "policy," "a pure ballot-box," etc., were out of order, and altogether unprofitable.

The definition given in Webster's is not erroneous. It is correct, as far as it goes; but it is defective. The "great lexicographer," as Mr. Pence says, "does not attach the meaning of secrecy to the word." Neither does "the great lexicographer" negative such meaning,—as Mr. Pence does not observe.

Webster's is, therefore, a worthless witness in the controversy. A few of the other dictionaries testify as follows:

A small edition of the "Household English Dictionary," London, 1872, defines the word thus:

"Ballot, s., a ball or ticket used in giving votes *privately*."

Nuttall's Standard Dictionary, London, 1865, defines the word thus:

"Ballot, s. A little ball, ticket, or anything used to give a *secret* vote; the act or practice of voting by balls or tickets."

Zell's Cyclopædia, Philadelphia, 1870, gives the derivation, and defines the word thus:

"BALLOT. *n.* [Fr. *ballotte*, from *balle*, a ball] A little ball used in giving votes; a ticket or written note, used for the same purpose, and put *privately* into a box or urn set apart for that object."

None of these definitions can be said to be erroneous, yet they are each and all more or less defective. It will be remarked, however, that in some way, more or direct and unequivocal, they severally less recognise the *secret*—"the idea of secrecy," which Mr. Pence thinks Webster's (unabridged) authorizes him to say, "does not inhere in the word."

Two more "authorities" will be quoted, neither absolutely and unquestionably perfect in every particular; but, the first, the highest and best among "American" dictionaries, and the second, the highest and best among English dictionaries, and, notwithstanding its errors and defects, the best dictionary of the English language yet published in England or America.

Worcester's dictionary, Boston, 1872, gives the derivation and definition (and the "authority" for the definition) of the word thus:

"BALLOT. *n.* [Sp. *ballota*; Fr. *ballote*.] 1. A little ball, a slip of paper, or anything which is used in giving a *secret* vote. *Brande.* 2. *A secret method of voting at elections.* 'America, where the ballot is practiced,' *Brande.*"

JOHNSON'S Dictionary, Todd's edition, five volumes, 4to., London, 1818, gives a definition of the verb at once full, clear and conclusive. And the "authorities" quoted are among the highest and best that even a Chicago philologist (if we have one) could desire to refer to. Thus says Todd's Johnson:

"BALLOT. *n. s.* [*ballote*, Fr.] 1. A little ball or ticket used in giving votes, being put *privately* into a box or urn. 2. The act of voting by ballot."

"*To* BALLOT. *v. n.* [*balloter*, Fr.] To choose by ballot; that is, by putting little balls or tickets with particular marks, *privately* in a box; by counting which it is known what is the result of the poll, *without any discovery by whom each vote was given.* 'None of the competitors arriving at a sufficient number of balls, they fell to ballot some others.' *Wotten*, Rem. p. 262. 'Giving their votes by balloting, they lie under no awe.' *Swift.*"

Some law dictionaries have been looked into, but uselessly; the word is not to be found in any of them. Probably the compilers deemed it a word so well understood that definition or explanation would be a work of supererogation. And indeed this seems to be the idea of the lawyers as well as of the lay-writers who have written with admitted "authority" on the subject. Thus, in McCrary's *American Law of Elections*, the author commences the section of his treatise devoted to the subject of the ballot, in these words:

"§ 194. The chief reason for the general adoption of the ballot in this country is, that it affords the voter the means of preserving the *secrecy* of his vote. And this enables him to vote independently and freely, without being subject to be overawed ["they lie under no awe."—*Swift.*], intimidated, or in any manner controlled by others, or to any ill will or persecution, on account of his vote. The *secret ballot* is justly regarded as an important and valuable safeguard for the protection of the voter, and particularly the humble citizen against the influence which wealth and station may be supposed to exercise. And it is for this reason that the *privacy* is held not to be limited to the moment of depositing the ballot, but is *sacredly guarded by the law for all time*, unless the voter himself shall voluntarily divulge it. (People *v.* Pease, 27 N. Y., 81)."

In Cooley's *Constitutional Limitations*, the learned, and now standard author, says: "The mode of voting in this country, at all general elections, is almost universally by ballot. * * * * The distinguishing feature of *this mode of voting is*, that every voter is thus enabled to *secure and preserve the most complete and inviolable secrecy* in regard to the persons for whom he votes, and thus escape the influences which, under the system of oral suffrages, may be brought to bear upon him with a view to overbear and intimidate, and thus prevent the real expression of public sentiment. In order to secure as perfectly as possible the benefits anticipated from this system, statutes have been passed in some of the States, which prohibit ballots being received or counted unless the same are written or printed upon white paper, without any marks or figures thereon intended to distinguish one ballot from another. These statutes are simply *declaratory of a constitutional principle that inheres in the system of voting by ballot*, and which ought to be inviolable whether declared or not. In the absence of such a statute, all devices by which party managers are enabled to distinguish ballots in the hand of the voter, and thus determine whether he is voting for or against them, are opposed to the spirit of the Constitution, inasmuch as they tend to defeat the design for which voting by ballot is established, and though they may not render an election void, they are exceedingly reprehensible, and ought to be discountenanced by all good citizens. The system of *ballot voting* rests upon the idea that every elector is to be entirely at liberty to vote for whom he pleases and with what party he pleases, and that *no one* is to have the right, or *be in position*, to question him for it, *either then or at any subsequent time.* The courts have held that a voter, even in case of a contested election, cannot be compelled to *disclose for whom he votes*, and for the same reason we think others who may accidentally, or by trick or artifice, have acquired knowledge on the subject, should not be allowed to testify to such knowledge, or to give any information in the courts upon the subject. Public policy requires that the vail of *secrecy* should be impenetrable, unless the voter himself voluntarily determined to lift it; his ballot is absolutely privileged; and to allow evidence of its contents, when he has not waived the privilege, is to encourage trickery and fraud, and would, in effect, establish this remarkable anomaly, that, while the law from motives of public policy establishes the *secret ballot* with a view to conceal the elector's action, it at the same time encourages a system of epionage, by means of which the veil of secrecy may be penetrated and the voter's action disclosed to the public."

The above quotations would seem to be reasonably conclusive. No liberty has been taken with any of them, except that of *italicizing* the words that seemed to show that "the idea of secresy" *does* "inhere in the word" *ballot;* that a vote by ballot is a *secret* vote.

In conclusion, it is submitted that the word *ballot* in the constitution means a mode of voting "that secures and preserves to the voter the most complete and inviolable secresy." That the clause in the statute (Chap. 46, Sec. 55), providing that "the judges [of election] shall indorse on the back of the ticket offiered the number corresponding with the number of the voter on the poll-books," violates the "inviolable secresy" of the ballot, and is, therefore, unconstitutional and void. And that one of the highest and most sacred duties of the judiciary is to uphold the constitution, in letter and in spirit, uninfluenced by legislative or any other definitions or opinions, unless satisfied that they are sound and true.

* * *

"LAWFUL HOLDERS" OF CHEQUES ETC.

In a letter addressed by the Right Hon. J. G. Hubbard to the *Times* relative to the decision in Smith *v.* The Union Bank, a very important point is raised as to presumptions of law. Mr. Hubbard seems to say that if it was assumed that the ultimate holder of the cheque in question was a lawful holder, the assumption was contrary to the evidence furnished by the cheque itself. "Lawful owner," he presumes, "does not mean an innocent ignoramus who has given full value for an article whose very face disproves the title of the seller, but a person intelligent enough to comprehend the nature of a cheque, and combining honesty with his intelligence." This may be a very satisfactory definition of a lawful holder from a high moral standpoint, but it has been found unsuited to the exigencies of commerce as represented by the cases which come before courts of law. A person giving value for a cheque may not be an innocent ignoramus, but he may be negligent. He may not have noticed the crossing particularly. Mr. Hubbard would compel him to lose his money as Smith lost his from allowing a thief to get possession of his cheque. The law, however, distinctly says no more than this, that *gross* negligence may be *evidence* of *mala fides*. In the case of Goodman *v.* Harvey (4 Ad. & E. 870), Lord Denman said:—"I believe we are all of opinion that gross negligence only would not be a sufficient answer by the defendant where the plaintiff has given consideration for the bill." The principle affecting bills and cheques is precisely the same in this respect. "Gross negligence may be evidence of *mala fides*, but is not the same thing. We have shaken off the last remnant of the contrary doctrine." Giving consideration is strong evidence of *bona fides*, and it is clearly a sound doctrine that such evidence should not be rebutted by the simple circumstance that the form of the instrument purchased would even inevitably arouse suspicion in the mind of a man of business.

The law is the same in England and America, and Mr. Story, in his work on Contracts, states it very strongly thus:—"It is therefore no defense to a *bona fide* holder for value that the person from whom he took the note or bill acquired it by fraud, theft, or robbery, or that the original consideration was illegal (if the paper be not absolutely void by statute)." And as regards negligence, he notices Goodman *v.* Harvey as overruling Gill *v.* Cubitt (3 B. & C. 466), and says:—"The rule now is that nothing short of proof of bad faith is sufficient to repel the claim of an indorsee who has paid value for the paper; in other words, nothing short of notice, actual or constructive, of some defense."

Mr. Hubbard quotes the remark of Mr. Justice Blackburn that the holder who had given full value for the cheque must be taken to be the lawful holder unless the crossing prevented him from being so, and goes so far as to say that the crossing alone, *ipso facto*, made the holding illegal. As an abstract proposition this is somewhat astounding, and we think any legislation which should give effect to it would be unwise, as restricting the negotiability of cheques. Mr Hubbard thinks otherwise, designating a cheque with any other design than that of procuring payment to the payee named in it an illegitimate bill of exchange. If commercial expediency favors this view, and no harm can be done by restraining the transfer of orders for payment of money, legislation to protect payees of cheques will be a simple matter. We are quite clear that courts of law could not have undertaken the functions of Parliament, or decided otherwise than they did in the case of Smith *v.* The Union Bank.—*The London Law Times.*

TIME FOR DELIVERY.

(*Bergheim* v. *The Blaenavon Iron and Steel Company*, Q.B., 23 W. R. 618, L. R. 10 Q.B. 319.)

If this case does not throw any decisive light on the common stipulation in mercantile contracts providing for delivery within certain limits, it is at least a useful contribution. The contract was for rails, "the delivery of the rails to commence on the 15th of January, 1873, and to be completed by the 15th of April, 1873. The makers to have the option to begin delivery on the 15th of December, 1872. In the event of the makers *exceeding the time of delivery* above stipulated they shall pay, by way of fine, the sum of 7s. 6d. per ton per week." The question arose on the penalty clause, under which the plaintiff contended that the liability to pay commenced upon the 15th of January, if delivery were not then commenced, and the defendants that it commenced only on the 15th of April. The court held that the defendants' construction was right, and Field, J., observed that the word "time" was in the singular, and added that "if the language had been 'exceeding the times for delivery,' I might have come to a different conclusion." But though, in determining the effect of the penalty clause it did not become necessary to say what was the obligation on the defendants as to any

time for delivery before the 15th of April, the point was considered by the court, and much the same difference of opinion appeared as in Coddington *v.* Paleologo (15 W.R. 961, L. R.2 Ex., 193). Mellor, J., said, "The time for delivery is the period between the two specified times, and on no other day or time can I fix the time of delivery." Field, J., seemed prepared to hold that "the defendants were to commence by delivering a reasonable quantity, probably 500 tons, on the 15th of January, and to deliver the remainder ratably," and Blackburn, J., hesitated, and declined to express an opinion on the point. So in Codington *v.* Paleologo, where the contract was "deliveries to commence on the 17th of April, and to be completed by the 8th of May." Kelly, C.B., and Pigott, B., held that the seller was not bound to commence on the 17th of April, whilst Martin and Bramwell, BB., held that he was, Martin, B., saying that the seller must "deliver a reasonable quantity, having reference to the entire bulk and to the interval of the time between the 17th of April and the 8th of May, *and that of necessity would be a question for the jury.*"

Thus opinions seem equally divided, and between Martin, B., and Field, J., who both take the view that delivery must commence at the first date, the further difference arises that the one would leave to the jury the question of what is a reasonable delivery, the other seems inclined to determine it for himself. Some light is thrown on the question by the case of Alexander *v* Vanderzee (20 W. R. 871, L. R. 7 C. P. 530), where the contract was for a "June shipment," and it was held in the Common Pleas and the Exchequer Chamber that it was sufficient if the shipment was completed in June. This decision, in reading the contrart with reference to the time of *completion*, somewhat favors the view of Kelly, C.B., Pigott, B., and Mellor, J. In that case also the same question arose of whether the construction of the contract was for the judge or the jury; Kelly, C. B., thought it was for the judge, Blackburn, J., balanced, and the rest of the court, thought it was for the jury. Upon the whole, it is probably the better view that, in the absence of something more definite than the mere statement of a time for commencement and completion of delivery, the first date refers only to the right, the second date to the obligation of the seller; and, certainly, if the buyer desires an early delivery he will do wisely to secure that right to himself in plain terms.—*The Solicitor's Journal.*

SUPREME COURT OF ILLINOIS.

This court commenced its January term on last Tuesday, all the judges being in attendance. There are many cases before the court of importance to this district. Among them may be mentioned the cases affecting the re-organization of the city and the terms of its officers. In the case of the People ex rel. Charles W. Henderson et al. *v.* The City Council of Chicago, Mr. ISHAM moved the court for an alternative writ of mandamus; upon which motion Chief Justice SCOTT announced the opinion of the court, as follows:

The motion in this case is for an alternative writ of mandamus against the city council of Chicago, to show cause why they should not order an election for mayor of the city. It is objected that the statute has provided that proceedings in mandamus shall be commenced by summons. That statute obviously has reference only to circuit courts, and was intended to regulate the practice in these courts; but we have endeavored to make the practice in this court conform as near as may be to that which prevails in other courts, and in analogy to that practice we have required proceedings in mandamus in this court to be commenced by summons, instead of awarding the alternative writ, as was the former practice. In all matters of mere private concern it is customary to make the writ returnable at the next term of court, but in cases where public interests are involved, to a day in the same term at which the application is made. Accordingly, in lieu of the alternative writ applied for in this case, summons will be ordered to the defendant named, returnable in 10 days. In making this order we refrain from expressing any opinion on the merits of the case. Questions of the gravest importance, having relation to public interests, are involved, and we are therefore willing to consider the case on full argument, and therefore order a summons to the present term, that the parties may be brought into court.

In reply to the inquiry of Mr. Isham, the court said the argument would be heard when the cause was reached on the call of the docket.

E. S. ISHAM and MELVILLE W. FULLER for the relators.

JAMES P. ROOT for the respondents.

This decision settles an important question of practice in mandamus cases before the Supreme Court. It would now seem as if the Supreme Court would at this term define the duration of the terms of the mayor and aldermen of the city.

EXAMINATION OF STUDENTS.—There were forty-three applicants for admission to the bar, among them Miss Ella Martin, a graduate of the Michigan State University. The court appointed H. S. Green, of Springfield, Judge Gallagher, of Decatur, and Mr. Ewing, of Bloomington, examiners.

On yesterday, on motion of Attorney-General Edsall, the people's cases were set for hearing on the 21st.

Daniel F. Bayliss of Waynesville, DeWitt County, William S. Hall of Chicago, and Robert O'Hara of Lacon, were admitted to practice on foreign licenses.

Chief Justice Scott announced that all members of the class examined yesterday were admitted. The following compose the class: George W. Brewer, Coles; Alfred B. Davidson, McLean; H. Baker, Logan; Walter W. McKaig, Cook; Daniel H. Slayton, Kane; Wesley Martin, Henry; M. F. Hoskinson, Wabash; Alex M. Wilson, Hamilton; John W. Lindsay, Randolph; John W. Karr, Woodford; E. R. E. Kimbrough, Vermillion; Russell M. Crocker, Peoria; N. B. Brant, Cook; Walter Bennett, Woodford; Ella A. Martin, Cook; Jacob F. Murdock, Livingston; William H. Twaddle, McDonough; Thomas L. McGrath, McLean; Charles W. Townsend, Cook; George Morgan, Cook; Jesse B. Barton, Cook; L. W. Paine, Cook; Nicholas Uhlrich, Peoria; James E. Jewett, McLean; S. H. Bethen, Cook; William M. Stokes, Logan; George R. Barton, Douglas; Charles W. Aken, Macon; F. H. Dickey, Cook; Levi N. Brewer, Cumberland; Alfred Ficklin, Coles; John W. Williams, McLean; John C. Maxwell, Crawford; Rufus M. Barlie, Fulton; George W. Crow, Moultrie; W. E. Loomis, Sangamon; W. B. Charsser, Galine; Benjamin F. Portius, Shelby; William B. Leitch, Coles; David W. Dale, LaSalle; James H. Fleming, LaSalle; Oliver P. Chisholm, Kane.

SUPREME COURT OF TENNESSEE.

NASHVILLE, FEB. 20, 1875.

[HEAD-NOTES FROM THE COMMERCIAL AND LEGAL REPORTER.]

A. Hamilton & Co. v. *Alex. Kennedy and Others.*

WAREHOUSEMAN.

Services not enuring to benefit of true owner of property in storage—Claim for.—Cotton had been seized as captured and abandoned property, and removed by a special agent of the U. S. Treasury, and stored with the complainants, and several parties claiming the property as not abandoned, the special agent filed his bill of interpleader in U. S. Circuit Court, under which the cotton was sold and proceeds held subject to further order of the court; upon bill filed by the warehouseman to impound this fund to pay their claim for charges upon the cotton; *held*, that the possession of the special agent up to the filing of his bill of interpleader was justifiable, and the charges properly accruing to that date were a lien upon the cotton. But all charges accruing after that date do not constitute a lien, as they have not enured to the benefit of the true owners, who were all the time insisting upon the restoration of their property. The bailee or warehouseman can stand in no higher attitude than the party under whom he holds.

NASHVILLE, DEC. TERM, 1874.

W. W. Wilhoit v. *J. P. and S. C. Castell.*

TRANSFER OF NOTE AFTER INJUNCTION—CONFLICTING CLAIMS.

Where an injunction and attachment were issued and served upon the maker and the payee of a note under a bill for a divorce and alimony filed by the wife of the payee, and the payee, the husband, with knowledge of the injunction, assigned the note for valuable consideration, and gave notice to the debtor, and the assignee took the assignment with the consent of the wife and not to interfere with her claim to alimony; upon bill filed by a judgment creditor of the husband to subject the proceeds to his debt, *Held*, That the injunction rendered a transfer of the note by the husband null and void so far as such transfer might affect the claim of the wife to the proceeds of the note for purposes of alimony or support; but subject to this, the transfer of the note or an attachment of it by a creditor of the husband would not be null and void. The assignee or the creditor would hold it subject to the claim fixed by the wife's injunction and attachment.

UNITED STATES SUPREME COURT.

PROCEEDINGS OF.

Monday, January 3, 1876.

The court having adjourned on the 17th of December until the 3rd of January, met, pursuant to adjournment, at 12 o'clock to-day:

On motion of E. L. Goold, William Matthews, of San Francisco, Cal., and Willis Drummond, of Washington, D. C., were admitted.

On motion of C. F. Peck, Edward W. Munford, of McMinnville, Tenn., was admitted.

On motion of P. Phillips, George L. Paddock, of Chicago, Ill., was admitted.

On motion of George F. Edmonds, H. N. Hewitt, of Keeseville, N. Y., was admitted.

On motion of G. H. Williams, John Q. Charles, of Denver, Colorado, was admitted.

On motion of M. H. Carpenter, C. H. Krum, of St. Louis, was admitted.

Case. (Original.) Ex parte A. J. Ambler. Waite, C. J., announced the opinion of the court, denying the motion for a mandamus.

No. 868. The Board of Commissioners of Douglass county et al. v. The Union Pacific Railroad Company. Waite, C J., announced the decision of the court, denying the motion to advance this cause.

No. 887. Levi R. Morrill, administrator, etc. v. The Mutual Benefit Life Insurance Company. In error to the Circuit Court of the United States for the district of Indiana. On motion of E. L. Stanton the case was docketed and dismissed.

No. 880. John Henderson et al v. William H. Wickham, mayor of New York et al. The motion to advance this cause was submitted by H. Nicoll for plaintiffs.

No. 99. Susan B. Allen v. Thomas D. Allen. This cause was argued by George H. Bradley for appellee, and submitted on printed argument by M. Thompson for appellant.

No. 100. T. G. Haines et al., trustees, etc. v. Charles Carpenter, executor, etc. This cause was submitted on printed arguments by Joseph Casey for appellants. No counsel appearing for appellee.

No. 101. The State of North Carolina v. Charles Dewey, assignee, etc., et al. Dismissed with costs under sixteenth rule.

No. 102. Jane F. Hay et al. v. Charles Dewey, assignee.

No. 103. John G. Blount v. R. C. Windley. Passed without prejudice.

No. 104. Myra Clark Gaines v. Joseph Friendas et al. Passed until after assigned cases for 11th instant.

No. 105. Milwaukee and St. Paul Railway Company v. Mary A. F. Arms. Passed.

No. 106. Edwin Reeder et al. v. Walter Crane.

No. 107. Edwin Reeder et al. v. Walter Crane. On motion of D. B. Duffield for plaintiffs, dismissed with costs.

To-day, the case of the United States against Allison, an appeal from the Court of Claims, was submitted, involving the question whether a printer employed in the Government Printing Office at the date of the election of a Congressional printer by the Senate was entitled to the additional twenty per cent. provided for by the act of February 28, 1867. The Court of Claims gave judgment for the claimant and the government here contends that, as two days before the passage of the twenty per cent. act the Government Printing Office passed from the jurisdiction of the Interior department to the control of the Senate, by the election of a Congressional printer, the terms of that act do not sustain the claim, because the twenty per cent. was to be paid only to those at the date of the act within its provisions—that is, in an executive department. It is also submitted, that in fact the Government Printing Office always did belong to the Legislative department, it was always under the control of a Congressional committee, and that fact should seem to establish that it was not intended to be an executive bureau.

The claimant contends that the act of the Senate electing a Congressional printer was unconstitutional, because it was an election of a person to fill an office of the United States established by law, and therefore not within the jurisdiction of the Senate, which may elect only its own officers; and for this reason, it is said, the office of Government printer was not abolished by the action of the Senate in electing a new officer to succeed him. The election was inoperative and void, and has no effect upon the then organization of the bureau as previously existing.

Solr. Gen. Phillips for the government, and J. A. Garfield and J. Daniels for the claimant.

Owing to the absence from the capital of several of the judges during the holidays, which prevented the usual conference of the judges, no opinions were delivered.

The court adjourned until Tuesday at 12 M.

Tuesday, Jan. 4.

On motion of N. H. Sharpless, Charles Swayne of Philadelphia, was admitted.

No. 87. Daniel C. Sawin v. D. G. Kenney and Thomas Foley. M. H. Carpenter suggested the death of Thomas Foley, one of the defendants, and moved that the case abate as to him. Granted.

No. 87. Daniel C. Sawin v. Dennis G. Kenny. Quinton Corwin moved to enter the appearance of the administratrix of Daniel C. Sawin, the plaintiff whose death had already been suggested. Granted.

No. 57. The First Unitarian Society, of Chicago, v. H. F. Faulkner et al. On motion of Mr. Quinton, mandate allowed to issue.

No. 391. The Manhattan Life Insurance Company v. R. S. Buck. This cause was submitted on printed arguments by A. B. Pittman for plaintiff, and by W. P. Harris for defendant, under the twentieth rule.

No. 608. William H. Hoover, assignee, etc.. v. Abraham Wise et al. This cause was submitted on printed arguments by J. H. B. Latrobe for plaintiff, and by W. W. Boyce for defendants, under the twentieth rule.

No. 609. The Board of Liquidation of the State of Louisiana et al. v. H. S. McComb. This cause was submitted on printed arguments by J. A. Campbell and J. Q. A. Fellows for appellants, and by Thomas J. Semmes and Robert Mott for appellees, under the twentieth rule.

No, 634. Desire A. Chaffraix v. Arthur Shiff. This cause was submitted on printed arguments by Mr. Robinson for appellant, and by J. A. Campbell for appellee, under the twentieth rule.

No. 730, Frank A. Otis et al. v. Henry B. Cullum, receiver, etc. This cause was submitted on printed arguments by Alfred Ennis for plaintiff, and by George R. Peck for defendant, under the twentieth rule.

No. 108. Sarah E. Lloyd et al. v. M. C. Fulton, trustee, etc. This cause was argued by P. Phillips for appellants, and by John D. Pope for appellee.

No. 109. Thomas E. Williams et al. v. Thomas B. Florence et al. Passed.

No. 110. Rufus Baker and Isaac F. Baker, assignees, etc. v. Henry S. White. The argument of this cause was commenced by Charles E. Perkins for plaintiffs.

Adjourned until Wednesday at 12 o clock.

Wednesday, Jan. 5.

On motion of P. Phillips, William H. C. Ellis, of Norfolk, Va., W. A. Manderson, of Philadelphia, Pa., and George E. Bird, of Portland, Me., were admitted.

On motion of J. W. Cary, J. C. Gregory, of Madison Wis., was admitted.

No. 110. Rufus Baker and Isaac F. Graham, assignees, etc. v. Henry S. White. The argument of this cause was continued by A. P. Hyde for defendant and concluded by Charles E. Perkins for plaintiff.

No. 111. Lee Dunlop v. The State of North Carolina. Postponed to foot of the docket.

No. 112. The Fort Wayne, Muncie and Cincinnati Railroad Company v. Henry G. Gaylord. Dismissed with costs.

No. 113. J. Young Scammon v. Mark Kimball, assignee, etc. Passed until to-morrow.

114. Thomas Slater Smith et al. v. William Vodges, assignee, etc. This cause was argued by N. H. Sharpless and Richard C. McMurtrie for the appellants, and by William A. Manderson for appellee.

No. 115. The Delaware, Lackwanna & Western Railroad Company v. Joseph Warren, assignee, etc.

No. 116. The Delaware, Lackawanna and Western Railroad Company v. Joseph Warren, assignee, etc.

No. 117. The National city Bank of New York v. Joeeph Warren, assignee.

The argument of these aauses was commenced by F. T. Frelinghuysen for plaintiffs, and continued by S. S. Rogers for defendants.

Adjourned until Thursday at 12 o'clock.

THE LOUISIANA LAW JOURNAL.—We have received the first number of a monthly periodical bearing this name. It is devoted to law and literature, and published by B. BLOOMFIELD & Co., of New Orleans, at five dollars per year, in advance. It is printed upon good paper, and contains thirty-two pages. We are not informed who the editors are. It contains much information that will be useful to the bar, particularly the bar of Louisiana.

THE AMERICAN LAW REVIEW.—The January number of this quarterly, being the second of the volume, is received. Its contents are, 1. How can War be Prevented; 2. Liabilities of Express Companies as Common-carriers; 3. Joel Parker; 4. German Legislation; 5. Digest of the English Law Reports; 6. Selected Digest of State Reports; 7. Book-notices; 8. List of Law Books published in England and America, since October, 1875; 9. Summary of Events.

CHICAGO LEGAL NEWS.

SATURDAY, JANUARY 15, 1876.

The Courts.

UNITED STATES SUPREME COURT.

OCTOBER TERM, 1875.

IRA P. NUDD et al. *v.* GEORGE B. BURDOWS, assignee of the estate of NORTON EMMONS, a bankrupt.

In error to the Circuit Court of the United States for the Northern District of Illinois.

EVIDENCE—DECLARATIONS OF BANKRUPT—INSTRUCTIONS TO JURY—ACT OF 1872 RELATING TO PRACTICE CONSTRUED—PRACTICE IN STATE AND FEDERAL COURTS.

1. DECLARATIONS OF BANKRUPT.—That the court did not err in admitting in evidence the declarations of the bankrupt.

2. DUTY OF JUDGE AND JURY.—The court states the province of the judge and jury in jury trials.

3. FACTOR'S LIEN.—The court states how a factor's lien is affected by the bankrupt law.

4. HOW FAR PRACTICE IN THE FEDERAL COURT MUST CORRESPOND TO THE PRACTICE IN THE STATE COURTS UNDER ACT OF 1872.—That the purpose of this act was to bring about uniformity in the law of procedure in the Federal and State courts in the same locality. It had its origin in the code enactments of many of the States. While in the Federal tribunals the common law forms, pleading and practice were adhered to, in the State courts of the same district, the simpler forms of the local code prevailed. This involved the necessity of the bar studying two distinct systems of remedial law. It was the aim of this act to remove this evil. The personal administration by the judge of his duties while sitting upon the bench was not complained of; that the personal conduct and administration of the judge in the discharge of his separate functions, in the judgment of the court, is neither pleading, practice, nor a form, nor mode of proceeding within the meaning of those terms as found in the context, and therefore the Federal court is not bound by the provision of the Illinois practice act; that the court in charging the jury shall instruct them only as to the law of the case: that no instructions shall be given unless reduced to writing, etc.—[ED. LEGAL NEWS.]

Mr. Justice SWAYNE delivered the opinion of the Court.

The first of the assignments of error presents the question whether the court erred in admitting in evidence the declarations of the bankrupt.

The suit was brought by the assignee to recover against Nudd and Noe for money and property which they had received from Emmons. They had applied the money and the proceeds of the property in payment of a debt which Emmons owed them. The property was live stock, consisting of cattle, sheep and hogs. The net proceeds were $7,553.27. The money was $1,000. The aggregate amount in controversy was $8,553.27. The assignee claimed that the stock was bought largely upon credit; that Emmons was at the time hopelessly insolvent; that Nudd and Noe knew it, and that the transaction was the fruit of a conspiracy between the parties, having for its object the giving to Nudd and Noe by Emmons a fraudulent preference over his other creditors.

Nudd and Noe received the property and money in January, 1871. The petition in bankruptcy against Emmons was filed in the following month of February. The action is founded on the 35th and 39th sections of the bankrupt act. The transaction was within four months before the filing of the petition. Upon the trial the plaintiffs proposed to prove what Emmons had said touching the purchase of the stock and the payment of the money to the defendants.

To each and all of the questions asked with this view the counsel for the defendants objected, "on the ground that they called for the declarations of Emmons not made in the presence of either of the defendants, or brought to their knowledge."

Was this ground of objection well taken?

The counsel for the defendant in error insists that they were competent as the declarations of a co-conspirator.

In general the rules of evidence are the same in civil and criminal cases. U. S. *v.* Gooding, 12 Wheaton, 469.

"Where two or more persons are associated for the same illegal purpose, any act or declaration of one of the parties in reference to the common object, and forming a part of the *res gestæ*, may be given in evidence." Amer. Fur Co. *v.* U. S., 2 Peters, 365.

The bill of exceptions does not purport to give all the evidence. What proof had been given of the alleged concert and conspiracy on the part of the defendants when the declarations of Emmons were offered to be proved does not appear.

It is to be presumed it was sufficient to lay the proper foundation as to them for the introduction of the evidence. The declarations were competent to prove the whole case as against Emmons. 1 Taylor's Evidence, 486.

Whether the declarations were made in the presence or brought to the knowledge of either of the defendants is immaterial. The objection as taken was confined to this point, and this is the only aspect in which it is necessary to consider it. If it were intended to rest it upon any other ground it should have been so presented and the court advised accordingly.

In the early part of December, 1870, Emmons and James W. and Richard Chandler were partners, under the name of Emmons & Chandler. The plaintiff claimed that the partnership was dissolved on the 13th of that month. The defendants insisted that it continued down to the close of the business in question, and that the transaction was not with Emmons alone but with the firm of Emmons & Chandler.

They offered in evidence the declarations of the Chandlers touching the points in controversy. The court excluded the testimony and the defendants excepted.

This ruling was correct. The declarations of a party may be evidence against him, but, except under circumstances which had no existence in this case, they cannot be received in his favor. The Chandlers might have been called as witnesses. Their declarations were merely hearsay, and as regards this case were *res inter alios acta*.

It appears by the bill of exceptions that in charging the jury the judge commented upon the evidence.

Questions of law are to be determined by the court—questions of fact by the jury. The authority of the jury as to the latter is as absolute as the authority of the court with respect to the former.

No question of fact must be withdrawn from the determination of those whose function it is to decide such issues.

The line which separates the two provinces must not be overlooked by the court. Care must be taken that the jury is not misled into the belief that they are alike bound by the views expressed upon the evidence and the instructions given as to the law. They must distinctly understand that what is said as to the facts is only advisory and in no wise intended to fetter the exercise finally of their own independent judgment. Within these limitations it is the right and duty of the court to aid them, by recalling the testimony to their recollection, by collating its details, by suggesting grounds of preference where there is contradiction, by directing their attention to the most important facts, by eliminating the true points of inquiry, by resolving the evidence, however complicated, into its simplest elements, and by showing the bearing of its several parts and their combined effect, stripped of every consideration which might otherwise mislead or confuse them. How this duty shall be performed depends in every case upon the discretion of the judge. There is none more important resting upon those who preside at jury trials. Constituted as juries are, it is frequently impossible for them to discharge their function wisely and well without this aid. In such case chance, mistake, or caprice may determine the result.

We do not think the remarks and suggestions of the learned judge in this case exceeded the proper license.

They did not go beyond the verge of what has been often sanctioned by this and other courts. Games et al. *v.* Stiles, 14 Pet., 337; U. S. *v.* Fourteen Packages, Gilp., 254; 1 Taylor's Evid., 35.

The modifications of the two instructions asked for by the defendants, were, we think, correct in point of law. Only the second one calls for any remarks.

There was proof tending to show that on the 13th of December, 1870, the defendants adjusted their account with Emmons & Chandler, and by the agreement of all the parties transferred the amount due to themselves to the separate account of Emmons, and gave the Chandlers a release. The balance found due, and so transferred, was the same with the amount in controversy, as before stated. The business of the defendants was the selling of live stock upon commission. The balance accrued in the course of their previous business in this way with the firm of Emmons & Chandler. They claimed a factor's lien upon the money and proceeds of the property in question for the satisfaction of this demand.

The court charged that as the lien could not attach until the money and proceeds were received by the defendants—if the previous transactions created the relation of debtor and creditors between them and Emmons and they could have sued Emmons for the amount—"this would bring the debt under the bankrupt act the same as any other debt."

This must necessarily be so. The lien attempted to be set up was repelled by the circumstances referred to. Such a claim occupies no better ground than would a mortgage, pledge, or power to confess judgment given at the same time and for the same purpose. Otherwise every factor might be thus secured when his debtor was in the article of bankruptcy, and this class of creditors would have a monopoly of the preferences so given. Such preference, to whomsoever given, is forbidden by the bankrupt law and is a fraud upon it. Fraud destroys the validity of everything into which it enters. It affects fatally even the most solemn judgments and decrees. Bankrupt Act, sec. 35; 1 Story's Eq., sec. 252; Freeman on Judgments, sec. 486.

Whenever fraud is perpetrated by one party to the injury of another, the offender is liable. Paisley *v.* Freeman, 3 T. R., 51; Benton *v.* Pratt, 2 Wend., 385. Here the jury have found the facts charged by the assignee. This is conclusive against the defendants with respect to any claim upon the fund.

The last assignment relates to alleged errors of the court in matters of practice. Before the judge began his charge to the jury, the counsel for the defendants requested him in giving it to conform in all things to the practice of the courts of record and the law of the State. This he refused to do. He also refused to allow the jury to take with them to their room the written instructions he had given them, and likewise, the account book, bills of lading, and additional papers which had been introduced in evidence, other than the depositions. To each of these refusals the defendants excepted.

The practice act of Illinois provides, that the court in charging the jury shall instruct them only as to the law of the case; that no instructions shall be given unless reduced to writing; that instructions asked shall not be modified by the court except in writing; that the instructions shall be taken by the jury in their retirement and returned with the verdict, and that papers read in evidence, other than depositions, may be carried from the bar by the jury. 1 Gross' Stat., 289.

It is declared by the act of Congress of June 1, 1872, sec. 5, "that the practice, pleadings, and forms and modes of proceeding in civil causes, other than equity and admiralty causes, in the circuit and district courts shall conform as near as may be" to the same things "existing at the time in the courts of record of the State within which such circuit and district courts are held."

The purpose of the provision is apparent upon its face. No analysis is necessary to reach it. It was to bring about uniformity in the law of procedure in the Federal and State courts of the same locality. It had its origin in the code enactments of many of the States. While in the Federal tribunals the common law pleadings, forms, and practice were adhered to, in the State courts of the same district the simpler forms of the local code prevailed. This involved the necessity on the part of the bar of studying two distinct systems of remedial law, and of practicing according to the wholly dissimilar requirements of both. The inconvenience of such a state of things is obvious. The evil was a serious one. It was the aim of the provision in question to remove it. This was done by bringing about the conformity in the courts of the United States which it prescribes. The remedy was complete. The personal administration by the judge of his duties while sitting upon the bench was not complained of. No one objected or sought a remedy in that direction.

We see nothing in the act to warrant the conclusion that it was intended to have such an application.

If the proposition of the counsel for the plaintiff in error be correct, the powers of the judge, as defined by the common law, were largely trenched upon.

A statute claimed to work this effect must be strictly construed. But no severity of construction is necessary to harmonize the language employed with the view we have expressed. The identity required is to be in "the practice, pleadings, and forms and modes of proceeding." The personal conduct and administration of the judge in the discharge of his separate functions is, in our judgment, neither *practice*, *pleading*, nor *a form* nor *mode of proceeding* within the meaning of those terms as found in the context. The subject of these exceptions is, therefore, not within the act as we understand it.

There are certain powers inherent in the judicial office. How far the legislative department of the government can impair them or dictate the manner of their exercise are interesting questions, but it is unnecessary in this case to consider them. Houston *v.* Williams, 13 Cal., 24.

The judgment of the Circuit Court is affirmed.

D. W. MIDDLETON,
C. S. C. U. S.

UNITED STATES SUPREME COURT.

OCTOBER TERM, 1875.

JAY COOKE et al. *v.* THE UNITED STATES.

THE UNITED STATES—COMMERCIAL PAPER—TREASURY NOTES—FORGERY—PAYMENT OF FORGED PAPER.

1. That when the United States become parties to commercial paper, they incur all the responsibilities of private persons under the same circumstances.

2. That genuine treasury notes, like those now in question, were, before their maturity, part of the negotiable commercial paper of the country.

3. That the receipt of the paper, accompanied by payment, was an adoption of it.

4. How far the government is bound by the acts of its officers in receiving and paying forged notes of the government.

5. That Congress seems to have been desirous of meeting its obligations of this class whenever they could be exchanged for, or retired with the proceeds of the sale of certain specified bonds having a longer time to run; the object was to get rid of this species of debt.

6. DISSENTING OPINION.—From the opinion, Clifford, J., Field and Bradley, JJ., dissent, and are of the opinion that the United States are not liable for forged paper under any circumstances.—[ED. LEGAL NEWS.]

Opinion by WAITE, C. J.

The United States sued Jay Cooke & Co., in this action, to recover back money paid them by the assistant treasurer, in New York, for the purchase or redemption before maturity, under the act of August 12, 1866 (14 Stat., 31), of what purported to be eighteen 7.30 treasury notes, issued under the authority of the act of March 3, 1865 (13 Stat., 468), but which it is alleged were counterfeit. Cooke & Co. insist that if they honestly believed the notes in question were genuine, and so believing in good faith passed them to the assistant treasurer, and he, under a like belief and with like good faith received and paid for them, there can be no recovery even though they may have been counterfeit.

As this defense meets us at the threshold of the case, it is proper that it should be first considered.

It was conceded in the argument that when the United States become parties to commercial paper they incur all the responsibilities of private persons under the same circumstances. This is in accordance with the decisions of this court. (Floyd's Acceptances, 7 Wall., 557; U. S. *v.* Bk. of Metropolis, 15 Pet., 373.) As was well said in the last case: "From the daily and unavoidable use of commercial paper by the United States, they are as much interested as the community at large can be, in maintaining these principles." It was, also, conceded that genuine treasury notes, like those now in question, were before their maturity part of the negotiable commercial paper of the country. We so held, at the last term, in Vermilye & Co. *v.* Express Co., 21 Wall., 138.

It is, undoubtedly, also true, as a general rule of commercial law, that where one accepts forged paper purporting to be his own, and pays it to a holder for value, he cannot recall the payment. The operative fact in this rule is the acceptance or more properly perhaps, the adoption of the paper as genuine by its apparent maker. Often the bare receipt of the paper accompanied by payment is equivalent to an adoption within the meaning of the rule, because as every man is presumed to know his own signature and ought to detect its forgery by simple inspection, the examination which

he can give when the demand upon him is made, is all that the law considers necessary for his protection. He must repudiate as soon as *he ought* to have discovered the forgery, otherwise he will be regarded as accepting the paper. Unnecessary delay under such circumstances is unreasonable, and unreasonable delay is negligence which throws the burden of the loss upon him who is guilty of it, rather than upon one who is not. The rule is thus well stated in Gloucester Bank *v.* Salem Bang, 17 Mass., 45. "The party receiving such notes must examine them as soon as he has opportunity, and return them immediately. If he does not, he is negligent, and negligence will defeat his action."

When, therefore, a party is entitled to something more than a mere inspection of the paper before he can be required to pass finally upon its character, as, for example, an examination of accounts or records kept by him for the purposes of verification, negligence sufficient to charge him with a loss cannot be claimed until this examination ought to have been completed. If, in the ordinary course of business, this might have been done before payment, it ought to have been, and payment without will have the effect of an acceptance and adoption. But if the presentation is made at a time when, or at a place where such an examination cannot be had. time must be allowed for that purpose; and, if the money is then paid, the parties, the one in paying, and the other in receiving payment, are to be understood as agreeing that a receipt and payment under such circumstances shall not amount to an adoption, but that further inquiry may be made, and if the paper is found to be counterfeit, it may be returned within a reasonable time. What is reasonable, must in every case depend upon circumstances; but until a reasonable time has in fact elapsed, the law will not impute negligence on account of delay.

So, too, if the paper is received and paid for by an agent, the principal is not charged unless the agent had authority to act for him in passing upon the character of the instrument. It is the negligence of the principal that binds, and that of the agent has no effect, except to the extent that it is chargeable to the principal.

Laches is not imputable to the government, in its character as sovereign, by those subject to its dominion. (U. S. *v.* Kilpatrick, 9 Wheat., 735; Gibbons *v.* U. S., 8 Wall., 269). Still a government may suffer loss through the negligence of its officers. If it comes down from its position of sovereignty and enters the domain of commerce, it submits itself to the same laws that govern individuals there. Thus, if it becomes the holder of a bill of exchange, it must use the same diligence to charge the drawers and indorsers that is required of individuals, and if it fails in this, its claim upon the parties is lost. (U. S. *v.* Barker, 12 Wheat., 559.) And generally, in respect to all the commercial business of the government, if an officer specially charged with the performance of any duty and authorized to represent the government in that behalf, neglects that duty and loss ensues, the government must bear the consequences of his neglect. But this cannot happen until the officer specially charged with the duty, if there be one, has acted or ought to have acted. As the government can only act through its officers, it may select for its work whomsoever it will, but it must have some representative authorized to act in all the emergencies of its commercial transactions. If it fail in this, it fails in the performance of its own duties, and must be charged with the consequences that follow such omissions in the commercial world.

Such being the principles of law applicable to this part of the case, we now proceed to examine the facts.

The department of the treasury is by law located at the seat of government as one of the executive departments, and the Secretary of the Treasury is its official head. (Rev. Stat., sec. 233; 1 Stat., 65.) All claims and demands against the government are to be settled and adjusted in this department, (Rev. Stat., sec 236; 3 Stat., 366,) and the Treasurer of the United States is one of its officer. (Rev. Stat., sec 301; 1 Stat, 65.) His duty is to receive and keep the money of the United States and disburse it upon warrants drawn by the Secretary of the Treasury, countersigned by either comptroller, and recorded by the register, and not otherwise. (Rev. Stat., sec. 305; 1 Stat., 65.) The rooms provided in the Treasury building at the seat of government for the use of the Treasurer are by law the Treasury of the United States. (Rev. Stat., sec. 3591; 9 Stat., 60.) The rooms assigned by law to be occupied by them are appropriated to their use and for the safe keeping of the public money deposited with them. (Rev. Stat., sec. 3598; 9 Stat., 59.) The assistant treasarers are to have the charge and care of the rooms, etc., assigned to them, and to perform the duties required of them relating to the receipt, safe keeping and disbursement of the public money. (Rev. Stat., sec. 3599; 9 Stat., 59.) All collectors and receivers of public money of every description within the city of New York are required, as often as may be directed by the Secretary of the Treasury, to pay over to the assistant treasurer in that city all public money collected by them or in their hands. (Rev. Stat., sec. 3615; 9 Stat., 61.) The treasurer of the United States, and all assistant treasurers, are required to keep all public money placed in their possession till the same is ordered by the proper department or officer of the government to be transferred or paid out, and, when such orders are received, faithfully and promptly to comply with the same, and to perform all other duties as fiscal agents of the government that may be imposed by any law or by any regulation of the Treasury Department made in conformity to law. (Rev. Stat., sec. 3639; 9 Stat., 60.) All money paid into the Treasury of the United States is subject to the draft of the treasurer, and for the purpose of payment on the public account, the treasurer is authorized to draw on any of the depositories as he may think most condusive to the public interest and the convenience of the public creditors. (Rev. Stat, sec. 3644; 9 Stat., 61.)

Thus it is seen that all claims against the United States are to be settled and adjusted "in the Treasury Department," and that is located "at the seat of Government." The assistant treasurer in New York is a custodion of the public money, which he may pay out or transfer upon the order of the proper department or officer, but he has no authority to settle and adjust, that is to say, to determine upon the validity of any claim against the government. He can pay only after the adjustment has been made "in the Treasury Department," and then upon drafts drawn for that purpose by the Treasurer.

By the act of April 12, 1866, the Secretary of the Treasury was authorized, at his discretion, to receive the treasury notes issued under any act of Congress in exchange for certain bonds, or he might sell the bonds, and use the proceeds to retire the notes. (14 Stat., 31.) This exchange or retirement of the notes involved an adjustment of the claims made on their account against the government. That adjustment, as has been seen, could only be had in the Treasury Department, and the Government cannot be bound by any payment made without it, through one of the assistant treasurers, until a sufficient time has elapsed, in the regular course of business, for the transmission of the notes to the department and an examination and verification there.

That such was the expectation of Congress is apparent from the legislation authorizing the issue of such notes. On the 23d December, 1857, an act was passed "to authorize the issue of treasury notes. (11 Stat., 257.) The payment or redemption of these notes was to be made to the lawful holders upon presentment at the treasury. (Sec. 2.) The notes were to be prepared under the direction of the Secretary of the Treasury, and to be signed in behalf of the United States by the treasurer thereof, and countersigned by the register of the treasury. Each of these officers was to keep, in books provided for that purpose, accurate accounts, showing the number, date, amount, etc., of each note signed or countersigned by himself, and also showing the notes received and canceled. These accounts were to be carefully preserved in the treasury. (Sec. 3.) The notes were made receivable for public dues. (Sec. 6.) The officer receiving the same was required to take from the holder a receipt upon the back of each note, stating distinctly the date of payment and amount allowed. He was also required to make regular and specific entries of all notes received by him, showing the person from whom received, the number, date, and amount of principal and interest allowed on each note. These entries were to be delivered to the treasurer with the notes, and if found correct he was to receive credit for the amount allowed. (Sec. 7.) To promote the public convenience and security, and protect the United States, as well as individuals, from fraud and loss, the Secretary of the Treasury was authorized to make and issue such instructions as he should deem best, to the officers required to receive the notes in behalf of, and as agents in any capacity for, the United States as to the custody, disposal, canceling and return of the notes received, and as to the accounts and returns to be made to the Treasury Department of such receipts. (Sec. 8.) The Secretary of the Treasury was directed to cause such notes to be paid when they fell due, and he was authorized to purchase them at par for the amount of the principal and interest due at the time of the purchase.—(Sec. 9.)

The act of July 17, 1861, "to authorize a national loan, and for other purposes," provided for an issue of 7-30 treasury notes, and, in terms, re-enacted all the provisions of the act of December 23, 1857, so far as the same were applicable and not inconsistent with what was then enacted.—(12 Stat., 259, secs. 1 and 10.)

The acts of June 30, 1864 (13 Stat., 218), and March 3, 1865 (13 Stat., 468), which authorized further issues of the same class of notes, did not in terms re-enact the provisions of the acts of 1857 and 1861, but they did authorize and require the Secretary of the Treasury to make and issue such instructions to the officers who might receive the notes in behalf of the United States, as he should deem best calculated "to promote the public convenience and security, and to protect the United States, as well as inividuals, from fraud and loss."—(13 Stat., 221, sec. 8.)

These are public laws of which all must take notice. In the absence of any evidence showing a regulation permitting an exchange or redemption of notes at any other place than the treasury, and after settlement and adjustment in the department, it will not be presumed that one was made. The notes in question are not made payable at any particular place. Consequently they are in law payable at the treasury, and this is at the seat of government and in the Treasury Department. In this department the Seeretary represent the government. His acts and his omissions, within the line of his official duties, are the acts or omissions of the government itself, and in all commercial transactions his official negligence will be deemed to be the negligence of the government. He is specially charged with the duty of retiring these treasury notes by exchange, payment, or purchase, and he is the only agent authorized to act for the government in that behalf. All who deal with the government in respect to these notes are presumed to know his exclusive authority, for it is public law. Until such time, therefore, as he has acted, or in due course of business ought to have acted, there can have been no such laches as will charge the government. He is presumed to act officially only in his department. His attention can only be demanded after the presentation of the notes at that place. It was there that the accounts and records of the issues and redemptions under the early laws were by statute required to be kept, and that is the appropriate place for keeping such similar records as the Secretary of the Treasury may by regulation prescribe under the later laws, to protect against fraud and loss.

Such seems to have been the understanding of the parties in the transaction which is now under consideration. The notes were "sold" to the assistant treasurer, and were, by stamp upon their back at the appropriate place for their endorsement, made payable "to the order of the Secretary of the Treasury, for redemption." The payment by the assistant treasurer under such circumstances, for the purchase, did not "retire" the notes. That upon the face of the transaction required the further order of the Secretary of the Treasury. Undoubtedly it was expected that in due course of business that order would be given, but, until given, or at least until it ought to have been given, it cannot be said that the government has accepted the notes and adopted them as genuine.

Neither has there been such delay in returning the notes to Cooke & Co., after their receipt by the assistant treasurer, as will throw the burden of the loss upon the government. The return should have been made within a reasonable time and what is a reasonable time is always a question for the courts when the facts are not disputed.—Wiggins *v.* Burkham, 10 Wall, 133.) Here there is no dispute. The notes were delivered to the assistant treasurer on different days between September 20 and October 8. The first suspicion in Washington in regard to their character was October 5, when a note was found of which, upon inspection of the record, a duplicate was already in. All the notes were found and returned to New York, October 12, and the next day Cooke & Co. were notified.

The amount of 7-30 notes issued by the government was many hundreds of millions of dollars. Necessarily the accounts and records of their issue and redemption were voluminous. Between September 20 and October 8 Cooke & Co. themselves sold to the assistant treasurer for redemption more than $7,500,000. Other parties were at the same time making sales to large amounts. Time must be given for careful examination and scrutiny, and we do not think that, under all the circumstances, any unreasonable delay occurred either in their transmission to or return from the Treasury Department.

We are all clearly of the opinion, therefore, that if the notes were in fact counterfeit, their receipt by the assistant treasurer and his payment therefor did preclude the United States from receiving back the money paid. So far there was no error in the courts below.

It was, however, contended by Cooke & Co. that if the notes were not counterfeit, but genuine notes unlawfully and surreptitiously put in circulation, the government was bound for their payment to a bona fide holder, and consequently that there could be no recovery. We quite agree with the lamented judge of the circuit court who had this case before him upon error to the district court, that the evidence tending to show a fraudulent or surreptitious issue of notes printed from the genuine plates was exceedingly meagre, and by no means sufficient to warrant a verdict to that effect; but the jury was not permitted to pass upon that question, as the district judge charged "that if the notes were printed in the department, and all ready for issue, yet if they were not in fact issued, the United States could recover." The issue to bind the government, said the judge, "must be a physical act of an authorized officer."

It was conceded on behalf of the government, in the argument here, that if the notes had been due when they were received and paid, this part of the charge could not be sustained. We need not, therefore, examine that question. The notes were perfect and complete as soon as printed. They did not require the signature of any officer. As soon as they had received the impression of all the plates and dies necessary to perfect their form, they were ready for circulation and use. In this respect they did not differ from the coins of the mint when fully stamped and prepared for issue. Coin is the money of commerce and circulates from hand to hand as such. These notes represent the promises of the government to pay money, and were intended to circulate and take the place of money, to some extent, for commercial purposes. Although not made legal tender as between individuals, they were, for their then face value, exclusive of interest, as between the government and its creditors.—(13 Stat., 221, sec. 8.) They were issued under the authority of "an act to provide ways and means for the support of the government" (13 Stat., 218, title) in its great peril, and they bore the "imprint of the seal of the Treasury Department as further evidence of lawful issue."—(Ib., 220, sec. 6.) Their aggregate amount was very large, and they were all of convenient denominations, not less than ten dollars. (Ib., 218, sec. 2). The people were appealed to, through their patriotism, to accept and give them circulation. They entered largely, and at once, into the commerce of the country, and passed readily from hand to hand as, or in lieu of, money. After the close of the war they became, in a sense, too valuable for circulation, and were, on that account,

to a large extent, withdrawn and held for investment.

But it is insisted, on the part of the government, that as the act of April 12, 1866, only authorized the Secretary of the Treasury to retire, before their maturity, notes "issued" under the authority of some act of Congress, he could only take up such as were actually put out by the "physical act" of some authorized officer of the government in pursuance of law. This, we think, is too narrow a construction of the act. At the time it was passed, the war of the rebellion was over. In the prosecution of this war an immense debt had been contracted. To meet the pressing demands upon the credit of the government, various forms of securities had been put forth, some of which, like these now under consideration, would mature at an early date, and sooner, perhaps, than they could be met without the negotiation of new loans. In view of this possible contingency, Congress seems to have been desirous of meeting its obligations of this class whenever they could be exchanged for or retired with the proceeds of the sale of certain specified bonds having a longer time to run. The object, evidently, was to get rid of this species of debt, and we think the act may be fairly construed to authorize the retirement of all notes of this class outstanding which the government would be required to meet at maturity

This leads to a reversal of the judgment. There have been other errors assigned upon the rulings made in progress of the trial as to the admission of evidence. These need not be specially alluded to. It is sufficient to say that we think there is no error here. The same may be said as to the ruling of the court upon the punching or cancellation of the notes If they were counterfeit, the cancellation could do no harm, for they were worthless before. If they were genuine, they had already been canceled by the payment.

The judgment of the Circuit Court is reversed, and the cause remanded, with instructions to reverse the judgment of the District Court, and to award a venire de novo.

(Mr. Justice Miller did not sit on the argument of this cause, and took no part in the decision).

Mr. Justice CLIFFORD dissenting.

I dissent from the opinion of the court in this case—

1. Because I am of the opinion that the United States are not liable for forged paper under any circumstances.

2. Because I am of the opinion that the United States are not liable for its paper promises fraudulently or surreptitiously put into circulation, nor even if the fraudulent act was perpetrated by treasury officials.

Mr. Justice Field and Mr. Justice Bradley also dissent, and concur in this dissent.

SUPREME COURT OF ILLINOIS.

OPINION FILED JANY., 1876.

T. LYLE DICKEY et al. *v.* CHAS. H. REED et al.

Appeal from Cook.

CONTESTED ELECTION—POWERS OF A COURT OF EQUITY IN—WHEN PARTIES CANNOT BE LEGALLY FINED FOR DISOBEYING AN INJUNCTION—CONTEMPT OF COURT.

1. The court below enjoined the aldermen and city clerk from canvassing the returns of a municipal election. The aldermen and their counsel disregarded the injunction and canvassed the vote. The court below fined them for contempt of court in disregarding the injunction. Whereupon they appealed to the Supreme Court, and that court holds that the court below had no power to hear and adjudicate in this class of cases; and having no power under any head of its jurisdiction, the court acted wholly without power to entertain the bill for any purpose, or to award the writ of execution, wanting both power and jurisdiction to entertain the bill, or award the writ; it was a nullity which could legally operate on no one, nor was any one bound to yield obedience to its requirements; having been issued without power, it was as inefficient as if it had been issued without any bill presented, or as though no person had ever asked for it; that the whole proceeding was *coram non judice*, and the appellants could not be legally punished for contempt in disobeying it.

2. JURISDICTION IN ELECTION CASES.—The court states the jurisdiction of courts of equity in cases of election contests, and draws a distinction between a county-seat contest and a municipal election; that no case can be found where an English court of chancery has ever tried a contested election where the public was concerned, and such cases are of rare occurrence in this country, and then only where the power has been conferred by express enactment or necessary implication therefrom.

3. CONTEMPT OF COURT.—That the general assembly have not only failed to define the offense of resisting the authority of the State as exercised by the courts and declare the penalty or punishment to be inflicted, but in the revision of our statutes omitted the prior provision on the subject. They have thus repealed the law authorizing courts to punish contempts offered in the presence of the same, and for disobedience to their orders and process. Whether it was the design of that body to strip the courts of that power, or to leave them to exercise the undefined power as it existed at common law, or whether the courts being created by the Constitution and the power to punish for contempt being inherent in courts of record, the right is not constitutional and beyond the power of the general assembly, are questions not discussed in the case.—[ED. LEGAL NEWS.]

WALKER, J.—On the 23d of April, 1875, an election was held in the city of Chicago to determine whether that municipality would change their charter, and the people would become incorporated under the general incorporation act for cities and villages, which went into force on the first day of July, 1872. On the 26th of that month, the prosecuting attorney and five others, tax-payers of the city, filed a bill in the Circuit Court of Cook county against forty aldermen, composing the Common Council of the city, and the city clerk.

It alleges the omission by the mayor and Common Council to submit in express terms, or otherwise, to a vote of the people, the question of minority representation, and charges that on account of such omission, the election held on the 23d of the month was void; also, that a large number of illegal and fraudulent votes were cast in favor of organization under the law; that a large number of ballots not actually cast by voters were deposited in the ballot-boxes by the judges, or by their connivance; that in some of the wards there were no poll lists and no clerks, and that if the illegal votes were rejected, the result would be against organization under the act; that the judges had returned, or were about to return their canvass of the votes, including such illegal and fraudulent votes so cast and received, and those cast at the polling places where no poll-lists were kept; and that complainants had good reason to believe and did believe that the Common Council would proceed to declare the act of 1872 adopted.

Affidavits were filed in support of the bill, and in compliance with the prayer thereof, a temporary injunction was ordered restraining that body from canvassing the returns made to them by the judges and clerks of the election. The injunction was to remain in force ten days, with leave to defendants to move to dissolve, and like leave to the complainants to move to continue the same.

The writ was issued and served on the 26th of April. The Common Council, on the same day, were in session, and, after the writ was served, they appointed a committee to procure legal advice and assistance to defend the suit. They employed Wm. C. Goudy, M. F. Tuley, E. A. Storrs, and J. P. Root to assist the regular law officers in such litigation as might grow out of the election.

After being thus employed, the mayor of the city put to them and to the corporation counsel and his assistants the question whether the members of the Common Council would be liable to punishment for contempt of court if they should, notwithstanding the injunction, proceed to canvass the returns and declare and certify the same.

They, after deliberation, answered that the Circuit Court had no jurisdiction in the case, and the writ was void; and that the defendants could not be legally punished for contempt, in case they should disobey the writ.

These opinions were in writing, signed by counsel and delivered to the mayor; and, at a meeting of the Common Council on the 3d of May, 1875, were read to that body, whilst in session, and they canvassed the returns, declared the result, and caused it to be entered on the records of the city.

On the 4th of May the original bill was amended, and a supplemental bill was filed, making the city a party, and setting out what had subsequently transpired after issuing the writ, and praying that the city be restrained from exercising the powers conferred by the act of 1872, thus declared to have been adopted. A motion to strike the supplemental bill from the files was overruled.

On the next day defendants answered the original and supplemental bills, and complainants moved to continue the injunction, but the motion was denied. The injunction expired by the lapse of time. On the 12th of that month complainants dismissed their supplemental bill.

On the 14th complainants, on affidavits filed, moved for a rule on the members of the Common Council who canvassed the returns, and the attorneys who signed the opinions, to show cause "why they should not be punished and committed" for a contempt of court—the members for violating, and the attorneys for advising, the violation of the injunction.

A rule was accordingly entered requiring them to show cause, by the 21st of May, at 10 o'clock, and requiring them to answer interrogatories. They were subsequently exhibited, and answers thereto were filed by all of the defendants. The members of the Common Council admitted the canvassing of the returns, and the attorneys admitted the giving of the opinions referred to herein. The court found the defendants guilty of a contempt, and fined each of a number of aldermen $100, and each attorney $300, and they all appeal to this court.

It is first urged that there is error in the form in which the judgments are entered. This may be true; but we have chosen to consider and determine the case on its merits, passing over technical objections.

The General Assembly have not only failed to define the offense of resisting the authority of the State as exercised by the courts, and declare the penalty or punishment to be inflicted, but in the last revision of our statutes omitted the prior provision on the subject. They have thus repealed the law authorizing courts to punish contempts offered in the presence of the same, and for disobedience to their orders and process. Whether it was the design of that body to strip the courts of that power, or to leave them to exercise the undefined power as it existed at the common law, or whether the courts being created by the Constitution and the power to punish for contempt being inherent in courts of record, the right is not constitutional and beyond the power of the General Assembly, are questions not discussed in this case, and in the view we have taken of it become unimportant in its decision.

It is urged by appellants that the court below had no power to entertain jurisdiction of the case, or to issue the writ, and that all which followed the filing of the bill was utterly void. That the want of power to entertain a bill in such a case, or to make there straining order, rendered the whole proceeding void and of no effect, and being void appellants had the right to disregard its requirements and to proceed to the performance of a plain duty required of them by the statute, although in violation of the restraining order of the court. This we understand to be in substance the position assumed by appellants. On the other hand appellee insists, that if the court had power as contradistinguished from mere jurisdiction, to entertain a bill, to review the canvass of election returns in any case, and to correct frauds, accidents or mistakes, that then the want of jurisdiction in the particular case did not affect the power to issue the writ. That the court had power and had exercised it in contested county seat cases independent of statutory authority, and as an inherent power, or if not inherent a power derived from the Constitution, and hence the court had power in this case to issue the writ and punish those refusing to observe its requirements or for disobedience to its commands, as a contempt of the authority of the court and the State. Thus it is seen that a question of much interest, and it may be of great importance is presented for consideration. It is a question of how far a court of equity may use its powers to relieve against frauds, accidents or mistakes in elections, when its action must determine which of two persons shall fill an office, or as in this case, which of two forms of local government shall control the people of this municipality. If the election may in this case, be thus contested, and the municipal officers and others, be restrained from performing the functions and duties imposed, until by the tedious process of taking depositions and preparing the case for trial can be made, and the case heard in the court below, and an appeal with the incident delays may be heard, years would in all probability elapse before the government chosen by the people could in many instances go into operation. Hence it is the policy of the law to afford a more speedy and less expensive mode of settling these contests.

If the court may exercise this jurisdiction in cases of doubt, or even where there is no doubt of the result, a few contentious and not over scrupulous persons might and probably would be induced from the heat and strife always engendered in such elections, to resort to a bill and an injunction and thus for years thwart the will of the people, which the General Assembly has made absolute in adopting or rejecting this charter for their government. Public policy does not require such a jurisdiction even if it could sanction it. If the power were admitted, where would its jurisdiction end? Suppose a person were to conceive a law to have been unconstitutionally enacted, could he by bill restrain the governor and all other officers from executing it until a hearing could be had and the law declared valid? Suppose a citizen in his hostile opposition to a governor elect, or from other motives, were to conceive that he had obtained his apparent majority by fraud, could he apply to a court for and obtain an injunction, to restrain him from becoming inaugurated, until by delays and appeals the term for which he had been elected should expire and thus defeat the will of the people?

Again, suppose a constitutional convention were called, a Constitution adopted and submitted to the people for ratification or rejection, and the vote were in favor of adoption, could a bill be filed to prevent the Secretary of State from canvassing the returns because fraud was alleged, until the vote of every county could be contested, purged, and new returns were made and a trial were had after long and vexatious delays?

Can it be said that the two houses of the General Assembly may be restrained by injunction from the enactment of laws, because a portion of the members may have procured their seats by fraud, or one or both of the houses have, or are supposed to have been illegally or even unconstitutionally organized? Can the Supreme and other courts be restrained from proceeding with the business before them because it may be supposed that the judges have obtained their seats by frauds in the election, or some statutory requirement has been omitted?

Or may such a course be pursued in a large number of other like cases which would defeat the will of the people constitutionally expressed? To so hold would be revolutionary. Such propositions cannot be maintained, as it would largely give control of the political power of the State to the courts, a department not designed either directly or indirectly to exercise or control that power. But it is believed no one would contend for such power in the courts. But the expansive force of precedent may be said to be almost unlimited. A decision is made as an exception to a rule, and soon it is pressed with vigor as establishing a principle that would embrace cases falling within well defined rules, and if adopted would lead to the perversion of justice. Sanction the power in this case as inherent in the court of chancery, could any ingenuity suggest reasons which should forbid the application of the same rule to every case we have supposed, or any election case where fraud is alleged. In this case alleged fraud is the ground on which the power is urged. So would it be in those cases, and the fraud would be precisely the same in each.

Whilst the writ of injunction is one of the most important in the law, by affording preventive relief—in fact is indispensable to the complete administration of justice, it is one from the facility with which it may be obtained, that is liable to great abuse, when granted to temporarily restrain the action of parties, until a hearing is had. And the whole tendency seems to be towards its improvident use and consequent abuse. Whilst its use is absolutely essential to the administration of equitable relief, it has its limits, and the policy would not be wise, nor would it promote justice to extend its use to cases of doubtful right or to accomplish ends where there are other adequate remedies. The whole tendency of our jurisprudence has been to enlarge its scope, and it is now used in cases where formerly no one supposed it could be rightfully applied, and the present tendency is to a point which, when reached, will compel the General Assembly to intervene to restrain the abuses it will produce. And it is all be-

lieved to have grown out of the expansion of precedents not unfrequently of doubtful correctness.

Having stated these general propositions we now come to the consideration of the question, whether the court below had power as contradistinguished from mere equitable jurisdiction, growing out of the facts charged in the bill, to award the temporary injunction. To the complete authority to so act, there are several things which are indispensable to enable the court to hear, to determine and decree. There must be a complainant who must file a bill alleging facts showing that he has an interest in the matter in litigation, or at least to complain and have relief for others; there must be a matter about which rights are claimed, and that matter must be within the power of the court when properly before it, to act upon or control it by its sentence, before it can adjudge and decree that parties shall be restrained from acting in reference to the thing in litigation. If any, or either of these essential requirements is wanting the court cannot decree that a restraining order shall issue.

In this case there was a complainant who had exhibited a bill, and there was a subject-matter for litigation. And the controlling question is, whether the court, under any circumstances could have power to hear, determine and decree in reference to it. If not, then the whole proceeding was *coram non judice*.

The law under which the election was held neither in terms or by implication confers the power. Nor is it asserted that the court had facts before it which required it to take judicial cognizance and hear, adjudicate and decree. On the contrary the court refused to continue the injunction, thus virtually deciding that the court was powerless to afford the relief sought, and thereby permitting the injunction to come to an end by the terms of the order awarding it. And we are clearly of the opinion that it was not a case for equitable interposition. The act itself provides, Sec. 57, Art. 4, p. 217, R. S. 1874, that "the manner of conducting and voting at elections to be held under this act, and contesting the same, the *keeping of poll-lists and canvassing* the votes, shall be the same as nearly as may be, as in the case of electing county officers under the general laws of this State." The 98th section of the election law (R. S. 1874, p. 464,) provides for the manner of contesting the election of all county officers except the county judge, in the county court. Other sections of the act provide who may contest, how service shall be made, the trial had and conducted, and for the judgment to be rendered.

Thus it is seen there was complete and in every way an ample remedy expressly provided for contesting this election under the statute, but it was not invoked. Hence there could be no pretense of jurisdiction from necessity. The remedy was obvious, plain, and simple in its application, and being ample and complete there is not the slightest reason why equity should interpose and perform the functions of the county court, where the statute has placed it.

It has been held that a court of equity has no power to try a contested election, even when the statute has not provided a mode for contesting. See Moore *v.* Hoisengton, 31 Ill., 243. Elections belong to the political branch of the government, and are beyond the control of the judicial power. It was not designed when the fundamental law of the State was framed that either department of government should interfere with or control the other. And it is for the political power of the State within the limits of the constitution, to provide the manner in which elections shall be held and the manner in which officers thus elected shall be qualified, and their elections contested. And the political power of the State may organize municipal bodies and put them into operation by the force of enactment, or by election by the people to be thus governed, and they can provide the mode of reviewing the returns of all elections to ascertain whether they are in accordance with the expressed will of the people. And until the courts are empowered to act by the constitution or legislative enactment they must refrain from interference.

But did the court have a general power to hear and determine as to the fairness of the result of elections in this class of cases on the requisite facts being stated in the bill? If so, then the court had power over the subject matter although the facts were so defectively stated as to fail to confer jurisdiction in the particular case; we think clearly not, because no state of facts, however stated, could confer power to adjudicate in that class of cases. We are aware of no adjudged cases, or text-writer who has ever announced the power as inherent in the courts of equity, to try contested elections between persons claiming an office or in a case of this character.

It is believed that no case can be found where an English court of chancery has ever tried a contested election where the public were concerned. And such cases are believed to be of rare occurrence in this country, and then only where the power has been conferred by express enactment or necessary implication therefrom.

The first section of our act creating and defining the power, jurisdiction, and practice of courts of chancery, provides that the courts shall have power to proceed in the exercise of their jurisdiction in the mode prescribed by the act; and when there is no provision made by the act, then according to the general usage and practice of courts of equity. Now, it is not the general usage or practice of courts of equity to hear and determine contested elections, and, if not, the power is not conferred by the chancery act, and none other has been referred to from which it can be derived.

But it is said that this court has held that chancery has power and could take jurisdiction to try a contested county seat election, and, therefore, such power might be exercised in this class of cases, or, rather, this belongs to the same class of cases, and whether or not the facts charged in the bill conferred jurisdiction to hear and adjudicate, there was still the power in that class of cases, and if the power existed the writ must be obeyed, without regard to what would be the result in the particular case. It is true that in a number of county seat cases we have held that chancery might take jurisdiction, and hear and determine them; but the power was placed expressly upon the grounds that the Constitution had provided that county seats should not be removed except on a vote resulting in a majority in favor of a removal. And the General Assembly, in providing for the mode of holding such an election, wholly failed to provide for any means of contesting it; and to prevent the obstruction and a defeat of the rights of the majority, conferred and intended to be secured to them, it was held that the fundamental law by implication conferred the power on the courts of chancery. But, in making these decisions, it was on that express ground, and those cases thereby became an exception to all other cases. If these decisions recognized them as a class of cases, they only recognize county seat questions as being embraced in the class, and nothing was intended to be, nor do we think anything was said, which can, by fair intendment, be construed to embrace any other character of election cases. They cannot be held to extend the power to other or different cases. The power therein flowed solely and entirely from the Constitution.

But, in this case, there is no pretense that this or like elections were required to be held, by any provision of the Constitution; nor that the statute had not provided a means for contesting it. Hence, this case lacks these essential elements to bring it within the scope of those decisions. Being an exception to all other cases or class of cases, they afford no precedent, nor do they establish any principle that can embrace this case, or in the remotest degree affect or control its decisions.

It then follows, if what we have said is correct, that the court below had no power to hear and adjudicate in this class of cases; and, having no power under any head of his jurisdiction, the chancellor acted wholly without power to entertain the bill for any purpose, or to award the writ of execution. Wanting both power and jurisdiction to entertain the bill or award the writ, it was a nullity which could legally operate on no one, nor was any one bound to yield obedience to its requirements. Having been issued without power, it was as inefficient *as* if it had been issued without any bill presented, or as though no person had ever asked for it. Not having power, the writ was no more binding than would be a decree in a criminal case, and for the same reason—the want of power. Where power to take judicial cognizance is wholly wanting, all power to judicially bind or affect the rights or interest of parties is wanting; and whilst the powers of the chancellor are great and expanded, still they have their limits, and, when transcended, all acts beyond the limit are absolutely void, and can have no binding effect, and the awarding of this writ falls within and is of that character.

In the case of the People *v.* The City of Galesburg, 48 Ills., 486, it was held that a court of chancery had no power to enjoin the holding of an election. Again, in the case of Moore *v.* Hoisington, 31 Ill., 243 it was held that a court of chancery has no power to try a contested election, even where the statute had provided no mode of contesting. And in Walton *v.* Develing, 61 Ill., 201, it was held where an injunction was issued to restrain the officers from holding an election and it was disobeyed, that they were not amenable to the process or liable to be punished for a contempt in disobeying the writ, and it was upon the grounds that the writ was void for the want of power and the law required the officer to perform this particular duty. The distinction was then taken that where the court has power over the subject-matter, and authority to take such jurisdiction, and the court acts, its process must be obeyed, but when the power is wholly wanting, then the process is void and need not be obeyed. The same rule was recognized and applied in Darst *v.* The People, 62 Ill., 306. So the doctrine is by no means novel in this court.

It is true that officers and others may be embarrassed as to their course of action in such cases. They must act at their peril under all such circumstances. They can, as the parties did in this case, call to their aid able counsel, learn their duty from all available sources, and then act and abide the consequences. If the advice they procure be wrong, it will be their misfortune and the incorrect advice will not excuse the offense, or mitigate the punishment.

We have confined ourselves to the adjudged cases in our own court, and to general and well recognized legal and equitable principles, not only because we regard them as settled, but because we do not in the least doubt their entire correctness. Hence we have not reviewed the numerous authorities of other courts and text-writers incidentally bearing on the question, presented in the very elaborate and unusually able arguments of counsel. But notwithstanding their industry, research and ability, we have been irresistibly impelled to reach the result here announced.

The entire record, considered in the light of the arguments, we must say that the court below transcended its powers in awarding the writ, and as a consequence thereof, in fining the defendants as for a contempt of the process of the court and the authority of the State, and the several judgments imposing such fines must be reversed.

Judgment reversed.

For appellants: DICKEY, GOUDY, TULEY, STORRS, ROOT.

For appellees: LAWRENCE, CAMPBELL & LAWRENCE, ROSENTHAL & PENCE.

LXIV. MAINE REPORTS.

We are under obligations to CHARLES HAMLIN, of the Bangor bar, for advance sheets of the 64th volume of Maine Reports, from which we take the following head-notes:

State of Maine v. *Amos C. Benner*, p. 267.

EVIDENCE—PRACTICE.

It is in the discretion of the court to permit the counsel calling a witness to propose to him leading questions, and to cross-examine him, when he is an unwilling witness and adverse to the party by whom he is called.

The occasion for this permission is to be determined by the presiding justice, and the granting of it is not subject to exception.

The limit of cross-examination as to collateral matters, allowable by a judge at *nisi prius*, is matter of discretion.

When a witness, on whose evidence in part an indictment has been found, but who is called by the prisoner, testifies at *nisi prius*, differently from what he had done before the grand jury, a member of that panel is a competent witness to prove what he stated before that body for the purpose of contradicting and impeaching his testimony.

A witness cannot be cross-examined on collateral matters for the purpose of subsequently contradicting and impeaching his testimony in relation to such collateral subjects.

If the irresponsive answer of a witness is objectionable, the objection must be taken at the time, and the court should be requested to have it stricken out.

The statements of a witness, not under oath, are hearsay, and receivable only to contradict what he may have said under oath, and to impeach his testimony, and not as evidence of the facts stated.

It is not error to say to the jury that their verdict is not final and irreversible, and that the evidence is to be reported to the governor and council for their consideration and examination, and that after revising the evidence they may order the execution of the sentence, or commute it, or pardon the offender.

When it is perceived that the court has misapprehended testimony, it is the duty of the counsel at the time to call its attention to the subject, that the correction may at once be made.

It is no ground of complaint that the judge states to the jury the positions of fact as respectively assumed, or claimed to exist, by the counsel on the one side or the other, that they may more distinctly perceive the precise issues presented for their decision. Indeed, it may be his duty so to do.

The utterance of falsehoods by the prisoner, by way of exculpation, the falsehoods being established by satisfactory proof, is universally recognized as circumstantial evidence tending to establish his guilt, the inculpatory force of which is to be determined by the jury.

A hypothetical statement, which presupposes as its basis that the issue has already been determined, is not an expression of an opinion "upon issues of fact arising in the case," within the act of 1874, c. 212.

The opinion for the expression of which a new trial is to be granted, must be a distinct and positive one, "upon issues of fact arising in the case."—(Opinion by APPLETON, C. J.)

LIABILITY OF MARRIED WOMEN TO MAINTAIN THEIR HUSBANDS.—At the Caurse Petty Sessions, Welshpool, on Monday, Nov. 1, before J. Robinson Jones, Esq., William Fisher, Esq., Captain Mytton, and E. S. R. Trevor, Esq., Mr. Wilding, on behalf of the Guardians of the Forden Union, applied for an order of maintenance on Arthur Jones (son), Susannah Jones (wife), and the daughter of one Richard Jones, a pauper inmate of the workhouse. He stated that as regarded the wife, the application was grounded upon the provisions of the "Married Woman's Property Act," which rendered the wages of a married woman living apart from her husband her separate property, at the same time that it rendered her liable to contribute towards his maintenance, if a pauper, as was here the case. The wife did not appear, but proof was given of the service of the summons upon her. Witnesses were called who proved that the son was a porter, and the wife cook at Bicton Lunatic Asylum. It was also proved that both were in receipt of wages sufficient to enable them to contribute to the maintenance of the pauper. It was also stated that the cost per week of an indoor pauper was 3s. 8d., and the magistrates, after some deliberation, particularly with reference to the provisions of the Act before mentioned, made an order upon the son to contribute 2s. 6d., and upon the wife for the remaining 1s. 2d., per week. The case as against the daughter was withdrawn, as it appeared that she was out of service. We believe this to be the first instance in this neighborhood of a married woman's being called upon to contribute to the maintenance of her husband.—*Oswestry Advertiser*.

CHICAGO LEGAL NEWS.

Lex vincit.

MYRA BRADWELL, Editor.

CHICAGO: JANUARY 15, 1876.

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CHICAGO LEGAL NEWS COMPANY,

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We call attention to the following opinions, reported at length in this issue:

Federal Court Practice—Act of 1872 Construed.—The opinion of the Supreme Court of the United States, by Swayne, J., holding that the object of this act was to make the practice, pleadings, and forms and modes of proceeding of the Federal courts conform to that of the local State courts; that the personal conduct and administration of the judge in the discharge of his separate functions is, neither practice, pleading, nor a form nor mode of proceeding within the meaning of those terms as found in the act. The statute of the State of Illinois requiring the court to instruct the jury only as to the law of the case and in writing, is not, therefore, within the act, and the Federal courts in that State are not required by the act to regard the statute. We would call attention to the language of the court in stating the province of a judge in instructing a jury. This is the first opinion of the Supreme Court of the United States upon this question under the act of Congress and affirms the judgment of the circuit court.

The United States—Treasury Notes—Forged Notes—Payment of.—The opinion of the Supreme Court of the United States. by Waite, C. J., in a suit brought by the United States against Jay Cooke et al., to recover back money, paid them by the assistant treasurer for the purpose of the redemption of treasury notes, which were alleged to be counterfeits.

Contested Election—Power of a Court of Equity in—when party cannot be Legally Punished for Disobeying an Injunction.—The opinion of the Supreme Court of this State by Walker, J., holding, where the Circuit Court enjoined the aldermen, their counsel and city clerk of Chicago from canvassing the vote of a city election, and they did canvass the vote and disregard the injunction, and the court fined them for contempt; that the Circuit Court had no power to hear and adjudicate in this class of cases; that the whole proceeding was *non coram judice*; and that the aldermen and their counsel and the city clerk could not be legally punished for contempt in disobeying the injunction; the court comments upon the legislature having repealed, by the revision of the statutes, the prior provision authorizing courts to punish for contempts offered in the presence of the same. The questions involved in this case are of the greatest importance to the people. The court makes a distinction between a municipal election where the statute provides a mode for contesting it and a county seat election, where the statute provides no mode for contesting it. Judge Walker, in delivering the opinion of the court, says, no case can be found where an English court of chancery has ever tried a contested election where the public was concerned, and such cases are of rare occurrence in this country, and then only where the power has been conferred by express enactment, or necessary implication therefrom.

Creditor's Bill—Proceedings in Bankruptcy—Receiver.—The opinion of the United States District Court for the Northern District of Illinois, by Blodgett, J., holding that proceedings in bankruptcy supersede a creditor's bill and that when a receiver has been appointed in such chancery suit, the receiver can be compelled to deliver the property over to the assignee in bankruptcy, subject to all the rights which the creditors whom he specifically represents has obtained and to all the priorities which they have obtained by their diligence. This opinion of the learned judge was an extempore opinion. Owing to our haste in going to press, he had no opportunity of revising it.

The Removal of Causes.—The opinion of the United States Circuit Court for the District of California, by Sawyer, J., as to the removal of causes from State to Federal courts.

Chicago Bar Association.—The Bar Association commences the new year with the following efficient officers and committees:

President—E. B. McCagg.

Vice Presidents—Wirt Dexter, Thomas Dent.

Secretary—Frederic Ullmann.

Treasurer—John H. S. Quick.

Board of Managers—B. F. Ayer succeeds M. F. Tuley, W. C. Goudy succeeds W. P. Black, H. W. Bishop succeeds W. H. Barnum, S. A. Goodwin succeeds E. C. Larned, Kirk Hawes succeeds E. B. McCagg.

Committee on Admissions—George Gardner succeeds Sidney Smith, Edwin Walker succeeds Geo. W. Smith, Frank J. Crawford succeeds Thos. A. Moran.

At a meeting of the Board of Managers the following officers were elected:

B. F. Ayer, *President.*

Frederic Ullmann, *Secretary.*

Recent Publications.

The Rights, Remedies and Liabilities of Landlord and Tenant, including the Law and Practice on Summary Proceedings, under the statute peculiar to that relation. By David McAdam, one of the justices of the Marine Court of the City of New York, with numerous forms. New York: Diossy & Co. Publishers. 1876.

This is a neat appearing volume of four hundred pages. The references and citations are mostly, but not exclusively, to New York cases. It will be much more valuable to the lawyer of that than any other State. The work treats first of the rights belonging to the respective parties growing out of the relation of landlord and tenant; second, the remedies for the enforcement of those rights; and lastly, the liabilities incidental to those remedies. It contains a number of excellent forms.

Addison on Torts.—We have received, too late for notice in this issue, an American edition of Addison on Torts, published by James Cockcroft & Co. Edited by H. G. Wood, author of the Law of Nuisances. All who have ever had the English edition, know Addison to be a valuable work. This edition must be more valuable, as it contains American notes. For terms, etc., see advertisement on first page.

The New York State Library.—We are indebted to S. B. Griswold, law librarian, for a copy of the fifty-seventh annual report of the trustees of this library. From it we learn that there are one hundred eulogies on President Lincoln in the library.

LIBEL AND SLANDER.

PRACTICAL RULES FROM A NEW LECTURE, BY C. C. BONNEY, OF THE CHICAGO BAR.

1. The truth is stronger than a lie, and will always conquer in a fair fight. He who relies upon the truth need not worry about the result of the conflict. He has only to be true to the truth and to himself, and to go straight forward in his work, turning neither to the right hand nor to the left, to follow any "barking dog," and time will surely bring his vindication. "All things come in time to them that know how to wait."

2. Calumny is an almost certain penalty of marked success. It is the voice of the "revenge that dwells in little minds." It is the outlet of baffled wrong. It is the return of ingratitude for favors received, and which there is not the manliness to acknowledge. It is the base and cowardly refuge of hatred, malice, envy, and ill-will. Hence those who aspire to any eminence should as much expect to meet with calumny, as a sailor on the great sea should be prepared for storms. They try the strength of the ship, but if well built and well managed, they rarely break it. The assault should only quicken the faculties, rouse the courage, and strengthen the hand. It is a proof that the "evil things that hate to look on happiness" find an obstacle in their way, and their enmity is highest praise.

3. No good man will willingly speak evil of another. If circumstances will compel him to accuse, he will show that he does so reluctantly, and for the sake of justice, and that he scorns the thought of self gratification in such an act. If, therefore, any accusation appears to be grounded in a mean, wanton, or malignant spirit; if the occasion to make it appear to be sought; if the accuser speak not to the face of the accused, but behind his back, then it may be set down as certain that at least the truth is distorted, and that, in all probability, it is corruptly falsified. For where a revengeful and malignant spirit is, there the truth cannot dwell. The angel will not abide with the demon. The common perception of this fact is the reason why slanders are so little credited and do so little harm.

4. The best safeguards against libel and slander are a clean character and a circumspect behavior.

That thou mayst injure, no man, dove-like be:
And serpent-like, that none may injure thee.

In the presence of an enemy be on your guard, and while devoutly trusting in God, "keep your powder dry!" The light and power of a just life will shine through the cloud of a slander and dispel it. A habitually careful conduct will naturally secure the present and provide for the dangers of the future. "The truth is always consistent with everything true; while error is inconsistent, alike with the truth and with itself." Hence, he who acts correctly from day to day need never fear what the future may bring forth.

5. Sometimes circumstances seem to be against the innocent, but the innocent need never despair. The truth is somewhere in the circumstances, however deeply hidden, and will surely come to the light, if carefully and patiently pursued. Never take a false step for the purpose of avoiding an apparently unfavorable circumstance. Trust the truth and it will bring you safely out of the wilderness.

6. Never condemn any one without hearing his defense. Never believe an improbable story on the testimony of an interested or prejudiced witness. Always regard a good reputation as stronger than the testimony of any such witness or witnesses. Never believe that a person whom you have known as honest, just, and trustworthy, has been the contrary to another, without "proofs and confirmation as strong as holy writ." Righteousness and iniquity can no more dwell in the same heart, than the lamb and the wolf can live together in the same fold. He who is willfully unfaithful to one is not faithful to others. At heart, he must be essentially "all one thing, or all the other."

7. There may be cases of libel so malignant as to warrant and demand a criminal prosecution, but very rarely indeed does a case arise which can warrant a civil suit for the recovery of a compensation in money. Where the damage done by a libel or slander is in its nature pecuniary, a pecuniary satisfaction may well be sought, but the refined mind naturally revolts from seeking such a cure for wounded honor, or violated peace. For such wrongs, justice demands a swifter and heavier retribution.

8. A statement may at the same time be verbally true, and substantially false. Words may be uttered, or an act done, in such a manner, and under such circumstances, as to be wholly free from any objection. The same act may be described, or words repeated in such a manner, with such change of tone, emphasis, and inflection; with such omissions of qualifying circumstances, as to wholly change the character and effect of the act or words, and inspire them with a malignant spirit Hence, in all cases, the animus of the speaker should be most carefully considered. If hatred, malice, envy, ill-will, or the love of cruelty appear in his tone, manner or purpose the hearer may be sure that those qualities color his statement, whatever literal ground there may be to support it.

9. There are many cases of libel and slander arising from mistake. The eyes and the ears are often deceived. Astonishing cases of mistaking one person for another are within the knowledge of almost every one. A general resemblance suggests the individuality of a particular person. That individuality occupies the mental vision, and, for the time, the dissimilarities are not perceived. In such cases, statements may be made which will be true in all respects, except as to the person involved, and as to him, utterly false. This may be illustrated by abundant examples. Hence, on the ground of probabilities, it is more likely that a single witness, not fully corroborated by all the circumstances, is mistaken, than that a person has acted or spoken contrary to his general character and reputation.

All these rules fitly culminate in the legal maxim that "every one is to be presumed innocent until proved guilty." In favor of innocence, justice, peace, and the general welfare, all reasonable things are to be presumed; while against their opposites every allowable intendment shall be made.

10. In the end, almost every one is estimated according to his own merit. The good sense of the community is rarely at fault. Controversies, legal or otherwise, about alleged libels, slanders, misrepresentations, and the like, rarely result in anything satisfactory. If the correction of an erroneous statement seem to be imperatively required, the force of the correction will be in proportion to its simplicity and clearness, and its freedom from bad temper, countercharges, and epithets.

UNITED STATES SUPREME COURT.

PROCEEDINGS OF.

Thursday, Jan. 6, 1876.

On motion of George W. McCrary, A. E. Stevenson, of Bloomington, Ills., was admitted.

On motion of B. H. Hill, B. F. Lyon, of Macon, Ga., was admitted.

No. 880. John Henderson et al. v. William H. Wickham, mayor, etc., et al. Ordered that this cause be advanced and argued with No. 478.

No. 115. Delaware, Lackwanna & Western Railroad Company v. Joseph Warren, assignee, etc. No. 116. The Delaware, Lackawanna and Western Railroad Company v. Joseph Warren, assignee. No. 117. The National City Bank of New York v. Joseph Warren, assignee. The argument of these causes was continued by S. S. Rogers for defendants, and concluded by F. T. Frelinghuysen for plaintiffs.

No. 113. Thomas Slater Smith et al. v. William Vodges, assignee. This cause was argued by M. H. Carpenter for appellants, and by John L. Thompson for appellee.

No. 118 The Western Union Telegraph Company v. Charles Eyser. This cause was argued by J. H. Ashton for plaintiff, and by J. W. Denver for defendant.

No. 105. (Substituted for 120.) The Milwaukee and St. Paul Railway Company v. Mary A. F. and D. D. Arons. The argument of this cause was commenced by J. W. Cary for plaintiff.

Adjourned until Friday at 12 o'clock.

Friday, Jan. 7.

On motion of W. P. Lynde, L. L. Ainsworth, of West Union, Iowa, was admitted.

On motion of L. D. Woodworth, N. B. Billingsley, of New Libson, Ohio, was admitted.

No. 126. John Forsythe v. Mark Kimball, assignee. Continued.

No. 584. The Union Pacific Railroad Company v. Samuel E. Hall and John W. Morse. This

cause was submitted on printed arguments by A. J. Poppleton for plaintiff. and by John N. Rogers for defendants, under the twentieth rule.

No. 729. George O. Marcy v. The Township of Oswego. This cause was submitted by Alfred Ennis and A. L. Williams for the plaintiff, and by H. G. Webb for defendant, under the twentieth rule.

No. 539. Marshall O. Roberts et al., Surrogate trustees, etc., v. The United States. This cause was submitted on printed arguments by Thomas Wilson for appellants, and by Solr. Gen. Phillips for appellee, under the twentieth rule.

No. 105. (Substituted for 120.) The Milwaukee and St. Paul Railway Company v. Mary A. F. and D. D. Adams. The argument was continued by J. W. Cary for plaintiff, and by C. C. Noure for defendants, and concluded by J. W. Cary for plaintiff.

No. 121. Samuel S. Smoot v. Charles E. Rittenhouse, was argued by T. T. Crittenden for plaintiff. The court declined to hear further argument in this cause.

No 122. John M. Miller v. Wells, Fargo & Co. Passed.

No. 123. Charles Stott et al. v. William Rutherford. The argument of this cause was commenced by W. A. Meloy for plaintiffs.

Adjourned until Monday at 12 o'clock.

Monday, Jan. 10.

On motion of R. D. Mussey, William J. Marshall of Fitchburg, Mass., was admitted.

On motion of O. H. Browning, M. E. Cutts, of Oskaloosa, Iowa, was admitted.

No. 66. August F. Ludwig et al. v. The Propeller Free State, etc. Appeal from the Circuit Court of the United States for the eastern district of Michigan. Hunt, J., delivered the opinion, affirming the decree of the Circuit Court with costs.

No. 80. Henry M. Nebbett v. James E. McFarland. Appeal from the Circuit Court of the United States for the district of Louisiana. Hunt, J., delivered the opinion, affirming the decree of the Circuit Court with costs.

No. 94. Mutual Benefit Life Insurance Co. v. Hattie B. Tisdale. In error to the Circuit Court of the United States for the district of Iowa. Hunt, J., delivered the opinion, reversing the judgment of the Circuit Court with costs, and remanding the cause with directions to award a new trial.

No. 62 Richard L. Wallach et al. v. John Van Riswick. Appeal from the Supreme Court of the district of Columbia. Strong, J., delivered the opinion, reversing the decree of said Supreme Court with costs, and remanding the cause for further proceedings in conformity with the opinion of this court.

No. 634. Desire A. Chaffrait v. Arthur Shiff. Appeal from the Circuit Court of the United States for the district of Louisiana. Strong, J., delivered the opinion, reversing the decree of the Circuit Court with costs, and remanding the cause with directions to dismiss the complainant's bill.

No. 69. The Twin Lick Oil Company v. William Marbury. Appeal from the Supreme Court of the district of Columbia. Miller, J., delivered the opinion, affirming the decree of the Supreme Court with costs.

No. 82. Gilbert Woodruff et al. v. Benjamin F. Hough et al. In error to the Circuit Court of the United States for the northern district of Illinois. Miller, J., delivered the opinion of the court, affirming the judgment of the Circuit Court with costs and interest.

No. 588. The United States v. Archibald McKee et al. Appeal from the Court of Claims. Miller, J., delivered the opinion, affirming the judgment of the Court of Claims. Dissenting, Clifford and Hunt, JJ. Davis, J., did not sit on the argument, and took no part in the decision of this cause.

No. 59. Sarah McMurray et al. v. Austin P. Brown. Appeal from the Supreme Court of the district of Columbia. Clifford, J., delivered the opinion, affirming the decree of the Supreme Court with costs.

No. 79. John Miner v. Thomas Pitts, executor, etc. Appeal from the Circuit Court of the United States for the eastern district of Michigan. Clifford, J., delivered the opinion of the Circuit Court with costs, and remanding the cause with directions to enter a decree affirming the decree of the District Court.

No. 85. The New Lamp Chimney Company v. The Ansonia Brass and Copper Company. In error to the Supreme Court of the State of New York. Clifford, J., delivered the opinion, affirming the judgment of the Supreme Court with costs.

No. 93. Maria A. N. Pollard v. Jacob Lyon. In error to the Supreme Court of the District of Columbia. Clifford, J., delivered the opinion, affirming the judgment of the Supreme Court with costs.

No. 60. John H. Kennard v. The State of Louisiana ex rel.. P. H. Morgan. In error to the Supreme Court of the State of Louisiana. Waite, C. J., delivered the opinion, affirming the judgment of the Supreme Court with costs.

No. 76. John W. Butterfield v. George Usher. Appeal from the Supreme Court of the District of Columbia. Waite, C. J., delivered the opinion dismissing the appeal for the want of jurisdiction.

No. 496. Samuel Black et al. v. The United States. Appeal from the Court of Claims. Waite, C. J., delivered the opinion, affirming the judgment of the Court of Claims in this cause.

No. 98. Reuben Wright v. Jonas M. Tebbetts. In error to the Supreme Court of the district of Columbia. Waite, C. J., delivered the opinion, affirming the judgment of the Supreme Court with costs and interest.

No. 97. John Miller and John Zimmer v. Louis Ehlers. In error to the Circuit Court of the United States for the eastern district of Wisconsin. Waite, C. J., delivered the opinion, affirming the judgment of the Circuit Court with costs.

No. 89. Charles Watts v. The Territory of Washington. In error to the Supreme Court of the Territory of Washington. Waite, C. J., delivered the opinion, dismissing the writ of error for want of jurisdiction.

No. 70. David H. Mitchell v. Board of County Commissioners, Leavenworth, Kansas, et al. In error to the Supreme Court of Kansas. Waite, C. J., announced the decision of the court, affirming the decree of the Supreme Court with costs.

No. 84. Henry B. Lewis et al. v. The Michigan Central Railroad Company. In error to the Circuit Court of the United States for the northern district of Illinois. Waite, C. J., announced the decision of the court, affirming the judgment of the Circuit Court with costs, by a divided court.

No. 121. Samuel S. Smoot v. Charles E. Rittenhouse. In error to the Supreme Court of the District of Columbia. Waite, C. J., announced the decision of the court, affirming the judgment of the Supreme Court with costs.

No. 99. Susan B. Allen v. Thomas D. Allen. Appeal from the Supreme Court of the District of Columbia. Waite, C. J., announced the decision of the court, affirming the decree of the Supreme Court with costs.

No. 894. Tobias R. Jamison et al. v. Theodore L. Roy. In error to the Circuit Court of the United States for the district of California. On motion of E. L. Goold, docketed and dismissed with costs.

No. 895. A. N. Lancaster v. L. Bullis, and No. 896. Charles H. Dalton v. Thomas Davis. In error to and appeal from the Circuit Court of the United States for the district of Iowa. On motion of C. C. Nourse, docketed and dismissed with costs.

No. 897. Michael Curley v. Charles B. Wood. Appeal from the Circuit Court of the United States for the southern district of New York. On motion of E. W. Stoughton, docketed and dismissed with costs.

No. 898. Charles D. Harvey, assignee, etc. v. Lorenzo D. Hamilton et al. In error to the Circuit Court of the United States for the southern district of Indiana. On motion of A. E. Stevenson, docketed and dismissed with costs.

No. 658. Robert R. Rolling v. Gustavus Leisner. The motion to dismiss this cause was submitted on printed argument by James V. Brooke and James R. Tucker in support of the same, and by C. Robinson in opposition thereto.

No. 611. M. A. Zellar v. Edgar A. Switzer. The motion to dismiss this cause was submitted on printed arguments by John A. Grow in support of the same, and by E. T. Merrick and G. W. Race in opposition thereto.

Adjourned until Tuesday at 12 o'clock.

Tuesday, Jan. 11.

On motion of O. H. Browning, William Woodburn, of Virginia City, Nevada, was admitted.

On motion of J. M. Harlan, E. Y. Parsons, of Louisville, Kentucky, was admitted.

On motion of Solr. Gen. Phillips, Allen Rutherford, of Wilmington, N. C., was admitted.

On motion of U. I. Southard, A. W. Train, of Zanesville, Ohio, was admitted.

On motion of M. H. Carpenter, Joseph B. Braman, of Boston, Mass., was admitted.

On motion of J. B. Sanborn, Johnathan W. Chiles, of Washington, D. C., was admitted.

No. 796. R. W. Frayser et al. v. Authony C. Lane. On motion of M. H. Carpenter for appellants, dismissed with costs.

No 798. William and Emily Hill v. William Brackett and C. B. Waite. This cause was submitted on printed arguments by J. D. McPherson and George W. McCrary for appellants, and J. S. Clark for appellee, under the twentieth rule.

No. 825. The Town of Colonia v. David W. Eaves. This cause was submitted on printed arguments by Charles M. Osborne for plaintiff, and James Grant for defendant, under the twentieth rule.

No. 3. (Original.) State of Florida v. E. C. Anderson et al. The motion of J. G. Gibbs, to discharge receiver, etc., was argued by E. N. Dickerson, in support of the same.

No. 123. Charles Stott et al. v. William Rutherford. The argument was continued by W. A. Meloy for plaintiffs, and W. S. Cox for defendant, and concluded by A. G. Riddle for plaintiffs.

No. 552. (Assigned.) The Chicago, Burlington & Quincy Railroad Company v. M. E. Cutts, attorney general, et al. The argument was commenced by F. T. Frelinghuysen for appellant, and continued by M. E. Cutts for appellees.

Adjourned until Wednesday at 12 o clock.

Wednesday, Jan. 12.

On motion of F. T. Freylinghuysen, Jehiel G. Shipman, of Belvidere, N. J., was admitted.

No. 866. Edwin M. Lewis, trustee, etc. v. The United States. The motion to advance this cause was submitted by Assist. Atty. Gen. Smith for appellees.

No. 677. The Good Intent Towboat Co. v. The Steamer "Juniata," etc. On motion of James McConnell, dismissed with costs.

No. 552. (Assigned.) The Chicago, Burlington & Quincy Railroad Co. v. M. E. Cutts, attorney general, et al. The argument was continued by M. E. Cutts for appellees, and O. H. Browning for appellants.

Adjourned until Thursday at 12 o'clock.

OUR thanks are due JAMES L. HIGH, of the Chicago bar, for the following opinion:

U. S. DIST. COURT, N. D. OF ILL.

OPINION JAN., 1876.

In Re R. M. WHIPPLE.—*In Bankruptcy.*

CREDITOR'S BILL—PROCEEDINGS IN BANKRUPTCY—RECEIVER.

That proceedings in bankruptcy supersede a creditor's bill in a State court; and that when a receiver has been appointed by the State court he can be compelled to deliver the property over to the assignee in bankruptcy, subject to all the rights which the creditors whom he specifically represents has obtained, and to all the priorities which they have obtained by their diligence.—[ED. LEGAL NEWS.]

This was a rule to show cause why certain judgment creditors of the bankrupt should not be enjoined from proceeding under creditors bills against the bankrupt in the State Courts, and from enforcing an assignment by the debtor to the receiver appointed in such creditors suits. On the 8th day of August, 1874, Louis Stix and others filed in the Circuit Court of Cook county an ordinary creditors bill to enforce a judgment against Whipple previously recovered in that court. On the fourth day of November, 1875, a receiver of the debtor's effects was appointed in that suit, and the debtor was ordered to make an assignment of his effects to such receiver. On the 10th day of July, 1875, the Chatham National Bank and others filed a similar creditors bill in the Superior Court of Cook county, upon judgments previously recovered therein against Whipple, and upon the 5th day of November, 1875, a receiver was appointed and the debtor was ordered to assign his effects to such receiver. On the 24th day of November, 1875, and before the debtor had executed an assignment to the receiver in either creditors suit, an involuntary petition in bankruptcy was filed against him in this court, on which he was adjudicated a bankrupt on the 6th day of December, and delivered his property to the marshal under the warrant in bankruptcy. The judgment creditors in each of the suits in the State courts above named, having taken proceedings therein against Whipple to enforce an assignment to the receiver appointed in each case, a rule was granted against them in this court to show cause why they should not be enjoined from further proceeding in the State courts.

E. & A. VANBUREN and TENNEYS, FLOWER & ABERCROMBIE, Solicitors for the judgment creditors.

EDWIN BEAN and GEO. W. SMITH, Solicitors for the petitioners.

J. L. HIGH, Solicitor for the bankrupt.

BLODGETT, J.—This question came before me in the case of the National Insurance Company, which was also a case where a creditors bill had been filed in the State court, on which a receiver was appointed and took possession of the assets of the company, and proceedings in bankruptcy were then instituted against the company. I had occasion to investigate the question very thoroughly in that case, and after a very careful examination in the light of the authorities, both in this country and in England, I came to the conclusion that the proceedings in bankruptcy superseded the creditors bill; and that the receiver in the chancery suit would be obliged and could be compelled to deliver the property over to the assignee in bankruptcy, subject, of course, to all the rights which the creditors whom he specifically represented had obtained, and to all the priority which they had obtained by their diligence. I announced my conclusion in that case and the parties acquiesced in it.

This class of cases of course brings up the difficult question of collision between the jurisdiction of the several courts, and I see no way to harmonize it except to assume that when proceedings in bankruptcy are properly instituted and take effect, they must of necessity supersede the proceedings on creditors bills, subject, of course, to all the rights which the parties may have acquired by the steps taken. Now, if Judge Van Buren's client obtained a judgment in 1873, that judgment is *ipso facto* a lien upon the real estate of the debtor, and if anything is realized out of his real estate this lien would have to be respected. Then if he had acquired possession of any assets through his receiver, undoubtedly to the extent that assets had come into the receiver's hands the authorities require the bankruptcy court to respect the lien thereby obtained.

How far we are to go in enforcing what counsel characterize as an equitable lien, simply by their having instituted proceedings in chancery and obtained the appointment of a receiver, is a question upon which I would prefer to reserve an opinion, until we come to distribute the estate. That is a question that has never been fairly up. It is presented by Mr. Tenney in this case, he claiming that by their diligence in filing the creditors bill, they have acquired a sort of blanket lien on the whole property. It seems to me utterly impossible to carry on the two administrations together; the estate should be administered in one court, and I think the bankrupt court the proper one. The assignee in bankruptcy necessarily, and by operation of law, takes possession of the assets, subject to the existing claims or liens of the creditors in the State courts. And I think that the better authority and the more reasonable doctrine is that the proceedings in bankruptcy supersede all other proceedings for the administration of the assets of the debtor, subject only to the priorities which are obtained by any creditors by the use of diligence, which are to be respected and which should be paid in the order of priority, according to whatever rights have been obtained. Now, in this case, the receiver in the State court has obtained no property. The bankrupt reports to this court that he has turned over all his assets of every nature to the marshal of this court, under the warrant of seizure in bankruptcy. Under these circumstances, the bankruptcy court must go on and administer the estate, leaving these judgment creditors to assert their claims and priorities, if any, in this court. The question is not a new one, but has been frequently up, and until it is overruled by the Supreme Court, I shall insist upon this construction of the law.

Let the rule to show cause be made absolute, and the judgment creditors be enjoined from proceeding in the creditors suits in the State courts, reserving all questions as to the priorities which they have there acquired, to be determined by this court hereafter.

U. S. CIR. COURT, D. OF CAL.

MILO HOADLEY v. THE CITY AND COUNTY OF SAN FRANCISCO.

REMOVAL OF SUITS FROM STATE TO NATIONAL COURTS.—A suit was pending in the Supreme Court of California on appeal from the judgment of the District Court at the date of the passage of the act of Congress of March 3, 1875, relating to the jurisdiction of the U. S. Circuit Courts, in which the judgment was reversed and the cause subsequently remanded to the District Court for new trial. At the first term of the District Court at which a trial could be had after the filing of the remittitur and before any other trial, the suit was removed to the United States Circuit Court, on application of the plaintiff.

Held, That the case is within the provisions of sections 2 and 3 of said act of Congress, and that it was properly removed.

SAWYER, Circuit Judge.

This action was originally commenced in the District Court of the State of California for the Twelfth Judicial District, on January 5, 1870. A trial was had and a judgment entered therein July 3, 1871. An appeal having been taken to the Supreme Court of the State, October 25, 1871, the judgment was reversed and a new trial ordered by that tribunal, February 3, 1875, and a petition for re-hearing having been subsequently filed and denied, a remittitur issued in pursuance of the judgment of reversal, July 29, 1875, which was filed in the District Court, September 20, 1875.

On November 15, 1875, which was before the term at which the case could be first tried in the State District Court—the only court in which it could be tried—after it had been remitted to that court by the Supreme Court, the plaintiff presented a petition to the said District Court, in due form, praying a removal of the case to this court, and it was accordingly removed. The defendant now moves to remand the case to the State Court, on the ground that its removal was not authorized for the reason that it had already been tried in the State Court before, and was pending in the Supreme Court on appeal at the time of the passage of the act of Congress of March 3, 1875, under which the removal was had. It is not denied that the subject-matter of the suit is such as in that particular would authorize a removal.

Section 2, as to the point in question, provides that "*any* suit of a civil nature, at law or in equity, *now pending*, or hereafter brought, in *any* State Court," etc., may be removed. And section three, that whenever any party entitled to remove a suit shall desire to do so, he "may make and file a petition in such suit it such State Court *before or at the term* at which said cause should be *first* tried, and *before the trial* thereof for removal," etc. Thus it will be seen the statute in express terms authorizes the removal of a suit *pending in any* State Court at the time of the passage of the act—"*now pending*"—as well as those that should be afterwards brought. But section three limits the time within which a removal may be had. It requires the election in either case, to be promptly made. It requires the party to avail himself of the opportunity to remove at, or before, the first term at which a trial could be had, and before any trial after the right to remove attaches. This case was pending in a State Court, on appeal, at the date of the passage of the act. The judgment of the court below had been reversed, and a new trial ordered, but there was pending a petition for re-hearing. It was liable to be tried again, this liability depending upon the decision of the Supreme Court upon the petition for rehearing. All proceedings in the case in the District Court were suspended pending the appeal; and it could not be tried in the District Court till remitted from the Supreme Court. Upon the final reversal of the judgment, with directions to try the case again, it stood in *all* particulars as though it had never been tried. The case not having been finally disposed of, but being liable to be tried again, at the date of the passage of the act of Congress, it was in my judgment a suit pending in a State Court, within the meaning of section two, to which a right of removal attached; and the clause

"the term at which said cause could be first tried and before the trial thereof," means "first trial," and "before the trial thereof," after the right of removal attached; and that is necessarily after the passage of the act giving the right of removal. In this case there was no trial, and no term when the cause could have been tried, after the passage of the act, and after the right to remove attached, before the application for removal was actually made and granted. Mr. District Judge Swing, of the Southern District of Ohio, held a removal to have been properly made in a cause pending in the State Court at the date of the passage of the act of Congress in which there had, prior to that date, been two trials and verdicts, both of which had been set aside, and where the cause stood awaiting a third trial at the date of the passage of the act. (Andrew's Executors *v.* Garrett, 2 Cent. Law Jour., 797).

I fully concur in the views expressed by the learned judge. The only difference between that case and this is, that the present case was pending in the Supreme Court, on a petition for re-hearing, after a judgment of reversal, and no trial could be had, or movement for removal made, until the petition for re-hearing should be decided and the case remitted to the District Court, in which alone the new trial could be had. I do not think this circumstance affects the right of removal. It was a cause "now pending," within the meaning of the act, to which a right of removal attached, and the removal was made at the first opportunity. The motion to remand must be denied, and it was so ordered.

BURNETT for motion.

HOLLIDAY contra.

Dec. 27, 1875.—*Pacific Law Reporter.*

SUPREME COURT OF INDIANA.

[From the Indianopolis Sentinel.]

COMMON CARRIER—LIABILITY WHERE GOODS ARE TAKEN UNDER LAWFUL PROCESS.

4388. The Ohio & Mississippi Railroad Company *v.* Yoke et al. Martin C. C. Downey, J.

Action by appellees against appellant as a common carrier.

The question presented in the case is this: Is a common carrier of goods excused from liability for not carrying and delivering the goods, when they are, without any act, fault or connivance on his part, seized, by virtue of legal process, and taken out of his possession?

The court holds that he is excused from liability where the goods are so taken, provided he exercises proper diligence in giving notice to the consignee of such seizure. (36 N. Y., 407; Redfield on Railways, volume 2, page 158; Drake on Attachments, sections 453, 290 and 350.) Such notice, as the law requires, was not given in this case. Affirmed.

ADMINISTRATOR—REPORT OF, AS EVIDENCE AGAINST—PRACTICE.

4230. The State ex rel. Christian C. Nave *v.* Wilson et al., Hendricks C. C. Worden, J.

Action by appellant against appellees upon the bond of Wilson as administrator.

The questions presented arise upon the alleged error of overruling the motion for a new trial. The reasons filed for a new trial were: First, that the decision of the court is contrary to law; second, that the decision of the court is not sustained by the evidence in the cause; third, error of law in excluding the evidence offered by the relator, to prove that Wilson had, in violation of law and his duty as administrator, appropriated to his own use large sums of money belonging to the estate, etc.; fourth, error of law in suffering Wilson as a witness in the cause to explain a certain report made by him as administrator, and to contradict the same; fifth, "receiving improper evidence offered by defendants over the objections thereto of the relator;" sixth, "and the rejection of proper evidence offered by the relator, Christian C. Nave, on the trial."

As to the first and second reasons, the court is of the opinion that for these, it can not disturb the finding.

As to the third reason, the record does not show that it is well founded in point of fact.

As to the fourth reason, the accounts of an administrator are not conclusive, either for or against him, until final settlement. (48 Ind. 584.)

The fifth and sixth reasons are too general to bring in review any question. Affirmed.

EVIDENCE—ADMISSIONS—WHEN COMPETENT.

3922. Campbell *v.* Coon. Montgomery C. C. Worden, J.

Replevin by appellant against appellee for certain saw logs. Verdict for defendant.

Plaintiff claimed title to the logs by purchase from John K. and William P. Yonkey, and gave in evidence a bill of sale of the property, executed by them on the 16th of July, 1873.

The defendant, as it appears from the evidence, claimed that the Yonkeys purchased the logs with his money, for him, advanced to them for that purpose.

A writing, over plaintiffs' objection, was introduced by defendant, which was dated September 30, 1873, and written by W. P. Yonkey to Flanagan, from whom he purchased the logs, admitting that they were bought for the defendant and with his money. The defendant also introduced W. P. Yonkey as a witness, and proved by him, over plaintiffs' objection, that he had admitted at different times to Coon and Flanagan the same facts.

The court is of opinion that the written instrument and the oral testimony were both incompetent and should have been excluded.

Before the instrument was written, the Yonkeys had transferred the property to the plaintiff. Declarations made by a person, under whom a party claims, after the declarant has parted with the right, are inadmissibie to affect any one claiming under him. (17 Ind. 284. do. 446.)

As to the oral evidence, the admission of a vendor, while he is in possession, and before a sale of the property, such as would be evidence against the vendee is admissible against himself. (11 Ind. 347; 18 Ind. 343.) But admissions made after such sale are clearly incompetent. It does not appear in this case when the admissions were made, but the court is of opinion that it should affirmatively appear that the admissions were made at such time and under such circumstances as would render them competent. Reversed.

CONSTRUCTION OF TWELFTH SECTION OF THE LIQUOR LAW OF MARCH, 1873—LIABILITY OF THE SELLER OF INTOXICATING LIQUOR TO ONE INJURED BY THE PARTY INTOXICATED.

4447. English et al. *v.* Beard, Decatur C. C. Downey, J.

Action by appellee against appellants under the twelfth section of the liquor law of March, 1873. The complaint sets up, substantially, that English sold the intoxicating liquor to one Hickman, who, becoming intoxicated thereon, "struck, beat and wounded the plaintiff, etc."

The errors assigned are: Overruling the demurrer to the complaint, and refusing to grant a new trial.

The first objection to the complaint is that the twelfth section does not give a right of action to the person incapacitated from labor direct, but only to those who occupy a collateral relation to the party injured, and that he who receives the injury direct must look to his ordinary remedy against the person inflicting the injury.

The section says that "every husband, wife, child, parent, guardian, employer, or other person who shall be injured in person or property, or means of support, by any intoxicated person, or in consequence of the intoxication, habitual or otherwise, of any person, shall have a right of action or "the court is of opinion that the language of the act embraces the casesunder consideration."

The other objection to the complaint is, that Hickman should have been united as a defendant with the persons sued.

The section further says that the party injured "shall have a right of action in his or her own name, severally or jointly, against any person or persons who shall, by selling, etc., and any persons owning, renting, etc., any building, etc., shall be liable jointly with the person selling, etc." The court holds that the language of the act is too plain to admit of doubt.

Under the second assignment the sufficiency of the evidence is questioned. The court can not disturb the judgment upon this ground.

Affirmed.

CHALLENGE TO JUROR—THE INTEREST OF A CITIZEN AND TAXPAYER IN A PROCEEDING AGAINST THE CITY A DISQUALIFYING INTEREST.

4264. Hearn et al. *v.* The City of Greensburgh. Decatur C. C. Reversed.

Biddle, C. J., delivering the opinion of the court: Appellant brought suit against the appellee, a municipal corporation, alleging that said city unskillfully constructed a certain sidewalk, and negligently allowed the same to remain out of repair, whereby the said Mary, the wife of the said Silas, while rightfully traveling along the same, fell and broke her arm, etc.

The only question presented by this case is as to the overruling the challenge of the appellant to three of the jurors, the ground of the challenge being that they were citizens and taxpayers of the city of Greensburgh, and, therefore, interested in the proceedings.

The trial by jury is as old as the common law. Sir William Jones, indeed, asserts that it was known in Athens, but the history of Greece scarcely sustains his views. At all events, it is found in our system of jurisprudence at its very earliest source; and, with the exception of a short time under William, the Norman, who introduced trial by battle, during which trial by jury was somewhat impaired and shaken, has always remained, with English-speaking people, and all who inherit the common law, a favorite mode of trial; and during all this period of its history, there has been no time when interest in the suit did not disqualify a juror. (Section 3, Blackstone, 349-387).

A case in point has been recently decided in the State of New York (51 N.Y., 506). The action was brought to recover damages alleged to have been sustained by plaintiff by reason of his falling through, down, and upon a defective sidewalk in the city of Elmira. Six jurors were challenged for the cause that they were residents and taxpayers of the city. The court said: "The question, therefore, to be considered, is, whether a resident and taxpayer of the city was incompetent as a juror upon the trial of this action. The object of the law is to procure impartial, unbiased persons for jurors. They must be *omni exceptione majores.* They must have no interest in the subject-matter of the litigation. In this case, a verdict against the city would impose additional burdens upon all the taxpaying residents thereof. Hence, such residents are, at common law, incompetent to serve as jurors in a case to which the city is a party, or in which the city is directly interested."

Our code is with the common law in its spirit. (Sec. 208, 2 G. & H., 154). The decision must be left to the common law, and, according to that judgment, must be reversed.

COMMON CARRIER—FREIGHT—UNREASONABLE DELAY—EXTRAORDINARY CONTINGENCIES.—The London *Law Times* of Dec. 25, in commenting on a decision of the Supreme Court of Michigan, says:

It is interesting to compare a decision of the Supreme Court of Michigan (reported in a recent number of the CHICAGO LEGAL NEWS), in the Michigan Railway Company *v.* Burrows with some recent decisions in our own courts at Westminster. The respondent delivered four loads of apples to the appellants at Vandalia for carriage to Minneapolis. At Chicago they were transferred to the other carrier, who delivered them at their destination in four days from the date of the transfer at Chicago. The apples were found upon arrival to be badly injured by the frost. The respondent then brought an action against the railway company to recover damages alleged to have arisen from unreasonable delay on the part of the company. The damage was proved to have been caused after the fruit was delivered at Chicago. The main facts were that the appellants' line and rolling stock were in good order, and that there was sufficient of the latter for all the ordinary purposes of the traffic, but owing to the great Chicago fire on the 8th Oct., 1871, the company's line was damaged and rendered useless for a time. As soon as the line was in working order the ordinary traffic was greatly delayed by reason of the number of relief trains sent to the succor and assistance of the sufferers by the fire. This was the state of the line at the time of the conveyance of the apples of the respondent. It was further given in evidence that whilst previous to the fire the goods trains ran from Vandalia to Chicago in about twenty-four hours, the average time was, owing to the causes already mentioned, lengthened to ten days, whilst the whole time taken by the company in carrying the respondent's apples to Chicago did not exceed seven days. The court below decided that there was unreasonable delay. The view taken by the Supreme Court will be at once plain from the following reference to its reasoning. Proceeding from the recognition of the principle that railway companies must have all reasonable and necessary facilities and appliances for carrying on their business in a prompt, skillful, and careful manner, the learned judge who delivered the judgment of the court continued: "They are not bound, however, to be prepared for unusual and extraordinary contingencies, which no ordinary prudence or foresight could reasonably foresee or anticipate; and where an unusual contingency has arisen, which unexpectedly largely increases the business, or prevents, as in this case, the handling of freight in so prompt and expeditious a manner as the company formerly had been accustomed to do, the company cannot be charged with unreasonable delay for not carrying freight in the same time it had done previous to such contingency." This statement of the law as well as the rules respecting *vis major* and *actus Dei*, and so on, is really the statement of a principle easily deducible from the maxim *Lex non cogit ad impossibilia*, or in the words of Sir W. Scott (2 Dods. 323), the law itself, and the administration of it, must yield to that to which everything must bend—to necessity; the law, in its most positive and peremptory injunctions, disclaims all intention of compelling to impossibilities. The Supreme Court thought the damages too remote. The loss was not necessarily the consequence of the delay. The law cannot inquire into all the concurring circumstances which may have contributed to produce an injury. Upon this point a maxim not seldom quoted in Westminster Hall was adopted by the learned judge. "It were infinite," said Lord Bacon, "for the law to consider the causes of causes, and their impulses, one of another; therefore it contenteth itself with the immediate cause, and judgeth of acts by that without looking to any further degree." The whole judgment, however, is worthy of study as illustrative of such questions as have reference to the important subjects of remoteness of damages, and *vis major*.

FREDERIC ULLMANN,
Attorney. 88 Washington Street.

TRUSTEE'S SALE.—WHEREAS, BY THEIR trust deed dated on the first day of May, 1874, Harry Fox and William B. Howard, of the city of Chicago, county of Cook and State of Illinois, conveyed to the undersigned, as trustee, all the following described lands and premises situate in the town of Lake View, county of Cook and State of Illinois, to wit:

Lots number six (6), seven (7), eight (8) and nine (9) in block number seven (7), in Hundley's subdivision of lots three to twenty-one (3 to 21) and thirty-three to thirty-seven (33 to 37), inclusive in Pine Grove being a subdivision of section twenty-one (21), in township forty (40), north range fourteen (14) east, to secure the payment of a certain promissory note, bearing even date therewith, executed by Fox and Howard as part payment of the purchase money of said real estate for the sum of ten thousand dollars, payable one year after the date thereof to the order of Elisha E. Hundley, at the office of Rees, Peirce & Co., Chicago, Illinois, with interest at the rate of ten per cent. per annum, payable semi annually, and ten per cent. per annum after maturity; which said trust deed was on the 4th day of August, A. D. 1874, duly filed for record in the recorder's office of said county of Cook, and was duly recorded in book 443 of records, on page 31.

And whereas, it was provided in and by said trust deed, that in case of default in the payment of the said note or any part thereof, according to the tenor and effect of said note, then on application of the legal holder of said note, it might be lawful for the undersigned to sell and dispose of the said premises, and all the right, title, benefit and equity of redemption of said Harry Fox and William B. Howard, their heirs and assigns therein, at public auction at the door of the court house in the city of Chicago, Cook county, in the State of Illinois, or on said premises, as might be specified in the notice of such sale, for the highest and best price the same would bring in cash, at least thirty days public notice having been previously given of the time and place of such sale by advertisement in one of the newspapers at that time published in said city of Chicago, and to make, execute and deliver to the purchaser or purchasers at such sale, good and sufficient deed or deeds of conveyance for the premises sold.

And whereas, default has been made in the payment of the principal of said promissory note which became due on the 4th day of May, 1875, and also in the payment of six months interest thereon, which became due on the same day, and there is now actually due and unpaid on said note the sum of ten thousand dollars, together with interest thereon since November 1st, 1874, at the rate of ten per cent. per annum.

And whereas, the said Elisha E. Hundley, the legal holder of said note has applied to the undersigned to sell said premises in accordance with the provisions of said trust deed for the purpose of satisfying the said indebtedness.

Now, therefore, public notice is hereby given that I, the undersigned, James H. Rees, trustee as aforesaid, will, on Tuesday the 8th day of February, A. D. 1876, at the hour of ten o'clock in the forenoon of said day, at the door of the court house in the city of Chicago, county of Cook and State of Illinois, to wit: at the west door of the north doors of the court house, situated on the southeast corner of Adams and LaSalle streets, in said city of Chicago, county of Cook and State of Illinois, sell and dispose of said premises hereinbefore described, and all the right, title, benefit and equity of redemption of the said Harry Fox and William B. Howard, their heirs and assigns therein, at public auction, for the highest and best price the same will bring in cash, pursuant to the terms of said trust deed.

Dated Chicago, January 7th, 1876.

JAMES H. REES, Trustee.

FREDERIC ULLMANN, Atty. 16-20

RUFUS KING.
Attorney. 25 Metropolitan Block.

CHANCERY NOTICE.—STATE OF ILLINOIS, } county of Cook, ss. Circuit Court of Cook county. January term, A. D. 1876. Margaret Gleason vs. John Gleason.—In Chancery.

Affidavit of the non-residence of John Gleason, defendant above named, having been filed in the office of the clerk of said circuit court of Cook county, notice is hereby given to the said John Gleason, that the complainant heretofore filed her bill of complaint in said court, on the chancery side thereof, and that a summons thereupon issued out of said court against said defendant, returnable to the court house in the city of Chicago, in said county, on the third Monday of January inst., 1876, as is by law required.

Now, unless you, the said John Gleason, shall personally be and appear before said circuit court of Cook county, on the first day of a term thereof, to be holden at Chicago, in said county, on the third Monday of February, 1876, and plead, answer or demur to the said complainant's bill of complaint, the same, and the matters and things therein charged and stated, will be taken as confessed, and a decree entered against you according to the prayer of said bill.

JACOB GROSS, Clerk.

RUFUS KING, Complts. Sol. 16-19

BARNUM & CRANE,
Attorneys. Room 50, Major Block.

PUBLICATION NOTICE IN ATTACHMENT.—State of Illinois, County of Cook. ss. Superior court of Cook county. December term, A. D. 1875. William F. McLaughlin vs. Austin C. Slayton.—Attachment.

Public notice is hereby given to the said Austin C. Slayton that a writ of attachment issued out of the office of the clerk of the Superior court of Cook county, dated the 30th day of October, A. D. 1875, at the suit of the said William F. McLaughlin, and against the lands, goods, chattels, rights, moneys, credits and effects of the said Austin C. Slayton for the sum of one hundred dollars, directed to the sheriff of Cook county to execute.

Now, therefore, unless you, the said Austin C. Slayton, shall personally be and appear before the said Superior court of Cook county, on or before the first day of the next term thereof, to be holden at the court house, in the city of Chicago on the first Monday of March, A. D. 1876, give bail and plead to the said plaintiff's action, judgment will be entered against you, and in favor of the said William F. McLaughlin, and so much of the lands, goods, chattels, rights, moneys, credits and effects attached, as may be sufficient to satisfy the said judgment and costs, will be sold to satisfy the same.

JNO. J. HEALY, Clerk.

BARNUM & CRANE, Attys. 16-18

WILLIAM C. WILSON,
Attorney. 157 Clark Street.

SALE OF CERTIFCATE OF SIX SHARES OF stock of the Eagle Tanning Works of Chicago.—Whereas, on the 22nd day of September, 1875, H. C. Mowry executed the undersigned, T. C. Hoag & Co., his promissory note in the sum of six hundred dollars due in ninety days, at ten per centum after maturity; and to secure the payment of the same, he deposited with said Hoag & Co., a certificate of six shares of the capital stock of the Eagle Tanning Works of Chicago, bearing date March 11th, 1875, and numbered 96, of one hundred dollars a share.

And whereas, it is provided in said note, that at the maturity of said note, or at any time thereafter, said T. C. Hoag & Co., their agents or assignee, might sell said certificate, or any part thereof, at public or private sale, and to apply so much of the proceeds thereof to the payment of said note, as may be necessary to pay the same, with all interest due thereon, and all expenses attending the sale of the said certificate, including attorney's fees.

Whereas, default has been made in the payment of said note and interest accrued thereon, leaving now due thereon ($602 50-100) six hundred and two and 50-100 dollars.

Now, therefore, public notice is hereby given that, on Saturday, the 29th day of January, A. D. 1876, at ten o'clock A.M., at the west door of the Bank Building of said T. C. Hoag & Co., on the southeast corner of Davis street and Chicago avenue, in the village of Evanston Cook county, Illinois, the undersigned will sell said certificate and stock, or so much thereof as is necessary to pay said indebtedness, and attorney's fees, and expenses, etc., to the highest and best bidder, for cash.

T. C. HOAG & CO.

January 8th, 1876. 16-

EDGAR L. JAYNE,
Attorney, Room 40, Portland Block.

TRUSTEE'S SALE.—WHEREAS, BRUNO GANSEL and Anna Gansel, his wife, of the town of Hyde Park, in the county of Cook and State of Illinois, by their certain trust deed, duly executed, acknowledged, and delivered, bearing date the ninth (9th) day of December, A. D. 1874, and recorded in the recorder's office of Cook county, in the State of Illinois, in book 490 of records, at page 123, did convey unto John H. Wrenn, as trustee, all the following described premises, situated in the county of Cook and State of Illinois, to wit:

Lots number one (1), two (2), three (3) and four (4), in block number four (4), in McKichan and Mason's subdivision of the west half of the northwest quarter of section number fourteen, township thirty-eight north, range number fourteen, east of the third principal meridian; also, the east one hundred and fifty (150) feet of lots number one (1) and two (2), in Tyler's subdivision of block number two (2), in Walker and Stinson's subdivision of the west half of the southwest quarter of section number two (2), township number thirty-eight (38) north of range number fourteen (14), east of the third principal meridian, to secure the payment of said Bruno Gansel's principal promissory note for the sum of three thousand and six hundred (3,600) dollars, executed by said Bruno Gansel, dated the ninth day of December, A. D. 1874, and payable to the order of himself and by him indorsed, said note having been made payable on the first day of August, 1875, after date, with interest at the rate of ten per cent. per annum, payable at the office of Adolph Loeb and brother, Chicago, Illinois.

And whereas, it is provided in and by said trust deed, that in case of default in the payment of the said promissory note, or any part thereof, according to the tenor and effect of said note, or in case of a breach of any of the covenants or agreements in said trust deed contained, then, on the application of the legal holder of said note, it should and might be lawful for the undersigned, John H. Wrenn, trustee, to sell and dispose of the said premises, and all the right, title, benefit and equity of redemption of said Bruno Gansel and Anna Gansel, his wife, their heirs and assigns therein, at public auction, at the north door of the Board of Trade building, in the city of Chicago, in the county of Cook and State of Illinois, for the highest and best price the same will bring in cash, thirty days previous notice of such sale having been given by publication once in each week, for four successive weeks in any newspaper at that time published in the said city of Chicago, and to make, execute, and deliver to the purchaser or purchasers at such sale, good and sufficient deed or deeds of conveyance for the premises sold, and out of the proceeds of such sale to pay all costs and expenses incurred in advertising and selling said premises, including attorney's fees, also the principal and interest on said note.

And whereas, default has been made in the payment of the said note; and whereas, said note is overdue and unpaid, together with interest thereon since December 9th, 1874, and the legal holder of said note has made application to the undersigned, the trustee in said trust deed named, and requested him, as trustee, to sell and dispose of said premises under the power in said trust deed, and for the purposes therein stated.

Now, therefore, public notice is hereby given, that in pursuance of said trust deed, and by virtue of the power and authority to me granted in and by the same, and by virtue of the statute of the State of Illinois, I, the undersigned, will, on Monday, the seventh (7th) day of February, A. D. 1876, at ten o'clock A. M of said day, at the north door of the Board of Trade building, in the said city of Chicago, sell and dispose of the premises above and in said trust deed described, and all the right, title, benefit and equity of redemption of the said Bruno Gansel and Anna Gansel, his wife, their heirs or assigns therein, at public auction, for the highest and best price the same will bring in cash.

Dated January 8th, 1876.

JOHN H. WRENN, Trustee.

EDGAR L. JAYNE, Atty. 16-19p

TRUSTEE'S SALE.—WHEREAS, EDWIN A. RICE and Marcie M., his wife, and Thomas Pickering, a bachelor, for the purpose of securing the payment of a certain note numbered eight (being one of a series of ten like notes numbered from one (1) to ten (10), inclusive, secured by the same trust deed on separate lots of land), made by the said Edwin A. Rice and Thomas Pickering, bearing even date with the trust deed hereinafter mentioned, payable to the order of Henry W. B. Hoyt on February 25th, A. D. 1877, with interest at the rate of ten (10) per cent. per annum, payable semi-annually, conveyed unto the undersigned, J. Whitney Farlin, by their certain trust deed dated October 15, A. D. 1874 and recorded in the recorder's office of Cook county, Illinois, in book 417 of records, at page 453, the south twenty-six and a half (26½) feet of the north seventy-seven (77) feet of the west half of lot ten (10), (except eight (8) feet of the east end thereof reserved for one-half an alley), in block two (2), in Saltonstall and Russell's subdivision of the north half of the northeast quarter of the southeast quarter of section three (3), in township thirty-eight (38) north, range fourteen (14) east of the third principal meridian, situated in Cook county, Illinois, in trust, to wit: upon the trusts specified in said trust deed, to which reference is hereby made.

And whereas, by reason of default having been made in the payment of the semi-annual installments of interest maturing April 15th, A. D. 1875, and October 15th, A. D. 1875, on said note numbered eight (8), the said principal sum of two hundred and fifty dollars specified in said note numbered eight (8), and all interest accrued thereon has become due and payable, there being claimed to be due two hundred and fifty dollars and interest thereon from October 15, A. D. 1874, at the rate of ten (10) per cent. per annum.

Now, therefore, public notice is hereby given, that I, the undersigned, J. Whitney Farlin, trustee named in said trust deed, in pursuance of the power in me vested by said trust deed, and in order to execute the trusts by said trust deed, created, will on Tuesday, the eighth day February, A. D. 1876, at the hour of eleven (11) o'clock in the forenoon of said day, at the most western of the two outer doors on Adams street of the building occupied as a court house in the city of Chicago, in said county of Cook, situated on the southeast corner of Adams and Lasalle streets, in said city of Chicago, sell at public auction, for the highest and best price the same will bring in cash, the premises in said trust deed and hereinbefore described, and all the right, title, benefit and equity of redemption of the said Edwin A. Rice and Marcie M., his wife, and Thomas Pickering, their heirs or assigns therein.

Chicago, January 7th, A. D. 1876.

J. WHITNEY FARLIN, Trustee.

H. M. SHEPARD, Atty. 16-19

TENNEYS, FLOWER & ABERCROMBIE,
Attorneys.

PUBLICATION NOTICE IN ATTACHMENT.—State of Illinois, county of Cook, ss. Superior court of Cook county. January term, A.D. 1876. The Northwestern National Insurance Company vs. Mortimore McMahon and Elen McMahon.—Attachment.

Public notice is hereby given to the said Mortimore McMahon and Elen McMahon, that a writ of attachment issued out of the office of the clerk of the Superior court of Cook county, dated the 11th day of December, A. D. 1875, at the suit of the said The Northwestern National Insurance Company, and against the lands, goods, chattels, rights, moneys, credits and effects of the said Mortimore McMahon and Elen McMahon, for the sum of two hundred and twenty-nine dollars and fifty cents, directed to the sheriff of Cook county to execute.

Now, therefore, unless you, the said Mortimore McMahon and Elen McMahon, shall personally be and appear before the said Superior court of Cook county, on or before the first day of the next term thereof, to be holden at the court house, in the city of Chicago, on the first Monday of January, A. D. 1876, give bail and plead to the said plaintiff's action, judgment will be entered against you, and in favor of the said The Northwestern National Insurance Company, and so much of the lands, goods, chattels, rights, moneys, credits and effects attached as may be sufficient to satisfy the said judgment and costs will be sold to satisfy the same.

JOHN J. HEALY, Clerk.

TENNEYS, FLOWER & ABERCROMBIE, Attys. 16-18

E. & A. VAN BUREN,
Attorneys, 78 Fifth Ave.

TRUSTEE'S SALE.—WHEREAS, JABEZ BARKER and Margaret Barker, his wife, John K. Beatty and Kate Beatty, his wife, of the village of Hyde Park, in the county of Cook and State of Illinois, by their certain trust deed, duly executed, acknowledged and delivered, bearing date the third day of December, A. D. 1874, and recorded in the recorder's office of Cook county, in the State of Illinois, in book 272 of records, at page 80, did convey unto John V. Clarke, as trustee, all the following described premises, situated in the county of Cook and State of Illinois, to wit:

Lot number two (2) and the north twenty-four feet of lot three (3), in block fourteen (14), in Egandale, being a subdivision of the east one hundred and eighteen acres of the southwest quarter of section eleven (11), township thirty-eight (38), north of range fourteen (14), east of the third principal meridian—to secure the payment of one principal promissory note, for the sum of three thousand four hundred and eleven 52-100 dollars, and executed by Jabez Barker and John K. Beatty, and payable to the order of Thomas Tully, one year after date, with interest at the rate of ten per cent. per annum, payable semi-annually.

And whereas, it is provided in and by said trust deed, that in case of default in the payment of the said promissory note or interest as aforesaid, or in case of a breach of any of the covenants or agreements in said trust deed contained, then, on the application of the legal holder of said note, it should and might be lawful for the undersigned, John V. Clarke, to sell and dispose of the said premises, and all the right, title, benefit and equity of redemption of the said Jabez Barker and Margaret Barker, his wife, and John K. Beatty and Kate Beatty, his wife, their heirs and assigns therein, at public auction, at the north door of the court house, corner of La Salle and Adams streets nearest LaSalle street, in the city of Chicago, in the county of Cook and State of Illinois, for the highest and best price the same will bring in cash, twenty days previous notice of such sale having been given by publication in one of the newspapers published in said city of Chicago, and to make, execute and deliver to the purchaser or purchasers at such sale, good and sufficient deed or deeds of conveyance for the premises sold, and out of the proceeds of such sale to pay all costs, commissions, and all other expenses incurred in advertising and selling said premises, also the principal and interest on said note.

And whereas, it is further provided in said trust deed, that in case of default in any of said payments of principal or interest, according to the tenor and effect of said promissory note, as aforesaid, then and in that case the whole of said principal sum thereby secured, and the interest thereon to the time of sale, may at once, at the option of the legal holder thereof, become due and payable, and the said premises be sold, in the manner and with the same effect as if the said indebtedness had matured.

And whereas, default has been made in the payment of the whole of said principal sum and the interest thereon, and the legal holder of said note has made application to the undersigned, the trustee in said trust deed named, and requested him, as such trustee, to sell and dispose of said premises under the power in said trust deed, and for the purposes therein stated.

Now, therefore, public notice is hereby given, that in pursuance of said trust deed, and by virtue of the power and authority to me granted in and by the same, and by virtue of the statute of the State, I, the undersigned, will, on Tuesday, the 15th day of February, A. D. 1876, at 10 o'clock A. M., at the north door of the court house, corner of LaSalle and Adams sts., nearest LaSalle st., in the said city of Chicago, sell and dispose of the premises above and in said trust deed described, subject to a certain other trust deed, dated May 18, 1874, to secure the principal sum of six thousand five hundred dollars, and all the right, title, benefit and equity of redemption of the said Jabez Barker and Margaret Barker, his wife, and John K. Beatty and Kate Beatty, his wife, their heirs or assigns therein, at public auction, for the highest and best price the same will bring in cash.

Dated December 23d, 1875.

J. V. CLARKE, Trustee.

E. & A. VAN BUREN, Attys. for Trustee. 14-17 17-20

WALTER G. GOODRICH,
Attorney, 78 Dearborn street.

TRUSTEE'S SALE.—WHEREAS, HARRIET S. Bankson (widow) did, on the first day of February, A. D. 1875, execute and deliver to the undersigned, as trustee, her trust deed dated on the day and year aforesaid, and recorded in the recorder's office of Cook county, Illinois, on the fourth day of February, A.D. 1875, in book 454 of records, on page 217, which said trust deed was given to secure the payment of said Harriet S. Bankson's certain promissory note payable to the order of Horace A. Goodrich, for the sum of four hundred and eighty and 50-100 dollars, with interest at the rate of eight per centum per annum, said note being dated the first day of February, A. D. 1875, and due on the first day of November, 1875.

And whereas, default has been made in the payment of said promissory note, and application has been made by the legal holder of said note to me,

Now, therefore, notice is hereby given, that I, the undersigned, by virtue of the authority in me by said trust deed vested, and at the request of the holder of said note, will on Wednesday, the sixteenth (16th) day of February A. D. 1876, at eleven (11) o'clock in the forenoon, at the west door of the Adams street front of the court house in the city of Chicago, county of Cook and State of Illinois, at public auction, to the highest and best bidder, for cash, sell the premises described and conveyed by said trust deed, to wit:

The two story frame house, together with all the appurtenances thereof, situate upon lots four (4) and five (5), in Hamline's subdivision of the northeast quarter of block fifty-two (52), of the Canal Trustee's subdivision of section seven (7), township thirty-nine (39), north range fourteen (14), east of the third (3d) principal meridian, and also all the right, title and interest of said Harriet S. Bankson, in and to said lots four (4) and five (5) aforesaid, derived through and by a lease thereof before that time made from Melinda Hamline to said Harriet S. Bankson, together with all the right, title, interest and equity of redemption of the said Harriet S. Bankson, her heirs and assigns in and to the above described premises.

Dated Chicago, January 8th, 1876.

E. F. ALLEN, Trustee.

WALTER G. GOODRICH, Atty. 16-17-20

LEVI SPRAGUE,
Attorney. Room 13 Major Block.

ESTATE OF JOHN WALSH, DECEASED.—Notice is hereby given to all persons having claims and demands against the estate of John Walsh, deceased, to present the same for adjudication and settlement at a regular term of the County court of Cook county, to be holden at the court house, in the city of Chicago, on the third Monday of February, A. D. 1876, being the 21st day thereof.

Chicago, December 11th, A. D. 1875.

MARY WALSH, Administratrix.

LEVI SPRAGUE, Atty. 13-18a

ESTATE OF CHARLES WIRTH, DECEASED.—Notice is hereby given to all persons having claims and demands against the estate of Charles Wirth, deceased, to present the same for adjudication and settlement at a regular term of the county court of Cook county, to be holden at the court house, in the city of Chicago, on the third Monday of February, A. D. 1876, being the 21st day thereof.

Chicago, December 18th, A.D. 1875.

MARIE WIRTH,
FREDERICK MAHLA,
Executors.

ROSENTHAL & PENCE, Attys. 13-18

ESTATE OF JOHN G. BROWN DECEASED.—Notice is hereby given to all persons having claims and demands against the estate of John G. Brown, deceased, to present the same for adjudication and settlement at a regular term of the County court of Cook county, to be holden at the court house, in the city of Chicago, on the third Monday of February, A. D. 1876, being the 21st day thereof.

Chicago, December 21st, A. D. 1875.

15-20a GERHARD KLANER, Administrator.

DAVID FALES,
Attorney.

TRUSTEE'S SALE.—WHEREAS, OMAR NEWman, of the city of Chicago, of the county of Cook, and State of Illinois, by his two certain deeds of trust, both dated the eleventh day of March, A. D. eighteen hundred and seventy-four, and recorded in the recorder's office of Cook county, State of Illinois, in book 349 of records, on page 243 and 244, did convey to Oliver B. Green, in trust, the real estate hereinafter described; one of said conveyances being made to secure the prompt payment of the bond of the said Omar Newman for the penal sum of $22,000, conditioned upon the payment by the said Omar Newman to one Mary F. Green, of the city of Worcester, in the State of Massachusetts, of the sum of eleven thousand dollars and interest thereon, in manner following, to wit:

One thousand dollars on the first day of June, A. D. 1875, and two thousand (2,000) dollars on the first day of June, A.D. 1876, and eight thousand (8,000) dollars on the first day of June, A.D. 1879, with interest at the rate of ten per cent. per annum, payable semi-annually, on all of said principal moneys unpaid until payment of the same, said semi-annual interest to be paid on the eleventh days of September and March, occurring in each year, from and after said date thereof, except that the interest due on each of said portions of said principal at the date of maturity of each of said portions, shall be paid at the maturity of said portion of said principal sum, according to thirteen several interest coupons of even date herewith, made by said Omar Newman, and payable at the First National Bank of Chicago, with ten per cent. interest after due. Said indebtedness being a part of the purchase money of the premises hereinafter described. And the other of said conveyances being made to secure the payment of two (2) promissory notes both dated the eleventh day of March, A. D. 1874, and signed by the said Omar Newman, and payable to the order of Mary R. Knudson, one of said notes being for the sum of fifteen hundred and thirty-three and 31-100 dollars, and due on the first day of June, A. D. 1874, and the other of said notes being for the sum of one thousand and sixty-three and 87-100 dollars, and due on the first day of November, 1874, both of said notes bearing interest at the rate of ten per cent. per annum after maturity, and being given for a part of the purchase money of the premises hereinafter described.

And whereas, it was provided in said deed of trust first mentioned, that in case of default in the payment of the said bond and interest coupons aforesaid in the said deed of trust mentioned, or of any part thereof according to the tenor and effect thereof, then it should be lawful for the undersigned, on the application of the legal holder of said bond and coupons, or either of them, to sell and dispose of all and singular, the said premises by said deed of trust granted, and all right, title, benefit and equity of redemption of the said Omar Newman, his heirs and assigns therein, at public auction, at the north door of the Chamber of Commerce building, in the city of Chicago, in the State of Illinois, or on said premises, or any part thereof, as may be specified in the notice of such sale, for the highest and best price the same will bring in cash, having previously given at least three weeks' notice of the place and time of such sale by advertisement in the Chicago Legal News or in any newspaper at that time published in the said city of Chicago, and to make, execute and deliver to the purchaser or purchasers at such sale, good and sufficient deed or deeds of conveyance for the premises sold.

And whereas, default has been made in the payment of said sum of one thousand dollars ($1,000) due the first day of June, A. D. 1875, and also in the payment of the coupon note for five hundred and fifty (550) dollars, representing the interest due the eleventh day of September, A. D. 1874, and also in the payment of the coupon note for five hundred and fifty dollars ($550), representing the interest due the eleventh day of March, A. D. 1875, and also in the payment of the coupon note for twenty-two and 22-100 dollars, representing the interest due the first day of June, A. D. 1875, and also in the payment of the coupon note for five hundred dollars ($500), representing the interest due the eleventh day of September, A. D. 1875, and such default have continued for the space of more than 20 days, and the said Mary R. Green has elected to declare and has declared the whole of said principal sums and arrearages of interest thereon immediately due and payable, as by the terms of said bond she was authorized to do, and there is now due thereon the sum of thirteen thousand and eleven and 7-100 dollars ($13,011.07).

And whereas, it was provided in said second mentioned deed of trust, that in case of default in the payment of the said promissory notes in the said deed of trust mentioned, or the interest that might grow due thereon, or of any part thereof, according to the tenor and effect of said notes, then it should be lawful for the undersigned, on the application of the legal holder of said notes, or either of them, to sell and dispose of the said premises by said deed of trust granted, and all right, title, benefit and equity of redemption of the said Omar Newman, his heirs and assigns therein, at public auction, at the north door of the Chamber of Commerce building, in the city of Chicago, in the State of Illinois, or on said premises, or any part thereof, as may be specified in the notice of such sale, for the highest and best price the same will bring in cash, having previously given at least three (3) weeks notice of the place and time of such sale, by advertisement in the Chicago Legal News or any newspaper at that time published in the said city of Chicago, and to make, execute and deliver to the purchaser or purchasers at such sale, good and sufficient deed or deeds of conveyance for the premises sold.

And whereas, default has been made in the payment of both said promissory notes in said second mentioned deed of trust mentioned, and there is now due thereon the sum of twenty-nine hundred and sixty-seven and 69-100 ($2,967.69) dollars.

Now, therefore, public notice is hereby given that on Saturday, the fifth day of February, A. D. 1876, at the hour of ten o'clock A. M., at the north door of the Chamber of Commerce building, I shall sell at public auction the following described premises, to wit:

Lot number twenty-three (23) in Laflin & Smith's subdivision of blocks numbered eighty-six (86) and eighty-nine (89) in the Canal Trustees' subdivision of the west half (½) of section number twenty-seven (27), in township number thirty-nine (39) north, of range number fourteen (14), east of the third (3d) principal meridian, for the highest and best price the same will bring in cash, for the purposes in said deeds of trust mentioned.

Chicago, January 8th, 1876.

OLIVER B. GREEN, Trustee.

DAVID FALES, Attorney. 16-17-19h

HOWARD HENDERSON,
Attorney.

CHANCERY NOTICE.—STATE OF ILLINOIS, } county of Cook, ss. Superior court of Cook county, February term, A. D. 1876. James H. Hill vs. Paul Weber.—In chancery.

Affidavit that upon due and diligent inquiry the place of residence of Paul Weber cannot be ascertained, having been filed in the office of the clerk of the Superior court of Cook county, notice is hereby given to the said Paul Weber, that the above named complainant heretofore filed his bill of complaint in said court on the chancery side thereof, and that a summons thereupon issued out of said court against the above named defendant, returnable on the first day of the term of the Superior court of Cook county, to be held at the court house in Chicago, in said Cook county, on the first Monday of February next (1876), as is by law required, and which suit is still pending.

JOHN J. HEALY, Clerk.

HOWARD HENDERSON, Complts. Solr. 16-19

E. B. SHERMAN,
Attorney.

ESTATE OF JOHN MILLER, DECEASED.—Notice is hereby given to all persons having claims and demands against the estate of John Miller, deceased, to present the same for adjudication and settlement at a regular term of the County court of Cook county, to be holden at the court house, in the city of Chicago, on the third Monday, being the 21st day of February, A. D. 1876.

Chicago, January 6th, 1876.

SUSAN MILLER, Administratrix.

E. B. SHERMAN, Attorney. 16-21

CHICAGO LEGAL NEWS.

SATURDAY, JANUARY 22, 1876.

The Courts.

UNITED STATES SUPREME COURT.

OCTOBER TERM, 1875.

CHARLES A. NICHOLS, assignee of A. M. EATON, *v.* A. M. EATON et al.

CONSTRUCTION OF WILL—RIGHT OF TESTATOR TO MAKE THE INSOLVENCY OF A LEGATEE TERMINATE ALL HIS LEGAL VESTED RIGHT IN THE ESTATE OF SUCH TESTATOR—DISCRETION OF TRUSTEES.

1. ESTATE TERMINATED ON INSOLVENCY OF LEGATEE.—The will provided that if certain sons of the testatrix should respectively alienate or dispose of the income to which they were entitled under the trusts of the will, or if, by reason of bankruptcy or insolvency, or other means whatsoever, said income could no longer be personally enjoyed by them respectively, but the same would become vested in or payable to some other person, then the trust expressed in said will concerning so much thereof as would so vest should immediately cease and determine. The court held this provision in the will valid.

2. DISCRETION OF TRUSTEES.—The court passes upon the validity of a provision placing certain portions of the income in the hands of the trustees, in their discretion, but without its being obligatory upon them, to pay or to apply for the use of the sons of the testatrix so much and such parts of the income to which her said sons would have been entitled under a certain trust named in the will in case a forfeiture in said will provided for had not happened.

3. ALIENEATION—LIFE ESTATE.—The court does not see that the power of alienation is a necessary incident to a life estate in real property, or that the rents and profits of real property and the interests and dividends of personal property may not be enjoyed by an individual without liability for his debts being attached as a necessary incident to such enjoyment. The court is not prepared to follow the English doctrine upon this subject.—[ED. LEGAL NEWS.]

Mr. Justice MILLER delivered the opinion of the court.

The controversy in this case arises on the construction and legal effect of certain clauses in the will of Mrs. Sarah B. Eaton. At the time of her death, and at the date of her will, she had three sons and a daughter, being herself a widow and possessed of large means of her own. By her will she devised her estate real and personal, to three trustees, upon trusts to pay the rents, profits, dividends, interest and income of the trust property to her four children equally, for and during their natural lives, and after their decease, in trust for such of their children as shall attain the age of twenty-one, or shall die under that age having lawful issue living, subject to the condition that if any of her children should die without leaving any child who should survive the testatrix and attain the age of twenty-one years, or die under that age leaving lawful issue living at his or her decease, then, as to the share or respective shares, as well original as accruing, of such child or children respectively, upon the trusts declared in said will concerning the other share or respective shares. The will also contained a provision that if her said sons respectively should alienate or dispose of the income to which they were entitled under the trusts of the will, or if, by reason of bankruptcy or insolvency, or any other means whatsoever, said income could no longer be personally enjoyed by them respectively, but the same would become vested in or payable to some other person then the trust expressed in said will concerning so much thereof as would so vest should immediately cease and determine. In that case, during the residue of the life of such son, that part of the income of the trust fund was to be paid to the wife and children, or wife or child, as the case might be, of such son, and in default of any objects of the last mentioned trust, the income was to accumulate in augmentation of the principal fund.

There is another proviso which, as it is the main ground of the present litigation, is here given verbatim, as follows:

"Provided, also, that in case at any future period circumstances should exist which, in the opinion of my said trustees, shall justify or render expedient the placing at the disposal of my said children, respectively, any portion of my said real and personal estate, then it shall be lawful for my said trustees, in their discretion, but without its being in any manner obligatory upon them, to transfer absolutely to my said children respectively, for his or her own proper use and benefit, any portion not exceeding one-half of the trust fund from whence his or her share of the income, under the preceding trusts, shall arise; and immediately upon such transfer being made, the trusts hereinbefore declared concerning so much of the trust fund as shall be so transferred shall absolutely cease and determine; and in case, after the cessation of said income as to my said sons respectively, otherwise than by death, as hereinbefore provided for, it shall be lawful for my said trustees, in their discretion, but without its being obligatory upon them, to pay to or apply for the use of my said sons respectively, or for the use of such of my said sons and his wife and family, so much and such part of the income to which my said sons respectively would have been entitled under the preceding trusts in case the forfeiture hereinbefore provided for had not happened."

The daughter died soon after the mother, without issue and unmarried. The defendant Amasa M. Eaton, one of the sons of the testatrix, failed in business and made a general assignment of all his property to Charles A. Nichols for the benefit of his creditors, in March, 1867, and in December, 1868, was, on his own petition, declared a bankrupt, and said Nichols was duly appointed his assignee in bankruptcy. The defendant was then, and during the pendency of this suit, unmarried and without children. The executors and trustees of the will were William M. Bailey and George B. Ruggles, a son of testatrix by a former husband, and her son Amasa M. Eaton, the present defendant and bankrupt.

It will be seen at once that, whether we look to the assignment before bankruptcy, or to the effect of the adjudication of bankruptcy and the appointment of Nichols as assignee in that proceeding, one of the conditions had occurred on which the will of Mrs. Eaton had declared that the devise of a part of the income of the trust estates to Amasa M. Eaton should cease and determine, and as he had no wife or children in whom it could vest, it became, by the alternative provision of the will, a fund to accumulate until his death or until he should have a wife or child who could take under the trust.

But Nichols, the assignee, construing the whole of the will together, and especially the proviso, which we have given verbatim, to disclose a purpose, under cover of a discretionary power, to secure to her son the right to receive to his own use the share of the income to which he was entitled before the bankruptcy, in the same manner afterwards as if that event had not occurred, brought this bill to subject that income to administration by him, as assignee in bankruptcy, for the benefit of the creditors. His claim is founded on the proposition, ably presented here by counsel, that a will which expresses to vest in a devisee either personal property, or the income of personal or real property, and secure to him its enjoyment free from liability for his debts, is void, on grounds of public policy, as being in fraud of the rights of creditors, or, as expressed by Lord Eldon in Brander *v.* Robinson, 18 Vesey, 433, "if property is given to a man for his life the donor cannot take away the incidents of a life estate."

There are two propositions to be considered as arising on the face of this will as applicable to the facts stated: 1. Does the true construction of the will bring it within that class of cases, the provisions of which on this point are void under the principle above stated? and, 2d, if so, is that principle to be the guide of a court of the United States sitting in chancery?

Taking for our guide the cases decided in the English courts the doctrine of the case of Brander *v.* Robinson seems to be pretty well established. It is equally well settled that a devise of the income of property, to cease on the insolvency or bankruptcy of the devisee, is good, and that the limitation is valid. (Demmill *v.* Bedford, 3 Vesey, 149; Brander *v.* Robinson, 18 Vesey, 429; Rockford *v.* Hackmen, 9 Hare; Lewin on Trusts, 80, chapter vii., sec. 2; Tillinghast *v.* Bradford, 5 Rhode Island, 205.)

If there had been no further provision in regard to the matter in this will than that on the bankruptcy or insolvency of the devisee, the trust as to him should cease and determine, or if there had been a simple provision that in such event that part of the income of the estate should go to some specified person other than the bankrupt, there would be no difficulty in the case. But the first trust declared after the bankruptcy for this part of the income is in favor of the wife, child, or children of such bankrupt, and in such manner as said trustees in their discretion shall think proper. There does not seem to be any doubt that if the bankrupt devisee had a wife or child living to take under this branch of the will that there would be nothing left which could go to his assignee in bankruptcy. The cases on this point are well considered in Lewin on Trusts, above cited, and the doctrine may be stated that a direction that the trust to the first taker shall cease on his bankruptcy, and shall then go to his wife or children, is valid, and the entire interest passes to them, but that if the devise be to *him* and his wife or children, or if he is in any way to receive a vested interest, that interest, whatever it may be, may be separated from those of his wife or children and be paid over to his assignee. (Page *v.* Way, 3 Beavan, 20; Perry *v.* Roberts, 1 Mylne & Keene, 4; Rippon *v.* Norton, 2 Beavan, 63; Lord *v.* Bunn, 2 Younge & Collier Chanc'y R., 98). Where, however, the devise over is for the support of the bankrupt and his family, in such manner as the trustees may think proper, the weight of authority in England seems to be against the proposition that anything is left to which the assignee can assert a valid claim. (Twopenny *v.* Peyton, 10 Simon, 487; Godden *v.* Crowhurst, Ib., 642).

In the case before us, the trustees are authorized, in the event of the bankruptcy of one of the sons of testatrix without wife or children, which is the condition of the trust as to Amasa M. Eaton, to loan and reinvest that portion of the income of the estate in augmentation of the principal sum or capital of the estate until his decease, or until he shall have a wife or children capable of receiving the trust of the testatrix forfeited by him.

There does not seem thus far any intention to secure or revest in the bankrupt any interest in the devise which he had forfeited, and there can be no doubt that but for the subsequent clauses of the will there would be nothing in which the assignee could claim an interest. But there are the provisions that the trustees may, at their discretion, transfer, at any time, to either of the devisees, the half or any less proportion of the share of the fund itself which said devisee would be entitled to if the whole fund were to be equally distributed, and the further provision that in case after the *cesser* of income provided for in case of bankruptcy or other cause, it shall be lawful, but not obligatory, on her said trustees, to pay to said bankrupt or insolvent son, or to apply for the use of his family, such and so much of said income as said son would have been entitled to in case the forfeiture had not happened.

It is strongly argued that these provisions are designed to evade the policy of the law already mentioned, that the discretion vested in the trustees is equivalent to a direction, and that it was well-known it would be exercised in favor of the bankrupt.

The two cases of Twopenny *v.* Peyton and Godden *v.* Crowhurst, above cited from 10 Simons, seem to be in conflict with this doctrine; while the cases cited in appellant's brief go no further than to hold that when there is a right to support or maintenance in the bankrupt, or the bankrupt and his family, a right which he could enforce, then such interest, if it can be ascertained, goes to the assignee.

No case is cited, none is known to us, which goes so far as to hold that an absolute discretion in the trustee, a discretion which, by the express language of the will, he is under no obligation to exercise in favor of the bankrupt confers such an interest on the latter, that he or his assignee in bankruptcy can successfully assert it in a court of equity or any other court.

As a proposition, then, unsupported by any adjudged case, it does not commend itself to our judgment on principle. Conceding to its fullest extent the doctrine of the English courts, their decisions are all founded on the proposition that there is somewhere in the instrument which creates the trust a substantial right, a right which the appropriate court would enforce, left in the bankrupt after his insolvency and after the *cesser* of the original and more absolute interest conferred by the earlier clauses of the will. This constitutes the dividing line in the cases which are apparently in conflict. Applying this test to the will before us it falls short, in our opinion, of conferring any such right on the bankrupt. Neither of the clauses of the provisos contain anything more than a grant to the trustees of the purest discretion to exercise their power in favor of testatrix's sons. It would be a sufficient answer to any attempt on the part of the son in any court to enforce the exercise of that discretion in his favor, that the testatrix has in express terms said that such exercise of this discretion is not "in any manner obligatory upon them," words repeated in both these clauses. To compel them to pay any of this income to a son after bankruptcy, or to his assignee, is to make a will for the testatrix which she never made, and to do it by a decree of a court is to substitute the discretion of the chancellor for the discretion of the trustees, in whom alone she reposed it. When trustees are in existence, and capable of acting, a court of equity will not interfere to control them in the exercise of a discretion vested in them by the instrument under which they act. (Hill on Trustees, 486; Lewin on Trusts, 538; Boss *v.* Goodsall, 1 Younge & Collier, 617; Madison *v.* Andrew, 1 Vesey, Sr., 60.) And certainly they would not do so in violation of the wishes of the testator.

But while we have thus attempted to show that Mrs. Eaton's will is valid in all its parts upon the extremest doctrine of the English Chancery court, we do not wish to have it understood that we accept the limitations which that court has placed upon the power of testamentary disposition of property by its owner. We do not see, as implied in the remark of Lord Eldon, that the power of alienation is a *necessary* incident to a life estate in real property, or that the rents and profits of real property and the interest and dividends of personal property may not be enjoyed by an individual without liability for his debts being attached as a necessary incident to such enjoyment. This doctrine is one which the English Chancery court has engrafted upon the common law for the benefit of creditors, and is comparatively of modern origin. We concede that there are limitations which public policy or general statutes impose upon all dispositions of property, such as those designed to prevent perpetuities and accumulations of real estate in corporations and ecclesiastical bodies. We also admit that there is a just and sound policy peculiarly appropriate to the jurisdiction of courts of equity to protect creditors against frauds upon their rights, whether they be actual frauds or constructive frauds. But the doctrine that the owner of property, in the free exercise of his will in disposing of it, cannot so dispose of it, but that the object of his bounty, who parts with nothing in return, must hold it subject to the debts due his creditors, though that may soon deprive him of all the benefits sought to be conferred by the testator's affection or generosity, is one which we are not prepared to announce as the doctrine of this court.

If the doctrine is to be sustained at all, it must rest exclusively on the rights of creditors. Whatever may be the extent of those rights in England, the policy of the States of this Union, as expressed both by their statutes and the decisions of their courts has not been carried so far in that direction.

It is believed that every State in the Union has passed statutes by which a part of the property of the debtor is exempt from seizure on execution or other process of the courts. In short, is not by law liable to the payment of his debts. The extent and nature of this exemption varies in the different States. In some it extends only to the merest implements of household necessity. In others, it includes the library of the professional man, however extensive, and the tools of the mechanic; and in many, it embraces the homestead in which the family resides. This has come to be considered in this country as a wise as it certainly may be called a settled policy in all the States. To property so exempted the creditor has no right to look, and does not look, as a means of payment when his debt is created. And while this court has steadily held, under the constitutional provision against impairing the obligations of contracts by State laws, that such exemption laws when first enacted are invalid as to debts then in existence, it

has always held that as to contracts made thereafter, the exemptions were valid.

This distinction is well founded in the sound and unanswerable reason that since the creditor knows when he parts with the consideration of his debt that the property so exempt can never be made liable to its payment, he is neither defrauded nor injured by the application of the law to his case. Nothing is withdrawn from this liability which was ever subject to it, or to which he had a right to look for its discharge in payment. The analogy of this principle to the devise of the income from real and personal property for life seems perfect. In this country all wills or other instruments creating such trusts are recorded in public offices where they may be inspected by every one, and the law in such cases impntes notice to all persons concerned of all the facts which they might know by the inspection. When, therefore, it appears by the record of a will that the devisee holds this life estate or income, dividends, or rents of real and personal property, payable to him alone, to the exclusion of the alienee or creditor, the latter knows that in creating a debt with such person he has no right to look to that income as a means of discharging it. He is neither misled nor defrauded when the object of the testator is carried out by excluding him from any benefit of such a devise.

Nor do we see any reason in the recognized nature and tenure of property and its transfer by will, why a testator who *gives*, who gives without any pecuniary return, who gets nothing of property value from the donee, may not attach to that gift the incident of continued use, of uninterrupted benefit of the gift, during the life of the donee. Why a parent, or one who loves another and wishes to use his own property in securing the object of his affection, as far as property can do it, from the ills of life, the vicissitudes of fortune, and even his own improvidence or incapacity for self-protection, should not be permitted to do so, is not readily perceived.

These views are well supported by adjudged cases in the State courts of the highest character.

In the case of Fisher *v.* Taylor, 2 Rawle, 33, a testator had directed his executors to purchase a tract of land, take the title in their name in trust for his son, who was to have the rents, issues, and profits of it during his life, free from liability for any debts then or thereafter contracted by him. The Supreme Court of Pennsylvania held that this life estate was not liable to execution for the debts of the son. "A man," says the court, "may undoubtedly dispose of his land so as to secure to the object of his bounty, and to him exclusively, the annual profits. The mode in which he accomplishes such a purpose, is by creating a trust estate, explicitly designating the uses and defining the powers of the trustees. * * Nor is such a provision contrary to the policy of the law or to any act of assembly. Creditors cannot complain because they are bound to know the foundation on which they extend their credit."

In the subsequent case of Holdship *v.* Patterson, 7 Watts, 547, where the friends of a man made contributions by a written agreement to the support of himself and family, the court held that the installments which they had promised to pay could not be diverted by his creditors to the payment of his debts, and Gibson, Chief Justice, remarks, that "the fruit of their bounty could not have been turned from its object by the defendant's creditors had it been applicable by the terms of the trust to his personal maintenance, for a benefactor may certainly provide for the maintenance of a friend without exposing his bounty to the debts or imprudence of the beneficiary."

In the same court, as late as 1864, it was held that a devise to a son of the rents and profits of an estate during his natural life, without being subject to his debts and liabilities, is a valid trust, and the estate being vested in trustees the son could not alienate. (Shankland's Appeal, 47 Penn. State R., 113.)

The same proposition is either expressly or impliedly asserted by that court in the cases of Ashurst *v.* Given, 5 Watts & Sergeant, 323; Brown *v.* Williamson, 36 Penn. State, 338; Still *v.* Spear, 45 Penn. State, 168.

In the case of Leavitt *v.* Bierne, 21 Connecticut, Waite, Justice, in delivering the opinion of the court, says: "We think it in the power of a parent to place property in the hands of trustees for the benefit of a son and his wife and children, with full power in them to manage and apply it at their discretion, without any power in the son to interfere in that management or in the disposition of it until it has actually been paid over to him by the trustees." And he proceeds to argue in favor of the existence of this power, from the vicious habits or intemperate character of the son, and the right of the father to provide against these misfortunes.

In the case of Nickell et al., *v.* Handly et al., 10 Grattan, 336, the court thus expresses its view on the general question, though not, perhaps, strictly necessary to the judgment in that case: "There is nothing in the nature or law of property which would prevent the testatrix, when about to die, from appropriating her property to the support of her poor and helpless relatives, according to the different conditions and wants of such relatives, nothing to prevent her from charging her property with the expense of food, raiment, and shelter for such relatives. There is nothing in law or reason which should prevent her from appointing an agent or trustee to administer her bounty."

In the case of Pope's Executors *v.* Elliott & Co, 8 Ben. Monroe, 56, the testator had directed his executors to pay for the support of Robert Pope the sum of $25 per month. Robert Pope having been in the Rocky Mountains until the sum of $225 of these monthly payments had accumulated in the hands of the executors, his creditors filed a bill in chancery, accompanied by an attachment to subject this fund to the payment of their debt.

The Court of Appeals of Kentucky say that it was the manifest intent of the testator to secure to Robert the means of support during his life to the extent $25 per month or $300 per year, and that this intent cannot be thwarted, either by Robert himself by assignment or alienation, or by his creditors seizing it for his debts, unless the provision is contrary to law or public policy. And after an examination of the statutes of Kentucky and the general principles of equity jurisprudence on this subject, hold that neither of these are invaded by the provision of the will.

The last case we shall refer to specially is that of Campbell *v.* Foster, 35 New York Court of Appeals, 361.

In that case it is held, after elaborate consideration, that the interest of a beneficiary in a trust fund, created by a person other than the debtor, cannot be reached by a creditor's bill; and while the argument is largely based upon the special provision of the statute regulating the jurisdiction of the court in that class of cases, the result is placed with equal force of argument on the general doctrines of the court of chancery, and the right of the owner of property to give it such direction as he may choose without its being subject to the debts of those upon whom he intends to confer his bounty.

We are not called upon in this connection to say how far we would feel bound, in a case originating in a state where the doctrine of the English Courts had been adopted so as to become a rule of property, if such a propositon could be predicated of a rule like this. Nor has the time which the pressure of business in this court authorizes us to devote to this case permitted of any further examination into the decisions of the state courts. We have indicated our views in this matter rather to forestall the inference that we recognize the doctrine relied on by appellants, and not much controverted by opposing counsel, than because we have felt it necessary to decide it, though the judgment of the court may rest equally well on either of the propositions which we have discussed. We think the decree of the court below may be satisfactorily affirmed on both of them.

Other objections have been urged by counsel, such as that the bankrupt is himself one of the trustees of the will, and will exercise his discretion favorably to himself. But there are two other trustees, and it requires their joint action to confer on him the benefits of this trust. It is said that one of them is mentally incompetent to act, but this is not established by the testimony. It is said, also, that since his bankruptcy, the defendant, Amasa, has actually received $25,000 of this fund, and that should go to the assignee, as it shows conclusively that the objections to the validity of the will were well founded.

But the conclusive answer to all these objections is, that by the will of decedent, a will which, as we have shown, she had a lawful right to make, the insolvency of her son terminated all his legal vested right in her estate and left nothing in him which could go to his creditors or to his assignees in bankruptcy, or to his prior assignee; and that what may have come to him after his bankruptcy through the voluntary action of the trustees under the terms of the discretion reposed in them, is his lawfully, and cannot now be subjected to the control of his assignee.

The decree of the circuit court is, therefore, affirmed.

SUPREME COURT OF ILLINOIS.

SYLVESTER G. DOWNEY, admr., *v.* CHARLES D. BEACH.

Appeal from Jersey.

NOTE—30 PER CENT. AFTER DUE—PENALTY —USURY.

1. That it is not usurious to insert in a note that it shall bear interest at the rate of ten per cent. per annum, with 30 per cent. per annum interest after maturity, as liquidated damages for non-payment when due.

2. That in the absence of fraud, etc., a court of equity in all such cases will withhold its aid, and leave the parties to their legal rights whatever they may be.

3. The complainant charged that he was ignorant of the fact that the note contained the provision for the payment of 30 per cent. after maturity until the day he filed his bill. The court *held* that this was his own negligence against which it is not the province of a court of law or equity to afford him relief.—[ED. LEGAL NEWS.]

SCOTT, C. J.—This bill was to enjoin a suit at law. Complainant borrowed of Talitha and Charlotte Crane, $500, for which he gave them his promissory note with Edwin Colean as surety. The note bears date of July 26th, 1870, payable at one year after date; and bears interest at the rate of ten per cent. per annum, with thirty per cent. per annum interest after maturity as liquidated damages for non-payment when due. Both payees are now dead, and the present defendant as administrator of the estate of the last survivor, had commenced suit on the note to enforce collection. A default had been entered, when this bill was filed to prevent the entering of final judgment. With his bill, complainant tenders the principal of the note, with interest at ten per cent. per annum compounded, together with all costs of the common law case, and seeks to enjoin the further prosecution of the suit.

This court has repeatedly held that contracts like this one are not usurious if made with a single purpose to secure prompt payment of the principal sum. Although the party agrees to pay a rate of interest in excess of that allowed by statute after maturity, it is nevertheless regarded as in the nature of penalty to secure prompt payment. In such cases, the penalty is liquidated damages, fixed by the solemn agreement of the parties. When made for the sole purpose of securing prompt payment, and understandingly entered into, such contracts are valid at law and may be enforced. The cases that hold this doctrine are so numerous in this court, it is not necessary to do more than cite a few of them. Lawrence *v.* Cowles, 13 Ill., 577; Smith *v.* Whittaker, 23 Ill., 367; Blair *v.* Chamblin, 39 Ill., 521.

Connecting the fact insisted upon, that the provision for the payment of thirty per cent. per annum after maturity is in the nature of penalty, still in the light of the decisions of this court, the penalty imposed is liquidated damages, which have been the subject of adjustment by the previous agreement of the parties themselves. A court of equity in all such cases will withhold its aid and leave the parties to their legal rights, whatever they may be. There is nothing in the facts alleged in this case, that calls for the interposition of a court of chancery on equitable grounds. Complainant charges, he was ignorant of the fact, that the note contained the provision for the payment of thirty per cent. after maturity, and had no knowledge of it until the day he filed his bill. This was his own negligence; against which it is not the province of a court of law or equity to afford him relief. It is not claimed, he could not read, and if he failed to read the provisions of the note when he made it, in the absence of any fraudulent practices to procure the execution, he must bear the consequences.

When the note became due it was the duty of the maker to pay it or procure further extension upon such terms as the payees were willing to grant. By paying the note at maturity he could have relieved himself from the payment of the penalty agreed upon for non-payment. Having failed to avail of his privilege in this regard, it must be understood he did so in view of the fact, the damages had been adjusted and fixed by previous positive agreement. He had his election, and a court of equity will not relieve him from the consequences of his own contract.

No deception was practiced by the payees or either of them, to procure the note with the provision for the payment of thirty per cent. after maturity. They were guilty of no wrong or oppression. By no act or word did they mislead or deceive the maker into giving the note with the penalty attached. If he has suffered injury that may now seem grievous, it is attributable alone to his own *laches*. It is his own contract, which is valid at law, and a court of equity will not interfere to set it aside.

The decree will be reversed and the bill dismissed.

Decree reversed.

SUPREME COURT OF ILLINOIS.

JANUARY TERM, 1875.

THE AMERICAN INS. CO., garnishee of MARTIN ANDERSON, *v.* JAMES H. PADFIELD et al.

Appeal from the St. Clair Circuit.

MEANING OF THE WORDS "VACANT AND UNOCCUPIED" IN A POLICY.

1. The words "vacant and unoccupied" mean that the premises should be without an occupant; that is, without any person living in the house.

2. That under the evidence in this case, the house was, within the meaning of the policy, vacant and unoccupied at the time it was burnt.—[ED. LEGAL NEWS.]

Opinion of the court by WALKER, J.

In this case appellees sued out a writ of attachment against Martin Anderson from the Circuit Court of St. Clair county. It was issued on the 28th day of February, 1872, and was served on the same day by levying on lots eleven and twelve in Williams' first addition to the town of Lebanon in that county, and by summoning James R. Padfield as garnishee.

On the first day of the following July, Anderson applied for and obtained a policy of insurance on a dwelling-house on the premises. The policy was for insurance for five years from that date. Early in September following the house was destroyed by fire, and on the 20th of the same month a further affidavit was filed in the attachment suit, that by reason of the destruction of the house by fire, that the property attached had thereby become insufficient to satisfy plaintiff's debt, and thereupon an alias writ of attachment was issued and served on appellants as garnishees.

On the 2d day of April, 1873, a trial was had in the attachment suit, which resulted in a judgment in favor of plaintiffs for $1,196.43, and costs of suit. Interrogatories were filed, which were answered by appellants, denying all indebtedness to Anderson, and all liability on the policy. At the September term, 1874, a trial was had upon the interrogatories and answer, by the court and a jury. A verdict was found for the plaintiff for six hundred dollars. A motion for a new trial having been overruled, judgment was rendered on the verdict, from which this appeal is prosecuted.

The defense relied on consists of the breach of three conditions in the policy: First, that Anderson warranted the premises to be free from incumbrances, when he made his application for insurance, when it was at the time subject to the levy of the writ of attachment. Second, that the house had become vacant, and had so remained for about two months before, and was vacant at the time it was burnt, and Anderson had notice thereof; whilst the validity of the policy was, by a condition therein, made to depend upon its continuous occupancy, and it provided that if the house should become vacant and unoccupied the policy should become void, and the assured should not be entitled to recover for loss. And third, the assured did not make and furnish the proofs of loss, as required by the policy, within the time or in the manner specified.

In the view we take of this case, it becomes unimportant whether or not the levy of the attachment was an incum-

brance until followed by a judgment, or whether the property seized was defendant's homestead, and not liable to attachment; other questions control and are decisive of the case.

The evidence incontestably shows that no person was residing in this house, or had been for about two months prior to, or at the time of the fire. The tenant in possession at the time the insurance was effected, testified that he had removed from the house that length of time before, and notified the assured of the fact, who requested him to lease it to some one else, but afterward countermanded the directions, and it had remained unoccupied until it was burnt.

He says that he did not consider that he had anything more to do with the house, that he was not occupying it or paying rent for it; he only had the key to deliver to Anderson when he came back from Missouri. That there was a table, a crib, and a straw tick in it, in the house when it burnt. A number of persons testified that the house was vacant.

We think there cannot be the slightest room to doubt that the house was vacant and unoccupied when the fire occurred, and had been for two months previously. A fair and reasonable construction of the language, "vacant and unoccupied," is that it should be without an occupant, without any person living in it. This is the popular meaning of the language as appears from the evidence. Several witnesses knowing that no one was residing in it, testified that it was vacant, and so would the great majority, if not all persons, say the same thing. The language is not used in the technical, but in a popular sense. If the house had been situated when insured as it was when it was burned, and the assured had answered that it was occupied by a tenant, would any one doubt that such representation was false? Or suppose assured had owned the property in fee, had been, as he was, absent in Missouri, and had received the key from the tenant, and he had answered that he was occupying the house, although it had been situated as it was when it was burned, would any one suppose that the technical rule that the fee draws to it for some purposes the possession, have made the answer true, or that he could have answered his warranty, that the house was occupied by him? We suppose no one would so contend. For some purposes the law might regard the leaving a few such articles in a house as carrying with them possession in their owner. But in such cases there must be an intention to thus take and hold possession, but here there was ho such intention by the tenant; on the contrary he disclaimed all possession. But such possession is not occupancy in its popular sense.

We think it clear, from the evidence in the case, that the house when burnt was vacant and unoccupied. That Anderson was notified of the fact and acquiesced in it, and that the condition that it should remain occupied was broken, and the policy became void, and the company [were not liable] to pay any portion of the loss.

This disposes of the case and renders the discussion of other questions unnecessary. The judgment of the court below must be reversed and the cause remanded.

Judgment reversed.

We are under obligations to C. A. Beecher, of the St. Louis bar, for the following opinion:

SUPREME COURT OF INDIANA.

Opinion January 4, 1876.

The Ohio & Mississippi R. W. Co. *v.* John A. Yohe et al.

Appeal from Martin Circuit Court.

PROPERTY TAKEN ON PROCESS IN HANDS OF CARRIER.

1. That a common carrier of goods is excused from liability for not carrying and delivering the goods, when they were, without any act, fault or connivance on his part, seized by virtue of legal process and taken out of his possession.

2. That a carrier is not bound when the goods are so taken out of his possession to follow them up and be at the expense of asserting the claim thereto of the party to or for whom he undertook to carry them.

3. That the carrier should have given immediate notice to the consignors that the goods had been seized and taken out of his possession.—[Ed. Legal News.]

Opinion of the court by Downey, J.

This was an action by the appellees against the appellant, as a common carrier. The action was commenced in Knox county and the venue changed to Martin.

It is alleged, in the complaint, that the plaintiffs, consignors, on the 3d day of November, 1873, delivered to the appellant, at Bridgeport, Illinois, a quantity of wheat to be carried to Vincennes, Indiana, and delivered to the appellees.

The appellant signed and delivered a bill of lading evidencing the contract, and this is the foundation of the action. It is alleged that the company failed to deliver the wheat according to the contract, etc.

A demurrer to the complaint was filed and overruled.

The defendant moved the court, on affidavit, to stay the action until the determination of an action of replevin in Illinois, involving the title and ownership of the property, brought by one Johnson. This motion having been overruled, the plaintiff asked that Johnson be made a party to this action, which request was also refused.

Thereupon the defendant pleaded, in substance, that while the wheat was in a car of the company at Bridgeport, awaiting the coming of a train and engine to transport it to Vincennes, in accordance with the bill of lading, without any act, fault, or connivance of the defendant, or of any of her agents, servants, or employees, Johnson sued out of the office of the clerk of the Circuit Court of Lawrence county, Illinois, a writ of replevin, the said Johnson then and there claiming to be the owner, and entitled to the possession of said wheat; and by virtue of said writ the sheriff of said county seized and took the same out of the possession of the defendant, and delivered the same to said Johnson, according to law and the command of said writ, and the said Johnson took possession thereof; that said action is yet pending, by reason whereof the defendant was prevented from transporting said wheat to said city of Vincennes and delivering the same to the plaintiffs. It is averred that said Lawrence Circuit Court had jurisdiction, and certified copies of the papers and process in the action of replevin, etc., are filed with the answer.

A demurrer to the answer—on the ground that it did not state facts sufficient to constitute a defense to the action—was filed by the plaintiffs and sustained by the court. The defendant declining to answer further, there was judgment for the plaintiffs.

It is objected to the complaint, that it does not show that the plaintiffs own the wheat, or that they are the consignees mentioned in the bill of lading. There is no foundation for these objections. The complaint alleges that the plaintiffs purchased the wheat of the consignors; that the consignors delivered the same to the defendant, and that the defendant executed the bill of lading to the plaintiffs.

It is further assigned as error that the court improperly sustained the demurrer to the answer.

The question presented is this: Is a common carrier of goods excused from liability for not carrying and delivering the goods, when they are, without any act, fault or connivance on his part, seized by virtue of legal process, and taken out of his possession?

It is impossible for the carrier to deliver the goods to the consignor when they have been seized by legal process and taken out of his possession.

The carrier cannot stop, when goods are offered to him for carriage, to investigate the question as to their ownership. Nor do we think he is bound, when the goods are so taken out of his possession to follow them up and be at the trouble and expense of asserting the claim thereto of the party to or for whom he undertook to carry them.

We do not think it material what the form of the process may be. In any case the carrier must yield to the authority of legal process.

After the seizure of the goods by the officer, by virtue of the process, they are in the custody of the law, and the carrier cannot comply with his contract without a resistance of the process and a violation of law.

The right of the sheriff to hold the goods involved questions which could only be determined by the tribunal which issued the process, or some other competent tribunal, and the carrier had no power to decide them. If the goods were wrongfully seized, the plaintiffs have their remedy against the officer who seized them, or against the party at whose instance it was done.

As between these parties, the process would be no justification if the plaintiffs were the owners and entitled to the possession of the goods.

It makes no difference, we think, that the process was issued by a tribunal of a State different from that in which the plaintiffs reside. The rule must be the same as in a case where the process emanates from a court in the State of the plaintiffs' residence.

It cannot be denied that the carrier must obey the laws of the several States in which it follows its calling. The laws of Illinois which give force and effect to a writ of replevin must be obeyed. It cannot say to the sheriff, who is armed with a writ issued in due form of law, commanding him to take the property, that it has executed a bill of lading and thereby agreed to transport the property to another State and therefore he cannot have it.

The sheriff would have the right, and it would become his duty to call out the power of the county to aid in serving his lawful process. The carrier is deprived of the possession of the property by a superior power—the power of the State—the *vis major* of the civil law—and in all things as potent and overpowering, as far as the carrier is concerned, as if it were the "act of God" or "the public enemy." In fact, it amounts to the same thing. The carrier is equally powerless in the grasp of either.

In Redfield on Railways, Vol. 2, p. 158, the learned author says, that it is settled that the bailee may defend against the claim of the bailor, by showing that the goods were taken from him by legal process. And in a note he adds: "If this defense were not valid it might compel the party to resist the acts of a public officer in the discharge of his duty, which the law will never do." (*Ibid*, note 27, p. 158)

In New York, where property was forcibly seized by a constable, on a complaint that the property had been stolen, the court said: "But my associates, not passing upon the question whether the property was delivered to the true owners, desire to put this case upon the doctrine that the common carrier is exonerated from his obligation to his bailor, when the property is taken from him by due legal process, provided the bailor is promptly notified of such taking. The judgment of the Supreme Court should, therefore, be affirmed. All affirm on the ground that when property is taken from the carrier by legal process, and he gives notice thereof, he is discharged." (Bliven et al. *v.* Hudson River R. R., 36 N. Y., 407.)

In this same case in the Supreme Court it was held that, "The bailee must assure himself and show the court, that the proceedings are regular and valid; but he is not bound to litigate for his bailor, or to show that the judgment or decision of the tribunal issuing the process, or seizing the goods, was correct in law or in fact. This is the rule as to bailees in general, and it includes the case of common carriers." (*Ibid*, 35 Barbour, 191.)

In a case where goods were seized on attachment, the court held: "If goods are taken from a bailee or carrier by authority of law, in any case coming within these exceptions, there is no doubt that it is a good defense to an action by the bailor or shipper for a non-delivery." (Van Winkle *v.* United States Mail Steamship Co., 37 Barbour, 124.)

In Vermont, where goods in the hands of a wharfinger were seized under legal process, the court held that if they are taken from the wharfinger or warehouseman by lawful process, the wharfinger or warehouseman can protect himself in a suit brought against him by the owner." (Burton et al. *v.* Wilkinson et al., 18 Vt., 190.)

In the Supreme Court of the United, States, where goods in the hands of a carrier had been attached by a third party, in a suit brought by the consignees on a bill of lading, Mr. Justice Nelson, in delivering the opinion of the court, said: "After the seizure of the goods by the sheriff, under the attachment, they were in the custody of the law, and the defendant could not comply with the demand of the plaintiffs without a breach of it, even admitting the goods to have been at the time in his actual possession. The case, however, shows that they were in the possession of the sheriff's officer or agent, and continued there until disposed of under the judgment upon the attachment. It is true that these goods had been delivered to the defendant as carriers, by the plaintiffs, to be conveyed by them to the place of destination, and were seized under an attachment by third persons; but this circumstance did not impair the legal effect of the seizure or custody of the goods under it, so as to justify the defendant in taking them out of the hands of the sheriff. The right of the sheriff to hold them was a question of law, to be determined by the proper legal proceedings, and not at the will of the defendant, nor that of the plaintiffs. The law on this subject is well settled, as may be seen on a reference to the cases collected in sections 453, 290 and 350 of Drake on Attachments, 2d edition." (Stiles *v.* Davis et al., 1 Black, 106.)

The above case is precisely the same as the case at bar, with the single exception that in Stiles *v.* Davis et al., the goods were seized under an attachment, while in this case they were seized under a writ of replevin.

There is a defect, however, in the answer which justified the Circuit Court in holding it bad, and that is the want of an averment that the defendant gave immediate notice to the plaintiffs that the goods had been seized and taken out of its possession.

That the carrier should do this seems to be a necessary and reasonable qualification of the rule. The rule is laid down with this qualification in Bliven *v.* The Hudson River R. R. Co., *supra*.

The only averment as to notice in the answer is this: "And the defendant further avers that said plaintiffs had notice before the commencement of this suit, that said action of replevin was pending," etc. The bill of lading bears date November 3d, 1873. The writ of replevin bears date November 5th, 1873. The wheat was taken and delivered to Johnson on the 6th day of November, 1873. The record does not show when this action was commenced. The first date given is that of the filing of the amended complaint, February 7th, 1874.

There is nothing from which we can find that proper diligence was used by the carrier in giving notice of the seizure of the goods. It may be repeated that the wheat was received by the defendant on the 3d day of November, 1873, and was not seized until the 6th. It is probable that a satisfactory excuse or reason should be alleged why the wheat was not moved before the seizure.

The answer admits the receipt of the wheat and the execution of the bill of lading on the 3d of November, and then alleges: "And thereupon said wheat was loaded into a car of said defendant then standing upon her side track at said town of Bridgeport, and while said wheat was in said car and so upon said track awaiting the arrival of a train and engine to transport the same to the city of Vincennes aforesaid, in accordance with the terms of said bill of lading, and without the act, fault or connivance of the defendant or of any of her agents, servants or employees, one Benjamin F. Johnson sued out," etc.

It is very questionable whether this shows proper diligence on the part of the carrier. We need not, however, decide this question.

Clearly we think the carrier cannot make use of the fact that the property has been seized by legal process to shield himself from liability for his own negligence, or to justify any improper confederation with the party or officer seizing the goods.

The rulings of the court on the motions to stay the proceedings in the action, and to cause Johnson to be made a party to the action were properly overruled for the reasons stated in determining the validity of the answer.

A question is made concerning the publication of a deposition taken by the plaintiff, which, it is contended, was not properly directed on the envelope. But as the deposition was not used on the trial, the defendant could not have been injured by this ruling.

The judgment is affirmed, with costs.

LXIX. ILLINIOS REPORTS.

We have received from Hon. NORMAN L. FREEMAN, official reporter, the entire advance sheets of the 69th volume of Illinois Reports, from which we take the following head-notes:

PROMISSORY NOTE.

1. *Assignee after maturity takes subject to all defenses.*—The purchaser of a promissory note after maturity takes it subject to any defense that exists against it in the hands of the payee. If the payee, at the date of the assignment, is indebted to the maker in a sum greater than is due on the note, such indebtedness may be set off in an action on the note by the assignee.—(Opinion by SCOTT, J.)—*Bissell* v. *Curran*, p. 20.

INSTRUCTION.

2. *Repeating.*—Where the law, so far as applicable to the facts of a case, is stated in an instruction given as liberally as the party could ask, the refusal of the court to give others not based on the evidence, asked by such party, is not erroneous.

BILL OF EXCEPTIONS.

1. *When necessary.*—The office of a bill of exceptions is to bring into and make something a part of the record which would otherwise be no part of the same. Where a case is decided on demurrer, there being no motion made or evidence heard, a bill of exceptions is wholly unnecessary.—(Opinion by WALKER, J.)—*Chase* v. *De Wolf*, p. 47.

ILLEGAL FEES.

2. *Justice of the peace will not be compelled to issue execution for.*—Where a constable charges illegal and unreasonable fees for executing a writ of replevin issued by a justice of the peace, the latter named officer will not be compelled by *mandamus* to issue an execution for their collection.

JUDGMENT FOR COSTS.

3. *Embraces only legal costs.*—Where a plaintiff, in replevin before a justice of the peace, recovers judgment for costs, it does not embrace all the costs and charges claimed, but only all the plaintiff's legal costs to be taxed, and any charge for services not enumerated in the statute is not embraced in such judgment.

FEES.

4. *For executing writ of replevin.*—The statute allowing reasonable charges to constables, to be allowed by the justice of the peace, for removing and taking care of property levied on, can not be construed to embrace a charge for taking and delivering property under a writ of replevin; and a charge of $85 for replevying one or two express wagon loads of goods, amounting to almost half the value of the goods, was held to be illegal, unjust, and oppressive.

EXECUTION.

5. *For collection of illegal costs claimed, properly recalled.*—Where a justice of the peace renders a judgment for costs generally, and afterwards taxes illegal and oppressive fees charged as costs in the case, and issues an execution for their collection, he has the right, and it is his duty, to recall the execution, as, if a levy and sale were made under it, he would be liable to an action of trespass.

REDEMPTION.

1. *Right is purely statutory.*—The right of a judgment creditor to redeem from a previous judicial sale is purely statutory, and the right must be exercised in the manner required by the statute, or it will be invalid.—(Opinion by CRAIG, J.)—*Durby* v. *Davis*, p. 133.

2. *Of a less interest than sold, not allowed.*—Where judgment is recovered against two defendants, each of whom own an undivided one-fifth of a tract of land, and their interest is sold together, being the undivided two-fifths, a judgment creditor of one of them has no right to redeem as to the interest of his debtor by paying one-half the amount for which the land sold, with interest.

INJUNCTION.

1. *To prevent trespass.*—Before a court of equity will lend its aid to enjoin a mere trespass, the facts and circumstances must be alleged in the bill from which it may be seen that irreparable mischief will be the result of the act complained of, and that the law can afford the party no adequate remedy.—(Opinion by SCOTT, J.)—*Goodel et al* v. *Losson*, p. 146.

2. Where the owner of a leased building sought, by bill in chancery, to enjoin a tenant, who had leased rooms from a prior owner, from attaching to the building a sign of three gilded balls to indicate his business of pawnbroker, there being no stipulation in the lease as to the signs to be used or where they should be placed: *Held*, that, if the owner would be injured in consequence of the acts sought to be restrained, his remedy at law was complete and adequate, and that it did not appear that any irreparable injury would follow the proposed act.

JUDGMENT.

Form in debt.—It is an irregularity to render a judgment in damages in an action of debt. But it is not such an error as to justify a reversal, and the irregularity is cured by section 56 of the Practice act of 1872.—(Opinion by BREESE, C. J.)—R. R. I. & St. L. R. R. Co. *v.* Steele, p. 253.

CHATTEL MORTGAGE.

1. *Title passes on breach.*—A chattel mortgage is but a conditional sale, and when the mortgagor fails to perform the condition, the title to the mortgaged property, so far as it is held by the mortgagor, vests in the mortgagee. Where possession is taken in accordance with the terms of the mortgage, the title passes, even though the debt be not then due. The fact that the mortgagee is required to sell the property, and render the surplus, after payment of the debt, etc., to the mortgagor, will not prevent the title from vesting in the mortgagee, as purchaser.—(Opinion by WALKER, J.)—Duffee *v.* Grinnell et al., p. 371.

2. *Mistake in date to certificate of acknowledgement.*—Where a chattel mortgage was in fact executed and acknowledged in 1871, but the justice dated the certificate of acknowledgement in 1872, and the mortgage was recorded on the day of its execution, and it did not appear but that the entry in the justice's docket showed the proper date: *Held*, that the mistake did not vitiate the mortgage, as no injury could have resulted from it to creditors or purchasers.

3. *Acknowledgement taken by justice out of his precinct.*—Where a chattel mortgage is acknowledged before a justice of the peace residing in the same precinct with the mortgagor, the acknowledgement will not be bad because it was taken in another township or precinct. It will be good if taken anywhere in the county, provided the justice resided in the same election precinct with the mortgagor.

4. *Not affected because the justice keeps his docket in another township.*—A chattel mortgage will not be rendered invalid from the fact that the justice of the peace takes his docket out of the township of his residence, and keeps his office, for convenince a few rods in an adjoining township, especially when it is readily accessible for inspection.

PARTIES PLAINTIFF.

5. *In replevin.*—Where mortgagees of chattels seek to reduce them to possession by replevin, under a clause giving them this right whenever they should feel insecure, etc., they, being joint owners, must sue jointly,

JUSTICE OF THE PEACE.

6. *Whether he may act out of his township.*—A justice of the peace having jurisdiction throughout his county, may issue any writ where he has jurisdiction, wherever he may be in the county, so that he make it returnable to his office, which must be in his township. So he may take and certify an acknowledgement to a deed, mortgage or other instrument anywhere in his county. But when he has to hear and adjudicate on any question, that must be done in his township and at his office, which must be at a known place.

EXECUTION.

7. *What subject to levy and sale.*—Where a chattel mortgage authorizes the mortgagor to retain possession of the property until default in payment, with no provision enabling the mortgagee to take possession in any other event than of default in payment, the interest of the mortgagor may be seized and sold under execution, at any time before the mortgage debt falls due, and the purchaser will succeed to the rights of the mortgagor, and nothing more.

8. But where the mortgagee is authorized, by the terms of the mortgage, to take possession if the property is levied upon, or he shall, at any time, feel unsafe or insecure, the levy of an execution on the property can not defeat the mortgagee's right to reduce it to possession. In such a case, it is only with the permission or non-action of the mortgagee that the property can be sold under execution.

U. S. DISTRICT COURT, MASS.

In Re BENJAMIN F. SPILLMAN.

In composition cases the register is entitled to five dollars for incidental expenses; three dollars for the meeting; five dollars when acting under a special order; ten cents for filing each paper; twenty cents for each folio of the examination; twenty five cents for each affidavit; one dollar for ordering an adjournment of a meeting, and ten cents for each folio of the report.

When the resolution has been definitely passed upon, the business of the meeting is over and no adjournment is needed.

The confirmation need not be presented at the meeting of creditors.

If the confirmation is presented to the register, the time spent in examining it may be considered as spent under a special order.

No memoranda are necessary in composition cases.

LOWELL, J.—In examining the question of the fees of the register in the case of composition, I have found that the fee bill, though not specially intended to reach such cases, may be applied to them. Without tracing all the items of charge in this case, I will point out such as seem to be allowable:

First. The general docket fee for office and incidental expenses, five dollars.

Second. For general meeting of creditors, three dollars.

Third. For service under order of court not exceeding, per day, * five dollars.

Fourth. Filing papers, not before filed with clerk, each † ten cents.

Fifth. Examination of bankrupt taken down in writing, for each folio, twenty cents.

Sixth. For affidavits when necessary, each twenty-five cents.

Seventh. Adjournments. A large part of the fees proposed to be charged in the bill sent in by the register are derived from adjournments and adjourned meetings. I understand the ground for making such adjournments was that the confirmation was incomplete. The statute does not contemplate that the confirmation should be made at a meeting, nor that it should be presented to the register. The debtor may procure it within any reasonable time after the meeting. Knowing that they often were presented and filed, I required the register's opinion upon them if filed with him. My orders are perhaps annulled by the action of the Supreme Court. Whether so or not, I shall at once repeal them. I do not understand the Supreme Court to require the register to pass upon the confirmation, and he is at liberty to refuse to do so. If he does examine it he may be considered to do so under a special order, and the time taken may be added to that spent in examining the resolution itself. Whenever the resolution has been definitely passed upon by the creditors assembled in person or by proxy, the business of the meeting is over. I believe it has been ruled in England that such a meeting cannot be lawfully adjourned, except by such a vote as would be requisite to pass the resolution. How that may be by our law I have not had occasion to decide. When an adjourned meeting is necessary (if ever) a fee for ordering it, one dollar; and for holding it, three dollars.

Eighth. Memoranda. The short memoranda are not necessary in composition cases, because the report which the register is required to make of the proceedings includes them. The memoranda are needed in ordinary cases to keep the creditors, who may choose to apply to the court, informed of the state of the proceedings from time to time during the months or years that the case may be pending. In composition cases the register ought to keep a docket and minutes, and can send them up if called for. He may, however, tax the folios of his report itself, for each folio, ten cents.—*Pittsburg Legal Journal.*

* I suppose in most cases the responsible duty which is put upon the register to examine and report will take time beyond and besides the holding of the meeting.

† A paper signed by any number of persons is but one paper. This was long since decided in taxing fees of the clerk.

THE ENGLISH RAILROAD LAW.—It would seem from the following extract which we take from the London *Law Times*, that they have as much trouble in England with their railroad legislation as we do in this country:

The railway commissioners appear to have been actively employed of late. Three of the more important cases heard before them (in which written judgments were delivered) are Innes *v.* Brighton and Southwestern Railway Companies; Greenock Railway Company *v.* Caledonia Railway Company; Bell *v.* Midland Railway Company (33 L. T. Rep. N. S. 534-40). Of these, the two last are cheifly interesting to the parties concerned, and only indirectly affect the public. Mr. Innes's case, however, is one of general concern. It was a complaint by a number of inhabitants of Merton and Tooting "of an insufficient number of trains and general lack of station and other accommodation." As to the number of trains the court held that the number of ten daily each way was sufficient, but trusted that the defendants would "endeavor so to fix the Tooting trains as to make their times to and from London harmonize as closely as possible with the hours most convenient for the generality of the passengers by them." As to through booking, the court held that it was not necessary in order to establish a claim to this very "reasonable facility" that "the service should be continuous by the same train, or by a connection between trains." Lastly, with regard to station accommodation, the commissioners decided that a station without a carriage approach, and without any protection from the weather, was not a sufficient one, and the defendent's had a month's grace accorded to them for the purpose of making improvements, the court suggesting only, and not ordering, the manner in which the improvements should be made. The decision is a satisfactory one, and should be widely known, being we believe the first instance in which an application respecting passenger traffic has been fully heard, for the more early and important application of the Dover corporation was unfortunately for the public, compromised at an early stage. We observe, by the way, that a formidable point of law was raised, but not decided in Mr. Innes's case. It was urged for the defendants that as railway companies cannot be compelled to become carriers by the ordinary law (see Hare *v* London and Northwestern Railway Company, 2 J. & H. 1 per Wood, V. C.), so neither can they be compelled to become so under the Railway and Canal Traffic Act of 1854. It is impossible to exagerate the importance of the point, but we cannot entertain any doubt upon it. The companies are compellable by the commissions to carry, otherwise the act of 1854 is meaningless.

THE FUGITIVE SLAVE CIRCULAR.—The London *Law Times* says: We are glad to perceive the substituted Fugitive Slave Circular does not depart from the prominent principle of its predecessor. It was our contention, in opposition to Sir Henry James, that the comity of nations forbids the ship of war of any country from setting up within the territorial waters of another country a law of the ship's flag at variance with the law of such other country. "Within the territorial waters of a foreign state," says the circular, "you are bound by the comity of nations, while maintaining the proper exemption of your ship from local jurisdiction, not to allow her to become a shelter for those who would be chargeable with a violation of the law of the place." We maintain this view, notwithstanding the array of so-called authorities brought forward by Sir W. V. Harcourt. The consequence of the clamor against a statement of the law which was certainly a law of expediency, if not strictly recognized by professors of international jurisprudence, is that the position of the fugitive slave is made worse than it was before. Captains are directed not to receive a fugitive slave on board unless by refusing to do so his life would be placed in manifest danger. We are not surprised that the anti-slavery enthusiasts are not satisfied with these amended instructions. Their content, however, cannot be purchased by the sacrifice of legal principles and a violation of the comity of nations.

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Lex vincit.

MYRA BRADWELL, Editor.

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We call attention to the following opinions, reported at length in this issue:

The Right of a Testator to Make the Insolvency of a Legatee Terminate his Legacy.—The opinion of the Supreme Court of the United States delivered by Miller, J., was to the right of a testatrix to make the insolvency of a legatee terminate all his vested right in the estate of such testatrix. The court decline to follow the English doctrine. In concluding the opinion, Miller, J., says the insolvency of the testatrix's son terminated all his legal vested right in her estate and left nothing in him which could go to his creditors or to his assignee in bankruptcy, or to his prior assignee; and that what may have come to him after his bankruptcy through the voluntary action of the trustees under the terms of the discretion reposed in them by the will, is his lawfully, and cannot now be subjected to the control of his assignee.

Policy — Vacant and Unoccupied.—The opinion of the Supreme Court of this State by Walker, J., as to the construction to be given to the words "vacant and unoccupied" in a policy of insurance.

Note—Thirty Per Cent. after Due.—The opinion of the Supreme Court of this State by Scott, C. J., holding that the provision in a note that it shall bear interest at the rate of ten per cent. per annum, with thirty per cent. per annum interest after maturity as liquidated damages for non-payment when due, is not usurious, and is to be regarded as a penalty for not paying the note at maturity; that in the absence of fraud the collection of such penalty will not be enjoined by a court of equity. This is in accordance with the former decisions of the Supreme Court of this State. It is quite common now to insert in notes a clause that they shall bear a greater rate of interest than ten per cent. after maturity.

Property Taken on Legal Process in Hands of Carrier.—The opinion of the Supreme Court of Indiana, by Downey, J., holding that a common carrier of goods is excused from liability for not carrying and delivering the goods when they were, without any act, fault or connivance on his part, seized by virtue of legal process and taken out of his possession; that a common carrier is not bound, when the goods are so taken out of his possession, to follow them up and be at the expense of asserting the claim thereto of the party to or for whom he undertook to carry them.

Proposed Reforms.—We call attention to the article of C. C. Bonney of the bar of this city, published in another column, proposing reforms in the administration of justice and a re-organization of the Supreme Court of the United States. Mr. Bonney has given this subject much thought and his suggestions are worthy of careful consideration.

NOTES TO RECENT CASES.

BANKRUPTCY—FRAUDULENT PREFERENCE.

The English House of Lords held, in Butcher *v.* Stead, 33 L. T. Rep., N. S., 541, that when an insolvent debtor pays a particular creditor, with a view of giving him a preference over his other creditors, if the creditor is not aware of the debtor's insolvency, and of his intention to give him such preference, the transaction is protected by the 92d sec. of the Bankrupt act 1869, and is not void as a fraudulent preference.

PRINCIPAL AND AGENT — BROKER—CUSTOM OF MARKET.

The House of Lords, in Robinson *v.* Mollett, 33 L. T. Rep., N. S., 544, held that a person who employs a broker to transact business for him in a market, with the usage of which the principal is unacquainted, gives him authority to contract upon the footing of such usages, provided they are only such as relate to the mode of performing the contract, and do not change its intrinsic character.

BREACH OF WARRANTY—MEASURE OF DAMAGES.

The English Court of Common Pleas Division, in Smith *v.* Green, 33 L. T. Rep., N. S., 572, held, in an action for breach of warranty, the plaintiff may recover damages for any injury which is the direct and natural conseqnence of his acting on the faith of the warranty. In the case under consideration, the plaintiff, a farmer, bought a cow from the defendant, warranted free from foot and mouth disease. The cow had the disease, and communicated it to plaintiff's other cows, with which she was placed. In an action for breach of the warranty, the judge below told the jury that if defendant knew, or ought to have known, that plaintiff, in the ordinary course, would put the cow with other cows, they might give damages for the loss of the other cows; and the court, on appeal, held this to be a right direction.

Recent Publications.

Ohio Digest: Containing all Reported Ohio Cases to the year 1875. By J. Bryant Walker and Clement Bates. Vol. II. Cincinnati: Robert Clarke & Co. 1875. Sold by E. B. Myers, Law Bookseller, Chicago. Price for the two volumes, $12.00.

On page 72 of the present volume, we noticed the appearance of the first volume of the Ohio Digest. We spoke of it as being worthy of the patronage of the profession. Having, upon several occasions since, had to consult it, we are confirmed in our previous good opinion of the work. The second volume is in the same general style as the first, and completes the digest. It will save every person who has to consult the Ohio Reports much labor. We wish we had as complete a digest down to date of the Illinois Reports.

Public Land Laws, passed by Congress from March 4, 1869, to March 3, 1875, with the Important Decisions of the Secretary of the Interior, and Commissioner of the General Land Office, the Opinions of the Assistant Attorney General, and the Instructions Issued from the General Land Office to the Surveyors General and Registers and Receivers during the same period. By Henry N. Copp, General Land Office, Editor of Copp's U. S. Mining Decisions, and proprietor of Copp's Land Owner. Published by the Compiler: Washington, D C. 1875. Sold by E. B. Myers, Law Bookseller, Chicago.

Mr. Copp says the radical changes in the Laws of Congress, the decisions of the Interior Department, and the instructions of the General Land Office, during the past five years, have created an urgent demand for a reliable authority on public land law; that this work resumes the subject where it was left by previous compilations in 1870, and brings it down to April, 1875. We admire the honesty of Mr. Copp in saying that the Digest of Judicial Decisions is taken from Brightly's Digest, and is brought down to 1873. It should have been brought down to the time of going to press. To persons interested in knowing the Land Laws and the rulings of the departments construing the same, this work will be indispensable.

Governor Haines.—The question arises, is the Hon. E. M. Haines, Speaker of the House of Representatives, entitled to be addressed as governor, and has he ever been governor of the State? The 17th Section of Article V. of the Constitution provides that "in case of the death, conviction or impeachment, failure to qualify, resignation, absence from the State, or other disability of the governor, the powers, duties and emoluments of the office for the residue of the term, or until the disability shall be removed, shall devolve upon the lieutenant governor." The 19th Section of said Article provides that if the lieutenant-governor shall for any of the causes mentioned above become incapable of performing the duties of governor, "the same shall devolve upon the speaker of the house of representatives." On last week, Governor Beveridge was absent in Washington, and during that time Lieutenant-Governor Glenn, who is also president of the senate, was absent one whole day in St. Louis. They were both, therefore, for the time being, "incapable of performing the duties of governor," and in the language of the constitution "the same devolved upon the speaker of the house of representatives," who is Mr. Haines. He is not only entitled to be called governor Haines, but he has actually for one day been governor of the State. We are sorry that he did not do more to remind the people that he was once governor of the State. He might have removed the members of the board of railroad and warehouse commissioners, which act would have been applauded by more than two-thirds of the people of the State. He could have called an extra session of the General Assembly, and in the call limited their action to such subjects as he pleased. He could in a single day have removed all the officers appointed by the governor and appointed a new set. A nice question arises as to the proper construction to be given to the words "or other disability" in the clause of the Constitution, "absence from the State or other disability of the governor, etc." When Governor Beveridge and Governor Glenn are both out of the State, there is no doubt about the powers and duties of Governor Haines; but suppose both of these governors are in the State, but in such a condition as not to be able to reach the capital in time to do some official act which ought to be done, and governor Haines is there and ready to do it and perform any other official act, has he the right to do it? Would this come within the meaning of the words, "or other disability?" We are not aware of any authority upon the question, but we have no doubt circumstances might arise which would not only justify, but make it the duty of the speaker of the house to act as governor when both the governor and lieutenant-governor were in the State.

Evanston, *Jan.* 21, 1876.

To the Editor of Chicago Legal News:

Will you please inform me whether a justice of the peace, elected in the town of Evanston, can have *two* offices—one in South Evanston and one in Evanston. An answer through your News will oblige "Curious."

Curious will find his question answered in the head-notes to the opinions of the Supreme Court of this State, published in this issue. A justice's office must be in a known place in the town for which he is elected. — Ed. Legal News.

The Attorney Generalship.—There are quite a number of able members of the bar who are candidates for this position. Attorney General Edsall, who has performed the duties with marked ability is a candidate for re election. Senator Eugene Canfield, who was a leading member of the last senate, is a candidate. Hon. E. Callahan, who represented the southern portion of the State in the last house of representatives with distinguished ability, is also a candidate. These gentlemen are all candidates for the nomination of the republican convention.

The Southern Law Review.—This valuable quarterly is edited by Seymour D. Thompson, of the *Central Law Journal*, and published by G. I. Jones & Co., of St. Louis, and is furnished to subscribers at $5.00 per annum. The contents of the January number are: I. The Early French Bar, by U. M. Rose; II. The Extra Territorial Force of Statutes, by M. A. Low; III. Notes of Current German Law, by William G. Hammond; IV. The Collateral Impeachment, by Parties and Privies, of Judgments in Personam of Sister States, by Robert O. Street; V. The Bar and the Growth of the Law, by Emory Washburn; VI. The Bench and Bar of the South and Southwest, by Henry S. Foot; VII. Damages for Injuries Resulting in Death, by G. W. Field; VIII. Liability of Railway Companies for Remote Fires, by Francis Wharton; IX. The Federal Courts, by Gustavus Schmidt; X. Book Reviews. This number of the *Review* commences with an excellent portrait of Judge Dillon, its first editor and present corresponding editor.

Judge Tipton is a candidate for Congress from the Bloomington district. He makes a popular circuit judge. We do not believe he will add to his reputation by going to Congress.

Marine Insurance.—We think that the majority of the Exchequer Division arrived at an erroneous conclusion in Gambles *v.* The Ocean Marine Insurance Company of Bombay, which we report to-day. The ship was insured from Pomaron to Newcastle-upon-Tyne, and for fifteen days after arrival. She arrived, and was damaged in port by a hurricane within the fifteen days. Here is a clear liability. She had, however, moved from one part of the port to another to take on board a cargo for a fresh voyage. This the majority of the court considered to be a deviation and variation of the risk. Reliance was placed upon Williams *v.* Shee (3 Camp, 469), and Hammond *v.* Reid (4 B. & Ald. 72), but neither of those cases really support the finding. The ship in Gamble's case was in the port contemplated by the parties. There was no deviation, nor was the risk in any way varied. The case seems rather within the principle of Raine *v.* Bell (9 East, 195), that if a ship be in a port for a necessary purpose (*a fortiori* in regular course), it is no deviation to trade, if the voyage be not delayed nor the risk varied. The appeal which is pending must be successful.—*The London Law Times.*

PROPOSED REFORMS IN THE ADMINISTRATION OF JUSTICE.

I.

DEPARTMENTS OF SUPREME COURT.

Increase the number of the judges of the Supreme Court of the United States to twelve, and divide the court into three permanent departments of four judges each.

Divide the business of the court into three permanent classes, and assign one such class to each department of the court.

Provide that each judge of the court shall be assigned to a particular department, and that he shall sit permanently therein. Provide that three judges shall constitute a quorum of each department for the transaction of business, and that the decision of a cause, by the department of the court to which it shall be assigned, shall be final and conclusive, except as below specified.

II.

HEARINGS BEFORE WHOLE COURT.

Provide that in all cases in which a dissenting opinion shall be filed, the cause shall be re-heard before the whole court.

Provide that a majority of the whole court may, at any time, order any cause to be heard or re-heard before the full bench, as the importance of the questions involved or the public welfare may seem to require.

The Supreme Courts of many of the States should be divided into similar departments.

III.

REVIEW FOR PROBABLE CAUSE AND CERTIFICATE OF POINTS IN DISPUTE.

Repeal the provisions of law which limit appeals to cases involving large amounts and provide for a review by the appellate court, in all cases in which a judge of that court shall certify that there is probable cause for such review.

Provide that the party aggrieved may require the presiding judge to certify to the appellate court the particular points of the case on which he desires to assign error, together with the decision of the court thereon; and that the cause shall be heard and determined by the appellate court, without any further or more complete transcript of the proceedings than may be reasonably necessary to a proper understanding of the questions involved.

IV.

DIRECT AND SPEEDY DECISION OF PUBLIC QUESTIONS.

Provide that the President of the United States, the Senate, the House of Representatives and the State governments respectively, may submit to the Supreme Court for decision, any question concerning the existence or the limitations of any power claimed by or against the same under the Constitution of the United States; and that such question shall thereupon be decided by the whole court, under such rules, regulations and directions for the hearing and argument thereof, as the court may prescribe.

V.

SPECIAL JUDGES TO ASSIST THE COURTS.

Provide that in all district and circuit courts, SPECIAL JUDGES from the ranks of the bar may be appointed for the trial of particular causes, as the pressure of business may from time to time require. Such judges to be selected by agreement of counsel, or by the presiding judge of the court, in case no particular objection be made by either party thereto; and to have all the powers of the presiding judge, for the trial of the causes submited to them; *Provided* that the presiding judge may exercise over them and their proceedings a summary jurisdiction to prevent oppression and abuse of power. The compensation of such special judges to be fixed by agreement of the parties with them; or if not so fixed, to be determined by the presiding judge of the court, in view of the nature and amount of the service involved. The public authorities to allow a reasonable *per diem* to apply on the compensation of such special judges, on account of the advantage to the public from the dispatch of business; and the residue of the expense to be divided between the parties as the court shall direct or the parties agree, in view of the delay and expense saved to them respectively.

VI.

PREVENTION OF LITIGATION WITHOUT PROBABLE CAUSE.

Provide that in any original case, either party, on filing a written submission to do and receive *substantial justice, on equitable terms*, without regard to any technical advantage, may thereupon have a *summary inquiry* to determine whether there be *probable cause* for litigating the matter according to the usual course of the court; and that if, upon such inquiry, the court shall find that there is not such probable cause, the court shall thereupon proceed to administer substantial justice between the parties, on equitable terms, by adequate orders, writs, and proceedings, from which there shall be no appeal, except upon the certificate of a judge of the appellate court that there is probable cause for a stay of such proceedings till the same can be reviewed, to obtain which certificate a reasonable time shall be allowed, as a matter of right.

VII.

QUALIFICATIONS OF JURORS.

Provide that upon all trials by jury, in civil cases, it shall be a cause of challenge, of any person called as a juror, that he does not appear to have such knowledge and experience as are reasonably required for the proper determination of the questions involved in the case.

VIII.

RELIEF FROM OPPRESSIVE ARRESTS AND SEIZURES.

Provide that in all cases for the seizure of the body or estate of any person or corporation, no process of seizure shall issue, except upon special cause, shown on oath, and the order of a judge or court therefor; and that the fact and cause of such seizure, when made, shall, at the request of the defendant, or of any person acting in his behalf, be forthwith certified to the appellate court, and that said court, or any judge thereof, may thereupon modify or discharge such seizure upon such terms, if any, as may appear to be just.

IX.

PREVENTION OF UNDUE DELAYS IN DECIDING CAUSES.

Provide that no case shall be held under advisement, or the decision thereof be delayed, for more than thirty days next after the submission thereof, in any court other than of last resort; nor more than ninety days in the court of last resort.

Provide that the unfinished business in the hands of any judge at the expiration of his term of office shall be completed by him, with the concurrence of his successor, in the same manner as though his official term had not expired.

X.

JUDICIAL CONDENSATION OF REPORTS AND REFORM OF PRACTICE.

Provide for a judicial commission to arrange in logical order, and in a condensed form, the doctrines of law contained in the reported cases, now too voluminous to be consulted with convenience and accuracy; and let the same commission reform and simplify, as far as practicable, the present forms and rules of practice. What is needed is, not the invention of a new system of pleading and practice, but simply a reform and improvement of the old system in accordance with the established and familiar rules of law.

C. C. BONNEY.

Chicago, Jany., 1876.

THE GRANGER CASES.

The Washington *Republican* of Wednesday, 12th inst., in speaking of the argument of the Granger cases in the Supreme Court of the United States, says:

The Supreme Court yesterday took up the Granger case, No. 552, The Chicago, Burlington and Quincy Railroad Company against the Attorney General of Iowa and others, which comes up on appeal from the Circuit Court of Iowa, and the argument is in progress, with the prospect of consuming two days in the delivery. The bill was filed to restrain the operation of the act of the State of Iowa establishing maximum rates of charges for the transportation of freight and passengers on State railroads, on the ground that it is in conflict with the provisions of the Federal Constitution, in that it impairs the contract contained in the charter of the road, under which it was established, to fix its own rates of compensation for the transportation of persons and property. It impairs not only the charter contract, but the contract between the company and its stockholders, bondholders and mortgagees; also, between the road and other roads with which it has existing contracts. It is also in conflict with the fourteenth amendment, in that it seeks to deprive the company of its property-rights without due process of law. It is in conflict with the provision of the Constitution which gives to Congress exclusive power to regulate commerce among the several States. Nor is it, in so far as it prescribes rates of compensation for the transportation of persons and property, a police regulation maintainable under the police power of the State. It also violates the constitution of Iowa, in that it is not uniform in its operation, establishing, as it does, one rate for some roads and other rates for other roads, making the burden of interference more onerous in some and more advantageous in others, and in cases where there is no natural diversity or class distinction between them. In reply to this the State contends that the act does not impair the charter contract, because by its charter there is no provision giving it the exclusive power and right to fix its rate of transportation, and where there is no such specific grant to a corporation it cannot be said that the exercise of the right to fix freight tariffs by the State in any manner affects the rights of the corporation. A statute, it is said, will not be held invalid by reason of any repugnancy to the Constitution, unless such repugnance is clear and undoubted. A conflict with some specified clause of the Constitution must be shown to exist beyond all reasonable doubt, or the law will be sustained. The burden is cast upon those who impugn its validity to show precisely where and the manner of its violation of the constitutional restriction. All legislative power is inherent in the people in their sovereign capacity. Another power has been delegated in a complete and unreserved manner to the legislature, except as restricted by the Federal Constitution.

The act complained of is legislative in its character, and within the scope of the legitimate powers of the legislature; but it is said that if the charter of the road contained a provision purporting to confer upon the company the exclusive right to establish its rates of tolls and fares such a provision would be invalid, because it is not competent for a legislature, by contract, to divest itself and future legislatures of the power to legislate for the public good. It holds its power in trust for the people, and can not divest itself of the power, but must exercise it at all times when required by the public good. In subsequently accepting from the State the land granted by the general government to aid in the construction of railroads in Iowa, the company expressly stipulated that it would at all times be subject to such regulations as the State might enact, and thereby surrendered any exclusive right it had previously possessed to fix its own fares and rates. The power to amend or repeal all laws creating corporations is given by the State constitution of 1857, and under this power it was competent for the legislature to make the law in question. The branch roads are subject to the operation of the law because they accepted the aid towards their construction under a statute expressly providing that roads accepting such aid should be subject to legislative control in regard to their charges for transportation.

The objection that the law is not uniform in its operation, it is said, is not sustained by showing that the railroads of the State are divided into classes, according to their gross earnings. As to the objection that it is a regulation of inter-State commerce, it is said that it is unnecessary to discuss the question, as the defendants disavow any attempt to apply the provisions of the act to inter-State transportation. It is, at least, in part constitutional; and that a law may stand and be in part constitutional and in part not, has been frequently held. The road is a foreign corporation, and it was therefore competent for the legislature to prescribe the terms upon which it should be permitted to transact business in Iowa.

In conclusion, it is said that the idea advanced that if this law is sustained all railroad property will become comparatively valueless, because of the insecurity of the investment, and that all efforts to raise money to construct roads will be fruitless, is shown to be a sombre flight of the imagination by the fact that one-half of the 3,500 miles of railway in Iowa have been constructed since the constitution of 1857, authorizing such legislation.

O. H. BROWNING and F. T. FRELINGHUYSEN for appellant, and M. E. CUTTS, attorney general for Iowa, for the State.

THE TESTIMONY OF EXPERTS.

The opinion of the Supreme Court of this State, delivered by Judge BREESE in the Quincy Will case, published in 8 CHICAGO LEGAL NEWS, 94, involving the question as to the weight to be given to the testimony of medical experts, has been commented on very generally by the legal press in this country, and also in England. The London *Law Times*, in referring to it, says:

The evidence of "experts" is apparently falling into discredit. In a case recently before Sir James Hannen, his lordship dealt severely with the evidence of experts in handwriting, which evidence the jury disregarded and found for the will. In a case recently before the Supreme Court of Illinois, Breese, J., delivering the opinion of the Court, spoke of the medical experts with undisguised contempt. He said: "These experts tell us, as do the books, there is no necessary connection of softening of the brain and apoplexy or paralysis, nor does cerebral softening usually proceed at a slow pace of years before death ensues. On a careful review of the testimony of these experts, we are unable to discover anything in the symptoms and history of the case justifying the conclusions of Dr. Bassett, that the testator was suffering from a cerebral softening. If mental imbecility did exist, it must have arisen from some other cause, and we feel confident we will be more likely to arrive at a just estimate of the mental condition and business capacity of the testator by relying on the accordant testimony of his lifelong aquaintances and neighbors with whom the testator was in frequent intercourse, rather than from the testimony of these medical gentlemen—and so would the jury. If we give heed to such testimony, and suffer it to prevail against the flood of proof in favor of the testator's competency, we should be doing great wrong, and departing from the rules we have laid down in like cases, to which we will hereafter refer. It must be apparent to every one, but few wills could stand the test of the fanciful theories of dogmatic witnesses who bring discredit on science and make the name of 'experts' a by-word and a reproach." An American contemporary, in alluding to the observations of the judge, remarks: "We concur with the judge above referred to; we would not give the testimony of these common-sense witnesses, deposing to what they know and saw almost every day for years, for that of so called experts who always have some favorite theory to support—men often as presumptous as they are ignorant of the principles of medical science."

SUPREME COURT OF INDIANA.

[From the Indianapolis Sentinel.]

CONTEMPT OF COURT—CARRYING OFF WITNESS—AFFIDAVIT PURGING OF THE CONTEMPT.

5024. Daniel Y. Haskitt *v.* The State of Indiana. Hamilton C. C. Reversed.

Downey, J., delivering the opinion of the court: Attachment proceedings against appellant for contempt of court. The affidavit on which the attachment was awarded shows that an indictment had been found in the court, on which the name of the daughter of appellant was indorsed as a witness, and that a summons had been issued and was in the hands of the sheriff to be served, requiring her attendance as a witness; that

appellant knew these facts and carried off the witness, etc. The motion to quash the attachment was properly overruled. (36 Ind., 196; Whart. Cr. Law, Vol. 3, section 3427).

The only other question in the case is as to the sufficiency of the affidavit filed by appellant to purge him of the alleged contempt, the court below holding it insufficient.

It has been held, in several cases in this court, that if the defendant, in such a case, deny, under oath, the facts constituting the alleged contempt, he should be discharged, leaving him, if he has sworn falsely, to be prosecuted for the perjury. (47 Ind., 528, and cases cited).

The court is of opinion that the answer of appellant was sufficient to purge him of the alleged contempt.

ACTION ON A PROMISSORY NOTE—SURETYSHIP—RELEASE BY EXTENSION OF TIME.

3587. Wiley White *v.* Edwin G. Whitney. Jefferson C. C. Reversed.

Biddle, C. J., delivering the opinion of court: Suit on a promissory note made by John Hugh and appellant. Process was not served on Hugh, nor did he appear in the case. Wiley answered, setting up suretyship on the note, and that Hugh, the principal, had obtained, for the consideration of $1, an extension of the time, from the payee, without his knowledge or consent.

The court is of opinion that the contract for delay was good, and could have been enforced by Hugh against the appellee. (43 Ind., 393; 44 Ind., 298); and that it operated as a release of the surety. (6 Ind., 128; 26 Ind., 338; 45 Ind., 300).

SUFFICIENCY OF DESCRIPTION OF PROPERTY IN A CHATTEL MORTGAGE.

3864. Jacob Ebberle et al. *v.* John Mayer. Jefferson C. C. Approved.

Biddle, C. J., delivering the opinion of the court: The only question in this case is as to the sufficiency of description of the property in the chattel mortgage.

The goods were described as follows: "All the stock, tools, fixtures and materials now on hand in the shop formerly occupied by said Krober & Co., on Central avenue, in the city of Madison, Indiana, and being the same property this day sold to us by said Krober, as in the invoice to us mentioned."

In 43 Ind., 494, the following description was held sufficient: "A ten-acre field of growing wheat on the northwest quarter, etc."

The court is of opinion that the description is sufficient.

BOARD OF COUNTY COMMISSIONERS — CONTRACTS BY.

4170. Burnett and the board of commissioners of Vigo county *v.* Abbott. Vermillion C. C. Worden, J.

Appellee has moved to strike out the papers stated by the clerk to have been filed as a substituted complaint. The court does not allow this motion. No objection was made below, this court presumes the filing was correct.

The court is of opinion that the complaint states no facts constituting a cause of action, because the contract out of which the cause of action arose was one which the board of commissioners had no power to make.

There is no law which authorizes them to make a contract for boring wells for oil, or sinking shafts for coal. Reversed.

PRACTICE—PLEADING.

4433. Theodore Humphrey and Harris, executor, etc., *v.* James H. Merritt and Huldah Merritt, Switzerland C. C. Biddle, C. J.

Merritt and wife filed their complaint against Theodore Humphrey and Jacob R. Harris, executor of Cornelius Humphrey deceased, alleging that Arthur Humphrey devised certain lands to said Huldah Merritt, his daughter, for life, and in fee to her children, and died; that his will was duly probated and recorded; that afterwards Theodore Humphrey and Cornelius Humphrey wrongfully entered upon said lands, plowed and cultivated the same, etc., and committed waste, without right, etc.,; the will is made an exhibit.

Appellants claim that the case should be reversed, because the plaintiffs show in their complaint how the plaintiff, Huldah Merritt, derives title to said lands, what that title is, and that she never took or received possession of said lands devised to her by her father; and until she did manifest her intention to accept said devise, and receive said lands by taking possession, or by offering to take possession, she is not in a condition to bring this personal action against the defendants for use and occupation.

The court is of opinion that this objection is of no force as against an action of test, which is the character of plaintiff's action; nor is the case, since the distinction between the forms of actions has been abolished, at all embarrassed by any technical notions of actual possession, as was necessary in trespass.

FILING CLAIM AGAINST ESTATE OF DECEDENT —NO FORMAL COMPLAINT NECESSARY.

4118. Post, administrator of, etc., Gustavus Schuman, *v.* Pedrick. Marion C. C. Reversed.

Worden, J., delivering the opinion of the court: Appellee filed a claim against the estate of the deceased, which raises the question in the case.

The court is of the opinion that the allegations in the fourth paragraph of the answer, as to willingness to perform, cannot be reconciled with the allegations in the complaint, that Schuman had sold the interest to third parties. The allegations in the answer may amount to an argumentation denial of the matter alleged in the complaint; but if so, no harm was done in sustaining the demurrer to the paragraph, as the whole complaint was put in issue by the general denial.

The first paragraph of the complaint goes upon the theory that as Schuman had put it out of his power to comply with his contract by selling the interest to other parties, the plaintiff had a right to treat the contract as rescinded and recover back what he had paid upon it. Is the paragraph good? The court thinks it is, (13 Ind., 206), no formal complaint being necessary; only a succinct statement of the claim.

But the court is of the opinion that the judgment must be reversed on account of error in assessing the amount of recovery, it being too large a sum.

PERSONAL LIABILITY OF TRUSTEES OF A SCHOOL CORPORATION UPON A CONTRACT TO A TEACHER.

4411. Morrison et al. *v.* McFarland, Howard C. C. Reversed.

Downey, J., delivering the opinion of the court: This is an action by appellee against appellant, in which she alleges that she was employed by appellants, the trustees of the school corporation of the town of Noblesville, etc., upon a contract to teach, etc., breaches of which are alleged and damages claimed.

There are numerous errors assigned, but the court does not deem it necessary to consider them all. The main question is as to the personal liability of the trustees.

The court is of opinion that the mere violation of the contract by the trustees in their official capacity, which they had entered into for the corporation, did not render them personally and individually liable.

THE XXV. OHIO REPORTS.

We have received from ROBERT CLARKE & Co., the publishers, the fifth number of the advance sheets of the 25th Ohio, from which we take the following headnotes.

Townsend's executors v. *O. Townsend et al*, p. 477.

CONSTRUCTION OF WILL—EXTRINSIC EVIDENCE.

1. In the construction of a will, the sole purpose of the court should be to ascertain and carry out the intention of the testator.

2. Such intention must be ascertained from the words contained in the will.

3. The words contained in the will, if technical, must be taken in their technical sense, and if not technical, in their ordinary sense, unless it appear from the context that they were used by the testator in some secondary sense.

4. All the parts of the will must be construed together, and effect, if possible, given to every word contained in it.

5. If a dispute arises as to the identity of any person or thing named in the will, extrinsic facts may be resorted to, in so far as they can be made ancillary to the right interpretation of the testator's words, but for no other purpose.

Reasin W. Shawhan v. *Peter Van Nest*. p. 490.

CONTRACT—DAMAGES—INTEREST.

Where the plaintiff, in pursuance of an agreement with the defendant, furnished the materials and constructed a carriage for the defendant, in accordance with his order and directions, for which a stipulated price was to be paid, and the defendant refused to receive and pay for it when completed and tendered—*Held:* That in an action brought for that purpose, the plaintiff is entitled to recover the contract price and interest from the time the money should have been paid.

George W. Stines v. *Miles Dorman*, p. 580.

AGREEMENT ENFORCED BY INJUNCTION.

A stipulation in a deed of conveyance, whereby the grantee, in part consideration for the conveyance, agrees for himself, his heirs, and assigns that the premises conveyed shall not be used or occupied as a hotel, so long as certain other property owned by the grantor shall be used for that purpose, binds both the grantee and all claiming under him, and may, in equity, be enforced by injunction.

Enyart et al. vs. *The Trustees of Hanover Township*, p. 618.

SPECIAL TAX—MAJORITY VOTING.

Where an act of the legislature authorized the trustees of a township to levy a special tax, with the proviso "that said trustees shall not cause said levy to be made until a majority of the electors of said township, at some regular election, shall vote in favor of said levy," it required a majority of all the votes cast at such regular election, and not simply a majority of those voting for or against the levy.

U. S. CIRCUIT COURT D. OREGON.

OPINION BY DEADY, J., DEC. 14, 1875.

In re The *Oregon Bulletin* Printing and Publishing Co., against which a petition in bankruptcy is filed. In Bankruptcy.

A proceeding to have a debtor adjudged a bankrupt is substantially an action at law, and terminates with the final judgment on the petition or verdict therein; and the subsequent proceedings to ascertain and distribute the estate of the bankrupt are merely consequent upon such action but no part of it.

Such an action is a *case at law*, and the proceedings therein cannot be reviewed in the circuit court until after final judgment therein; and if the case, by the election of the defendant, becomes triable by jury, it cannot be reviewed otherwise than upon a writ of error.

A stay of proceedings in bankruptcy in the district court is in the discretion of the circuit court, and ought not to be granted where it does not appear that the rights of the defendant will be prejudiced or seriously endangered, if the plaintiff is allowed to proceed to final judgment in the court below.

Semble, that *all* the appellate jurisdiction of the circuit courts in bankruptcy is conferred upon them by § 4,986 of the R. S., and that § 4,980 of said R. S. to § 4,984, inclusive, do not confer any such power, but only regulate its exercise; that the terms *cases* and *questions* are used in said § 4,986 in contradistinction to one another; that a case in bankruptcy, whether at law or equity, is only reviewable in the circuit court according to the mode prescribed in ordinary actions at law or suits in equity; and that the appellate jurisdiction, which the circuit courts may exercise upon bill or petition, is confined to the review of the action of the district courts upon isolated questions arising in the proceedings subsequent to an adjudication in bankruptcy.

Rule to show cause why the proceedings in the district court should not be stayed pending a petition for review in the circuit court.

UNITED STATES SUPREME COURT.

PROCEEDINGS OF.

Thursday, Jan. 13, 1876.

On motion of F. Kernan, Nelson Smith and William Allen Jenner, of New York city, were admitted.

On motion of E. W. Munford, Casey Young, of Memphis, Tenn., was admitted.

No. 693. Daniel Hand v. Thomas C. Dunn, comptroller general of South Carolina. The motion to dismiss this cause was re submitted by T. J. D. Fuller and D. T. Corbin in support of the same, and by P. Phillips in opposition.

No. 892. Williams *v.* United States.—Appeal from the District Court of California.—This was a claim for a place called "Arroyo de la Laguna," in California, which was successful in the District Court. Subsequently petition was filed asking that a mistake in the decree, occasioned by translating the word "*sitio*," league, instead of "place," might be corrected so as to give the petitioner whatever land—even if more than a square league in quantity — might be found within the boundaries of the place. The petition was denied, and the question here is whether the mistake can be corrected in the way asked. The government submits that in effect it is asking for a rehearing. The complainant avers that it is simply a petition to be heard correctly. E. S. Gould for claimants; Solicitor General Phillips for government.

No. 552. The Chicago, Burlington & Quincy Railroad Company v. M. E. Cutts attorney general, et al. The argument of this cause was concluded by O. H. Browning for appellants.

No. 478. Chy Lung v. J. H. Freeman et al.

No. 880. John and Thomas Henderson v. William H. Wickham, mayor, etc., of New York et al. The argument of this cause was commenced by Edwards Pierrepont for the plaintiff in No 478, and continued by James Emott for plaintiff in No. 880.

Adjourned until Friday at 12 o'clock.

Friday, Jan. 14.

No. 126. Forsyth *v.* Kimball.—Appeal from the Circuit Court for the Northern District of Illinois.—This was a bill asking that an amount due to the Mutual Insurance Company of Chicago by the appellant might be set off by an indebtedness by the company to him, on which the assignee of the bankrupt corporation was about to sue. The decision was against the complainant, on the ground that the indebtedness to the company was not wholly his, but, in fact, fell upon three of his brothers, who were mutually bound with him to pay, and that it could not, therefore, be made avoidable by way of set-off; and it is here contended that the court erred in its findings and conclusions. Submitted on printed briefs. W. C. Goudy for appellant; J. L. Thompson for appellee.

No. 478. (Assigned.) Chy Lung v. J. H. Freeman et al.

No. 880. (Assigned.) John and Thomas Henderson v. William H. Wickham, mayor, etc., of New York, et al. The argument of these causes was continued by James Emott for appellant, by John E. Develin and F. Kernan for appellees, and concluded by James Emott for appellants in No. 880.

No. 296. (Assigned.) Ira Munn and George L. Scott v. The People of the State of Illinois. The argument of this cause was commenced by W. C. Goudy, of Chicago, for plaintiffs in error.

Adjourned until Monday at 12 o'clock.

Monday, Jan. 17.

On motion of W. H. Smith, H. H. Greer, of Mt. Vernon, Ohio, was admitted.

No. 81. Joseph Moore v. The United States. Appealed from the Court of Claims. Bradley, J., delivered the opinion, affirming the judgment of the Court of Claims. Davis, J., did not sit during the argument and took no part in this decision.

No. 100. T. J. Haines et al., trustees, etc. v. Charles Carpenter, executor, etc. Appealed from the Circuit Court of the United States for the district of Louisiana. Bradley, J., delivered the opinion, affirming the decree of the Circuit Court with costs.

No. 91. The Grand Trunk Railway Company of Canada v. R. M. Richardson et al. In error to the Circuit Court of the United States for the district. Strong, J., delivered the opinion, affirming the judgment of the Circuit Court with costs and interest.

No. 180. M. N. Welton v. The State of Missouri. In error to the Supreme Court of the State of Missouri. Field, J., delivered the opinion, reversing the judgment of the Supreme Court with costs, and remanding the cause, with directions to enter a judgment reversing the judgment of the Circuit Court for Henry county, and directing that court to discharge the defendant from imprisonment and suffer him to depart, without day.

No. 110. Rufus Baker and Isaac F. Graham, assignees, etc. v. Henry S. White. In error to the Circuit Court of the United States for the district of Connecticut. Miller, J., delivered the opinion, dismissing the writ of error for want of jurisdiction.

No. 108 Sarah E. and Minerva E. Loyd v. M. C. Fulton, trustee, etc. Appeal from the Circuit Court of the United States for the northern district of Georgia. Swayne, J., delivered the opinion, affirming the decree of the Circuit Court with costs.

No. 114. Thos. Slater Smith et al. v. Wm. Vodges, assignee, etc. Appeal from the Circuit Court of the United States for the eastern district of Pennsylvania. Swayne, J., delivered the opinion, reversing the decree of the Circuit Court with costs, and remanding the cause with directions to dismiss the bill.

No. 113. J. Young Scammon v. Mark Kimball, assignee, etc. Appeal from the Circuit Court of the United States for the northern district of Illinois. Clifford, J., delivered the opinion, reversing the decree of the Circuit Court, and remanding the cause for further proceedings and decree in conformity with the opinion of this court. Strong, J., did not sit during the argument, and took no part in this decision.

No. 119. Asa Hodges v. Mary A. Speake, administratrix, etc. In error to the Circuit Court of the United States for the eastern district of Arkansas. Waite, C. J., announced the decision, affirming the judgment of said Circuit Court with costs and interest.

No. 116. Delaware, Lackawanna & Western Railroad Company v. Joseph Warren, assignee, etc. Appeal from the Circuit Court of the United States for the northern district of New York. Waite, C. J., announced the decision, reversing the decree of the Circuit Court with costs, and remanding the cause with instructions to reverse the decree of the District Court, and to direct that court to dismiss the bill. On authority of Wilson v. City Bank, 17 Wall., 473.

No. 115. The Delaware, Lackawanna & Western

Railroad Company v. Joseph Warren, assignee. No. 117. The National City Bank of New York v. Joseph Warren, assignee. In error to the Circuit Court of the United States for the northern district of New York. Waite, C. J., announced the decision, reversing the judgment of the Circuit Court with costs, and remanding the causes, with directions to reverse the judgments of the District Court, and to direct that court to enter judgment in favor of the defendants there, on authority of Wilson v. City Bank. 17 Wall., 473.

No. 856. John and J. K. Warren v. Sheridan Shook, late collector. Waite, C. J., announced the decision, granting the motion to advance this cause, and assigning it for argument on the 8th of February next.

No. 709. James L. Huse v. James S. McMillin et al., executors, etc. On motion of W. Bakewell, dismissed with costs per stipulation.

No. 163. James Barclay et al. v. John S. McMillin et al. On motion of W. Bakewell and consent of Harry Cox for plaintiffs, dismissed with costs.

No. 862. The American Emigrant Company v. The County of Adams. The motion to reinstate this cause was submitted by R. P. Lowe in support of the same, and by R. L. B. Clarke in opposition thereto.

No. 211. Frederick Robert et al. v. The Propeller "Galatea," etc. The motion for a commission to take further testimony in this cause was argued by R. D. Benedict in support of the same, and by J. H. Ashton in opposition thereto.

No. 664. Townsend *v.* Todd et al.—Appeal from the Circuit Court for the District of Connecticut.—This was a proceeding by the appellants, as assignees in bankruptcy of one Newhall, to have set aside a certain deed made to the appellant. The court below declared the deed to be void, because in violation of the spirit and policy of the laws of Connecticut, and because it was a constructive fraud upon creditors; and, the instrument being void as against creditors at the time of filing the bill in bankruptcy, it is void as against the assignee. This ruling is assigned as error here, where the cause is submitted on printed points. John S. Beach for appellant; S. E. Baldwin for appellee.

Adjourned until Tuesday at 12 o'clock.

Tuesday, Jan. 18.

On motion of J. W. Denver, R. McBratney, of Junction City, Kansas, was admitted.

No. 3. (Original.) The State of Florida v. E. C. Anderson, Jr., et al. The motion for an order on the receiver to deliver the possession of the road to the State of Florida, or its agent, was argued by William Birney in support of the same, and by Matt H. Carpenter in opposition thereto. Further hearing of this motion postponed until the 28th of February next.

The motion to direct payment of account of Roger's Locomotive Works in the above case also postponed until the 28th of February next.

No. 296. (Assigned.) Ira G. Munn and George L. Scott v. The People of the State of Illinois. The argument in this cause was continued by J. K. Edsall, Attorney General of the State of Illinois, for defendants, and concluded by John N. Jewett for the plaintiffs.

Adjourned until Wednesday at 12 o'clock.

Wednesday, Jan. 19.

On motion of James McConnell, John H. Kennard, of New Orleans, La., was admitted.

On motion of J. A. Garfield, L. D. Woodworth, of Youngstown, Ohio, was admitted.

No. 545. (Assigned.) B. F. Potts, governor, etc., et al. v. William Chumasero and John A. Johnson. This cause was argued by J. A. Garfield for plaintiffs, and by R. T. Merrick for defendants.

No. 646. (Assigned.) Henry M. Rector v. The United States. No. 692. (Assigned.) Sarah Hale, widow, etc., et al. v. The United States. No. 772. (Assigned.) William H. Gaines and wife, et al. v. The United States. No. 893. (Assigned.) John H. Russell v. The United States. The argument of these causes was commenced by F. P. Stanton for appellants in No. 692.

Adjourned until Thursday at 12 o'clock.

Thursday, Jan. 20.

On motion of J. M. Woolworth, Eleazer Wakeley, of Omaha, Neb., was admitted.

No. 543. Isabella McManus, administratrix, etc., v. C. D. O'Sullivan et al. This cause was submitted on printed argumenss by Calhoun Benham for plaintiff, and by John M. Coghlan and William Irvine for defendants, under the twentieth rule.

No. 754. Elizabeth Mead et al, v. Daniel Pipyard. This cause was submitted on printed arguments by E. S. Smith for appellants, and by Jerome B. Fitzgerald for appellee, under the twentieth rule.

No. 646. (Assigned.) Henry M. Rector v. The United States. No. 692. (Assigned.) Sarah Hale, Widow, etc., et al. v. The United States. No. 772. (Assigned.) William H. Gaines and wife, et al. v. The United States. No. 893. (Assigned.) John H. Russell v. The United States. The argument of these causes was continued by Matt H. Carpenter for appellant in No. 646; by John A. Grow for appellant in No. 893, and by E. W. Munford for appellant in No. 772.

Adjourned until Friday at 12 o'clock.

SUPREME COURT OF ILLINOIS.

We are indebted to C. D. Trimble, Clerk of the Supreme Court at Ottawa, for the following list of opinions filed in his office yesterday:

1873—CIVIL DOCKET.

492. Rood v. O. O. & F. R. V. Railroad Company. Affirmed.

1874—REHEARING DOCKET.

27 McCormick v. Huse. Affirmed.

CIVIL DOCKET.

71. Stevison et al v. Earnest. Affirmed.
258. Kamphouse et al. for use, etc. v. Gaffner. Reversed and remanded.
278. C. B. & Q. Railroad Company v. Van Patten, administrator, etc. Reversed and remanded.

1875—PEOPLE'S DOCKET.

2. Vandusen v. The People, etc. Reversed and remanded.
8. Conley v. The People, etc. Reversed and remanded.
12. Bragg v. The People, etc. Affirmed.
12. Kroer v. The People, etc. Affirmed.
17. Albrecht v. The People, etc. Reversed.

REHEARING DOCKET.

23. Gunnelt et al. v. Cockerell. Decree in part reversed and remanded.
24. O. O. & F. R. V. Railroad Company v. Black et al. Reversed and remanded.

CIVIL DOCKET.

7. Furness et al. v. McGovern. Decree affirmed.
13. Phelps v. Curts et al. Decree reversed in part and remanded.
20. Garden City Insurance Company v. Stagart. Reversed and remanded.
24. Berringen v. Casey. Decree affirmed.
30. Roby & Cossett et al. Decree affirmed.
34. Newlin et al. v. Snyder. Decree affirmed.
39. Bostwick et al. v. Hess et al. Affirmed.
42. C. D. & V. R. R. Co. v. Coyer et al. Decree reversed and remanded.
49. Morley v. The Town of Metamora. Affirmed.
50. Thompson v. Sorenberger. Affirmed.
55. Harms v. Solein et al. Reversed and remanded.
57. Rosehill and Evanston Road Company v. Hall. Affirmed.
59. Tuttle et al. v. Robinson. Affirmed.
60. P. P. & J. Railroad Company v. Barton. Reversed and remanded.
63. Lyon et al. v. Culbertson. Reversed and remanded.
66. C. R. I. & P. Railroad Company v. City of Joliet. Reversed and remanded, with directions.
74. Hays et al. v Parmalee. Reversed and remanded.
76. Muller et al. v. Inderreiden. Decree affirmed.
77. Gerard v. Gateau. Decree reversed and remanded.
80. Brown, Impld., & etc., v. Rounsavell. Affirmed.
83. Council of Village of Glencoe v. People ex-rel. Owen. Affirmed.
87. Roberts et al. v. Pierce. Decree reversed and remanded.
89. C. & P. Railway Company v. Kaheler et al. Affirmed.
90. Cummings et al. v. Burleson et al. Decree affirmed.
92. Mosher, administrator, v. Meek et al. Decree affirmed.
94. Coates v. Cunningham. Writ dismissed.
97. Skinner et al v. Baker et al. Decree affirmed.
98. Day v. Humphrey et al. Affirmed.
101. Coursen, impleaded, &c., v. Hixon et al. Affirmed.
103. Morse et al. v. Thorsell. Decree reversed and remanded.
104. Fry et al. v. Jones et al. Reversed in part and remanded.
106. Nixon, late Ball v. Halley. Affirmed.
108. Union National Bank v. Oceana County Bank. Affirmed.
109. Anderson v. Wood et al. Decree reversed and bill dismissed.
111. Wilson v. McDowell. Decree affirmed.
112. Clark et al. v. School District No. 1, 27. Affirmed.
115. Miller v. Superior Machine Company. Affirmed.
117. Euans v. Anderson. Affirmed.
118. American Express Company v. Greenhalgh. Reversed and remanded.
119. Kirkpatrick v. Howk. Reversed and remanded.
125. Todd, trustee, &c., v. K. & I. R. R. Company. Reversed and remanded.
126. Ross v. Ross. Decree reversed in part and remanded.
131. Ogden et al. v. Kirby. Reversed and remanded.
134. Potts et al. v. Davenport et al. Affirmed.
135. Commissioners of Highways v. Newell. Decree reversed and bill dismissed.
136. Powell et al. v. Webber et al. Decree affirmed.
141. Davis v. Merricks. Affirmed.
143. Harrison v. Willett. Reversed and remanded.
145. Mears et al. v. People ex rel., etc. Reversed.
147. Crowley v. Crowley et al. Affirmed.
148. Paton et al. v. Stewart. Affirmed.
150. Cooke v. Preble et al. Affirmed.
151. Frame v. Badger. Reversed and remanded.
153. Burt et al. v. Tisdale. Reversed and remanded.
154. Burt et al. v. Lichtenstein. Reversed and remanded.
157. Berger et al. v. Peterson. Decree affirmed.
158. Hadaway v. Kelley. Affirmed.
161. Nowak v. Excelsior Stone Company. Affirmed.
166. Sowards v. Sowards. Affirmed.
167. Kassing v. Mortimer. Affirmed.
166. Straus et al. v. Menzeshimer. Affirmed.
168. Dougherty, impleaded, etc., v. Monroe. Decree reversed and remanded.
169. Byrne v. City of Chicago. Affirmed.
170. Byrne v. City of Chicago. Affirmed,
171. Walsh v. People ex rel., etc. Affirmed.
172. Robinson v. Ferguson et al. Decree affirmed.
173. Ross v. Johnson, relator. Reversed.
175. Walker et al. v. Diehl, administrator, decree. Reversed and remanded with directions.
176. Mulvey v. Carpenter et al. Decree affirmed.
177. Morgan et al. v. Stevens. Reversed.
178. Rayburn et al. v. Ramsdell. Reversed and remanded.
179. McMillan v. Lee. Affirmed.
181. Fireman's Fund Insurance Company v. Congregation Rodeph Sholom. Affirmed.
182. Sanborn et al. v. Benedict. Affirmed.
183. Holcomb v. People ex rel., etc. Affirmed.
186. Adams v. Gardner. Reversed and remanded.
188. Hawver v. Hawver. Reversed and remanded.
191. Blood v. Barnes. Affirmed.
192. Harrer et al. v. Wallner. Decree affirmed.
194. Ely v. Ely et al. Decree affirmed.
197. American Merchants' Union Express Company v. Wolff et al. Affirmed.
198. Merchants' Dispatch Transportation Company v. Bolles. Affirmed.
200. Newman v. Wilits. Affirmed.
201. Keithsburg and Eastern Railroad Company v. Henry. Affirmed.
202. Chamberlain v. White. Affirmed.
204. Miller v. Balthasser. Affirmed.
205. Hardin v. Crate. Reversed and remanded.
206. Norton et al v. Maher. Affirmed.
207. Rutherford v. Merchant et al. Affirmed.
210. Welsh v. Dutton et al, Affirmed.
214. Henery v. Halloway. Affirmed.
215. Richardson v, Robinson. Reversed and remanded.
218. Penny v. Crane Bros. Manufacturing Company. Affirmed.
220. Hall v. Gould et al. Decree affirmed,
221. Hall et al. v. Johnson. Reversed and remanded.
223. First National Bank of Chicago v. Bersford, for use, etc. Affirmed.
224. McIntyre et al. v. Story. Decree affirmed.
225. Holmes v. Shaver. Decree affirmed.
226. Cole v. Joliet opera-house. Reversed and remanded.
228. Voight v. Resor. Affirmed.
229. Stearns et al. v. Sweet, et al. Affirmed.
230. Miller et al. v. Waugh et al. Decree affirmed.
232. Dryden et al. v. Parker. Affirmed.
233. Taylor v. Renn et al. Reversed and remanded.
234. Gardner v. Russell. Affirmed.
236. Gardner et al. y. Baker et al. Affirmed.
237. Gardner v. Thackara, et al. Affirmed.
242. Honore et al. v. Home National Bank, Chicago. Affirmed.
246. United States Life Insurance Company, v. Advance Company. Reversed and remanded.
247. Harms v. Aufel. Affirmed.
248. Thomas v. Hinsdale. Reversed and remanded.
249. Marsh et al. v. Green. Decree affirmed.
250. Wenger v. Calder. Reversed and remanded.
252. Plummer v. Rigdon. Affirmed.
253. Heck v. Lamar Insurance Company. Decree reversed and remanded.
255. Busby v. People ex rel., etc. Affirmed.
257. Law v. People ex rel., etc. Affirmed.
254. Law v. People ex rel., etc. Affirmed.
262. Cuddy v. Brown et al. Decree affirmed.
263. Culver v. Hide and Leather company. Affirmed.
265. Peterson et al v. Griffin. Affirmed.
267. Simpson v. Ham et al. Decree affirmed.
268. Warner et al., impleaded, etc. Reversed.
269. Village of Nunda v. Village of Crystal Lake. Decree affirmed.
270. Peters et al. v. Elliot et al. Reversed.
272. Tugman v. City of Chicago. Reversed.
273. Fleishman v. Moore. Decree affirmed.
278. People ex rel. Miller v. Brislin. Reversed and remanded.
279. People ex rel. Miller v. Thatcher et al. Reversed and remanded.
281. Larned v. People ex rel. Miller. Affirmed.
282. Larned v. People ex rel. Miller. Affirmed.
283. Monroe v. Chladek. Affirmed.
284. Iverson v. Mortimer. Affirmed.
285. Skelly v. Boland, impleaded, etc. Affirmed.
286. Doran v. Mullen. Affirmed.
287. Town of Partridge v. Snyder. Reversed.
288. Wadhams v. Hotchkiss. Affirmed.
291. Stewart v. Hibernian Banking association. Affirmed.
293. Myers, impleaded, etc., v. First National Bank of Fairbury. Reversed and remanded.
295. Pingree et al. v. Jones. Decree reversed and remanded.
296. Patmor v. Haggard et al. Affirmed.
299. C. R. I. & P. Railroad Company v. Gore. Reversed and remanded.
300. Same v. Clayton. Affirmed.
301. Same v. McKittrick. Reversed and remanded.
302. Williams v. Case. Affirmed.
310. Webster et al. v. Granger. Affirmed, Scott, C. J., dissenting.
312. Harris v. Lester et al. Decree affirmed.
313. Schœnfeld v. Brown et al. Affirmed.
314. Tobey et al. v. Foreman. Decree affirmed.
316. Boardman v. Cook et al. Affirmed.
317. Wheeler et al. v. People ex rel. Swigert. Affirmed.
319. Bownfield et al v. Wilson et al. Decree reversed and bill dismissed.
320. Ruth v. City of Abingdon. Reversed and remanded.
323. Richards v. Green. Decree affirmed.
325. Bliss v. Smith. Affirmed.
329. Gross et al. v. People ex rel Miller. Affirmed.
338. Weaver et al. v. Poyer et al. Decree reversed and remanded.
342. City of Rock Island v. Van Landschoot. Reversed and remanded. Scott, C. J. and Craig, J., dissent.
345. Lipman v. Lowitz. Affirmed.
346. Misch v. McAlpine et al. Reversed and remanded.
348. Hamlin v. Race. Reversed and remanded.
349. Clement v. Newton et al. Affirmed.
353. Proudfoot v. Wightman et al. Decree affirmed.
354. Steele v. Thatcher. Affirmed.
360. Gleason v. Village of Jefferson et al. Decree affirmed.
361. School District No. 1340 v. People ex rel. Roberts et al. Affirmed.
364. Thompson v. Bulson. Reversed.
365. Belden v. Perkins. Reversed and remanded.
366. Goldie v. McDonald et al. Affirmed.
367. Healey v. Charnley et al. Affirmed.
368. Simpson et al. v. Bradnor et al. Reversed and remanded
370. Shugart, impleaded, &c. v. Egan. Affirmed. Breese, J., dissenting.
372. Board of Commissioners of Cook county v. Coombs. Affirmed.
373. Fight, impleaded, etc., v. Holt. Decree affirmed.
376. Owen v. Stevens. Reversed and remanded.
381. Dobbins et al. v. Higgins. Affirmed.
382. McKenzie v. Remington. Affirmed.
387. Wachter v. Albee, administrator. Affirmed.
389. Carter v. Webster. Affirmed.
390. Brown et al. v. Pierce. Affirmed.
391. Michigan Central Railroad Company v. Curtis, Affirmed.
393. Palmer v. Nassau Bank. Affirmed.
400. C. and P. Railroad Company v. Munger. Affirmed.
401. Aurora Agricultural and Horticultural Society, impleaded, etc., v. Paddock. Affirmed.
402. Bass et al. v. People ex rel. Miller. Affirmed.
403. Wolcott et al. v. Heath. Reversed and remanded.
405. Zuel, impleaded, etc., v. Brown. Reversed and remanded.
408. Chicago, Burlington and Quincy Railroad Company v. Harwood. Reversed and remanded, Craig, J., dissenting.
411. Buchanan v. International Bank of Chicago et al. Decree affirmed.
412. Evans v. George et al. Reversed and remanded.
413. Horner v. Spellman et al. Affirmed.
414. Mix et al. v. People ex rel. Swigart. Affirmed.
415. Buck v. People ex rel. Swigart. Affirmed.
416. Mix et al. v. Balduc. Decree affirmed.
426. Bill v. Mulford. Affirmed.
430. Pixley et al. v. Boynton et al. Affirmed.
457. Anthony v. People ex rel. Miller. Affirmed.
463. Lycoming Fire Insurance Company v. Rubin. Reversed and remanded.
484. City of Chicago v. McGiven. Reversed and remanded, Scott, C. J., dissenting.
523. Merriam v. People ex rel. Rumsey. Affirmed.
524. LeMoyne et al. v. same. Affirmed.
525. McBride v. same. Affirmed.
526. Bradley et al. v. same. Affirmed.
527. Mason et al. v. same. Affirmed.
528. Sampson et al. v. same. Affirmed.
529. Oakwook Cemetery Association v. same. Affirmed.
530. Murray v. same. Affirmed.
532. Cook County Land Company et al. v. same. Affirmed.
533. Forsyth et al. v. same. Affirmed.
541. Stearns v. same. Affirmed.
542. Shurtleff et al. v. People ex rel. Miller. Affirmed.
603. Weston et al. v. same. Affirmed.
667. Lamb v. same. Affirmed.
835. People ex rel. Smith v. Common Council, Aurora. Writ awarded.
836. People, etc., ex rel. Montony v. same. Writ awarded.

THE SUPREME COURT-ROOM AT SPRINGFIELD.—When a new county court-house is to be occupied, the clerks and other inferior officers generally succeed in having their offices finished before the court-rooms, and as a consequence are comfortably located in the new court-house long before the judges. The same is also generally true in regard to a new State-house. The executive and legislative officers, having political power, generally manage to occupy the elegant new State-house long before the courts. The Supreme Court of this State, which commenced its term during this month, is still in its old quarters, although they are too small to properly accommodate the court and its officers. The other officers of state have for some time been occupying the new State-house. The Springfield *Journal*, in describing the Supreme Court-room in the new State-house, says:

The Supreme Court-room, in the southwest wing, however, is the principal point of attraction to visitors, and occasions mixed sentiments of surprise and astonishment. This room is more largely elaborated than is the Governor's parlor, and on it Moretti, the artist, has excelled himself. It is in the style of the Venetian Doge's palace, modified by French taste. On entering the chamber from the rotunda one sees apparently nothing but a profusion of sandy colors and a medley of fresco designs. Once inside, however, and the eye catches something emblematic, and other mysterious and emblematic results of the artist's genius have to be passed upon. The design of the architect in paneling the room serves to enlarge it almost a third, which Mr. Moretti has taken advantage of, and hence nearly all of his creations are in the heroic style. In the center of the room, overhead, is a design which at once strikes the beholder with admiration. It is that of the goddess of justice, heroic size, seated on a forum, a table of the law on the left hand, sword in the right, the forefoot protuding from drapery, is bare, and trampling upon gold pieces spilled from a cornucopia indicates that justice is not bought; a quiver of arrows at her feet. Two little cherubs—one holding a book of the law, the other the national flag—balance the representation of the goddess, and are not the least of the charms of design. In the dim perspective is a reproduction of the new capitol building. Turn which way you will, this glorious vision beams down upon you, and when the chamber is properly curtained and the soft, mellow western light steals in, it will be one of the richest treats to a lover of art that the State of Illinois affords. Around the picture are four motives in bronze and gold, representing the tables of the law, a globe representing the world, a lily representing purity, with festoons and sprays of laurel and oak.

The walls are in imitation of leather, with the word "Justice," in old-fashioned text, on every square foot. The architrave support to the panel sections forming the ceiling is imitation bronze, and on every panel are bronze emblems on an imitation marble background. Above the door entering into the Supreme Court Clerk's room is the National coat-of-arms, surmounted by an eagle. On a background of gold, flags are made to envelope tables of the law, the emblematic sword, etc. On each side of this design are panels frescoed in imitation of marble supported by massive columns, also imitation marble. The wainscoating of the chamber is in black walnut, and the doors and windows are in the same elegant finish. The greatest difficulty in frescoing is to preserve the harmonies of light and shade and the law of perspective. These difficulties have been handsomely surmounted by Miragoli & Moretti, and will speak their fame in eloquent silence for years to come.

Across the corridor is the Department of Public Instruction. These rooms—two in number—like the State Department, are in pure fresco and native woods, elaborately designed and carved, and presenting a pleasing contrast to the rich and gorgeous ornamentation of the Supreme Court Chamber. Both rooms have a southern exposure, and will always remain the most comfortable rooms in the new building.

THE BANKRUPT LAW.—The *American Law Record* says:

At a meeting of the Board of Trade directors in this city, Mr. Simpkinson took the floor and advocated the immediate repeal of the bankrupt law by Congress, at the same time presenting a form of a petition to be circulated for signatures, urging such a course. Mr. Dickinson, however, opposed the measure. He acknowledged that the law was in many respects faulty. Still he thought that some law of the general government on the subject was absolutely necessary, and he did not believe either in the policy or possibility of securing an unconditional repeal of the law. He therefore moved that a committee of three be appointed to take into consideration the preparation of such amendments to the bankrupt law as may be best adopted to secure its just and equitable operation, and report at some future meeting of the Board. The motion was carried, and Messrs. W. S. Dickinson, Judge Stanley Matthews and R. Dymond were appointed as said committee.

CHICAGO LEGAL NEWS

SATURDAY, JANUARY 29, 1876.

The Courts.

We are under obligation to our old friend, S. W. PACKARD, of the Yankton, Dakota bar, formerly of the law firm of COOPER, GARNETT & PACKARD of this city, for the following opinion:

UNITED STATES SUPREME COURT.

No. 42.—OCTOBER TERM, 1875.

J. SHERMAN HALL et al. *v.* RALPH A. LANNING et al.

In error to the Circuit Court of the United States for the Northern District of Illinois.

PARTNERSHIP—POWER OF ONE PARTNER TO ENTER APPEARANCE OF OTHERS AFTER DISSOLUTION—EFFECT OF JUDGMENT ON SUCH APPEARANCE—SUIT ON SUCH JUDGMENT IN FOREIGN STATE — JURISDICTION.

1. APPEARANCE AFTER DISSOLUTION.—That after the dissolution of a partnership, one of the partners, in a suit brought against the firm, has no authority to enter the appearance for the other partners who do not reside in the State where the suit is brought and have not been served with process.

2. JUDGMENT ON SUCH APPEARANCE.—That a udgment against all the partners, founded on such an appearance, can be questioned by those not served with process in a suit brought thereon in another State.

3. JURISDICTION.—That the jurisdiction of a foreign court over the person or the subject-matter embraced in the judgment or decree of such court is always open to inquiry, and in this respect the court of another State is to be regarded as a foreign court; that the record of such a judgment does not estop the parties from demanding such an inquiry.

4. FOREIGN AND DOMESTIC JUDGMENTS.—That the authorities refer only to appearances entered whilst the partnership was subsisting, and to the validity and effect of judgments in the State or country in which they were rendered. Domestic judgments stand in this respect on a different footing from foreign judgments. If regular on their face, and if appearance has been duly entered for the defendant by a responsible attorney, then they will not necessarily be set aside, but the defendant will be sometimes left to his remedy against the attorney for damages.—[ED. LEGAL NEWS.]

Mr. Justice BRADLEY delivered the opinion of the Court.

This was an action of debt brought on a judgment rendered in New York against the plaintiffs in error. One of them, Lybrand, pleaded separately *nul tiel record*, and several special pleas questioning the validity of the judgment as against him for want of jurisdiction over his person. On the trial the plaintiff simply gave in evidence the record of the judgment recovered in New York, which showed that an attorney had appeared and put in an answer for both defendants, who were sued as partners. The answer admitted the partnership, but set up various matters of defense. The cause was referred and judgment given for the plaintiffs. This was the substance of the New York record. The plaintiffs gave no further evidence.

Lybrand then offered to prove that he, Lybrand, never was a resident or citizen of the State of New York; and that he had not been within said State of New York at any time since, nor for a long time before the commencement of the suit in which the judgment was rendered upon which the plaintiff in this case brought suit; and that he never had any summons, process, notice, citation, or notice of any kind, either actual or constructive, ever given or served upon him; and that he never authorized any attorney or any other person to appear for him; and that no one ever had any authority to appear for him in said suit in the State of New York, or to enter his appearance therein, nor did he ever authorize any one to employ an attorney to appear for him in the action in which said judgment was entered; and that he never entered his appearance therein in person; and that he knew nothing of the pendency of said suit in the said State of New York until the commencement of the present suit in this court; that said Lybrand was a partner in business with said J. Sherman Hall at the time the transaction occurred upon which the plaintiffs brought suit in New York, though said partnership had been dissolved and due notice thereof published some six months prior to the commencement of said suit in New York.

This evidence being objected to, was overruled by the court, which instructed the jury as follows: "That the record introduced in evidence by the plaintiffs was conclusive evidence for the plaintiffs to maintain the issues submitted to the jury by the pleadings, and that they should return a verdict for the plaintiffs and against both defendants."

A bill of exceptions being taken to this ruling, the matter is brought here on writ of error.

The question to be decided, therefore, is, whether, after the dissolution of a co-partnership, one of the partners in a suit brought against the firm has authority to enter an appearance for the other partners who do not reside in the state where the suit is brought and have not been served with process; and if not, whether a judgment against all the partners, founded on such an appearance, can be questioned by those not served with process in a suit brought thereon in another state. We recently had occasion, in the case of Thompson *v.* Whitman, 18 Wall., 457, to restate the rule that the jurisdiction of a foreign court over the person or the subject-matter embraced in the judgment or decree of such court is always open to inquiry, and that in this respect the court of another state is to be regarded as a foreign court. We further held in that case that the record of such a judgment does not estop the parties from demanding such an inquiry. The cases bearing upon the subject having been examined and distinguished on that occasion, it is not necessary to examine them again, except as they may throw light on the special question involved in this cause. In the subsequent case of Knowles *v.* The Gas-Light Company, 19 Wallace, 58, we further held, in direct line with the decision in Thompson *v.* Whitman, that the record of a judgment showing service of process on the defendant could be contradicted and disproved.

It is sought to distinguish the present case from those referred to, on the ground that the relation of partnership confers upon each partner authority, even after dissolution, to appear for his co-partners in a suit brought against the firm, though they are not served with process and have no notice of the suit. In support of this proposition, so far as relates to any such authority after dissolution of the partnership, we are not referred to any authority directly in point, but reliance is placed on the powers of partners in general, and on that class of cases which affirm the right of each partner after a dissolution of the firm to settle up its business. But, in our view, appearance to a suit is a very different thing from those ordinary acts which appertain to a general settlement of business, such as receipt and payment of money, giving acquittances, and the like. If a suit be brought against all the partners, and only one of them be served with process, he may, undoubtedly, in his own defense, show, if he can, that the firm is not liable, and to this end defend the suit. But to hold that the other partners, or persons charged as such, who have not been served with process, will be bound by the judgment in such a case, which shall conclude them as well on the question whether they were partners or not when the debt was incurred, as on that of the validity of the debt, would, as it seems to us, be carrying the power of a partner after a dissolution of the partnership to an unnecessary and unreasonable extent.

The law, indeed, does not seem entirely clear that a partner may enter an appearance for his co-partners without special authority even during the continuance of the firm. It is well known that by the English practice, in an action on any joint contract, whether entered into by partners or others, if any defendant cannot be found, the plaintiff must proceed to outlawry against him before he can prosecute the action, and then he declares separately against those served with process, and obtains a separate judgment against them, but no judgment except that of outlawry against the defendant not found. (1 Chitty's Plead., 42; Tidd's Pract., chap. 7, p. 423, 9th ed.) A shorter method by *distringas* in place of outlawry has been provided by some modern statutes, but founded on the same principle. Now, it seems strange that this cumbrous and dilatory proceeding should be necessary in the case of partners if one partner has a general authority to appear in court for his co-partners. On the basis of such an authority, had it existed, the courts, in the long lapse of time, ought to have found some means of making service on one answer for service on all. But this was never done. In this country, it is true, as will presently be shown, legislation to this end (applicable, however, to all joint debtors) has been adopted, but it is generally conceded that a judgment based on such service has full and complete effect only as against those who are actually served. Further reference to this subject will be made hereafter.

It must be conceded, however, that the general authority of one partner to appear to an action on behalf of his co-partners, during the continuance of the firm, has been asserted by several text writers. (Gow on Partnership, 163; Collyer on Partn., § 441; Parsons on Part., 174, note.) But the assertion is based on somewhat slender authority. We find it first laid down in Gow, who refers to a dictum of Sergeant Dampier, made in the course of argument, (7 T. R., 207,) and to the case of Morley *v.* Strombong, 3 Bosanquet & Puller, 254, where the court refused to discharge partnership goods taken on a distringas to compel the appearance of an absent partner, unless the partner who was served, would enter an appearance for him. As to this case, it may be said that it is not improbable that the home partner had express authority to appear in suits for his co-partner; for in a subsequent case, (Goldsmith *v.* Levy, 4 Taunt., 299,) a distringas, issued under the same circumstances, *was* discharged where the home partner made affidavit that the goods were his own, and that he had no authority to appear for his co-partner. These seem to be the only authorities relied on.

But, as said before, these authorities, and one or two American cases which follow them, refer only to appearances entered whilst the partnership was subsisting; and, it is pertinent also to add that they only refer to the validity and effect of judgments in the state or country in which they are rendered.

Domestic judgments, undoubtedly (as was shown in Thompson *v.* Whitman), stand, in this respect, on a different footing from foreign judgments. If regular on their face, and if appearance has been duly entered for the defendant by a responsible attorney, though no process has been served and no appearance authorized, they will not necessarily be set aside, but the defendant will, sometimes, be left to his remedy against the attorney in an action for damages; otherwise, as has been argued, the plaintiff might lose his security by the act of an officer of the court. (Denton *v.* Noyes, 6 Johns., 296; Grazebrook *v.* McCreedie, 9 Wend., 437). But even in this case, it is the more usual course to suspend proceedings on the judgment and allow the defendants to plead to the merits and prove any just defense to the action. In any other state, however, except that in which the judgment was rendered (as decided by us in the cases before referred to), the facts could be shown, notwithstanding the recitals of the record, and the judgment would be regarded as null and void for want of jurisdiction of the person.

So, it may well be, that where appearance has been entered by authority of one of several co-partners on behalf of all, that the courts of the same jurisdiction will be slow to set aside the judgment unless it clearly appears that injustice has been done; and will rather leave the party who has been injured by an unauthorized appearance to his action for damages.

There are many other cases in which a judgment may be good within the jurisdiction in which it was rendered so far as to bind the debtor's property there found, without personal service of process or appearance of the defendant; as, in foreign attachments, process of outlawry and proceedings *in rem*.

Another class of cases is that of joint debtors, before alluded to. In most of the States legislative acts have been passed, called joint-debtor acts, which, as a substitute for outlawry, provide that if process be issued against several joint debtors, or partners, and served on one or more of them, and the others cannot be found, the plaintiff may proceed against those served, and, if successful, have judgment against all. Various effects and consequences are attributed to such judgments in the States in which they are rendered. They are generally held to bind the common property of the joint debtors, as well as the separate property of those served with process, when such property is situated in the State, but not the separate property of those not served; and whilst they are binding personally on the former, they are regarded as either not personally binding at all, or only *prima facie* binding, on the latter. Under the joint-debtor act of New York, it was formerly held by the courts of that State that such a judgment is valid and binding on an absent defendant as *prima facie* evidence of a debt, reserving to him the right to enter into the merits and show that he ought not to have been charged.

The validity of a judgment rendered under this New York law, when prosecuted in another State, against one of the defendants who resided in the latter State, and was not served with process, though charged as a co-partner of a defendant residing in New York, who was served, was brought in question in this court in December term, 1850, in the case of D'Arcy *v.* Ketchum, 11 Howard, 165. It was there contended that by the Constitution of the United States, and the act of Congress passed May 26, 1790, in relation to the proof and effect of judgments in other States, the judgment in question ought to have the same force and effect in every other State which it had in New York. But this court decided that the act of Congress was intended to prescribe only the effect of judgments where the court by which they were rendered had jurisdiction; and that, by international law, a judgment rendered in one State, assuming to bind the person of a citizen of another, was void within the foreign State, where the defendant had not been served with process or voluntarily made defense, because neither the legislative jurisdiction nor that of the courts of justice had binding force.

This decision is an authority which we recognized in Thompson *v.* Whitman, and in Knowles *v.* Gas-Light Company, before cited, and which we adhere to as founded on the soundest principles of law. And in view of this decision it is manifest that many of the authorities which declare the effect of a domestic judgment, in cases where process has not been served on one or all of the defendants, and where those not served have not authorized any appearance, and do not reside in the State, can have little influence as to the effect to be given to such a judgment in another State.

It appearing to be settled law, therefore, that a member of a partnership firm, residing in one State, cannot be rendered personably liable in a suit brought in another State, against him and his co-partners, although the latter be duly served with process, and although the law of the State where the suit is brought authorizes judgment to be rendered against him, the case stands on the simple and naked question whether his co-partners after a dissolution of the partnership, can without his consent and authority implicate him in suits brought against the firm by voluntarily entering an appearance for him.

We are of opinion that no authority can be found to maintain the affirmative of this question.

In the case of Bell *v.* Morrison (1 Peters, 351), this court decided, upon elaborate examination, that after a dissolution of the partnership, one partner can not by his admissions, or promises, bind his former co-partners. Appearance to a suit is certainly quite as grave an act as the acknowledgement of a debt.

It is well settled by numberless cases, that, even before dissolution, one partner cannot confess judgment, or submit to arbitration so as to bind his co-partners. (Stead *v.* Salt, 3 Bing., 101; Adams *v.* Bankart, 1 Cromp. Mee. & R., 681; Karthaus *v.* Ferrer, 1 Peters, 222; and cases referred to in Story on Partn., § 114; 1 Amer. Lead. Cas., 5th ed., 556; Freeman on Judgments, sect. 232; Collyer on Part., sect. 469, 470 and notes; Parsons on Partn., 179, note.)

It is equally well settled that, after dissolution one partner cannot bind his co-partners by new contracts or securities, or impose upon them a fresh liability. (Story on Partn., § 322; Adams *v.* Bankart, *qua supra*)

Appearance to a suit does impose a fresh liability. If there is no doubt of the validity of the demand, it places that demand in a position to be made a debt of record. If there is doubt of it, it renders the defendant liable to have it adjudicated against him, when, perhaps, he has a good defense to it.

On principle, therefore, it is difficult to see how, after a dissolution, one partner can claim implied authority to appear for his co-partners in a suit brought against the firm. It may, in some instances, be convenient that one partner should have such authority; and when such authority is desirable it can easily be conferred either in the articles of partnership or in the terms of dissolution. But, as a general thing, one can hardly conceive of a more dangerous power to be left in the hands of the several partners after the partnership connection between them is terminated, or one more calculated to inspire a constant dread of impending evil, than that of accepting service of process for their former associates, and of rendering them liable, without their knowledge to the chances of litigation which they have no power of defending.

Few cases can be found in which the precise question has been raised. The attempt to exercise such a power does not appear to have been often made. Had it been, the question would certainly have found its way in the reports; for a number of cases have come up in which the power of a partner to appear for his co partners during the continuance of the partnership had been discussed. The point was raised in Phelps *v.* Brewer (9 Cushing, 390), but the court being of opinion that the power does not exist even pending the partnership, did not find it necessary to consider the effect of a dissolution upon it.

In Alabama, where a law was passed making service of process on one partner binding upon all, it was expressly decided, after quite an elaborate argument, that such service was not sufficient after a dissolution of the partnership, and that acknowledgment of service by one partner on behalf of all was also inoperative as against the other partners. (Duncan *v.* Tombeckbee Bank, 4 Porter, 184; Demott *v* Swaim's Adm., 5 Stewart & Porter, 293.)

In the case of Loomis & Co. *v.* Pearson & McMichael (Harper's South Carolina Reports, 470), it was decided that after a dissolution of partnership, one partner cannot appear for the other; although it is true, that it had been previously decided by the same court in Haslet *v* Street et al. (2 McCord, 311), that no such authority exists even during the continuance of the partnership.

But the absence of authorities, as before remarked, is strong evidence that no such power exists.

In our judgment, the defendant Lybrand had a right, for the purpose of invalidating the judgment as to him, to prove the matter set up by him in his offer at the trial. And for the refusal of the court to admit the evidence, the judgment should be reversed with directions to award a *venire de novo.*

Judgment reversed.

D. W. MIDDLETON,
C. S. C. U. S.

Dissenting: WAITE, C. J., STRONG, J., and HUNT, J.

COOPER, GARNETT & PACKARD, attorneys for plaintiff in error.

FRANKLIN DENISON and SIDNEY S. HARRIS, of New York city, attorneys for defendants in error.

UNITED STATES SUPREME COURT.

OCTOBER TERM, 1875.

J. YOUNG SCAMMON *v.* MARK KIMBALL, assignee of THE MUTUAL SECURITY INS. CO.

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

BANKRUPT INSURANCE COMPANY—RIGHT OF STOCKHOLDER TO SET-OFF—BANKER—TREASURER—HOW THE FUNDS WERE HELD.

1. Complainant was a private banker; he had been elected treasurer of the Insurance company, which was made bankrupt by the great fire of 1871. He owned a large amount of stock in the company. It was owing him on policies for losses to a great amount. The company placed its money in the bank of the complainant under an agreement to receive interest on the same. The company held the notes of the complainant given to secure unpaid portions of his subscriptions to its stock. The bill prays that the company shall be decreed to deliver his notes, and he be allowed to prove the balance of his claim against the bankrupt Ins. Co.

2. SET OFF.—Since this bill was filed this court has decided that the debt due to a stockholder in such a case for losses sustained by the stockholder, of properties insured by the company, cannot be set-off against his indebtedness to the company for unpaid shares in the capital stock of the company.

3. SET-OFF IN LAW AND EQUITY.—The court states how a set-off must be understood, whether the suit be at law or in equity.

4. NOTES GIVEN FOR CAPITAL STOCK—CLAIM FOR LOSSES ON POLICIES—MONEY DEPOSITED.—That the claim for losses due from the company can not be set-off against the notes given for capital stock, but that the amount deposited by the company with the complainant, and which he still owes to the company, or to the respondent as assignee, was and is held by him as a private banker and not as treasurer of the company, and that any losses sustained by the complainant at the time and in the manner alleged, for which the bankrupt corporation were and are liable, may be set off against that claim of the bankrupt corporation as described in the pleadings.

5. DEPOSITS.—The law as to when a deposit becomes a part of the banker's general assets and he merely a debtor for the amount, is fully discussed. —[ED. LEGAL NEWS.]

Mr. Justice CLIFFORD delivered the opinion of the Court.

Jurisdiction is vested in the circuit courts under the bankrupt act, concurrent with the district court for the same district, of all suits at law or in equity which may or shall be brought by any person against the assignee of the bankrupt's estate, touching any property or rights of property of the bankrupt transferable to, or vested in, such assignee.

Pursuant to that authority the appellant on the 3d of May, 1872, filed the present bill of complaint in the circuit court against the appellee as assignee of the bankrupt company, described in the title of the case. Prior to that, to wit, on the 27th of January, in the same year, the insurance company was duly adjudged bankrupt, and the record shows that the present appellee was appointed the assignee of the estate of the bankrupt company.

Satisfactory evidence is exhibited in the record to show that the company was duly organized with a nominal capital of $300,000, of which 10 per cent. had been paid, and that the residue was secured by the notes of the subscribers. Provision is made by the charter that the stock and affairs of the corporation shall be managed and conducted by any number of directors, not more than twenty-five nor less than nine, to be chosen by ballot from among, and by, the stockholders. Directors, it is also provided, shall choose out of their number a president, vice president, and the directors have the power to appoint, for the time being "such officers, secretaries, agents, and servants as they shall judge necessary."

Shares in the stock of the company, to a large amount, were owned by the complainant, and he admits that the company held notes against him to the amount of $10,147.50, given to secure unpaid balances of subscriptions, for which he was liable either as principal guarantor or surety. Throughout the lifetime of the company the complainant insured many and valuable properties in the company and paid to the proper officers of the same large sums of money as premiums for such policies of insurance. Antecedent to the event which caused the failure of the company the proper officers of the same transacted a large, and, for the greater portion of the time, a prosperous insurance business.

Much reference to those details will not be made, as they are no longer material in this investigation. Suffice to say, in that connection, that the complainant was, as he alleges, during the whole of that period, a large owner of real and other property and was possessed of sufficient means to render secure any moneyed obligation into which he might enter, and to enable him to perform any promise or contract for the payment of money he might make; and he also alleges that it was necessary that the means of the company should be kept where the same could be promptly commanded, if required to pay losses, and, in order that the company might accomplish that object and still realize interest on the same, he came to an agreement with the proper authorities of the company that the funds thereof, or such portion of the same as they might choose, should thereafter, from time to time, be deposited with him, he being then a private banker, and that the moneys so deposited should be paid out or drawn at the pleasure of the company, without notice or limitation; and he avers that he agreed with the company to account with the proper officers for such moneys when and as often as thereto required, and to pay to the company interest thereon, at the rate of ten per centum annually during the continuance of such deposit, until a further or other agreement should be made.

Funds of the kind contemplated were, in accordance with the agreement, deposited with the complainant at the pleasure of the company, and the complainant avers that he paid interest on the average amount of the same at the agreed rate, for the period and to the amount specified in the exhibit annexed to the bill of complaint.

Ten per centum per annum was paid during the period specified in the annexed exhibit, but it appears that the rate at the close of that period was reduced to 8 per cent. per annum, and the complainant admits that no part of the interest since the rate was reduced has been paid.

Both parties, it seems, were solvent until the 9th of October, 1871, when a large part of the property of the complainant and others, which was insured by the company, was destroyed by fire, the immediate effect of which was to cause the failure of the insurance company. Losses of the complainant by the fire, for which the company is responsible, as claimed by the complainant, amount to the sum of $55,800, as appears by the second exhibit annexed to the bill of complaint, and he admits that he held on deposit at the time the company failed the sum of $39,188.03, received under the agreement already fully described, which is due to the company with 8 per cent. interest from July 1, 1871, to the 18th of December in the same year.

Process was accordingly issued, and the complainant prays that the respondent may be decreed to deliver to him the notes referred to, and that he, the respondent, shall acquit and discharge the complainant from the admitted indebtedness to the company, and that he, the complainant, be allowed to prove the balance of his demand against the estate of the bankrupt company, and that the respondent be enjoined and restrained from selling or assigning the said notes, and from instituting any suit against the complainant to recover the notes or his indebtedness to the company.

Service was made and the respondent appeared and filed an answer. He admits that the complainant was one of the original corporators and subscribers to the capital stock of the company; that only 10 per cent. of the subscriptions for the capital stock was paid in cash, and that 90 per cent. of the same was secured in the promissory notes of the subscribers; that the company at the time of the great fire became insolvent, and that the company on the day named in the bill was adjudged bankrupt; that the company, as alleged, issued several policies of insurance to the complainant, and that he sustained large losses by the great fire; that he is indebted to the company as set forth in the third schedule exhibited in the record, and that he was and is the holder of the funds of the company to the amount specified in the bill of complaint; but the respondent avers that the company never came to any such agreement, in respect to such funds, as that alleged, and that the complainant held the same solely in his official character as treasurer of the company.

Most of the allegations of the answer were also embodied in a cross-bill filed by the respondent at the same time, in which he denied all the equity of the original bill, and prayed for a decree in his own favor, and that the complainant in the original bill be decreed to pay over to him as assignee the whole amount he owed to the company, including the notes given for subscriptions for stock and the amount he held on deposit.

Proofs were taken, and the parties having been fully heard the court dismissed the original bill of complaint and entered a decree for the respondent in the sum of $9,532, being the amount of the promissory notes given for capital stock, and $39,108.03, being the amount of the funds of the company held by the respondent in the cross bill, with 10 per cent. interest on both amounts. Immediate appeal was taken by the complainant in the original bill and respondent in the cross-bill, and he now seeks to reverse that decree.

Complainant's losses by the great fire, it is admitted, amount to $45,015.33, and that the company is liable to him in that amount for such losses under the policies of insurance issued to the complainant prior to the fire.

Since the bill of complaint was filed in this case this court has decided that the debt due to a stockholder in such a case, for losses sustained by the stockholder, of properties insured by the company, cannot be set off against his indebtedness to the company for unpaid shares in the capital stock of the company, for the reason that moneys arising from that source constitute a trust fund for the payment of the debts of the company, which, in the due administration of the bankrupt law, must be equally divided among all the creditors of the bankrupt. (Sawyer *v.* Hoag, 17 Wall., 610.)

Such an indebtedness constitutes an exception to the rule that where there are mutual debts, "one debt may be set against the other," as originally provided by act of Parliament: or, perhaps, it would be more accurate to say that the rule does not apply where it does not appear that the debts are not in the same right as well as mutual. (U S. *v.* Eckford, 6 Wall., 488)

Whether the suit be one at law or in equity, set off must be understood as that right which exists between two parties, each of whom, under an independent contract, owes an ascertained amount to the other to set off their respective debts by way of mutual deduction, so that in any action brought for the larger debt the residue only, after such deduction, shall be recovered. (Adams Eq, (6th Am. ed.), 447.)

Courts of equity, following the law, will not allow a set-off of a joint debt against a separate debt, or of a separate debt against a joint debt; nor will such courts allow a set-off of debts accruing in different rights, except under very special circumstances, and where the proofs are clear, and the equity is very strong. (2 Story's Eq., (6th ed,) sec. 1,437.)

Equity regards the capital stock and property of a corporation as held in trust for the payment of the debts of the corporation, and recognizes the right of creditors to pursue properties into whosesoever possession the same may be transferred, unless the stock or property has passed into the hands of a bona fide purchaser; and the rule is well settled that stockholders are not entitled to any share of the capital stock, nor to any dividend of the profit until all the debts of the corporation are paid. (Railroad Co. *v.* Howard, 7 Wall., 416)

Moneys derived from the sale and transfer of the franchises and capital stock of an incorporated company are the assets of the corporation, and as such constitute a fund for the payment of its debts, and if held by the corporation itself, and so invested as to be subject to legal process, the fund may be seized by a creditor on such process and subjected to the payment of the indebtedness of the company; and where the fund has been improperly distributed among the stockholders, or passed into the hands of third persons, not bona fide creditors or purchasers, the established rule in equity is, if the debts of the company remain unpaid, that such holders take the fund charged with the trust in favor of the creditors, which a court of equity will enforce and compel the application of the same to the satisfaction of the debts of the corporation. (2 Story Eq., 9th ed., sec. 1,252; Mumma *v.* Potomac, 8 Pet., 286; Wood *v.* Dummer, 3 Mason, 308; Vose *v.* Grant, 15 Mass., 522; Spear *v.* Grant, 16 Id., 14; Curran *v.* Arkansas, 15 How., 307)

Tested by these considerations it is clear that the prayer of the bill of complaint, that the respondent may be directed to deliver to the complainant the notes referred to, must be denied.

Claim for losses due from the company cannot be set off against the notes given for capital stock. Suppose that is so, still the complainant insists that such claims for losses may be set off against the amount due from him to the company for the moneys of the company deposited with him under the agreement set forth in the bill of complaint.

Matters alleged in the bill of complaint and denied in the answer must be proved before such matters can be assumed as true by the court. Concede that, and it follows that the important question remains to be considered, whether there was such an agreement between the complainant and the company, in respect to the moneys deposited with the complainant, as that set forth in the bill of complaint.

Moneys to a large amount were deposited with the complainant, and it is not denied that he paid interest on the same to the amount of $11,799.96, as shown by the first schedule annexed to the original bill, but the respondent in the original bill and complainant in the cross-bill alleges that the complainant in the original bill received and held all such sums as treasurer of the company,

and that the balance in his hands is a trust fund belonging to all creditors, and consequently that his claim for losses under the policies issued to him by the company cannot be set off against his indebtedness to the company for the balance of that fund in his hands. He admits that he was elected to the office of treasurer by the directors in the month of July, 1870, and that he was reappointed thereto during the following year, but he denies that he ever accepted the office, or that he ever qualified as such, or that he held in his custody any money whatever as treasurer of the company. Subsequently he was examined as a witness in the case, and testified that he never qualified as treasurer or gave bond, and never had any other or different relations with the company in respect to its funds than such as existed before he was elected.

What he states in respect to the alleged agreement is substantially as follows: That he agreed, at the first meeting of the directors, to receive all moneys paid to the company, and to allow the company 10 per cent. interest upon it, payable annually, until he should notify the company to the contrary or a different arrangement should be made between the parties, the purpose of the directors being to have the money at all times available, as far as possible, and at the same time to get interest on it, and he says that he made the offer, not because it was of advantage to him, but to encourage the company.

Sufficient appears to show that the complainant was at that time a private banker in good standing and of great reputed wealth, and he testifies that the arrangement was continued as long as the company transacted business, except that the rate of interest which he was to allow was reduced from 10 to 8 per cent. per annum. Blank checks to draw the money in his hands were prepared by the officers of the company and were drawn on him, not as treasurer, but as a private banker, and he testified that it was never understood at any meeting of the company that there were any funds of the company in his hands as treasurer, and that the funds on hand were always reported as funds in bank, and were so described in the published reports of the company.

Decided confirmations of the material parts of these statements comes from several witnesses, and it appears to the entire satisfaction of the court that the arrangement, set forth in the bill of complaint, was known to and approved by the stockholders as well as the directors, and by the executive committee and committee of finance and investment. Deposits undoubtedly may be made with a banker under circumstances where the legal conclusion would be that the title to the fund deposited remained in the depositor, and in that case the banker would become the bailee of the depositor, and the latter might rightfully demand the identical money as his property; but where the deposit is general and there is no special agreement proved inconsistent with such a theory, the title to the money deposited, whatever it may be, passes to the banker and he becomes liable for the amount as a debt which can only be discharged by a legal payment of the amount. (Thompson *v.* Riggs, 5 Wall., 678. Bank *v.* Wister, 2 Pet., 325.)

All deposits made with bankers, said Mr. Justice Miller, may be divided into two classes, namely: those in which the bank becomes bailee of the depositor, the title to the thing deposited remaining with the latter; and that other kind of deposit money peculiar to banking business, in which the depositor for his own convenience parts with the title of his money and loans it to the banker, and the latter, in the consideration of the loan of the money and the right to use it for his own profit, agrees to refund the same amount or any part thereof on demand. (Marine Bank *v.* Fulton Bank, 2 Wall., 256.)

Such an agreement to refund may be express or implied, and if it is express it may be to refund with or without interest, according to the terms of agreement. Where the agreement is to pay interest the agreement is obligatory, but the fact that the depositary agreed to pay interest affords very strong evidence that the title to the money deposited passed out of the depositor by the act of making the deposit.

Money deposited with a banker, says Hill, creates a legal debt between the parties, which under proper circumstances, may be recovered in an action at law. (Hill on Trustees, (4th Am. ed.,) 173.)

Authorities to the same effect are numerous and decisive, as, for example, it was expressly decided by the master of the rolls, that money paid to a banker becomes immediately a part of his general assets, and he is mereby a debtor for the amount. (Devaynes *v.* Noble, 1 Merivale, 561.)

Sums which are paid, says Lord Denman, to the credit of a customer with a banker, though usually called deposits, are, in truth, loans by the customer to the banker, and the party who seeks to recover the balance of such account must prove that the loan was in reality intended to be his and that it was received as such. (Sims *v.* Bond, 2 Barn. & Adol., 392.)

Exactly the same rule was laid down in a court of exchequer, where it was held that money deposited with a banker by his customer, in the ordinary way, is money lent to the banker, with a superadded obligation that it is to be paid when demanded by a check. (Pott *v.* Clegg, 16 Mee. & Wels., 327).

Viewed in the light of these suggestions, it is clear that the amount deposited by the company with the complainant, and which he still owes to the company, or to the respondent, as assignee, was and is held by him as a private banker and not as treasurer of the company, and that any losses sustained by the complainant, at the time and in the manner alleged, for which the bankrupt corporation were and are liable as insurers, may be set off against that claim of the bankrupt corporation, as described in the pleadings in the original suit and cross-bill filed by the respondent.

Nothing remains to be done in this investigation except to recapitulate the elements for a decree, and to direct, in general terms, what the new decree in the case shall be in the court below. Enough is already remarked to show that the complainant is entitled to the relief prayed, so far as respects the claim of the respondent for the balance due to the bankrupt corporation for the moneys deposited with him as a private banker, amounting to the sum of $39,188 03, as appears in the record, and that he should be allowed to prove the balance due to him for the said losses, to the extent that the company is liable therefor, against the estate of the bankrupt corporation; that the complainant is not entitled to the relief prayed, so far as respects the notes referred to, in the bill of complaint, for the reason that the notes were given for shares in the capital stock and constitute a trust fund which belongs to all the creditors of the company, for which the complainant in the cross-bill is entitled to a decree.

Should further investigation become necessary in order to ascertain the exact amount of the respective claims, that investigation will be made by the Circuit Court.

The decree of the Circuit Court is reversed, and the cause remanded for such further proceedings as may be necessary, and for decree in conformity to the opinion of this court.

U. S. CIR. COURT, E. D. OF MICH.

OPINION DELIVERED JAN. 20, 1876.

In Re JAMES T. HURST. In bankruptcy. On petition for review of order of District Court.

CONSTRUCTION OF THE RESOLUTION OF COMPOSITION — WHEN INDORSED NOTES MAY BE PAID FOR DIVIDENDS.

1. A resolution of composition under the bankrupt act which provided that payment should be made by the delivery of indorsed promissory notes was sustained upon the ground that such phraseology would be interpreted to mean a payment in money within the meaning of the statute.
2. There is no principle of law which constrains a court to construe the words, "received in full payment," "received in full satisfaction of," or other similar words, when applied to the reception of a note or other security in payment of an antecedent debt, to mean absolute satisfaction; but it is in all instances a question of fact and intention, to be deduced from the words of the instrument, and the facts in reference to which they have been employed.
3. A resolution of composition under the statute will not be effective to discharge the debtor unless the dividend is actually paid to the creditor.
4. The form of the resolution in question strongly disapproved by the court.

This was a proceeding under the bankrupt act between debtor and creditor to compromise the former's indebtedness. A "resolution of composition" having been adopted, by which the creditors agreed "to accept the sum of twenty cents on the dollar in full satisfaction and discharge, provided the said sum be paid as follows: six month notes of the debtor, indorsed by, etc., as security," the District Court, on motion, made an order to record the same.

E. K. Roberts & Co., a creditor, having refused to sign the resolution, filed a petition in review of the said order, on the ground that it did not provide for payment in money.

EMMONS, J.

The only error urged upon this bill of review is, that the resolution of composition provides for a payment in indorsed promissory notes, whereas the statute requires it shall be in money. Literally interpreted, it is subject to the criticism made. It does provide expressly that the payment shall be made by the delivery of certain indorsed promissory notes. If we cannot construe this to mean a payment in money, the "resolution" must be rejected. We think, without any violation of familiar rules of interpretation, we can read this language as importing such payment, notwithstanding its apparent literal meaning to the contrary. The circumstances in which these words are employed, show that the word "payment" is not to be understood in its literal, absolute signification.

Did not peculiar circumstances constrain us to put in accessible form the reasons for our ruling, we should not, pressed as we are with other duties, feel obliged to do so. We are informed, however, the legality and the effect of these proceedings are questioned in other tribunals; and we assume that the construction which we give them here will be adopted there. In the midst of jury trials, acting also for the district judge, to dispose of a long list of certified admiralty cases, as well as those upon appeal, and the whole business of the bankruptcy court, it is impossible for us to do more than simply link together what is mere memoranda from which our oral judgment was delivered. The few moments we can spare from three sittings a day, will not enable us to condense these suggestions or avoid considerable repetition. What little we have done could by no possibility have been accomplished had we not received some very exceptional and very efficient aid from the learned counsel of the bankrupt.

Had the resolution come before us in different circumstances, and where without great injury we could have caused another to be adopted in its stead, we should have preferred its rejection on account of the impolicy of sanctioning doubtful terms when it is so easy to comply with the provisions of the law. Litigation is naturally created by such ambiguities, and has actually resulted from them in the present instance. It is with great reluctance that we sustain the practice in this case, notwithstanding the many precedents found in the books for construing similar words as we now interpret these. We have much reason to believe that had this point been argued before the District Court, the proceedings would have been remitted to the creditors and a new resolution required. We hesitated indeed, whether, owing to the practice in that court, we would listen to the objection at all.

We deem it unnecessary to discuss the doctrines, much less cite adjudications in reference to the interpretation of statutes and contracts generally, where the decisions are so numerous in reference to the very words employed in this resolution and the subject-matter with which it deals. They are but illustrations of the familiar general rule on which they rest, that every instrument must be construed to effectuate the presumed intention of the parties. It is so in deeds, wills, personal covenants and even judgments and statutes. In reference to them all, the same language in numerous instances has been held to bear wholly different meanings according to the circumstances in which it is employed. The bearing upon this subject is so full and so familiar that its citation and discussion would be quite out of place. We shall do no more than refer to a very small portion of the very great number of English and American judgments which have declared that the words "payment," "in satisfaction of," "in full discharge of," and numerous other similar expressions when contained in receipts and other instruments in reference to antecedent and liquidated obligations, operate to discharge them, or the contrary, just as the circumstances in which they are used indicate intention, and as justice demands. The receipt of a promissory note in payment of an antecedent debt when a suit is brought by the creditor against his debtor, in all of the States of the Union where they profess to follow the common law, is held not to discharge the original obligation. This result is declared in various forms of expression. It is sometimes said to be a conditional payment, at others that the word payment is not to be understood in its technical sense, but is intended only to evidence the amount to be paid. In those States where a different rule is established they concede it to be peculiar. If the same receipt is given in circumstances where it is quite clear that the parties intended to satisfy absolutely an antecedent debt, as where financial adjustments demand that a mortgage should be discharged, a judgment satisfied, a retiring partner who leaves the assetts of a firm in the hands of his previous associates, and numerous other instances where the nature of the transaction shows that actual satisfaction was intended; in all such instances these words "in payment of," or "in satisfaction of," will be ruled to import what they literally mean. In the construction which we give this resolution, holding as we do that it does not mean the delivery of the promissory notes as payment and a discharge of the debtor, we do not approbate the extreme expressions in several of the cases on this subject which hold that there must be in express agreement in terms to accept a note in satisfaction before it will operate as such. It is a mere matter of interpretation in each instance, controlled by the circumstances in which the agreement is made.

1 Smith's Lead. Cas., 7th Am. Ed., p. 613, cites a long list of cases and deduces from them the general principle which the author supposes they sustain. After saying that the transfer by a debtor to his creditor of the note of a third person will discharge his obligation, if such is shown to be the intention, and that such intention must appear by the express agreement of the parties, and will not be implied by the mere act of transfer, adds (p. 613) that "merely receipting the notes as cash, or giving a receipt in full, or receipting the notes as being in payment of the debt, will not alone be sufficient to prove that the notes were taken, not as conditional payment, but as an immediate and absolute discharge." (29 Pa., p. 448, McIntyre *v.* Kennedy.) The check of a third person was delivered to plaintiff in payment of an antecedent debt. It does not appear that a written receipt was given, but the whole case proceeds on the assumption that in terms it was delivered in payment. Woodward, J., on a very full review of the English and American cases approbating the summary which we have quoted from the American edition of Smith's Leading Cases, lays down the general doctrine that there must be either an express agreement to receive in payment, or facts *aliunde* from which such an understanding is clearly to be implied. 4 Watts, 308, McLaughlin *v.* Borard. A draft in this case was received "for the amount then due on the above judgment." Gibson, J., in deciding that it was not satisfaction of the judgment, on p. 315, says "a note or bill taken in satisfaction of a precedent debt imposes no further duty on the creditor than to use reasonable diligence in obtaining payment, or acceptance by presenting it in season, and giving notice of its dishonor to the debtor from whom it was had, if he be a party to it." 5 Johnson, p. 68, Tobey *v.* Barber. In this case the receipt was very positive in its terms. It read, "Received of Barber $163 on account of within lease, and in full for the second and third quarter's rent." It was held to be sufficient to explain this receipt, and to show that the rent was not paid, by simply proving that it was given for the note of a third person, and that the note was dishonored. 9 Johnson, 309, Johnson *v.* Weed, illustrates with what fullness the courts have held this question of payment to be one of mere construction, in the light of the circumstances in which the language of receipts and other contracts have been written. It is conceded everywhere that where goods are sold and the note of a third

person is cotemporaneously delivered in exchange, the presumption of law *prima facie* is that it is absolute satisfaction. In this case, however, a jury having found that the delivery of a note in payment of goods bought at the time was not intended by the parties to be absolute payment, the court refused to set aside the verdict; and see 2 Caines, 117, Reget *v.* Merit. In 10 Maryland, 27, Berry *v.* Griffin, it was held that a request to charge which implied as matter of law that the reception of a note in payment of a debt was *per se* an absolute satisfaction, was erroneous. It might or might not be payment in fact, according to the conditions in which the receipt was given. 5 Rawle, 166, Perit *v* Pittsfield et al., was a case where property was delivered "in payment of a debt." Although the word payment was used, looking to the nature of the transaction, it was held not to be such. Other parts of the case illustrate the liberality of the interpretation which courts will indulge in order to carry out what the parties intended.

There is a class of cases which decides that where upon dissolution of a copartnership the paper of one member is taken for the debt of a firm, the same words which would not import payment, in other circumstances are construed to do so in these. These judgments well illustrate the principle we have assumed that no form of words will secure the same interpretation in all instances. When the motive is to discharge one of several debtors when the other assumes the control of the assets of the business, language indicating discharge and satisfaction will be interpreted so as to effectuate the presumed intention of the parties. Smith's Lead. Cas., vol. 1, 7th ed., pp. 613, 614, refers to a number of these judgments. 6 Barbour, 244, Van Eps *v.* Dillage, cites and approves 12 Johnson, p. 409, and other cases which hold that when the paper of one member of a firm is given in payment of a partnership debt, where the other member retires and relies upon the discharge of his obligation, it will be deemed absolute payment. It decides, nevertheless, even in such cases, that where there are facts *aliunde* showing it was not so intended by the parties, such consequences will not follow, and the verdict of a jury, finding there was no payment, was not disturbed; and see 4 Wash. C. C., 271, Harris *v.* Donaldson; 45 Mo., 150, Doebling *v.* Loos. In an action to enforce a lien, it was urged that the account was paid by note. The receipt given was as follows: "Received of Loos $1,300 in full of all my demands to date." It being the note of the debtor, the receipt, it was said, was not sufficient evidence to submit it to the jury. Had the circumstances been different, the words might have been differently interpreted. Those before us in reference to this "resolution" are quite as strong as those in 45 Mo.; and see 53 Ill., 309, Archibald *v.* Argall, which held, on proper testimony, that it was a question of intention for the jury, notwithstanding the form of the papers. The following very recent judgments equally sustain the principle of the cases we have already more particularly noticed: 45 Miss., 559, Lear *v.* Freedlander; 33 Iowa, 406, Hose *v.* McDaniel; 43 Ind., 368, Jewett *v.* Pleak; 33 Wis., 488, Matteson *v.* Ellsworth.

No State has more fully applied the doctrine than Michigan. It is with much propriety that we adopt one of its rules of interpretation for this resolution—being, as it is, the language of its business men. 1 Doug., Mich., 500, Gardner *v.* Gorham. A note and mortgage were received "in payment for goods." Upon the trial, evidence tending to show it was not intended to receive them in satisfaction was excluded. In reversing the judgment for this reason the court, by Whipple, J., at page 510, after laying down the general rule in the most stringent form, says: "It is applicable alike to a case where the note of the debtor or of a third person is taken." He cites 9 Johnson, 310, and 7 Term, 64, Owensen *v.* Morse. The 8th Michigan, 494, Hotchin *v.* Secor, also goes upon the ground that it is a mere interpretation of the language used by, and the conduct of the parties. 17 Mich., 273, Dudgeon *v.* Haggart, and 23 Mich., 228, Frazer *v.* Burchard, announce the same principle.

The English doctrine is quite as stringent as the American. In the 5th Term, 513, Kearslake *v.* Morgan, a note was received "for and account of the debt." Not being paid and the collateral circumstances failing to show an intention to discharge, it was held that an action could be maintained for the original consideration. This case is cited in 1 Meeson & Welsby 154, Saide *v.* Rhodes, with approval, and distinguished from the facts before the court, where it appeared by plea that the note was received in absolute satisfaction. The 12th California, 317, Griffith *v.* Grogan, approves the general principle that a promissory note of a third person is not payment unless so expressly agreed, and says such is the English law, citing the earlier cases on that subject.

The federal cases are equally full to the same point. 1 Wash., C. C., 328, Maze *v.* Miller. A receipt was given "in full for property sold." Upon proof that payment was made by note of a third person which was unavailable, it was held the receipt was no bar to an action. The language of the instrument was quite as strong as that before us. See also 4 Wash., C. C., 271, Harris *v.* Donaldson; 10 Peters, 558, 567, Peter *v.* Beverly. An executor gave his note for a debt due from the estate. In deciding it was no payment, Thompson, J., says "that in no case is the giving of the note of a third person for pre-existing debt, payment, unless it is expressly so agreed, or is clearly to be inferred from the facts of the transaction." He cites, with approbation, 11 Johnson, 513, 14 Ib., 404, 2 Gill & John, 493, Glenn *v.* Smith, 7 Har. & Johns, 92, in which written receipts declaring the paper was received in payment, were construed to be conditional payment only.

Glenn *v.* Smith is one of the leading cases, and perhaps is as fully argued as any in the books. The question was, whether certain indorsed notes constituted payment for the property in question. The receipt given was "for two promissory notes signed by herself and indorsed by Glenn & Co. in payment of the above account." After a very full review of the English and American adjudications down to the day of the judgment, it was held that the word "payment" would be interpreted to mean conditional payment only. The peculiar facts of the case are relied upon to sustain this reading of the instrument.

See also 10 Iredell, page 385, Gorgon *v.* Price; 2 Story, C. C., 467, Barque Chusan, in deciding that the giving of a note was not to be considered as a satisfaction of the cause of action, says, such is the law of New York, that of England, and so far as he (Justice Story) was informed, of any state in the Union, Massachusetts and Maine excepted. See also 2 Cliff., C. C., page 4. The Kimball, same case on error, in 3 Wallace, page 44; 1 Cliff., page 420, Bake *v.* Draper; and 14 Howard, 240, Downey *v.* Hicks.

In view of the many precedents for construing the words of this resolution in conformity with the requirements of the statute, and holding that they do import a payment in money, we feel confident it is our duty to do so. It is part of a statutory proceeding in which any other meaning is unlawful. If it does not mean this, it is not within the statute at all. It prohibits any other payment but one in money. Predicaments are presented in which that canon of construction is applicable when the instrument is to be saved, if by any possible interpretation it can be. To use the language of another judgment, "it is our duty to approach the line where interpretation ends, and interpolation commences."

There is no danger to creditors, resulting from such a construction. The composition will not be effective to discharge the debtor unless the amount agreed upon is actually paid. See 13 National Bank, Reg., 129. In re Reiman *v.* Friedlander. In re Hatton, 7 L. R. Ch., App., 723; Edwards *v.* Coombe, 7 L R, Com. Pleas, 519; and the numerous American and English adjudications which hold that in all similar cases deeds of composition, and accord and satisfaction, must be completely executed in order to be operative.

The order of the District Court to record the "resolution" is affirmed, without costs to either party as against the other.

JULIAN G. DICKENSON for creditor.

WM. JENNISON for bankrupt.

SUPREME COURT OF ILLINOIS.

OPINION FILED JAN. 21, 1876.

THE UNION NATIONAL BANK *v.* THE OCEANA COUNTY BANK.

Appeal from Cook.

RIGHTS OF DRAWEE AND HOLDER OF BANK CHECK.

Held, that where a depositor draws his check on his banker, who has funds to an equal or greater sum than his check, it operates to transfer the sum named to the payee, who may sue for and recover the amount from the bank, and that a transfer of the check draws with it the title to the amount named in the check to each successive holder. After the check has passed to the hands of a *bona fide* holder, it is not in the power of the drawer to countermand the order of payment.

SCOTT, C. J.—This action is upon a check drawn by James H. Ledlie on the Union National Bank, of Chicago, in favor of Underhill and Gray, and by them indorsed and delivered to the Oceana County Bank, located at Pentwater, Michigan. The declaration contains a special count upon the check, and also the common money counts. On the trial the plaintiff recovered a judgment for the amount of the check with interest, and the defendant brings the case to this court on appeal.

The evidence shows there was no unreasonable delay in presenting the check to defendant for payment, and notwithstanding it is shown the bank had funds in its possession on deposit subject to check at the time belonging to the drawer in excess of the amount of the check, payment was refused for the reason the drawer had previously ordered the bank not to pay it.

The facts proven in this case bring it clearly within the rule declared in Munn et al. *v.* Burch et al., 25 Ill., 35. The doctrine of that case has been so frequently affirmed in other cases in this court, it is not necessary now to discuss it as a new question. The principle of all the cases in this court on this subject is, that when a depositor draws his check on his bankers who has funds to an equal or greater sum than his check, it operates to transfer the sum named to the payee, who may sue for and recover the amount from the bank, and that a transfer of the check draws with it the title to the amount named in the check to each successive holder. After the check has passed to the hands of a *bona fide* holder, it is not in the power of the drawers to countermand the order of payment.

The case at bar is controlled by this principle, and we content ourselves by simply making reference to our former decisions where it is declared. The Chicago Marine and Fire Ins. Co. *v.* Stanford, 28 Ills., 168; Bickford *v.* First National Bank, 42 Ills., 238; Brown *v.* Lecker et al., 43 Ills., 497.

Adhering, as we do, to the doctrine of the cases cited, we are of opinion the evidence offered to prove facts establishing a defense as between the drawees and the drawer of the check, was properly rejected. The judgment must be affirmed.

Judgment affirmed.

MELVILLE W. FULLER for appellant.

J. C. & J. J. KNICKERBOCKER for appellee.

LV. NEW HAMPSHIRE REPORTS.

We have received from Hon. JOHN M. SHIRLEY, official reporter, the advance sheets of the LV. Volume of his reports, from which we take the followihg headnotes. The cases are of the August term, 1875:

Citizens' National Bank v. *Smith*, p. 593.

PROMISSORY NOTE — SIGNATURE OBTAINED BY MEANS OF FRAUDULENT REPRESENTATIONS—NEGLIGENCE.

The defendant was induced to sign his name, as maker, to a negotiable promissory note, by false and fraudulent representations that it was a contract of an entirely different character, whereby he would incur no pecuniary liability; but it appeared, further, that it was a negligent act on his part to sign the note without ascertaining whether it was what the payee represented, or something else: *Held*, that the defendant was precluded by his negligence from setting up the fraud, against a *bona fide* holder of the note who had purchased it for value before due.

Bullock v. *Wallingford*, p. 619.

EVIDENCE—CERTIFICATE OF PUBLIC OFFICER.

A certificate from the United States commissioner of patents that diligent search has been made, and that it does not appear that a certain patent has been issued, is not competent evidence of that fact.

Kittredge v. *Holt*, p. 620.

REPLEVIN—CONSTRUCTION OF STATUTE.

Replevin cannot be maintained, either at common law or by statute of July 1, 1873, by a third person claiming personal property taken on a valid execution.

Lucy v. *Lucy*, 9.

ADMINISTRATION — SALE WHEN VOID — ACCOUNTING—NEGLIGENCE.

1. The real estate of a deceased person, not insolvent, vests at once, upon his decease, in the heir-at-law or devisee, subject to be divested by a proper sale under a license for the purpose of paying debts; and the administrator cannot enter to take the rents and profits.

2. In such case, if the administrator has received the rents and profits, he is not to be charged with them in his administration account, but is liable to account to the heirs for the same; nor is he entitled to be credited for taxes assessed subsequent to the decease of his intestate, and paid by him, nor for repairs made by him on the real estate.

3. If, through the administrator's negligence, a sale of real estate under license is void because of some defect in his proceedings, he will not be credited with his charges for services and expenses of such sale upon settlement of his administration account.

4. Commissions are allowed, not as perquisites, but as compensation for services, and the amount to be allowed will vary, according to the labor, risk, responsibility, and trouble of each particular case.

JUDGE EDWARDS ON TAXES.

PERSONAL LIABILITY OF THE COLLECTOR IN CASE OF ATTEMPTED COLLECTION OF AN ILLEGAL LEVY.

To the Editor of the Illinois State Journal:

Having given an opinion that the Town Collector would be liable in an action of trespass if he enforced the collection under his warrant of illegal taxes, I give below the authorities in support of that opinion.

The Supreme Court of the United States, in 11 Wallace, page 112, says:

"If the tax was illegal, the plaintiff protesting against its enforcement might have had his action, after it was paid, against the officer, or the city, to recover back the money, or he *might have prosecuted either for his damages.*"

In 35th Illinois. 466, the Supreme Court held:

"Ordinarily, a party of whom a tax is illegally collected has an ample remedy at law, *by an action of trespass against the officer collecting it* or by an action of assumpsit to recover back the money."

In 40th Illinois, 389:

"Though a tax was illegally levied, yet the collector to whom a warrant was directed, regular on its face, and which he was to collect or not at his peril, was liable for the costs restraining the collection of the tax; it seems it *would be otherwise* if he had actually attempted to collect the tax. * * * Until he enforced collection under his warrant he has done no act injurious to the taxpayers of the town."

In 39th Illinois, 124:

"Though from motives of public policy a party is inhibited from raising the question of the validity of a law imposing a tax by a resort to the action of replevin, he yet has a remedy by *action of trespass*, in which, under a proper state of pleading, the questions can be fully presented, and if an unconstitutional law has been enforced against him, *depriving him of his property, the most ample redress may be found in that action*"

In Blackwell on tax titles, pages 162-3:

"If a tax is levied for an illegal purpose it cannot be sustained. It cannot be enforced against the citizen unless it is clearly and distinctly authorized by law. 'Whenever money is raised by taxation, the purpose for which it was levied ought to appear upon the face of the proceeding, and if that purpose was illegal, there can be no authority to collect the tax; *the officer who attempts to enforce it will be liable in trespass*, and the purchaser can acquire no title to the property seized and sold to satisfy it.'"

The italics are my own.

N. W. EDWARDS.

CHICAGO LEGAL NEWS.

Lex vincit.

MYRA BRADWELL, Editor.

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We call attention to the following opinions, reported at length in this issue:

Power of one Partner to Enter Appearance of Other after Dissolution.—The opinion of the Supreme Court of the United States, by Bradley, J., holding that after the dissolution of a partnership, one of the partners in a suit brought against the firm has no authority to enter the appearance for the other partners who do not reside in the State where the suit is brought and have not been served with process; that a judgment against all the partners, founded on such an appearance, can be questioned by those not served with process in a suit brought thereon in another State; that the jurisdiction of a foreign court over the person or the subject matter embraced in the judgment or decree of such court is always open to inquiry, and in this respect the court of another State is to be regarded as a foreign court; that the record of such a judgment does not estop the parties from demanding such an inquiry. A distinction is made between a foreign and domestic judgment. This is an unusually interesting opinion and will repay a careful study.

Bankrupt Insurance Companies—Set-Off.—The opinion of the Supreme Court of the United States, by Clifford, J., in the case brought by Mr. Scammon against Mr. Kimball, as assignee of the bankrupt Mutual Insurance Company, to compel him to allow certain claims of his against the company, by the way of set-off. The court held that the claim for losses due from the company could not be set off against the notes given for capital stock, but that the amount deposited by the company with Mr. Scammon, and which he still owes to the company, or to Mr. Kimball, as assignee, was and is held by him as a private banker and not as treasurer of the company, and that any losses sustained by Mr. Scammon, at the time and in the manner alleged, for which the bankrupt corporation were and are liable, may be set off against that claim of the bankrupt corporation as described in the pleadings.

Bankruptcy — Composition Resolution—Construction—Payment in Notes.—The opinion of the United States Circuit Court for the Eastern District of Michigan, by Emmons, J., sustaining a resolution of composition under the bankrupt act, which provided that payment should be made by the delivery of indorsed promissory notes, upon the ground that such phraseology would be interpreted to mean a payment in money, within the meaning of the statute, and holding that a resolution of composition, under the statute, will not be effective to discharge the debtor, unless the dividend is actually paid to the creditor. The opinions of the district judges construing that portion of the bankrupt law in relation to compositions, are conflicting. This opinion of the learned circuit judge will be of very general interest to bankruptcy practitioners.

Insurance—Authority of Broker.—The opinion of the Supreme Court of this State, by Breese, J., holding that the insurance broker who took the application of appellee for insurance, was not the agent of the company but of appellee. The court states the duty of the applicant for insurance to tell the truth and the consequence of his making false representations.

Rights of Drawee and Holder of a Bank Check.—The opinion of the Supreme Court of this State, by Scott, C. J., holding that where a depositor draws his check on his banker, who has funds to an equal or greater sum than his check, it operates to transfer the sum named to the payee, who may sue for and recover the amount from the bank, and that a transfer of the check draws with it the title to the amount named in the check to each successive holder, and that after the check has passed to the hands of a *bona fide* holder, it is not in the power of the drawer to countermand the order of payment.

Constitutional Oath of Office—School Funds.—The opinion of the Supreme Court of this State, by Sheldon, J., holding that Section 25 of Art. 5 of the Constitution, which provides that all civil officers, except members of the General Assembly, and such inferior officers as may be by law exempted, shall, before they enter upon the duties of their respective offices, take and subscribe the oath of office therein prescribed, has not been understood by the legislative department to be self-executing; otherwise all the numerous laws requiring the taking of an official oath would be supererogatory; that in the case of an inferior officer not requiring the oath to be taken is the dispensing with it. The court states who under the school law is the custodian of district school moneys, and the consequences of school directors failing to pay over money borrowed by them when demanded by the township treasurer.

The Board of Health Regulation of Slaughter-Houses—Power of Common Council.—The opinion of the Supreme Court of this State, by Craig, J., holding that the Board of Health of the city of Chicago had no power to make a regulation or ordinance, that from and after the first day of January, 1872, no distillery, slaughter-house, rendering establishment or soap factory should be erected or put into operation in any building not then used for such purpose, within certain named limits in the city of Chicago; that such regulation was void even if the board had power over the subject they could not allow those then in the business to continue and prohibit others from engaging in it; that it is doubtful whether the legislature could confer the law-making power upon a body not elected or chosen by the people such as the Board of Health; that the power over the subject is in the Common Council.

The Citizens' Association Case.—The mandamus in the case of The People ex rel. Henderson et al. *v.* The City Council of Chicago, came to a sudden and unexpected termination this week at Springfield. Judge Dickey, having been of counsel, took no part in the decision. The six judges stood three for awarding the writ, and three against it. Chief Justice Scott, in announcing the result, said:

The petition in this case is for a mandamus to compel the city council to order an election for mayor of the city of Chicago. We have considered the case with that care and deliberation its importance demands, but we have been unable to agree upon a decision for the reason that the court is equally divided in opinion on the question involved, three members being in favor of awarding the writ of mandamus as prayed for in the petition, and three being opposed to it. Mr. Justice Dickey was not present when the case was argued, and, having been of counsel to respondents before he was elected a member of this court, it is proper to say he has not since his return taken any part in the consideration of the case. It follows that no decision can be made either denying or allowing the writ, as the constitution declares that the concurrence of four members of the court shall be necessary to every decision of the court. (Constitution 1870, art. 6, sec. 2.) The result is the mandamus is not allowed, and the cause will be stricken from the docket. Mandamus not allowed.

Recent Publications.

Reports of Cases at Law and in Chancery Argued and Determined in the Supreme Court of Illinois. By Norman L. Freeman, Reporter. Volume LXXVI., Containing a Portion of the Cases submitted at the January term, 1875. Printed for the Reporter. Springfield: 1875.

The above volume contains 115 cases. Of these, 63 are affirmed and 52 reversed. In 6 cases the opinions are Per Curiam. In 11 cases the judges are not unanimous. In three, dissenting opinions are filed. The opinions delivered by Walker, C. J., affirm the judgments below in 10 and reverse them in 9 cases. Those delivered by Scott, J., affirm them in 8 and reverse them in 5 cases. Those delivered by Breese, J., affirm them in 10 and reverse them in 8 cases. Those delivered by McAllister, J., affirm them in 6 and reverse them in 9 cases. Those delivered by Sheldon, J., affirm them in 8 and reverse them in 7 cases. Those delivered by Scholfield, J., affirm them in 6 and reverse them in 7 cases. Those delivered by Craig, J., affirm them in 9 and reverse them in 6 cases. We give the names of the judges who tried the cases in the courts below, and how they were disposed of in the Supreme Court: Wm. H. Snyder, 2 affirmed, 1 reversed; Hiram H. Decius, 1 affirmed; Lyman Lacey, 9 affirmed, 7 reversed; Thomas F. Tipton, 12 affirmed and 5 reversed; C. L. Higbee, 2 affirmed; Cyrus Epler, 8 affirmed and 1 reversed; E. S. Williams, 1 reversed; Joseph Sibley, 3 affirmed, 6 reversed; C. B. Smith, 3 affirmed, 13 reversed; H. M. Vandeveer, 1 affirmed, 3 reversed; Charles S. Zane, 4 affirmed, 2 reversed; A. A. Smith, 1 reversed; W. W. Farwell, 1 affirmed, 1 reversed; A. J. Gallagher, 2 reversed; J. C. Allen, 2 reversed; Cumberland Circuit, 1 affirmed; O. L. Davis, 8 affirmed and 2 reversed; Davis Davis, 1 affirmed; John G. Rogers, 1 affirmed; Thomas P. Bowen, 1 reversed; Charles D. Hodges, 1 affirmed; Charles Turner, 1 reversed; Clinton Circuit, 1 reversed; M. C. Crawford, 1 reversed; Joseph Gallespie, 1 affirmed; St. Clair Circuit, 1 affirmed; Ford Circuit, 1 affirmed; Geo. W. Pleasants, 1 reversed. Among the most important cases in this volume are, the Cass county seat contest case; the Morgan county bond case, Hewitt *v.* Long, involving the right of a mother to the custody of her minor child as against the father; The City of Quincy *v.* Jones et al., stating the law of this State upon the right to lateral support of adjacent soil. There are two or three cases construing what is known as the recent temperance law.

Fire Insurance Cases: Being a Collection of All the Reported Cases on Fire Insurance, in England, Ireland, Scotland and America, from the Earliest Period to the Present time, chronologically arranged. Vol. IV. Covering the Period 1855-1864, with Notes and References. By Edmund H. Bennett. New York: Published by Hurd & Houghton. Cambridge: Riverside Press. 1876. Sold by Callaghan & Co., Law-book Publishers, Chicago. pp. 855. Price, $7.50.

The mechanical execution of this volume is excellent. We wish all the Reports of American cases were as good. It is the fourth of the series. These reports are now well known by the profession and have been received with favor. In fact, so much so, that it would be difficult to find a good law library without them. Mr. Bennett, in his preface to the present volume, says the insurance cases decided during the period covered by this volume are so numerous, it was found impossible to insert them all in full; and as many involved only points that had been often previously decided, they were deemed relatively unimportant. In such cases a head-note or syllabus merely of the case has been published here. Mr. Bennett, in these days of pad book-making, is to be applauded for passing an unimportant opinion by with a simple head-note, instead of publishing it, as most authors would, to swell the size of his book.

Wrongs and Rights of a Traveler—by Boat—by Stage—by Rail. By a Barrister-at-law, of Osgoode Hall. Toronto: Published by R. Carswell. 1875.

This is a little volume of about two hundred pages, dedicated by the author to his fellows of the legal fraternity, the traveling public and all others who may care to read therein. The author very modestly says this little work does not aspire to compete with the learned productions of Redfield, Chitty or Story, but merely to supply a want felt by many to exist in this age of perpetual motion, of a plain and brief summary of the rights and liabilities of carriers and passengers by land and by water; that an attempt is made to combine instruction with entertainment, information with amusement, and to impart knowledge while beguiling a few hours in a railway carriage, or on a steamboat. While it is hoped that the general public will peruse with interest the text, containing elegant extracts from ponderous legal tomes, gems from the rich mines of legal lore, and where in many cases the law is laid down in the very words of learned judges of England, Canada and the United States. The notes, a cloud of authorities, the index and the list of cases, are inserted for the special delectation of the profesaional reader. The style of this work is novel and witty; it amuses and at the same time instructs. We do not know who the barrister is that wrote it, but we are much pleased with his work. He says he is very "'umble, coming of an 'umble family," like the celebrated Uriah, not the Hittite, but he of the Heap tribe. This book for its size contains a heap of common sense, sharp wit and good every-day law.

ADMINISTRATOR'S ACCOUNT—STOLEN MONEY.

Stevens v. *Gage*, 175.

1. In settling an administration account, a court of probate will act upon equitable principles; therefore, where money belonging to an estate was stolen by burglars from the safe of the administrator, the court, upon being satisfied that the administrator had been guilty of no want of due care, *held* that he should be discharged as to the money so lost, on the settlement of his account.—[*From L V. New Hampshire.*]

We have received from LAWRENCE PROUDFOOT, of the bar of this city, the following opinion:

SUPREME COURT OF ILLINOIS.

OPINION FILED JAN. 21, 1876.

THE LYCOMING FIRE INS. CO. *v.* JOHN O. RUBEN. *Appeal from Cook.*

INSURANCE — FALSE REPRESENTATIONS — PROOF OF LOSS AS EVIDENCE — INSURANCE BROKER—AGENCY.

1. CONTRACT OF INSURANCE—FALSE REPRESENTATIONS.—That the contract of insurance is one in which the parties to it must act in the utmost good faith. No false representations must be made which go to affect the risk. The insured must tell the whole truth There must be no concealment of any important facts, or false representations as to amount of stock r value. The insurer trusts to the representations of the insured, and proceeds upon the confidence that he has been given all the *data* necessary to enable him properly to estimate the risk.

2. AMOUNT OF STOCK.—The evidence shows appellee had not at the date of the policy, the amount of stock and of the value reported.

3. INSURANCE BROKER—NOT AGENT OF COMPANY. That the insurance broker who took the application of appellee was not the agent of the company, but of appellee.

4. FALSE REPRESENTATIONS.—That the false representations as to amount and value of property vitiates the policy and makes it void.

5. PROOF OF LOSS.—The court states the effect of refusing to allow the proof of loss to go to the jury.—[ED. LEGAL NEWS.]

BREESE, J.

This was assumpsit in the Circuit Court of Cook county by John O. Ruben, plaintiff, against the Lycoming Fire Insurance Company, defendants, on a policy of insurance executed by the defendant to the plaintiff, August 29, 1872, insuring plaintiff for one year, in the sum of two thousand dollars, on his stock of jewelry, watches, clocks, and materials for the same, silver plate, and plated ware, contained in a two-story framed building, in the town of Evanston.

The general issue was pleaded and submitted to a jury, who found for the plaintiff, assessing his damages at two thousand one hundred and eighty-one dollars, for which the court rendered judgment, having denied defendant's motion for a new trial.

The case is presented to us on the evidence and instructions, and we have given the record a careful and laborious examination.

The theory of the defense was, fraud in procuring the insurance in the amount stated in the policy, the *insuree*, at the time of its execution, not having articles of that value in the building. Appellants contend that appellee, at the time of taking out the policy, willfully and fraudulently over-valued his stock and deceived appellants, whereby they were induced to take the risk; and, further, that appellee did not have the goods at the time of the fire which he claims were lost, and for which the verdict allows him.

The contract of insurance is one in which the parties to it must act in the utmost good faith. No false representations must be made which go to affect the risk. The insured must tell the whole truth—there must be no concealment of any important fact, or false representations as to amount of stock or value. The insurer trusts to the representations of the insured, and proceeds upon the confidence that he has been given all the *data* necessary to enable him properly to estimate the risk.

From the best examination we have been able to give to the testimony in this cause, it is very evident appellee had not, at the date of the policy, the amount of stock and of the value reported. It is said, however, in explanation, that his stock was examined and valued by an agent of the company, and, on his report, the risk was taken.

This supposed agent is a Mr. Ludlam, who was not, at that time, nor at any other time, the appointed agent of this company. He was a man in the habit of picking up, as a broker on the street, any risk of which he might get information. It was on his application to appellee to permit him to place some insurance for appellee that the policy was written. He never made any examination of the stock at any time. He merely looked into "the show case," where he saw some watches, some chains, and some plated forks, saw no invoices, but took the value from representations and figures made by appellee, which appellee had ready to show him on the second visit he made to him. After this showing, Ludlam took the application to the agent of the company and obtained the policy in question. In this he was the agent of appellee and not of appellants. The fact that the agent allowed him a commission, does not change the character in which he acted.

The representations made by appellee to Ludlam, and which he communicated to the company's agent, Mr. Hoag, was that the stock on Land was of the value of thirty-three hundred dollars, or thereabouts.

That this was a false representation, appellee's own testimony, taken in connection with that of Oppenheimer, Younggreen, Fossoldt, and Logercrantz.

From this testimony appellee could not have brought to Evanston, from Amboy and Kewanee, an amount of stock to exceed in value six hundred dollars, to which was added by purchases from Happel & Co., from March 27, 1872, to the day of the date of the policy, goods to the amount of ten hundred ninety-eight 92 100 dollars, of which some fifty-three dollars were for tools and materials and not claimed to have been covered by the policy. Subsequent to the date of the policy, August 29, up to October 5, he purchased of the same firm stock to the amount of three hundred and eight 28-100 dollars, which two purchases aggregate fourteen hundred and seventy-nine 20-100 dollars, from which deduct for tools and materials $53.18, leaves fourteen hundred twenty-six 02-100 dollars. Adding this to the stock brought from Amboy and Kewanee, six hundred dollars, there would have been apparently, a stock at the date of the policy of two thousand and twenty six dollars. Appellee came to Evanston from Amboy *via* Kewanee and Chicago, about the first day of April, 1872. The policy was executed August 29, and the fire burned October 15 of the same year.

By his own testimony his business, after opening at Evanston, up to the date of the policy, a period five months, was *fair;* his sales amounting to as much as one hundred dollars a month; deducting, then, five hundred dollars from the aggregate of two thousand twenty-six dollars, his stock could by no possibility have exceeded in value fifteen hundred and twenty-six dollars. On this value he obtained by false representations, an insurance on a valuation of three thousand dollars. This of itself vitiates the policy and renders it void absolutely.

Now as to proof of loss:

It is impossible to read the testimony on this branch of the case without a conviction that the goods for which appellee claimed, as for a total loss, were not in the building at the time of the fire, or that the laws of matter have undergone a radical change.

Appellee testified, the fire happened about three o'clock in the morning. McKay, who slept in an adjoining apartment, says about one o'clock. Appellee further testified the tea-set was in the window the night of the fire, also the cake baskets, napkin rings and butter knives—"all my plated ware was in the window."

According to Happel and Co's invoice, there was of plated ware—and he had no other—besides the above as specified, cups, ice pitchers, castors, 3 dozen plated forks, 3 doz. tablespoons, 6 doz teaspoons, one plated child-set (in case), 4 dozen sugar shells; all these articles were in the window for display, placed there to attract attention, and which from their variety, they could not fail to do; yet Mr. Huntoon, a magistrate of the town, living near the premises, going to the fire, having been aroused by the cry, testifies positively, when he got to the building the fire had not reached the window and when he saw it there was none of this ware, none of these articles in the window. This testimony is uncontradicted. It is impossible they should not have been there, if there at the time the fire broke out.

Upon the other proposition, it will be observed, that many of the articles claimed to have been destroyed were of solid silver and solid gold. The most careful and scrutinizing examination of the *debris* immediately after the fire failed to discover a single particle of gold or silver. Was it true articles of that nature were in the building when fired, some trace of them would certainly have been found, for the closest search was made for that purpose. The remains of nothing of any value were found. Huntoon the elder, spent the most of the day after the fire raking the embers, trying to find valuables. There were two or three others aiding. Esq. Huntoon asked where the show-case had stood and where appellee's work-bench had been, and under the window in which the plated ware was sworn by appellee to have been, he found a tea-caddy about eight inches square in which he put all that he found. There was some forks and spoons, spectacle bows and the dial-plate and inside plate of one watch; these plates were found where the bench had stood, and appellee told him afterwards belonged to a watch he was repairing. These were the only parts of the many watches appellee included in his claim of loss.

Huntoon further testified the spoons found were plated ware, the plating burned off. They found watch-springs and clock-springs under the shelf where the clocks once stood—found clock bells and some clock-hands—they found the fastening of the show-case and the hinges, and a metal spectacle-case. Was there all the day, and the most industriously searching—found no silver forks or spoons—found no gold rings, and not a grain of gold or silver of any kind—appellee put no one there to rake the ruins, and Huntoon had great difficulty to get him there to indicate the place where his property had been placed. Witness went after him and brought him there—he was not there during the fire and only twice there the next morning.

In all these statements except the last, this witness is corroborated by others, and as to the last it is not contradicted nor was any one interrogated on this point.

It may be, as stated by Mr. Happel, that gold mixed with soft solder will fall into a black oxide and when superheated, but not so with solid gold nor with solid silver. Solid gold can only be melted at a white heat and will still be gold—it is indestructible by any known heat. So with solid silver. This witness states that gold jewelry is solder compound of soft solder. If it does not come in contact with soft solder the article will be found as bullion. So with solid silverware. The residue after a fire will be found in the same condition—"it would melt into a lump." Watch-movements, the destruction of which was claimed, the witness says, would not become obliterated by fire.

We understand it to be a fact that the precious metals, gold and silver, no matter into what form they may be worked, if melted by a conflagration such as this, will reappear as bullion.

This fact concerns this claim, as not a trace of either metal was found in the debris of this fire—not a watch movement, nothing to indicate such articles were there to be consumed.

The truth of this case is, that appellee had not at the time he effected the insurance, the property of the kind and value stated, or if he had, these valuables were removed before the fire, which he could have removed as easily as he removed near five hundred dollars worth of watches. And the conclusion is not unreasonable that he caused the fire intentionally after removing the valuable goods.

On this point the evidence is, he left a lamp burning on the show-case, made of glass, with a metal border, sitting upon a wooden counter. When he awoke and discovered the fire, there was nothing burning but a small space about the centre, which could have been quenched, if desired, with a bucket of water. This he did not attempt to apply, but immediately left the building—was not seen at the fire—made no effort to save anything, and could be got to the scene only by the strong persuasion of Mr. Huntoon.

It is not improbable that he had packed off all the valuables to a safe place and then fired the building. And this is not uncommon with those who have been dishonest enough to over-insure their property. It is of frequent occurrence, and courts and juries are bound to expose them, and defeat the wicked intention.

An error in the ruling of the court is complained of, and that is in permitting appellee's proof of loss to go to the jury. That this was error is not denied; but it is insisted it was cured by the instruction of the court to the jury to disregard it.

That this did not cure the error is settled by Lafayette, Bloomington and Miss. R. R. Co. *v.* Winslow et al., 66 Ill., 219.

This point was distinctly presented in that case, and it was said "it was of the utmost importance in trials by jury that the testimony given to them should be free from all exception that it was not easy to remove from the minds of jurors by instructions, impressions produced by improper testimony which the court has admitted against objections. The inevitable tendency of such evidence is, in doubtful cases, to mislead, and the extent of the mischief produced by it can not well be calculated.

That this proof had great effect upon this jury is evident from the amount of the verdict, they finding for a total loss and against all the well proved facts and presumptions in the case.

There does not appear to us to be a shadow of justice in this claim of appellee. The verdict was wrong, and should have been set aside on motion. It is unnecessary to remark upon the tenth instruction asked by appellants and refused. The case is with them on the merits.

For the reason given, the judgment is reversed and the cause remanded.

O. B. SANSUM, PERKINS & CHASE, for appellee.

THROUGH the courtesy of FRANCIS ADAMS, of the city law department, we have received the following important opinion:

SUPREME COURT OF ILLINOIS.

OPINION FILED JAN. —, 1876.

NO. 272.—CHARLES H. TUGMAN *v.* THE CITY OF CHICAGO. *Appeal from the Criminal Court of Cook Co.*

POWER OF BOARD OF HEALTH—SLAUGHTER HOUSES—POWER OF COUNCIL OVER—ORDINANCE MUST BE GENERAL.

1. POWER OF BOARD OF HEALTH—VOID ORDINANCE.—That the Board of Health of the city of Chicago had no power to make a regulation or ordinance; that from and after the 1st day of January, 1872, no distillery, slaughter-house, rendering establishment, or soap factory, should be erected or put into operation in any building not then used for such purpose within the territory in the city of Chicago, bounded within certain named streets, and that such ordinance or regulation was void.

2. ORDINANCE MUST BE GENERAL.—That an ordinance which would make an act done by one penal and impose no penalty for the same act done under like circumstances upon another can not be sustained, because it would be unjust and unreasonable.

3. DISCRIMINATION.—That even if the Board of Health had power over the subject, they could not allow those then in the business to continue and prohibit others from engaging in it.

4. POWER OF THE BOARD.—The court questions whether the legislature can confer the law making power upon a body not chosen or elected by the people such as the Board of Health.

5. POWER OF THE COUNCIL.—The court construes the various statutes relating to the subject, and holds that the power over the subject is in the common council and not in the Board of Health. —[ED. LEGAL NEWS.]

CRAIG, J.—This was a prosecution originally instituted before a police magistrate by the city of Chicago, to recover from Charles H. Tugman, a penalty of ten dollars for the violation of a regulation or ordinance adopted on the 12th day of December, 1871, by the Board of Health of the city of Chicago, which reads as follows:

"That from and after the first day of January, A. D. 1872, no distillery, slaughter-house, rendering establishment or soap-factory shall be erected or put into operation in any building not now used for such purpose, within the territory in the city of Chicago, bounded as follows, to wit: Fullerton avenue on the north, thirty fifth street on the south, Lake Michigan on the east, nnd Western avenue on the west."

The cause was taken by appeal from the police court to the criminal court of Cook county, where, upon a trial, judgment was rendered against appellant for the sum of ten dollars.

It is conceded that appellant owned a slaughter-house within the limits designated by the ordinance which was erected and put into operation after the 1st day of January, 1872, and at the time and prior to the commencement of the action he was engaged in slaughtering cattle therein both for packing and city consumption.

It is also conceded by both parties that at and prior to the commencement of the suit several other slaughter-houses were in operation in said city within the limits designated in the regulation, which were erected and in operation prior to the adoption of the ordinance.

There being no dispute as to the facts, the only question presented by the record is, whether the regulation or ordinance adopted by the Board of Health is valid or void.

The first position of appellant is, that

the regulation is void because it is unreasonable and oppressive.

Where power is conferred upon the legislative department of a municipal corporation to enact by laws and ordinances for the better government of the inhabitants of the municipality, the body entrusted with that power in its exercise cannot enact ordinances that are unreasonable, oppressive, or such as will create a monopoly.

Each member of a municipal corporation is required to share the burdens incident to such an organization, but at the same time all are entitled to share and participate equally in all benefits to be derived from such a government.

An ordinance, therefore, which would make an act done by one penal, and impose no penalty for the same act done under like circumstances upon another, could not be sanctioned or sustained because it would be unjust and unreasonable. Dillon on Municipal Corporations, Sec. 256.

In the case of the City of Chicago *v* Rumpff, 45 Ill., 90, where the validity of an ordinance was called in question which provided that all slaughtering for city consumption should be done at the establishment of a particular firm, and prohibited under a penalty slaughtering at any other place, it was said: "All by-laws shoul be general in their operation and should bear equally upon all the inhabitants of the municipality. When privileges are granted by an ordinance they should be open to the enjoyment of all upon the same terms and conditions. That the Common Council had the right under the large powers conferred by the charter to so regulate the business of slaughtering animals as to prohibit its exercise, except in a particular portion of the city, leaving all persons free to erect slaughtering-houses and to exercise the calling at the place designated, cannot be controverted * * * * When that body have made the necessary regulations required for the health or comfort of the inhabitants, all persons inclined to pursue such an occupation should have the opportunity of conforming to such regulations, otherwise the ordinance would be unreasonable and tend to oppression."

The same principle was clearly and forcibly enunciated in the case of Mager *v.* Thorne, 7 Paige, 261, in the following language: "As all by-laws must be reasonable, the Common Council cannot make a by-law which permits a person to carry on the dangerous business and prohibits another, who has an equal right, from pursuing the same business. Neither have they the right to permit the dangerous manufacture to be carried on in buildings already erected and to prohibit these defendants, whose building was destroyed by an incendiary, from re-building the same for the purpose of carrying on a manufacture which is permitted to others." See also Cooley's Constitutional Limitations, 200.

It will be observed that the regulation to enforce which this suit was instituted, prohibits the use and operating slaughter-houses which should be erected after the first day of January, 1872, while those that were erected prior to that time are left perfectly free to be operated, as the owners thereof may desire.

If the health or comfort of the city require the prohibition of new slaughter-houses within a designated part of the city, the same reason would surely demand that old ones should be discontinued.

If one of the citizens of Chicago is permitted to engage in the business of slaughtering animals in a certain locality, an ordinance which would prevent, under a penalty, another from engaging in the same business, would not only be unreasonable, and, for that reason, void, but its direct tendency would be to create a monopoly, which the law will not tolerate.

The fact that certain persons were engaged in the business within the district designated in the ordinance at the time of its adoption, gave them no right to monopolize the business, nor would such fact authorize the Board of Health to provide that such persons might continue the avocation while others should be deprived a like privilege who should engage in the business at a later period.

If the Board of Health had any power to adopt an ordinance on the subject, the ordinance, to be valid, should not discriminate in favor of any citizen. If it prohibited one from carrying on the business, that prohibition should extend to all, regardless of the time the business may have been commenced.

A regulation of this character, to be binding upon the citizen, must not only be general, but it should be uniform in its operation.

It is also urged that it was incompetent for the legislature to confer upon the Board of Health legislative powers, and, for that reason, the regulation adopted by the Board is void.

The Board of Health derive its power, whatever it may be, from an act of the legislature, approved March 9th, 1867: An act to amend the charter of the city of Chicago. Private Laws of 1867, page 754.

The first section of chapter four of the act provides that the mayor of the city, with six other persons, to be appointed by the judges of the Superior Court, shall constitute the Board of Health of the city.

Section two of the same chapter is as follows:

"Said Board of Health may enact such by-laws, rules and regulations as it may deem advisable, in harmony with the provisions and objects of this act, and all acts the object of which is to promote and preserve the health, safety, and sanitary condition of the city now existing, or that may hereafter be passed, not inconsistent with the Constitution or laws of this State, for the r gulation of the action of said Board, its officers and agents in the discharge of its and their duties, and for the regulation of the citizens or public, and from time to time may alter, amend, or annul the same."

Under this section the ordinance in question was adopted.

The legislative power by the Constitution of the State is vested in the General Assembly. Ordinarily this power can not be delegated. The right, however, of the legislature to empower municipal corporations to make by-laws and ordinances for the welfare and government of the inhabitants of the corporation cannot be questioned or denied.

It may, however, be seriously questioned whether the legislature has the power to confer the law-making power upon a body not chosen or elected by the people, such as the Board of Health.

Where the legislature delegates authority to a municipal corporation to enact ordinances, these ordinances are enacted by a board of aldermen or common council, chosen or elected directly by the people of the municipality; thus the people have a direct voice in making the laws by which they are to be governed, but if the legislature possess the power to provide that some judicial officer of the State may appoint in a city a body of men styled a Board of Health, and that Board can be empowered to make ordinances for the government of the corporation, the people of that corporation may be deprived of self-government.

They will be governed by ordinances adopted by a body they had no voice in electing. This would be repugnant to the theory of our government.

Independent, however, of this question, which it is not necessary to decide in this case, we are of opinion that the act of 1867, did not confer the power upon the Board of Health to adopt the ordinance, but on the other hand the common council elected by the people was entrusted with the power to adopt ordinances in relation to and upon the identical subject-matter over which the Board of Health assumed to act.

Section twenty-four of chapter five of the act of 1867, which provided for the creation of the Board of Health, declares, That the Common Council shall have power and authority to regulate and control the slaughtering of all animals in the city, or within four miles thereof, intended for consumption or exposed for sale in the city, and to enforce by additional ordinances any regulation, contract or law heretofore made on the subject.

If it be true that the Board of Health was empowered by section two of the act to adopt the ordinance in question, then the legislature, by one and the same act, conferred upon two independent bodies, each having the same territorial jurisdiction, authority by ordinance to regulate and control the same thing.

To impute an intention of this character to the legislature is so unreasonable and inconsistent that we cannot sanction it.

We cannot understand how the power could at the same time exist in the two bodies to control by ordinance the same thing. The Common Council might adopt one regulation and the Board of Health another entirely different. Should that occur, which would the citizen be bound to obey? The regulation adopted by the one might be so inconsistent with that enacted by the other that an observance of the one might be a violation of the other.

We cannot, therefore, believe that it was the design of the General Assembly to confer legislative power over this subject, both upon the Common Council and the Board of Health. While perhaps the language used in section two might be regarded broad enough to confer the power upon the Board of Health, had section twenty-four been omitted from the act, yet as the power to legislate upon the subject, is expressly given to the Common Council by the latter section, the general intent expressed in the former must give way to the latter. Sedgwick on Statutory and Constitutional Law, 360.

We are, therefore, of opinion that no power was conferred upon the Board of Health to adopt the ordinance in question.

The judgment will be reversed.

Reversed.

EGBERT JAMESON for the city.

TULEY, STILES & LEWIS for Tugman.

OUR thanks are due FRANK J. CRAWFORD, of the Chicago bar, for the following opinion:

SUPREME COURT OF ILLINOIS.

OPINION FILED AT OTTAWA, JANUARY 21, 1876.

THE SCHOOL DIRECTORS OF DIST. 13, T. 40, COOK COUNTY *v.* THE PEOPLE ex rel. CLARK ROBERTS et al.

Appeal from the Superior Court of Cook Co.

CONSTITUTIONAL OATH OF OFFICE—LEGISLATIVE CONSTRUCTION—INFERIOR OFFICERS—TOWNSHIP TREASURER—SCHOOL FUNDS—DEMAND IN MANDAMUS—SCHOOL LAW CONSTRUED—DEMURRER.

1. OATH OF OFFICE—CONSTITUTIONAL PROVISION NOT SELF-ENFORCING.—Sec. 25 of Art. 5 of the Constitution which provides that all civil officers, except members of the General Assembly, and such inferior officers as may be by law exempted, shall, before they enter upon the duties of their respective offices, take and subscribe the oath of office therein prescribed, has not been understood by the legislative department to be self-executing; otherwise all the numerous laws requiring the taking of an official oath would be supererogatory.

2. SILENCE OF LAW AS TO REQUIREMENT IS EXEMPTION FROM, AS TO INFERIOR OFFICERS.—*Held*, where by the law there appears a manifestation of the intention of the legislature that an inferior officer should not be required to take an oath of office, there is a sufficient exemption "by law" from taking the oath of office within the intent of the constitutional provision. Not requiring the oath to be taken is the dispensing with it in the case of an inferior officer.

3. TOWNSHIP TREASURER.—*Held*, that the township treasurer falls within the designation of "inferior officers," and as the statute does not in terms provide that he shall be sworn, he is not required to take an oath of office.

4. CUSTODIAN OF DISTRICT MONEYS.—*Held*, that the place for the moneys of a school district is in the township treasury. The township treasurer is the only lawful depository and custodian of all district school funds, and they are only to be paid out on the order of the directors drawn upon him.

5. MONEY BORROWED BY SCHOOL DIRECTORS.—*Held*, that where the board of directors had borrowed and received money by the issuing and sale of bonds of the district under § 47 of the general school law, the money thus borrowed and received must be paid over to the township treasurer. And upon refusal by the directors so to do, a demand made by the treasurer upon the directors for the same is a sufficient demand on *mandamus* brought by the township board to compel the directors to pay over the money to the treasurer. Sec. 62 of the school law authorizes such demand.

6. DEMURRER.—And where the petition for mandamus alleged separate demands by the trustees, and the treasurer, and the answer of the directors denied only the demand by the trustees: *Held*, that the demurrer to the answer was properly sustained.—[ED. LEGAL NEWS.]

Opinion of the court by SHELDON, J.

This was a petition for a mandamus on the part of the trustees of schools of T. 40, R. 13 E., in Cook county, to compel the appellants the school directors of district 13 in the same township to pay over to William C. Hazleton, the township treasurer of the township, the sum of $13,750 which the board of school directors had borrowed and received, by the issuing and sale of bonds of the district, authorized by a vote of the people, under § 47 of the general school laws.

The answer of the school directors, admits the borrowing and receiving by them of the money, as alleged in the petition, but denies the right of the relators to require the same to be paid to the township treasurer, setting up as a defense to the proceeding:

First: That the township treasurer had failed to qnalify "in this, the said Hazelton did not take and subscribe the oath of office required of him by law to be taken and subscribed before entering upon the duties of the office of treasurer of said township."

Second: A denial that the board of trustees had made the demand for the payment of the money, as alleged in the petition. A demurrer was sustained to the answer, and the defendants refusing to answer further, judgment was entered on the demurrer, and a peremptory writ of mandamus awarded, from which the board of directors took this appeal. It is claimed that the court erred in sustaining the demurrer. The statute does not in terms require of school trustees, treasurers, or directors, the taking of an oath of office. It is urged that the Constitution of 1870 requires such oath to be taken by township treasurers they being nowhere by law exempted therefrom; and reference is made to § 25 of Art. 5 of the Constitution. That section provides that all civil officers except members of the General Assembly and such inferior officers as may be by law exempted, shall, before they enter on the duties of their respective offices, take and subscribe the oath of office therein prescribed, and further provides that no other oath, declaration or test shall be required as a qualification. The oath of members of the General Assembly is prescribed in another section.

It certainly has not been understood by the legislative department, that this constitutional provision is self executing, as express provisions of law have been enacted, prescribing with particularity every essential step to be taken by each person elected or appointed to an office; the mode of election or appointment, the giving of bonds, the manner, time, etc., of taking the oath of office, (where such oath is required) in order to become qualified to perform the duties of the office. If it were supposed that this constitutionul provision was self-enforcing, all the numerous laws, requiring the taking of official oaths would be supererogatory. But the section of the Constitution referred to, expressly leaves it in the discretion of the legislature to exempt "inferior officers" from taking the prescribed oath of office. The township treasurer is appointed by the board of trustees of schools, and falls within the designation of "inferior officers." As the legislature in prescribing the pre-requisites to the right to perform his official duties, has required only that the township treasurer shall be a resident of the township and neither a trustee or a director, and be appointed by the trustees, and give an official bond in a sufficient amount to cover all liabilities, it is not unreasonable to infer the legislative intention, that he should not take an oath of office, as in the very many cases where the legislature have intended an oath of office to be taken, they have so directed, prescribing the particulars in regard thereto, as to manner, time, etc. Not requiring an oath of office to be taken, is the dispensing with it by the legislature in this case. Where by the law there appears a manifestation of the intention of the legislature, that an inferior officer should not be required to take an oath of office, there is in our opinion a sufficient exemption by law from taking the oath of office, within the intent of the constitutional provision. We are of opinion the treasurer was not required to take an oath of office.

As to the demand for the payment of the money, the petition expressly alleges that such demand was made by the township treasurer on the 13th day of March, 1875. We regard this a sufficient demand. Section 62 of the school law declares that "the township treasurer shall demand, receive and safely keep according to law, all moneys, books and papers of every description belonging to his township. It is answered that this provision applies only to moneys belonging to the township; that the money in question belonged exclusively to the school district. But the place for their moneys is in the township treasury. The township treasurer is by statute the only lawful depository and custodian of all district school funds, and they are only to be paid out upon the order of the school directors, drawn upon the township treasurer.

The petition alleges that the board of trustees of schools and the township treasurer respectively, at different times

made separate demands for the payment over to the township treasurer of the money. The answer only denies the demand by the board of trustees.

We regard the answer as insufficient, and are of opinion, the demurrer thereto was rightly sustained.

The judgment will be affirmed.

Judgment affirmed.

DAVID S. PRIDE for appellants.
FRANK J. CRAWFORD for appellees.

UNITED STATES SUPREME COURT.

PROCEEDINGS OF.

Friday, Jan. 21, 1876.

On motion of W. W. Warren, William W. Crapo, of New Bedford; S. A. B. Abbott, of Boston; and Alonzo B. Windworth, of Dedham. Mass., were admitted.

On motion of F. Hereford, T. B. Swann, of Charleston, and A. C. Snyder, of Lewisburg, West Virginia, were admitted.

On motion of M. Blaine, T. K. Shinker, of St. Louis, Missouri, were admitted.

On motion of E. C. Ingersoll, H. B. Hopkins, of Peoria, Illinois, was admitted.

On motion of R. T. Merrick, Joseph A. Rice, of Washington, D. C., was admitted.

No. 557. W. S. Gilman et al. v. The Illinois and Mississippi Telegraph Company et al. No. 558. H. Coy Kendall, garnishee, v. The Illinois and Mississippi Telegraph Company. These causes were submitted on printed arguments by George G. Wright and William M. Evarts for appellants and plaintiffs, and by J. Scott Richman and J. D. Caton for appellees and defendants.

No. 645. The United States v. John M. Ashfield. This cause was submitted on printed arguments by Assist. Atty. Gen. Smith for appellants, and J. M. Carlisle and J. D. McPherson for appellees, under the twentieth rule.

No. 704. The United States v. The Corliss Steam Engine Company. This cause was submitted on printed arguments by Solr. Gen. Phillips for appellants, and Joseph Casey for appellees, under the twentieth rule.

No. 710. The Town of Elmwood v. George O. Marcy. This cause was submitted on printed arguments by H. B. Hopkins for plaintiff, and Isaac G. Wilson and Sandford B. Perry for defendant, under the twentieth rule.

No. 859. H. G. Angle v. Northwestern Mutual Life Insurance Company. This cause was submitted on printed arguments by George G. Wright for appellant, and by C. C. Nourse for appellee, under the twentieth rule.

No. 646. (Assigned.) Henry M. Proctor v. The United States. No. 692. (Assigned.) Sarah Hale, Widow, etc., et al. v. The United States. No. 772. (Assigned.) William H. Gaines and wife, et al. v. The United States. No. 892. (Assigned.) John H. Russell v. The United States. The argument of these causes was continued by Atty. Gen. Pierrepont for the United States, and by E. W. Munford for appellants in No. 772, and by Albert Pike for appellant in No. 646.

Adjourned until Monday at 12 o'clock.

Monday, Jan. 24.

On motion of George H. Williams, William James, of Syracuse, N. Y., was admitted.

On motion of Atty. Gen. Pierrepont, Augustus S. Gaylord, of Saginaw, Mich., was admitted.

No. 51. The Mississippi and Missouri Railroad v. Charles T. Cromwell. Appeal from the Circuit Court of the United States for the district of Iowa. Bradley, J., delivered the opinion, reversing the decree of the Circuit Court with costs, and remanding the cause with directions to dismiss the bill.

No. 67. Caleb Ives and George B. Green v. Milton R. Hamilton, administrator, etc. In error to the Circuit Court of the United States for the eastern district of Michigan. Bradley, J., delivered the opinion, affirming the judgment of the Circuit Court with costs and interest.

No. 74. Ann Kittredge, widow, etc. v. Olivia C. Race and her husband. In error to the Circuit Court of the United States for the district of Louisiana. Bradley, J., delivered the opinion, affirming the judgment of the Circuit Court with costs.

No. 73. John S. Wells et al. v. Horace B. Claflin et al. In error to the Circuit Court of the United States for the northern district of Illinois. Davis, J., delivered the opinion, affirming the judgment of the Circuit Court with costs and interest.

No. 61. The Western Union Telegraph Company v. The Western and Atlantic Railroad Company. Appeal of the Circuit Court of the United States for the northern district of Georgia. Miller, J., delivered the opinion, reversing the decree of the Circuit Court with costs, and remanding the cause for further proceedings in conformity with the opinion of this court. Dissenting, Field, J.

No. 126. John Forsythe v. Mark Kimball, assignees, etc. Appeal from the Circuit Court of the United States for the northern district of Illinois. Swayne, J., delivered the opinion, affirming the decree of the Circuit Court with costs.

No. 123. Charles Stott et al. v. William Rutherford. In error to the Supreme Court of the district of Columbia. Swayne, J., delivered the opinion, reversing the judgment of the Supreme Court with costs, and remanding the cause, with directions to enter a judgment upon the verdict in favor of the plaintiffs in error.

No. 730. F. A. Otis & Co. v. H. B. Cullum, receiver, etc. In error to the Circuit Court of the United States for the district of Kansas. Swayne, J., delivered the opinion of the court, affirming the judgment of the Circuit Court with costs.

No. 64. Thomas Pitts, executor, etc. v. The River and Lake Shore Steamboat Line, owners of the Steamer Dove, etc. Appeal from the Circuit Court of the United States for the eastern district of Michigan. Clifford, J., delivered the opinion, affirming the decree of the Circuit Court with costs and interest.

No. 892. James and Squire Williams v. The United States. Appeal from the District Court of the United States for the district of California. Clifford, J., delivered the opinion, affirming the decree of the District Court.

No. 611. U. A. Zellar, widow, etc. v. E. A. Switzer. In error to the Supreme court of the State of Louisiana. Waite, C. J., delivered the opinion, dismissing the writ of error in this cause with costs.

No. 658. Robert R. Bolling v. Gustavus Lersner. In error to the Supreme Court of Appeals of the State of Virginia. Waite, C. J., delivered the opinion, dismissing the writ of error for want of jurisdiction.

No. 798. William and Emily Hill v. Brackett and Waite. Appeal from the Circuit Court of the United States for the district of Iowa. Waite, C.J., announced the decision, affirming the decree of the Circuit Court with costs and interest.

No. 693. Daniel Hand v. Thomas C. Dunn, comptroller, etc. Waite, C. J., announced the decision, postponing the motion to dismiss the cause, until it is reached upon the merits.

No. 211. Frederick Robert et al. v. The Propeller Galatea, etc. Waite., C. J., announced the decision, denying the motion for a commission to take further testimony.

No. 862. The American Emigrant Company v. Adams County. Waite, C. J., announced the decision, granting the motion to reinstate this cause on payment of costs.

No. 851. Eliza W. Warfield v. John and Charles Chaffe. The motion to dismiss this cause was submitted on printed arguments by T. J. Durrant and C. W. Hornor in support of the same.

No. 869. Samuel B. Lowry, supervisor, et al. v. The United States ex rel. George O. Marcy. This cause was submitted on printed arguments by T. Lyle Dickey, of Chicago, of counsel for the plaintiffs in error, and by George O. Ide, of Chicago, for the defendant in error, under the twentieth rule.

No. 831. Alexander T. Stewart et al. v. Meyer Sonneborn. The motion to reinstate this cause was argued by C. F. Peck in support of the same, and by P. Phillips in opposition thereto.

No. 646. (Assigned,) Henry M. Rector v. The United States.

No. 692. (Assigned.) Sarah Hale, widow, et al. v. The United States.

No. 772. (Assigned.) William H. Gaines and wife, v. The United States.

No. 893. (Assigned.) John H. Russell v. The United States.

The argument of this cause was continued by Albert Pike for appellant in No. 646.

Adjourned until Tuesday at 12 o'clock.

Tuesday, Jan. 25.

On motion of Asa Iglehart, William F. Parrett, of Evansville, Indiana, was admitted.

On motion of J. B. Sanborn, Jefferson P. Kidder, of Vermillion, Dakota, was admitted.

On motion of A. E. Stevenson, William Hartzell, of Chester, Illinois, was admitted.

No. 646. (Assigned.) Henry M. Rector v. The United States. No. 692. (Assigned.) Sarah Hale, widow, etc., et al. v. The United States. No. 772. (Assigned.) William H. Gaines and wife, et al. v. The United States. No. 893. (Assigned.) John H. Russell v. The United States. The argument of these causes was continued by Albert Pike for the appellant in No. 646, and by Atty. Gen. Pierrepont for the United States, and concluded by F. P. Stanton for appellant in No. 692.

Adjourned until Wednesday at 12 o'clock.

Wednesday, Jan. 26.

On motion of D. S. Black, J. Boone Cassna, of Bedford, Pennsylvania, was admitted.

No. 376. Humphrey Pierce and wife v. Lorenzo D. Van Pelt. On motion of George H. Paschal, on behalf of counsel, dismissed with costs.

No. 487. Edward Matthews v. John Burnside. On motion of George W. Paschal, in behalf of counsel, dismissed with costs.

No. 104. Myra Clarke Gaines v. Joseph Fuentes et al. The argument of this cause was commenced by Geo. W. Paschal for plaiutiff, and continued by Jas. McConnell and T. J. Durant for defendant, and by J. S. Black for plaintiff.

Adjourned until Thursday at 12 o'clock.

We are indebted to R. A. D. WILBANKS, clerk of the court, for the following list of opinions:

SUPREME COURT OF ILLINOIS.

LIST No. 2.

CLERK'S OFFICE SUPREME COURT, MT. VERNON, ILL., *Jan.* 21, 1876.—The following opinions of June term, 1875, were this day filed:

40. Varnell *v.* Seimer. Rev.
78. Krug *v.* Ward. Aff'd.
88. Winkleman *v.* Chouteau. R & R.
117. Patrick *v.* Patrick. Aff'd.
127. Berns *v.* Atkins. Aff'd.
135. Wheeler *v.* Frankenthal. Aff'd.
142. Nichols *v.* Bradsby. R & R.
166. Yost, Bigelow & Co. *v.* Beckman. R & R.
170. Keller *v.* Brickey. R & R.
175. Board Trustees *v.* Meisenheimer. R & R.
182. Cobb *v.* Lavalle. R & R.
186. Paul *v.* Berry. R & R.

R. A. D. WILBANKS,
Clerk Supreme Court.

AN ADDITION TO THE CHICAGO BAR.—HENRY STRONG, formerly of Iowa, has opened a law office in this city, with Leonard Swett and John J. Herrick. Mr. Strong is a gentlemen of culture, of extended and varied experience. His attainments will secure for him a cordial welcome from the bar of this city. His card will be found on the last page of this issue.

LITTLE AND BROWN'S ADVERTISEMENT OF NEW LAW BOOKS.—The double column advertisement of new law books by Little Brown & Company will be found on the first page of this issue. This is the largest law book publishing house in the United States, and we believe in the world. Chicago and Boston have the two largest.

ANECDOTES OF THE BENCH AND BAR.

[From the Legal Adviser.]

JUDGE WALKER'S ADVICE TO A CLIENT.

A good story is told of Judge Walker, of the Supreme Court of this State, which well illustrates the exalted sense of honor that has always marked the private and public life of this distinguished judge. On one occasion, in the early days of his practice, a person against whom a judgment had been previously rendered, and who was desirous of fraudulently incumbering or otherwise covering up his property in such a way as to avoid its payment, called at Mr. Walker's office, and, stating his business, asked whether there was any means of preventing a levy or sale of his property to satisfy the judgment. Mr. Walker, discovering the man's real design to be a fraudulent proceeding to defeat a just demand, promptly replied that nothing was more easy: "What will I have to do?" asked the client. "Pay the judgment," replied Mr. Walker, "and no one will dare to touch your property." It is needless to add that the disgusted client went elsewhere for legal assistance in accomplishing his fraudulent purposes.

JUSTICE DE WOLF ON LAWYERS.

Justice DeWolf, of Chicago, who has filled the judicial chair for over twenty years, although he wears a very solemn face, loves a quiet joke now and then. A jury was being empanelled before him once, and a well-known lawyer happened to be summoned upon it. The attorney for one of the parties perceiving him in the jury-box, said: "Your Honor, I object to this man; he is a lawyer." The justice looked gravely over his spectacles, and in a sepulchral tone, remarked: "Your objection is not well taken, for the gentleman don't know enough law to disqualify him."

JUSTICES' FEES IN CRIMINAL CASES.

At the last term of the Criminal Court of Cook county, one of the Chicago justices was indicted and tried for receiving fees from the prosecuting witness in a criminal case, the indictment charging that he had received a fee when no fee was allowed by law.

A jury was waived and the case submitted to the court. Judge Jameson, then presiding, said that while he fully exonerated the defendant from any criminal intent, he was of the opinion that he had violated the statute under which he was indicted. The Constitution of the State provided that "every person ought to obtain by law, right and justice, freely and without being obliged to purchase it," and it would be a violation of that provision if magistrates were allowed to demand pay for issuing criminal process to persons seeking to apprehend offenders against the law. An opinion of Attorney General Edsall on the same subject, which was read in the case, and which was furnished at the request of the State's attorney, fully harmonized with the views of Judge Jameson.

If these opinions are correct, and there can be little reason to doubt it, in all cases where the fees cannot be collected of the party convicted or the prosecution fails, justices are dependant entirely for their compensation upon the County Board, which the statute provides, "may, in its discretion, direct that the cost of the prosecution, or so much thereof as shall seem just and equitable shall be paid out of the county treasury."

If this "discretion" be soundly exercised no injustice will be done, but if it be not, then the justice will have spent his time for naught, for no action will lie against the State for costs.—*Legal Adviser.*

CALLAGHAN & CO.'S ADVERTISEMENT OF NEW LAW BOOKS.—We call attention to the double column advertisement of Callaghan and Co., of new law books, on the last page of this issue. The list embraces two important works—The Law of Taxation, by Judge Cooley, and High on Receivers. The success of this house, since the fire, is wonderful, not only in the number of its publications, but their quality. There is to-day but one larger law-book publishing house in the United States.

BANKRUPTCY BLANKS.—The CHICAGO LEGAL NEWS bankruptcy blanks are prepared with reference to the recent statutes and decisions. They are the most complete series in the United States.

CREDITOR'S BILLS.—The LEGAL NEWS COMPANY have a very complete creditors bill. It is printed on half a sheet of cap and really contains more than those printed on ten or twelve pages.

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CHICAGO LEGAL NEWS

SATURDAY, FEBRUARY 5, 1876.

The Courts.

Our thanks are due ALBERT N. SPRAGUE, of the Sparta bar, for the following opinion:

SUPREME COURT OF ILLINOIS.

OPINION FILED OCT. 14, 1875.

THE PEOPLE *ex rel.* THE CAIRO & ST. LOUIS R. R. CO. *v.* JAMES B. ANDERSON et al., trustees of schools, etc.

TOWNSHIP FOR SCHOOL PURPOSES—SUBSCRIPTION FOR RAILROAD STOCK—CORPORATE POWERS.

1. SUBSCRIPTION FOR STOCK.—That a township organized for school purposes by the general school law in a county not under township organization cannot, under the Constitution of 1848, be empowered to incur a debt for the purpose of subscribing for the stock of a railroad company.

2. CORPORATE PURPOSE.—That the contracting such a debt and the levy and collection of taxes to pay the same with its accruing interest, cannot be held a corporate purpose within the meaning of that instrument.

3. A DISTINCTION.—That a distinction has been made between townships in counties under township organization, and those in counties not under township organization.—[ED. LEGAL NEWS.]

Opinion by WALKER, J.

The question is distinctly presented by these records—whether a township, organized for school purposes, by the general school law, can, under the Constitution of 1848, be empowered to incur a debt for the purpose of subscribing for the stock of a railroad company; whether contracting such a debt, and the levy and collection of taxes to pay the same, with its accruing interest, can be held a corporate purpose, within the meaning of that instrument.

It is urged by appellees that Art. IX., Sec. 5, of that Constitution prohibits the General Assembly from conferring that power on such a body; that the creation of such a debt, and the levy of such a tax, is not for a corporate purpose. That section provides that "the corporate authorities of counties, townships, school districts, cities, towns, and villages, may be invested with power to assess and collect taxes for corporate purposes." This clause was manifestly intended to limit the legislative power in conferring authority on corporate bodies to assess and collect taxes. Without any provision in the Constitution on the subject, the General Assembly have the power to impose taxes as they may choose. They could impose a tax on one species of property and exempt another. They could fix the mode of ascertaining the manner of its imposition as they might choose, if the power was not limited and the mode prescribed in the fundamental law. This was, then, most clearly, a limitation of legislative power.

Had this restriction not been imposed, the General Assembly could have empowered any of these quasi corporations or municipalities to levy and collect taxes for any purpose, whether germane to the object of its organization, or for other purposes. They could have authorized a school district to levy and collect a tax to build a court-house or jail, bridge or other county object, or a school township or district to erect a poor-house and maintain the paupers of the county.

These school townships were created and are continued for school purposes alone, and not for municipal purposes. They are only intended to establish schools, and loan and manage the school fund of the township, and pay the teachers of schools taught in their jurisdiction. This is the purpose of their organization. They were not created to exercise any of the functions of government, and hence are not municipal in their nature or purpose; nor are they provided with the officers or the power to exercise the functions of government. Cities, towns, and villages are endowed with such powers, and are created and maintained for their exercise. Their very object is to aid in the government of the people; and such is true, in a more limited sense, of counties. But none of these functions are conferred upon school townships or districts; but their creation is purely to aid in the great scheme of accomplishing universal education.

The body of men who framed the Constitution must be supposed to have known the meaning of the language employed, and they must have believed that it would be understood in its ordinary sense; and they must have supposed it would receive a reasonable interpretation and a practicable application in the administration of government. When, therefore, they used the language "for corporate purposes," they supposed that if any question arose in the construction of this clause that the legislative, executive, or judicial department of the State, which was required to apply its principles, would look and see what was the object of the creation of the body, and limit it to that purpose. They did not, on the one hand, expect that there would be an effort to push the construction to the extent that it would embrace all purposes which might be brought in the corporate power; nor yet, on the other hand, to so contract and narrow the construction as to exclude purposes that are embraced in their charters, but which may not be strictly germane to corporations of that character, but that it would be held to authorize the exercise of the power when the body is created for specified purposes, although of a mixed character—as if these school townships had been empowered, in addition to the duties imposed upon them, to locate, open, and maintain roads in the limits of their territory; then they could have been empowered to levy a tax for the maintenance of roads, as that would have been a corporate purpose.

But school townships are not invested with such power over roads, and hence they cannot be invested with authority to assess and collect a road tax, nor can it be until one of the purposes of its existence shall be to repair the roads in the township. To give any other construction would be to abrogate and wholly disregard this provision. To say that because the General Assembly confers the power to levy a tax for any purpose, that the law of the organization of such body is thereby changed, and the tax is for a corporate purpose, would be to render the restriction nugatory. We fail to comprehend the force of such reasoning, and we must give some effect to this constitutional provision. Although that constitution has ceased to be a rule for the guidance of the departments of governments, still all laws adopted whilst in force and all rights acquired under it, must be tried by and enforced as though it was in full vigor.

Had the construction contended for by appellant been what was intended, why not have simply said that these bodies might be invested with power to "assess and collect taxes"? Or why insert any provision on the subject, and let the power of the General Assembly remain unrestricted? That strikes us as the more natural and reasonable course that would have been pursued. Tested by these rules the subscription by a school township or school district for the stock in a railroad company, or the levy of a tax to raise the money for the same, cannot be held to be a corporate purpose. Such a tax in no wise aids or promotes education, for which such bodies are created. And this is the construction given to this clause in the cases of Trustees of Schools, etc. *v.* Toledo, W. & W. R. R. Co., 63 Ill., 299; People ex rel. *v.* Dupuyh (Jan. T., 1874), when the same question was before the court as is presented by this record.

It is, however, urged that townships in counties under township organization have been held capable of subscribing to the stock of a railroad company and levying a tax for the payment of the same, and that the same should be applied to a school township. All of the congressional townships in the State are created *quasi* school corporations and are vested with limited powers to establish schools and perform a few functions pertaining to that object. On the other hand townships created under the township organization law are invested with numerous and important governmental functions. They are authorized to locate, open and maintain roads, to construct and repair bridges, to pass by-laws regulating fences, and the conditions under which stock may run at large. Thus it is seen, these bodies are municipal in their character, and school townships have no such power. But the purpose of their creation is entirely different. It is urged that a liberal construction should be given this clause, and by doing so school townships may be embraced in its provisions.

It was only by the most liberal construction that counties, cities and towns were held to be embraced in this provision, and it was mainly in deference to the other departments of government in following the construction they had given this clause, and from the fact that these bodies were entrusted with making and repairing roads and bridges, that it was held to be a corporate purpose. But in doing so, construction was pushed to the utmost verge, and to hold that school townships and school districts were embraced would be to make an immense advance on the construction there given. Nor does it follow that because the courts have given the most liberal construction and sustained doubtful powers, that they will advance farther and embrace and sustain unauthorized powers. It is not a justifiable rule of interpretation, that because a very liberal construction has been given that the courts must give one more liberal. A point must be reached where there must be a limit of power under this clause.

If, because a municipal corporation created for governmental purposes may be invested with such powers, it does not follow that some other body having some of the attributes of a municipal corporation may be. It may be, and probably is true that to be constitutional such a power could not be conferred upon any but municipal corporations.

It is said that municipal townships were not in existence when the constitution of 1848 was adopted, and that school townships were. This is true, but that instrument provided for their organization. And knowing that when organized they would be municipal, they were as fully embraced in this provision of that article as were counties, cities, towns and villages. In fact, it fully embraces all such corporations created for public purposes, that were then in existence or that should be thereafter created. If a new county, city or town were created, it would fall as fully within the provision as one already brought into existence.

Nor does the argument, that simply because the construction of a road would promote the interest and advance the prosperity of the township render it a corporate purpose. It may show, that the people of the township had been unfortunate in the county not having adopted township organization, and the township thus become a corporation capable of aiding in the construction of the road. But it does not follow, that because they were not in a position to avail of the constitutional provision, that it shall be wholly disregarded, and held for naught.

On a careful review of the former decisions of this court, and the reasons which led to them, in the light of the argument of counsel for appellants, we do not see even the slightest grounds for overruling or modifying the principles of those decisions; but, on the contrary, we are fully satisfied with them as announcing the settled law of this court.

The judgment of the court below is affirmed.

Judgment affirmed.

BREESE, J.—I have never doubted the authority of the legislature to confer upon school townships the power to take stock in a railroad projected through the school township. Such a work may greatly enhance the value of the school lands belonging to the township, and the dividends on the stock may relieve the people from the payment of taxes to support schools therein.

W. S. SEARLS for appellants.
SPRAGUE & MICHAN for appellees.

We are under obligations to JOHN N. CRAWFORD, of the law firm of Crawford & Renick, of this city, for the following opinion:

SUPREME COURT OF ILLINOIS.

OPINION FILED JAN. 21, 1876.

No. 63—JOHN B. LYON et al. *v.* CHARLES M. CULBERTSON et al.

Appeal from Cook.

CHICAGO BOARD OF TRADE—USAGE—WHAT CONSTITUTES—RULE OF THE BOARD OF TRADE—OPTION CONTRACTS.

4. USAGE.—Evidence of a usage among members of the Board of Trade of Chicago, that where the name of the principal is not demanded from the broker at the time of a transaction, the broker alone is accepted and considered the responsible party, is admissible to explain the intention of the parties, and to ascertain the nature and extent of their contracts.

2. WHAT CONSTITUTES.—To constitute such a usage, there must have been such long and general acquiescence in it that the jury will feel themselves constrained to find that it entered into the minds of the parties and formed a part of the contract.

3. RULE OF THE BOARD OF TRADE.—A rule of the Board of Trade of Chicago, providing that on default of either party to a contract to make additional deposit of security or margin within the next banking hour, when demanded, the other may give notice to consider the contract filled at the market value of the article at the time of notice, is contrary to the law of the land and void.

4. OPTION CONTRACTS.—A party demanding performance of a contract must himself be ready, able and willing to perform the contract on his part, and must, as a general rule, tender performance before he can put the other in default and recover for a breach; and a rule of the Board of Trade dispensing with such readiness or tender, is contrary to the law of the land and void.

Opinion of the Court by WALKER, J.

It appears that appellees, as partners in the firm of Culbertson, Blair & Co., brought suit against appellants, also partners under the firm name of J. B. Lyon & Co., to recover damages for an alleged failure to fulfil certain contracts for the purchase of wheat.

The contracts were similar, except as to amount, etc., and the others were signed by different persons, and this is one of them: "Chicago, Aug. 14, 1872. We have this day bought of Culbertson, Blair & Co., ten thousand bushels of No. 2 spring wheat in store, at one dollar fifty-seven and one-half cents per bushel, to be delivered at seller's option during August, 1872." "This contract is subject in all respects to the rules and regulations of the Board of Trade of the city of Chicago.

J. B. Lyon & Co." "C."

Sections one and two of Rule nine of the Board of Trade are supposed to govern this case, and they are these:

"Section 1. On all time contracts, made between members of the association, deposits for security and margin may be demanded by either or both parties, said margin not to exceed ten (10) per cent., on the value of the property bought or sold on the day it is demanded. All such deposits to be made with the treasurer of the association, unless otherwise agreed upon by the parties. Said deposits and margins may be demanded on and after the day of contract, and from time to time as may be necessary to fully protect the party calling for the same. When margins are demanded, the party called upon shall be entitled to deduct from the margin called any difference there may be in his favor between the market price and the contract price of the property bought or sold. Any deposit made to equalize the contract price with the market price shall be considered as a deposit for security, and not margin.

"Sec. 2. Should the party called upon as herein provided for, fail to respond within the next banking hour, it shall thereafter be optional with the party making such call, by giving notice to the delinquent to consider the contract filled at the market value at the time of giving such notice; and all differences between said market value and the contract price shall be settled the same at though the time of said contract had fully expired.

"*Provided*, however, that when the call is made during the general meeting of the Board, between 11 A. M., and 1 P.M., the deposit shall be made before 2 o'clock of the same day."

Under these contracts deposits and margins were put up by both parties from time to time. On August the 19th, 1872, the market for No. 2 spring wheat opened at from $1.55 to $1.57 and declined during the day, closing after exchange hours, at from $1.44 to as low as $1.38. On the 20th, the market opened at 9 o'clock A.M., at from $1.27 to $1.34, and fell rapidly until some time between 11 and 1 o'clock it reached $1.10 or $1.11 per bushel. It was claimed that appellees, on the morning of the 20th, became entitled to further deposits, and thereupon by written notices sent to the offices of the buyers, demand was made of Lyon & Co. of further margins, but they failed to respond to these calls within the next banking hour; that on such failure Culbertson, Blair & Co, without tendering any wheat, elected under the rule to consider the contracts filled, and charged up to Lyon & Co. the difference between the price at which they had agreed to purchase, and $1.11½, and notified them of such election.

This suit was brought to recover the differences, and the jury found a ver-

dict for the amount claimed. The case is brought to this court by appeal, and various questions are raised on the record.

The contract signed by Anderson is claimed to have been otherwise settled, and hence is not properly in the case. Bnt the contract signed by Templeton as the purchaser, was admitted in evidence against the objection of appellants.

The court also excluded evidence offered by appellants to show a usage among the members of the Board of Trade, to demand of the broker the name of his principal at the time of the purchase, and a failure to do so was an election by the seller to look alone to the agent for a fulfillment of the contract. The proper foundation for the introduction of this evidence, was laid, and thus the question of the validity of such a usage is fairly presented.

Inasmuch as the great mass of commercial business is transacted by men pressed by their affairs, and who are not in the habit, even if time permitted, of reducing their agreements to writing beyond a mere memorandum, the courts are compelled to look to the usage of each trade or business, to learn the real intention of the parties. If such usages were not resorted to, it is believed that in a large number, if not the greater portion of commercial transactions, the intention of the parties would be frustrated instead of carried into effect. When there is a known usage, which obtains in trade, it must be presumed that all of hose engaged therein, where the usage prevails, contract with a view to it, unless they exclude it by their contract. It has been repeatedly held by this court that a usage or custom is to interpret the otherwise indeterminate intention of the parties, and to ascertain the nature and extent of their contracts arising, not from their express stipulations, but from mere implications and presumptions, and acts of doubtful or equivocal character. To have commercial usage take the place of general law, it must be so uniformly acquiesced in by length of time, that the jury will feel themselves constrained to find that it entered into the minds of the parties and formed a part of the contract. Dixon *v.* Donahue, 14 Ill., 324; Crawford *v.* Clark, 15 Ill., 561.

It has also been held that such customs as are universally known to exist, enter into and form part of every contract to which they are applicable, although not mentioned or alluded to in the contract. Munn *v.* Busch, 25 Ill., 35. But proof of usage can only be allowed to show the intention or understanding of the parties in the absence of special agreement. Fay *v.* Strawn, 32 Ill., 295; Deshler *v.* Beers, 32 Ill., 368. The parties, when entering into a contract are supposed to have reference to the known usage and customs which enter into and govern the business or subject-matter to which it relates, unless the parties rebut the presumption by the contract itself. Home Ins. Co. *v.* Favorite, 46 Ill., 263. But to be binding a custom must be uniform, long established and generally acquiesced in, and so generally known as to induce the belief that the contract was made with reference to it unless rebutted by the agreement. Turner *v.* Dawson, 50 Ill., 85. Thus it is seen that the doctrine is fully established in our system of jurisprudence. We are of the opinion that the court erred in rejecting this evidence.

The first section of the charter of the Board of Trade provides that the corporation may "make such rules, regulations and by-laws, from time to time, as they may think proper or necessary for the government of the corporation hereby created, not contrary to the laws of the land."

The question, then, arises: Whether the rule or by-law of the company is valid, which, on all time contracts between members of the association, require deposits for security and margin on and after date of the contract, and from time to time, as may be necessary to protect the party calling for the same, and on the failure of the party called on to make such deposit within the next banking hour, giving the other party the option by giving notice, to consider the contract filled at the market value of the goods at the time the notice was given. Is this rule contrary to the law of the land? Have the association, under their charter, the power to change the rule in regard to contracts so as to dispense with a tender, or at least a readiness to perform by the party claiming a forfeiture of the contract?

Where a party has property, and another contracts to purchase it, to be delivered at a future day, and the seller is required to keep it for delivery, he may, as a matter of prudence, or even choice, require that the purchaser shall give security for payment when delivered; and the other party may also, if he choose, require security for the delivery of the property on the day. So with optional contracts, when the seller may choose to deliver, or the buyer may choose to receive the property. But, according to the most elementary rules governing contracts, the party demanding a performance of the contract must himself be ready, able and willing, and, as a general rule, must offer to perform his part of the contract before he can put the other in default and recover for a breach. This has ever been regarded as fundamental in the law of contracts.

Under the general rules of law, where either party has the option to fix the time for the delivery, when he fixes it he must, to put the other party in default, be fully able, and must offer, to perform his part of the agreement.

This is a rule of general application, subject to a few slight modifications or exceptions. Is not this rule of the Board of Trade in violation of it, and, therefore, contrary to the law of the land, and void for that reason? It does not require either party to be prepared and to offer to perform. For aught that appears, the sellers may not have had a bushel of wheat, or, for that matter, have been unable to procure a bushel. May, then, the Board of Trade, by rule, authorize a seller to exercise an option to deliver many thousands of bushels of grain, when he does not have a bushel to deliver, and sue for and recover as though he actually had the amount and had offered or tendered the same? If so, then they may repeal the law of the land and substitute a new rule in violation of its requirements. Independent of this rule, all know that appellees would have been required to have shown that they had the grain on hand, or warehouse receipts therefor, of sufficient quantity and proper quality to have filled their contract, and they would also have been required to at least make an offer to deliver it, or warehouse receipts therefor, before they could have recovered for damages sustained.

It is true the contracts say the wheat was in store when the agreement was entered into, but the record is barren of all evidence to show that appellees had a bushel in store, or otherwise, when they elected to treat the contract filled. Even if it were conceded to be true when the agreement was made, it may be that it was sold the next or some other day, and it or any other wheat was not on hand to be delivered. If, when the notice was given, and within time limited for appellants to put up the margin, they had tendered the money at the contract price, and had demanded the wheat, is it pretended that appellees could have delivered it, or any portion of it, or warehouse receipts therefor? If so, it is most assuredly not proved that they could have complied.

Shall all of the rules be reversed regulating commerce and trade by this organization? It was created to promote the best interests of trade in the great commercial mart of Chicago, within and not outside of the law governing trade and commerce, and not to overturn the long and well-established law of trade. And this being the case, the courts should not, by a strained construction, enable that body to substitute other and different rules, repugnant to the settled law of the land.

If it be said that persons have the undoubted right to purchase grain for future delivery, the proposition is conceded; but, trammelled as these contracts were, can it be said that they have the elements of a *bona fide* transaction? Or is it not more like a mere wager on the price of grain on a given day? Where no grain is owned at the time of the sale, nor is any expected to be, or to be delivered or received, but simply that the difference in the stipulated price and the actual price at the time for delivery, is to be paid—if above, to the purchaser, and if below, to the seller—such a transaction is only, in fact, a wager, and the whole thing is but a gambling transaction; and such transactions are unlike real business operations, and are injurious to trade and demoralizing in their tendency. Such transactions tend to derange prices, produce great fluctuations, and produce injury, if not ruin, to the fair and legitimate traders, by inflations or depressions in prices, by such wagers being made by men not in business, but simply gambling on the grain exchange. And it is believed that under this rule of the Board of Trade dispensing with a delivery, or offer to deliver, with a present ability to do so, this species of gambling can be carried on without restraint. Hence, the rule, so far as it dispenses with a delivery, or an ability with an offer to deliver, is not only unlawful, but encourages gaming, and is, therefere, pernicious.

Where a transaction is fair and real, it can be shown, by proving an ability to perform by delivering grain or warehouse receipts that have not been sold perhaps a dozen of times to other persons. And such should be one of the tests of its fairness, and that it is a *bona fide* sale. Such seems to be the reason of the common law rule requiring a tender or an offer with the abiflity to perform, before the other party can be put in default. The law will not permit a party to recover for a breach of contract when he is unable or unwilling to perform on his part, and to do so would be to license wagers on the price of property under the forms of a purchase.

The law has always fostered trade and has never tolerated practices that retard, obstruct or embarrass its free action. Hence, all that tends to its injury or its free course has been held illegal. And to sanction practices which must inevitably damage prices, demoralize its votaries or work injury to the producing and business classes, cannot be sanctioned.

Were men to organize in large numbers and from day to day and constantly bet on the future price of grain, all would say that such a practice would be pernicious, and should be suppressed. In such wagers no one could expect the courts of the country to uphold and enforce them. And in effect what is the distinction between that and making a contract for delivery of grain at a future day, when the one has no grain and expects to have none, and the other neither desires or expects to receive any, at the time of delivery, but simply expects, if fortunate, to receive the amount that it has risen above the purchase price, or if unfortunate, to pay whatever it may have fallen below? Such a transaction is as much a wager in effect as a bet on the cast of a die or a game at cards.

The rule of the Board of Trade, adopting the failure of one of the parties to put up the margin as therein required, as a fulfillment by the other party of his part of the agreement, being unauthorized, nothingt but he ability of the party claiming the forfeiture of the agreement and an offer or tender of the wheat or warehouse receipts could have sufficed. The Board of Trade have no power to substitute something else for this requirement, and it cannot be dispensed with by the courts.

This is a question that involves the interest of large numbers of community besides mere brokers and "gamblers on 'change." The vast number of producers whose grain has to go to the Chicago market for sale, have a deep interest in the question and its solution. If this species of gambling is sanctioned as legal, then the price that shall be paid the producer will at all times depend upon the combination of these gamblers to reduce prices on the one side, and their inflation on the other, leaving the law of demand and supply, with the other considerations of trade, powerless to exert their beneficial and correcting influence in the various channels of business.

It is believed that no means can be invented to produce more or greater uncertainty in the price of commodities to produce greater revulsions in business, to produce ruin and bankruptcy, and great and irretrievable loss upon honest industry and men struggling to create and sustain small but legitimate business, than these pretended purchases and sales which are but wagers in effect. The whole thing is illegal, injurious, and requires to be suppressed.

The judgment of the court below is reversed and the cause remanded.

Judgment reversed.

LEONARD SWETT and JOHN J. HERRICK, for appellants.

DENT & BLACK, for appellees.

NOTE.—This case decides two principal points. The first, on the question of usage, is in accordance with all the authorities. Where a usage of trade has grown so general that all men in that trade act upon it, or take it for granted, even when not expressly mentioned, it has the force of law, and is presumed to enter into all contracts covered by its terms. Whether there is such a usage is always a question of fact to be determined by the jury from the evidence, but its force and effect is a question of law for the court. Such usages may be, and generally are, contrary to well-known rules of law, as in this case, but, nevertheless, are valid between parties acting upon them. Thompson *v.* Davenport, 2 Smith's Leading Cases, 342; Taintor *v.* Pendegrast, 3 Hill., 72; Gressell *v.* Bristowe, 4 L. R., 30.

The second point decided is, that the Board of Trade of Chicago have no pow- to adopt a rule or by-law providing that on time contracts, where one party demands deposit of security or margin, that unless such deposit is made within the next banking hour, he may elect to consider the contract filled at the market value of the article at the time the notice was given; and such a rule adopted by them is void, being contrary to a general rule of law that neither party to a general contract can recover for a breach thereof, or put the other in default, without a tender of performance on his part, or showing a willingness and ability to perform. This seems to be the main ground upon which the decision is based. The court further say that such a rule encourages gaming, and is, therefore, pernicious.

The effort of the court to strike down gambling operations, such as is described in the opinion, will, undoubtedly, meet with approval from all classes. But care must be taken to restrict the somewhat general language of the court to such operations as are mere wagers.

The decision does not hold that option contracts are gambling contracts, but that in the case of gambling contracts, this rule of the Board of Trade will not enable parties to dispense with requirements which the law compels.

Whether or not an option contract is a gambling contract, is a question of fact for a jury. Kirkpatrick *v.* Bonsall, 72 Penna. St., 155; McIlvaine *v.* Egerton, 2 Robt., 422. It may be the cloak of a gaming venture, but it may be, also, used in legitimate operations. Hence it must always be a question of fact whether any particular transaction is a gambling operation or not.

"We must not confound gambling. whether it be in corporation stocks or merchandise, with what is commonly called speculation. Merchants speculate upon the future prices of that in which they deal, and buy and sell accordingly. In other words, they think of, and weigh, that is, speculate upon the probabilities of the coming market, and act upon this look-out into the future in their business transactions; and in this they often exhibit high mental grasp and great knowledge of business and of the affairs of the world." Per Agnew, J, in Kirkpatrick *v.* Bonsall, 72 Penna. St., 155, and it was held in this case that a contract giving one party an option to call for so many barrels of oil, within a certain time, at a certain price, was not on its face a gambling contract, but was to be submitted to the jury with all the circumstances.

Bona fide time contracts for sale of stocks, or other personal property are legitimate. When stocks are bought and sold, although upon speculation, if they are to be delivered, it is not a gambling transaction. Smith *v.* Bouvier, 70 Penna. St., 325; see, also, Shales *v.* Seignoret, 1 Ld. Raymond, 440; McIlvaine *v.* Egerton 2 Robt. (N. Y.), 422.

The general principle, that a corporation has no power to enact a by-law which shall be contrary to the law of the land, is well settled. Angel and Ames on Corporations, 346. The authorities are not a few which hold that a corporation can make no by law contrary to law, good morals or public policy. Taylor *v.* Griswold, 2 Green. (N. J.), 222; Sayre *v.* Louisville Union Benevolent Association, 1 Duval, 143; Kennebec & Portland R. R. *v.* Kendall, 31 Me., 470.

Viewed from this standpoint, the Supreme Court is undoubtedly correct in deciding that the Board of Trade has no power to pass a by-law which will dispense with the necessity of parties fulfilling to each other their legal obligations.

But it is equally well settled in the law, that what may be bad as a by-law may be good as a contract. Angel & Ames on Corporations, 351; Adley *v.* Whitestable, 17 Vesey, 323. A man may part with a right voluntarily, which it would be unjust to deprive him of by a by-law passed without his knowledge or consent. Hence it will be found that a by-law may be void as against strangers or members who do not assent to it, and yet good as a contract between members of the corporation who do assent to it. Angel & Ames on Corporations, 352. This position seems also deducible from the decision on the question of usage. If a usage of the Board of Trade, although contrary to a rule of law, enters into and becomes part of a contract between parties cognizant of it, how much more would an express rule of the same Board, explicitly incorporated in the contract, become binding between the parties. The rule cannot aid a wagering contract; but where the contract is *bona fide*, the rule might not unlawfully be made a part of it.

The general rule of law, that neither party to a mutual contract can recover for a breach thereof, or put the other in default, without a tender of performance on his part, or showing a willingness and ability to perform, is, as stated by the court, elementary. But it is not inviolable. It is subject to another general maxim of the law, that any person may dispense with a rule provided for his benefit. Hence we see that this rule of tender is constantly and daily waived by parties to contracts, and a waiver may be by express language, or by a course of conduct. Root *v.* Wagner, 30 N. Y., 9; Buell *v.* Trustees, 3 N. Y., 197; Laird *v.* Pirn, 7 M. & W., 474. Even a constitutional provision affecting simply property or alienable rights may be waived. Phyfe *v.* Eimer, 45 N. Y., 102. So that if it should appear in any given case that the parties voluntarily entered into a contract which should embody a waiver by one of a rule of law intended for his benefit, or if by a course of conduct on his part, he should lead the other to act upon the supposition that this rule of law was waived by him, undoubtedly he would be estopped from setting it up in a suit arising out of the contract.

The facts of the case are not all fully stated in the opinion, and perhaps in the view taken by the court on the first point it was not essential. The case being reversed upon the question of usage, a decision of other points raised was not necessary, nor a statement of all the facts. Several important questions are argued in the very able briefs of the counsel on both sides, which are not noticed by the court. So too, one or two conceded questions of fact, such as the ability and willingness of the appellees to fill the contract, are also overlooked. The intention of the court was to strike a vigorous blow at gambling contracts and at all rules of the Board that might encourage them. The decision does not reach, nor is it intended to reach legitimate speculative operations.

The following conclusions may be deduced from it:

1. Usages of the Board of Trade enter into and become part of contracts made between members.
2. Option contracts in themselves are not invalid.
3. A rule of the Board of Trade will not render effective a gambling contract, nor enable parties to dispense with their legal obligations to each other.
4. Parties showing ability, willingness, and an offer to perform an option contract on their part, can recover thereon for a breach. They may also show an express or implied waiver of performance.

JOHN N. CRAWFORD.

Chicago, February, 1876.

THROUGH the kindness of ALEX. S. BRADLEY, of the Chicago bar, we have received the following opinion:

SUPREME COURT OF ILLINOIS.

OPINION FILED JAN. 21, 1876.

FREDERICK N. HAMLIN *v.* ALBERT S. RACE.

Appeal from Cook.

ACTION BROUGHT ON SPECIAL CONTRACT FOR SERVICES BEFORE THE EXPIRATION OF THE TERM—MEASURE OF DAMAGES—ETC.

1. When an employee under a contract for payment of money by installments for a term of service is discharged without cause, he can sue on the contract at the end of each month for the installment which accrues due at that time, or wait till the end of the term and sue for the whole.
2. If he sues on the contract for damages for the whole term, he can only recover for the amount that would have been due, had he continued in service, at the time the suit was instituted.
3. If, when discharged, he rescinds the contract and then sues for its breach, it may be that he can recover for all the damages he sustained during the term by the breach, if the trial was had after the expiration of the term.

Opinion by WALKER, J.

Appellee was employed on the first of of January, 1873, by Hamlin, Hale & Co., as a salesman in their store for one year, at a salary of $1,020, in monthly installments of $85. They, on the 23d of June following, dismissed him from their service, when they offered to pay him the amount that was due him to that date, which he declined to receive, and on the 6th of the following August brought this suit, to recover the balance for the full year, and on a trial in the court below recovered the full amount.

The declaration was in assumpsit, and contains a special count, with usual common counts. The plea of the general issue was filed, and on the trial the defense relied on was that appellee was discharged for good and sufficient cause.

It is contended that appellee was insolent to his employers, and coarse and vulgar in his conduct to such an extent as fully justified appellants in discharging him. This was a question of fact for the determination of the jury. All will at once concede that an employee must be respectful and obedient to all reasonable commands of his employers, and those having control of the business in which he is employed. And no one will dispute that a person so employed, must, when engaged in the discharge of his business, and in his intercourse with customers, and persons transacting business with the house, and with his employers, and those having charge of the business, be respectful, and must abstain from all vulgarity and obscenity of language and conduct. If wanting in any of these requirements, it would be ground for discharging a salesman in a store from his employment.

But the question raised and pressed on our consideration, is as to the measure for the recovery of damages in the case, appellant contending that appellee was in no event, on the pleadings in the case, entitled to recover more than was due at the time he brought his suit. That under the pleadings he cannot recover for the monthly installments, or any of them, after the suit was brought. On the other hand, it is argued that, as the year for which appellee was engaged had fully expired before the suit was tried, he was entitled to recover the unpaid balance of the $1020, which appellants had agreed to pay him.

Appellant contends that, inasmuch as appellee did not, when he was discharged, terminate the contract, or elect to so treat it, but on the contrary, considered it as still subsisting, and was ready and willing to perform it in full if required, he can only claim as damages in this suit the amount that would have been due him at the time the suit was commenced, had he continued in the employment of appellants. That if he desired to recover damages beyond that sum, he should, when discharged, have notified appellants that as they had chosen to terminate the contract, he would treat it as rescinded, and hold them for all damages he had sustained by their terminating the agreement.

This precise question, in the shape now presented to the court, has never been passed upon by us, although analogous questions may have been.

The law is well settled, that on a contract for the payment of money by installments, assumpsit will usually lie to recover each installment as it falls due, without waiting for the last to mature. 1 Chit. Pl., 116. Here was a sum of money to be paid by monthly installments, and there can be no doubt that appellee, at the end of each month, could have sued for and recovered for the installment which accrued due at that time. But it is equally well settled that a party cannot, when he sues for an installment which is due, recover for installments not due when the suit was brought. And where the declaration showed by its averments, that a recovery of installments not due was claimed, and there was a general verdict, the courts considered it grounds for arresting the judgment, because the plaintiff was not entitled to recover for the portion claimed in the declaration which was not due at the institution of the suit. If it were necessary to quote authorities on so simple and well-settled a proposition, we might refer to note 1 to the case of Hambleton *v.* Veere, 2 Saund. R. 171, a and b, and the cases therein cited; Gordon *v* Kennedy, 2 Brim, 287, and the authorities there referred to by the court.

We had supposed no rule was more inflexible or better established than that a plaintiff cannot recover for money not due at the institution of the suit. Gordon *v.* Kennedy, *supra;* Chit. Pl., 372; Cunningham *v.* Morrell, 20 J. R., 203; McLure *v.* Bush, 9 Dana, 64; Allen *v.* Sanders, 7 B. Monr., 593; Kittle *v.* Harvey, 21 Verm., 301; Low *v.* Belknap, 1 Cush., 279; and Thompkins *v.* Elliot, 5 Wend, 496. If this rule could be seriously questioned, other cases could be referred to as establishing the rule. But to our minds it requires no authority, as it is based upon principles obviously just.

If, then, a party cannot sue for and recover a debt or claim before it is due, why should he do indirectly the same thing, by sueing for a small part when due, and recovering a greater and more substantial part, accruing after the suit has been brought? The law never permits that to be done indirectly which it prohibits from being done directly. To permit the recovery of the sums falling due after suit brought, would be an evasion of the rule that the cause of action must be complete when suit is brought. It would be without analogy to any rule of law which now occurs to us. In the case of Crabtree *v.* Hagenbaugh, 25 Ill., 233, it was said that where a party sued for the breach of an independent portion of a contract, he might recover for its breach, though his recovery would be limited to the damages sustained at the time the suit was commenced.

We have no hesitation in holding that appellee was only entitled to recover for the amount that would have been due, had he continued in the service of appellants, at the time the suit was instituted, and the court below erred in admitting evidence of the installments that would have matured afterwards. Suppose that after the suit had been brought appellants had demanded of appellee the fulfillment of his part of the contract and he had refused, then what would have been the measure of damages? Obviously not more than the wages which had accrued up to the time of the demand. Then, why permit a recovery beyond the damages sustained when suit was brought? Or, suppose a trial had been had ten or fifteen days after suit was brought, and the same damages as were recovered in this case, had been allowed, and after the recovery appellants had demanded of appellee to go on and perform his contract and he had refused, would appellants have been compelled to sue and recover the amount back? Yet such a thing might occur, when the plaintiff is still insisting upon being allowed to perform his part of the agreement.

Such a state of things would be an anomaly. If he insists upon going on with his part of the agreement, he should sue when each installment accrues, or wait till the end of the time, and sue for the whole.

At common law it was a ground of arrest to claim such installments in the declaration. So it is a ground requiring the granting a new trial, to permit proof of the same, unless it is apparent that it was not considered by the jury, and was excluded from the verdict. But in this case it is manifest that the installments which were not due when appellee sued, entered into and formed much the greater portion of the finding.

Had appellee, when discharged, terminated the agreement and then sued on the breach of the contract, it may be that a different rule might have prevailed Then the cause of action would have been the breach, and it would have been averred that the contract was at an end, and that plaintiff had been thrown out of employment, whereby he had sustained damage, etc. In such a case, it may be that he could have recovered for all the damage he sustained during the year by the breach of the contract, if the trial was had after its expiration. In such a case, the damage would have continued, had he been unable to procure employment during the time.

But the suit here is not for a breach of the entire contract, and abandoned by appellee; but, on the contrary, he avers that he insisted upon its performance during the remainder of the year.

The judgment of the court below is reversed and the cause remanded.

Judgment reversed.

ALEXANDER S. BRADLEY for appellant.

D. S. PRIDE for appellee.

WE are under obligations to EARL BILL, clerk of the court at Cleveland, for the following opinion:

U. S. CIR. COURT, N. D. OF OHIO.

ELIZABETH CLIPPINGER, administratrix of the estate of JOHN CRESTEAD, deceased,

v.

MISSOURI VALLEY LIFE INSURANCE COMPANY.

REMOVAL OF CAUSES FROM STATE TO FEDERAL COURT—STATUTES CONSTRUED.

Motion by plaintiff to dismiss and remand to State Court.

The plaintiff filed a petition against the defendant, on a policy of insurance, in the Court of Common Pleas of Allen county, on the 28th day of December, A. D. 1872. On the 18th of January, 1873, and before appearance, the defendant, being a non-resident company, filed a petition for removal of the case to the Circuit Court of the United States, and at the February term, 1873, of said court, filed the necessary affidavit, and offered surety as required by the statute, at which term the Common Pleas Court refused to make an order of removal and dismissed the petition, the defendant excepting to the ruling.

On the 19th of April, 1873, the defendant filed its answer in Common Pleas to the original petition, on which issue at the October term, 1873, a trial was had, and verdict and judgment entered for the plaintiff. At the same term a second trial was demanded and allowed and bond given therefor, as authorized by the statute of the State. Afterwards, on the 19th of February, 1874, an amended answer was filed by the defendant to the original petition in said court. On the 23d of February, 1874, in term time, a second petition for removal to this court was filed by the defendant, alleging non-residence of the State, with, proper affidavit alleging local prejudice, and surety offered, and bond given, as required by the statute, for removal. At the May term, 1874, answer to petition for removal was filed by the plaintiff, and on hearing the court dismissed the petition for removal. At the October term, 1874, a second trial on the issue made in the original case, was had in said court, and a verdict and judgment rendered for the plainiff.

On the 13th of March, 1875, the defendant filed a petition in error in the District Court of Allen county to reverse the judgment so lastly rendered in the Common Pleas, alleging for error among other things the dismissal of the petition for removal as aforesaid; and at the April term, 1875, of said District Court, that court reversed the Common Pleas for the assigned error of dismissing said petition for removal. At the May term, 1875, of the Common Pleas, in pursuance of the said judgment of the District Court, that court made an order accepting the sureties, and ordered that no further proceedings be had in said court in the case.

Certified copies of the pleadings, etc., were filed in this court on the 26th day of August, A. D. 1875.

The plaintiff files a motion to dismiss the case from this court and remand the same to the State court.

First—Because the petition, affidavit and bond for the removal of the cause to this court were not filed in the Court of Common Pleas until after the trial of the cause.

Second—Because the certified transcripts of the process, pleadings, etc., were not filed in this court within the time prescribed in the statute after the filing of the petition, affidavit and bond for removal.

Third—Because the removal of the cause to this court is contrary to law, and this court has no jurisdiction to try and determine the same.

In determining this motion it will only be necessary to examine the second ground of the motion in connection with the third. As to the time of the filing of the petition for removal to this court,

it is conceded that the first petition was in time under the act of 1789, and the second under the act of A. D. 1873, which combines the preceding statutes on that subject in the Revised Statutes then passed.

It would seem from the fact that the defendant, after having filed the first petition for removal, failed to file copies of the process, etc., in this court, and filed an answer in the State Court, and there went to trial on the issue made, as well as the filing of the subsequent petition, affidavit, etc., for removal in 1874, that it had waived any right to file the papers under that petition. Indeed it is not claimed that it had such right.

The question then is, had the defendant the right to file copies, &c., in this court under the second petition. No question is made as to whether the case itself was a proper one to be removed, or that the defendant had not brought itself within the statue by the filing of a petition and affidavit and offer of surety in the State Court, but it is claimed that it did not file the papers for removal in this court within the time prescribed by the statute.

Each of the statutes upon the subject of removal, in force at the time the last petition was filed, provide "that on filing such petition and affidavit, and offering good and sufficient surety, for entering in such Circuit Court, on the first day of its session next to be held, copies of the process, &c., it shall be the duty of the State Court to accept surety and proceed no further in the case, and that when said copies are entered as aforesaid in the Circuit Court, the cause shall then proceed in the same manner as if it had been brought there by original process."

Thus, this court obtains its jurisdiction in such cases; and thus the jurisdiction of a State court is terminated; that is to say, by a compliance, on the part of the party seeking to remove a cause, with the provisions of the Act of Congress respecting such removals, and as the jurisdiction of this court in such cases is of a purely statutory character, the provision of the Act of Congress should be strictly followed or no jurisdiction is obtained.

But it may be urged that in the case at bar, although the petition for removal was duly filed, supported by the proper affidavits to bring the application within the provisions of the act of Congress, and good and sufficient surety was offered, yet the Court of Common Pleas defeated or obstructed defendent's right of removal by dismissing its petition and refusing to accept the surety, and that this operates to excuse the defendant for its failure to enter copies, &c., in this court on the first day of its then next session and enlarge the time within which this may be done.

The answer is, the Court of Common Pleas had no power to do this. Its "duty" is clearly defined by the act of Congress, viz: "To accept the surety and proceed no farther in the cause." A failure or refusal to perform this plain duty cannot defeat the right of the defendant to remove the cause. On this point the language of an eminent jurist of New York is so clear and comprehensive that it is adopted here. Says Judge Blatchford: "No action of the State court could either confer the right or take it away. The discretion to be exercised by the State court in passing on the question as to whether the proper steps for a removal have been taken, and as to whether the evidence thereof is sufficient, and as to whether the surety is good and sufficient, is a legal discretion," (*i. e.* a discretion to be exercised in a legal manner and in accordance with its "duty"). "No order of the State court for the removal of the cause is necessary." "The right of the defendant to a removal is not dependant on the question whether the State court does or does not make an order for the removal. If it were so dependent, the refusal of the State court, in a proper case, to make such an order, would make it impossible for the defendant to secure the removal except by carrying the suit through the State tribunals," * * and thence "to the Supreme Court of the United States. (Sec. 6, Blatch C. C. Reports. 117, 118.) This interpretation of the acts of Congress stands uncontradicted so far as my researches have extended, and is believed to be the true one; and in the conclusions of the learned judge from the premises there laid down, I am forced to concur. He says: "If he (the party seeking a removal) does all that is necessary to secure a removal, then, whether the State court makes an order of removal or not, he can perfect the removal by entering in this court, at the proper time, copies of the proper papers, and his appearance and special bail, if necessary." As will have been seen, the *proper time* for entering in the Circuit Court "copies of the proper papers," etc., was on the first day of the next session after the filling of the petition for removal, affidavit, etc. In this case the last petition for removal was filed in the Court of Common Pleas on the 23d of February, 1874. The first day of the then next session of this court, was the 7th April, 1874, and "copies of the proper papers" were not filed in this court until the 26th of August, 1875, a point of time too late to enable this court to obtain jurisdiction of the cause in the manner provided by the statute. Nor can the action of the Court of Common Pleas of Allen county be held to excuse the delay, nor to enlarge the time within which the defendant might, and should have completed the steps necessary to the removal of his cause to this court.

In the act of 1875, which takes the place of all preceding statutes on this subject, we have a legislative construction that the time of entering copies, etc., in this court is material to the jurisdiction of this court. That act provides that "if the term of the Circuit Court to which the same is removable then next to be holden, shall commence within twenty days after the filing of the petition and bond in the State Court for its removal, then the removing party shall have twenty days from such application to file copy of record, etc."

The motion is sustained, and cause stricken from the docket for want of jurisdiction.

ISAIAH PILLARS and C. M. HUGHES for plaintiff.

MARVIN, HART and SQUIRE, for deft.

THE RIGHTS OF PERSONS HOLDING FIRE INSURANCE POLICIES ON BUILDINGS.

AN OPINION BY JUDGE WELKER.

The following decision by Judge Welker of the United States Court will be of interest to persons having fire insurance policies, as to a certain extent it shows in what cases insurance companies are liable for damage by fire.

John P. Dorn vs. Germania Insurance Company et al.

In the Circuit Court of the United States for the Northern District of Ohio. Motion for new trial.

The action was brought upon a policy of insurance issued by defendant upon a stone building with a stone addition on one side, and a frame addition attached to the stone building on the other side.

After the insurance, and before the fire the plaintiff, without the consent of defendants, cut off eighteen feet of the frame addition next the stone building, and placed the same at the rear end of the frame building addition, thereby detaching the frame addition from the stone building, but leaving the remainder of the frame addition unmoved. In making this alteration it was admitted that the risk of loss by fire was not in any way increased thereby. There was no express provision in the policy against alterations or requiring assent of the insurer to make improvements upon the property insured. In the fire which occured, besides damages to the stone building, the frame addition was entirely consumed, the fire having originated somewhere in the stone building. The case was tried by a jury. On the trial the defendants by their counsel claimed that the alterations above stated disconnected the frame addition from the stone building described in the policy; and that being no longer attached thereto, it was not covered by the policy, and no recovery could be had for its loss; that such alteration separated the addition from the stone building, and became a seperate and distinct building, and no part of the main building; and therefore not any longer covered by the policy; and requested the Court to so charge the jury, which was refused, and the Court did charge in relation thereto

That in the absence of express stipulation in the policy prohibiting repairs and alterations of the premises insured, there was an implied engagement that the assured would not alter the premises or business described in the policy, so as thereby to increase the risk and liability of the insured.

The construction and use of the premises, as described in the policy, constituted the basis of the insurance and determined the amount of the premium. Hence no alteration in either must be made by the insured to enhance the liability of the insurer.

The right to repair and alter buildings is incident to the ownership, and such repairs and alterations as do not change the risk may be made by the assured, without consent of the insurer, if such assent is not expressly required in the policy. That the alteration or enlargement of a building will not avoid the policy of insurance unless the risk is thereby increased.

That if the jury found that the frame addition to the stone building described in the policy, was altered without the consent of the defendant, by taking off eighteen feet of the part next adjoining the stone building, and placing the part so taken off to the rear of the addition, leaving a part of the frame addition in its original place, and they were satisfied that such alteration did not increase the risk to the building insured, such alteration did not in law avoid the policy so far as the frame addition is concerned and the plaintiff would be entitled to recover for its loss.

The jury returned a verdict for the plaintiff, including damages for the loss of the frame addition.

The refusal of the court to charge as requested, and the charge as given are assigned as grounds for a new trial.

I have carefully considered this matter, and reviewed the legal questions involved, and am satisfied that in refusing to charge as requested and in the charge as given to the jury, there was no error, and therefore overrule the motion for a new trial.

SUPREME COURT OF INDIANA.

[From the Indianopolis Sentinel.]

INTEREST ON A LEGACY.

4128. Decatur E. Case *v.* Camilla C. Case, Laporte, C. C. Affirmed.

Worden, J., delivering the opinion of the court: Complaint by appellee to recover interest for one year on a legacy of $8,000 bequeathed to her by her deceased husband. The court allowed the claim.

The general rule is, that where a general legacy is given, no time of payment being specified, it will draw interest only after the expiration of a year from the testator's death. (2 Wm's. on Ex's. 5. American Ed. 1283). But the rule has exceptions, and one is, that "when a legacy is charged upon real property, and no day of payment is mentioned in the will, interest will be given from the testator's death." (2 P. Wm's. 26; 9 Ves., 483.)

The following opinion, construing the statute of the State of Indiana, which is similar to our own relating to a statutory deed, will be of interest to our Illinois readers. The statutory forms of deeds are unquestionably, all things considered, the best for general use.

EASEMENTS—MODIFICATION OF COMMON LAW DOCTRINE.

4295. Mary Ann Keiper et al. *v.* David A. Klein et al., Tippecanoe C. C. C. Reversed.

Biddle, C. J., delivering the opinion of the court: The statutory form of deed carries the easements of light and air, though the words "appurtenances" and "hereditaments" are wanting.

The main question in the case is: Does the deed of John Taylor convey to Klein with the room the easement of light and air to his west window, over and above the space owned by appellant?

The English doctrine of prescriptive right to ancient windows was never received in America.

The court erred in sustaining the demurrer to the second and third paragraphs of the complaint.

THE JUDICATURE ACT AND THE LAW OF PARTNERSHIP.

Pothier, in his "Treatise on the Law of Partnership," defines this collection of persons, among other qualifications, as a society to obtain honest profits. How far such a definition is applicable to a number of modern partnerships may be a matter of speculation. But be that as it may, there can be no doubt that the law should consider all partnership as created for honest purposes, and should as far as possible shut out every means by which they can be dishonestly conducted. Certain of the provisions of the Judicature Acts will aid honest creditors in the maintenance of their just rights, and will give to the collective name under which persons usually carry on business a legal force which it has hitherto not possessed. The view which English law has up to the present time taken of the name of a firm has been that it was merely a definition for purposes of commercial convenience. No creditor of the firm of Smith & Co., of 100, Lombard street, could obtain any legal remedy by serving Smith & Co. with a writ at their place of business. It was necessary for him to hunt out the names of the several partners, and to discover exactly with whom he had contracted. Not only was this the case, but if he discovered only one or more out of several of the contracting partners, it was possible for him to lose his cause, however just it might be, if all the persons liable were not made defendants. A man of an unsuspicious temperament might without negligence believe that A alone constituted the firm of D and Co., and by this supposition be defrauded of his just rights. To show that this is no piece of legal romance, it is only necessary to turn to the Law Reports. In one leading case, one Richard Smith traded with Walter Smith, under the title of Bush and Co. The plaintiff, believing that Richard Smith was the sole member of the firm, sued him alone. But Richard Smith pleaded, in abatement, as it is technically termed, that Walter Smith was a member of the firm. The verdict was given for the defendant, upon the ground, as succinctly put by Baron Parke, "that unless the plaintiffs could show that the firm of Bush and Co. consisted of the defendant only, or that the defendant held himself out as the only person composing the firm, they were not entitled to succeed." It needs no great subtlety of intellect to see that a door is thus opened to much commercial injustice. It may, indeed, be argued that every man should know with whom he is dealing; but such an argument assumes that every man is desirous of cheating his neighbour, not of making, to quote again from Pothier, honest profits. If persons trade under the name of a certain firm, every just argument points out that they should bear both the responsibilities and the advantages which arise from so doing. Such being the state of the law, the rules framed under the Judicature Act have given new force to the partnership name. In future partners will sue and be sued in the name of their firm, and instead of the plaintiff going forth to discover whom he is suing, it is sufficient to serve the writ upon any one or more of the partners, or at the place of business upon any person having the control or management of the partnership business. This latter provision will, if liberally construed, prevent a partner from shelving his responsibilities and placing it on the shoulders of a managing, but hitherto irresponsible, servant. But this having been done, either party may compel the other to state of whom the firm consists. The value of this rule is apparent when it is borne in mind how easy it was under the old procedure for a man of straw to be put forward as the actual and responsible partner, and thus, after an unprofitable speculation, the bad account was cleared off by the simple means of putting forward, not the real capitalist, but the nominal partner.

Though it may not be impossible, it will be difficult and dangerous to avoid disclosing the whole number of responsible individuals who form the collective whole. This principle is still further carried out by the provision that if after judgment yet another individual is discovered against whom the plaintiff believes that he has a claim, leave to issue an execution against him may be obtained. If this liability is disputed, the point can be decided by an action. In extreme cases this may be no useless remedy. It is not altogether impossible that these provisions, useful though they are, may give rise to some protracted litigation as to who is or is not a partner. But there can be no doubt at all that they will be practically useful, and are remarkable, both in the history of commerce and of law, as giving a force to the collective partnership name which has been so far quite unknown in this country.—*Exch.*

CHICAGO LEGAL NEWS.

Lex vincit.

MYRA BRADWELL, Editor.

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We call attention to the following opinions, reported at length in this issue:

Township for School Purposes—Subscription to R. R. Stock—Corporate Powers.—The opinion of the Supreme Court of this State, by Walker, J., holding that a township organized for school purposes, by the general school law, in a county not under township organization, cannot, under the Constitution of 1848, be empowered to incur a debt for the purpose of subscribing for the stock of a railroad company.

The Chicago Board of Trade—Option Contracts.—The opinion of the Supreme Court of this State, by Walker J., holding that evidence of a usage among members of the Board of Trade of Chicago, that where the name of the principal is not demanded from the broker at the time of a transaction, the broker is alone accepted and considered the responsible party, is admissible to explain the intention of the parties, and to ascertain the nature and extent of their contracts; that to constitute such a usage, there must have been such long and general acquiescence in it that the jury will feel themselves constrained to find that it entered into the minds of the parties and formed a part of the contract; that a rule of the Board, providing that on default of either party to a contract to make additional deposit of security or margin within the next banking hour, when demanded, the other may give notice to consider the contract filled at the market value of the article at the time of the notice, is contrary to the law of the land and void; that a party demanding performance of a contract must himself be ready, able and willing to perform the contract on his part and must, as a general rule, tender performance before he can put the other in default and recover for a breach; and a rule of the Board of Trade, dispensing with such readiness or tender, is contrary to the law of the land and void. Messrs. Dent & Black, the able counsel of the Board, have applied for a re-hearing in this case.

Contract for Services — Discharge Before Expiration of Term—Damages.—The opinion of the Supreme Court of this State, by Walker, J., holding that when an employee, under a contract for payment of money by installments for a term of service, is discharged without cause, he can sue on the contract, at the end of each month, for the installment which accrues due at that time, or wait till the end of the term and sue for the whole; that if he sues on the contract for damages for the whole term, he can only recover for the amount that would have been due, had he continued in service, at the time the suit was instituted. If, when discharged, he rescinds the contract and then sues for its breach, it may be that he can recover for all the damage he sustained during the term by the breach, if the trial was had after the expiration of the term. This opinion, regarding the right of an employee to recover for his services when discharged before the expiration of his term, we consider important. The precise question, as presented in this case, was never passed upon by the court before. The remarks of Judge Walker, as to the duty of employees, are timely and appropriate.

Injunction—Restraining the Collection of a Tax.—The opinion of the Circuit Court of this county, by Williams, J., as to when a court of equity will restrain the collection of a tax by injunction. This case occupies much more space than we usually allot to an opinion of a court of original jurisdiction, but the great public interest in the questions involved, the care with which it has been prepared and the number of authorities cited, justify its publication in our columns.

Recent Publications.

Laws and Ordinances of the Town of Jefferson. Published by authority of the President and Board of Trustees. Chicago: Printed by the Chicago Legal News Company. 1876.

This is a volume of about one hundred pages and contains all the laws and ordinances of the village of Jefferson. Each ordinance is preceded by head-notes, something like the style of the revised statutes of the State. The head-notes are the work of S. J. Hanna, village attorney. The ordinances were prepared for the press and arranged by him. Other towns and villages in perfecting and revising their ordinances might profit by an examination of this volume. We take this opportunity of saying to village trustees and others, we have such facilities that we are enabled to stereotype and print laws and ordinances cheaper than any other house in the West.

SUPREME COURT OF THE UNITED STATES.

The following are notes to opinions filed in the Supreme Court of the United States on Monday last:

THE RULE AS TO EXEMPLARY DAMAGES.

In the case of the Milwaukee and St. Paul Railroad Company against Armes, Mrs. Armes recovered in the court below $4,000 damages for injuries sustained in consequence of a collision of trains, in one of which she was a passenger. The court below instructed the jury that if they found the agents of the company guilty of gross negligence they might by their verdict give primitive or exemplary damages. From the judgment entered the case was brought here, where it was now held that the rule as to exemplary damages limits such recovery to cases in which it is shown that the negligence is willful, or that it is so reckless as to the rights of others as to be equivalent to intentional wrong. Mr. Justice Davis delivered the opinion. The same rule was applied to the case of the Western Union Telegraph Company against Eyser.

THE CONGRESSIONAL PRINTER AN OFFICER OF CONGRESS.

In the case of the United States against Allison, it was held that Allison, who was an employee of the Government printing office from June, 1866, to June, 1867, was not entitled to extra compensation under the twenty per cent. act, because the printing office was not under the Interior Department, as claimed, and therefore in the executive department, but was under the control of the committees of the two Houses of Congress. The opinion was delivered by the Chief Justice.

JURISDICTION OF THE PROPERTY OF INSOLVENTS.

In the case of Mayer and Evans against Hellman was decided, the court holding, substantially, that an assignment by an insolvent debtor of his property to trustees under State laws, for the equal benefit of all his creditors, is not fraudulent, and when executed six months before proceedings in bankruptcy are taken against the debtor is not assailable by the assignee in bankruptcy, and that such assignee is not entitled to the possession of the property from the trustees. Mr. Justice Field delivered the opinion.

HON. LYMAN COCHRANE, OF DETROIT.

To the Editor of the Chicago Legal News:

The Chicago *Journal*, in a recent issue, stated that Hon. Lyman Cochrane, judge of the Superior Court of Detroit, is one of the members of the starved judiciary of Michigan, whose salary is $1,500 a year. The *Journal* made wry faces at Judge C., and called him an ungrammatical, stupid blockhead, etc., etc.

In Michigan it is a work of supererogation to speak in laudatory terms of Judge Cochrane. But as the *Journal* has poured over him a tide of harsh, undeserved criticism, let me say a few words, in Judge C.'s behalf, in the News.

Judge Cochrane's court is the creation of a special statute, and his salary is $4,000 per annum. Judge C. is a gentleman of splendid education and broad culture. He has had legislative experience. The city authorities once employed him to revise the city charter, which he did satisfactorily. He has been upon the bench nearly three years, and during that time, although presiding over a city court, he has gained a State reputation for eminent ability and strict impartiality.

In Detroit, where he has lived so long, such criticisms as the *Journal* indulges in have no effect whatever against a judge occupying the high place Judge Cochrane does, in the estimation of the members of the legal profession and the gener l public. C.

Detroit, January 28, 1876.

SUPREME COURT OI INIONS.

The following official notification of the filing opinions at Springfield, has been issued by Mr. Hamburgher:

Springfield, Ill., Feb. 1, 1876.

Opinions filed this day: No. 164. The Toledo, Wabash and Western Railway Company *v.* O'Connor; affirmed. No. 202. Mitchell *v.* King et al.: affirmed. No. 221. Trowen et al. *v.* Elder; affirmed. No. 236. The People ex rel. *v.* The County of Cass; affirmed.

1876—Creed *v.* The People; reversed and remanded.

E. C. Hamburgher,
Clerk of Supreme Court.

ILLINOIS SUPREME COURT.

Opinions were filed at Ottawa yesterday in the following causes:

PEOPLE'S CAUSES—DOCKET OF 1875.

3. Empson v. The People. Affirmed.
4. Empson v. The People. Affirmed.
20. The People ex rel., etc. v. Goodrich. Information sustained and respondent disbarred.

REHEARING DOCKET OF 1875.

44. Mulferd et al. v. Beveridge. Decree affirmed—Schofield and Craig, JJ., dissenting.

CIVIL CAUSES—DOCKET OF 1874.

14. Harding v. Osborne. Affirmed—Breeze and Sheldon, JJ., dissenting.
146 Wing et al. v. Doge et al. Decree affirmed in part, and remanded.
147. Jordan v. Dodge et al. Decree affirmed in part, and remanded.

CIVIL CAUSES—DOCKET OF 1875.

146. Helpstal v. Berthold et al. Reversed in part, and remanded.
15. Phelps et al. v. Edwards et al. Reversed in part, and remanded.
25. Morris v. Graves. Affirmed.
35. Cursen. impleaded, etc. v. Browning. Reversed and remanded.
82. Robey v. Beach et al. Reversed and remanced.
86. Arnold et al. v. Rhodes et al, Decree reversed.
95. Artt v. Osgood. Decree reversed.
123. Getts v. Clark. Reversed and remanded.
187. Wilson v. Church. Affirmed.
211. The First National Bank of Galesburg v. Mayo. Reversed and remanded.
239. Ovington v. Smith et al. Reversed.
277. The People ex rel. Miller v. Dunham. Reversed and remanded.
280. The People ex rel. Miller v. Cushman. Reversed and remanded.
289. Brooks v. The People ex rel. Rumsey. Affirmed.
29. Cushman v. The People ex rel. Rumsey. Affirmed.
311. Flagler, Gay, et al. v. Miller et al. Affirmed
357. Hardin v. The People ex rel. Miller. Affirmed.
358. Hardin v. The People ex rel. Miller. Affirmed.
359. Cushman v. The People ex rel Miller. Affirmed.
369. Hart et al. v. Wingart. Decree reversed and remanded—Sheldon, Craig and Dickey, JJ., dissenting.
388. C. B. & Q. R. R. Co. v. Keith et al. Decree reversed and remanded.
394. Dietzsch v. Sisson. Reversed and remanded
395. Forsythe et al. v. The People ex rel. Miller Affirmed.
396 Clark et al. v. The People ex rel. Miller Affirmed.
397. Emory et al. v. The People ex rel. Miller Affirmed.
439. Magil v. Beers. Reversed and remanded.
562. Badger et al. v. The People ex rel. Miller Affirmed.
564. Webster et al. v. The People ex rel. Miller Affirmed.

SUPREME COURT OF MICHIGAN.

January Term, 1876.

NOTES OF DECISIONS, BY HENRY A. CHANEY.

Hourtienne v. *Schnoor.*

Appeal from Macomb. Affirmed with costs. Opinion by Campbell, J.

ACKNOWLEDGMENT—PROOF.

The regularity of an acknowledgment taken before a reputable acknowledging officer is presumed, and the burden of proof is with the party contesting an acknowledgment to show misconduct on the part of the officer, or forgery or other irregularity which he ought to have discovered.

Bohn v *Brown.*

Error to Saginaw. Affirmed with costs. Opinion by Graves, J.

CORPORATE DEBT—LIABILITY OF STOCKHOLDER.

Under Comp. L., ch. 76, allowing suits against stockholders to recover a corporate debt where an execution against the corporation has been returned unsatisfied, it is the original debt against the company for which the stockholder is liable. Where judgment is obtained against the company without fraud or collusion, the stockholder is probably bound by the judgment so far as regards the liability and the amount, and cannot litigate these questions. Their liability for debt does not make them liable for corporate torts, notwithstanding the right of the injured party to waive the tort and sue in assumpsit.

A street railway passenger was injured by the conductor's negligence and recovered damages, for which the execution issued against the company was returned unsatisfied. *Held*, that he could not sue individual stockholders therefor, as for a corporate debt, under Comp. L., ch. 76, which makes the holders of unpaid stock liable on corporate debts that can not be satisfied from the property of the company.

Roethke v. *Brewing Company.*

Error to Saginaw. Reversed, with costs; new trial granted. Opinion by Campbell, J.

SELLING LIQUOR—FOREIGN FIRM.

Verbal negotiations made in this State with the agent of a foreign liquor-selling company, for the sale of liquor to a resident of the State, are not sufficient, under the Statute of Frauds, to cover subsequent orders sent to the foreign firm, and such orders, therefore, are not within the provisions of the Michigan law avoiding liquor contracts.

Money paid for liquor purchased in violation of the State liquor law, may be properly set off against a valid indebtedness to the liquor-sellers.

Baxter v. *Spencer.*

Error to Hillsdale. Reversed, with costs; new trial ordered. Opinion by Graves, J.

CHATTEL MORTGAGE—TIME OF PAYMENT.

A mortgagee of chattels who had expressly fixed a certain time and place for the payment of the mortgage, the time being a few days later than the date of the maturity of the debt, made himself a wrong-doer by seizing the chattels on the day before the day he had fixed for payment; payment on that day would have been a satisfaction of the debt.

CIRCUIT COURT OF COOK CO., ILL.

OPINION FEBRUARY 1, 1876.

THE CHICAGO TRIBUNE CO *v.* CITY OF CHICAGO et al; W. F. STORY *v.* SAME: THE CHICAGO JOURNAL CO. *v.* SAME.

THE POWER OF A COURT OF EQUITY TO RESTRAIN THE COLLECTION OF A TAX BY INJUNCTION.

Opinion by WILLIAMS, J.

There are certain general principles, applicable to suits to restrain the collection of taxes, which have been repeatedly laid down by the Supreme Court of this State, and must, therefore, be the law of these cases now under consideration.

Among these are the following:

1st. "It is only in rare cases that the courts will enjoin a tax." * * * "They will not unless the property is exempt from taxation, or where a tax is levied which is not authorized by law, and in the absence of all legal power, or where the persons imposing it have no power conferred upon them by law to levy such a tax. But where the property is liable to the burden under the law, and the law has authorized the tax to be imposed, and it is levied by persons or officers designated by the law to levy such a tax, equity will not interfere, but will leave the parties to their legal remedies." 22 Illinois, 36; 22 Illinois, 595: 35 Illinois, 460; 65 Illinois, 286; 66 Illinois, 383

2d. Courts will not interfere by injunction to prevent the collection of taxes, because there have been irregularities in the assessment. 22 Illinois, 37; 22 Illinois, 312; 22 Illinois, 595; 65 Illinois, 286.

3d. Courts will not interfere by injunction to restrain a tax, because the officer assessing it was only an officer *de facto* and not *de jure*. 22 Illinois, 312; 22 Illinois, 602; 35 Illinois, 466; 65 Illinois, 286.

4th. The omission by the officer to assess property liable to tax, will not invalidate the assessment upon other property subject to the burden, though such omissions were made by the officer carelessly or even willfully. 55 Illinois, 361; 22 Illinois, 303; 65 Illinois, 286; 6 Legal News, 215.

5th. The assessment of property at too high a valuation will give to the injured party no redress, unless the assessment was fraudulent. 76 Illinois, 198; 6 Legal News, 215.

6th. Where a party has had an opportunity to redress his alleged grievance in another form, and has neglected to avail himself of such opportunity, a court of equity will not interfere to redress an injury which but for his own laches, might have been prevented. 76 Illinois, 201; 26 Illinois, 357; 6 Legal News, 215.

Whether these rules are reasonable or unreasonable, they have, in suits such as those now before the court, been so often stated and reiterated by the Supreme Court, that their binding force cannot be denied and should not be evaded. I have cited only a part of the cases which enforce them. The complainant's bills contain no charges of actual fraud perpetrated or attempted by the assessor. In the case of the Evening Journal the assessor valued its property at the exact sum he was directed by one of its proprietors to assess it In the case of the Times the valuation of the assessor was in strict accordance with the written and printed return of its business manager. This is not denied, and is proven by the production of documents signed by the parties. It could hardly be said to be a fraud on the part of the assessor committed upon the complainants, to permit them to set a value upon their own property. In the Tribune case the assessor returned the property at $55 000, a difference of only $15,000 from the value set upon the property in complainant's bill, and which in itself is not enough to justify the conclusion that the assessor acted fraudulently. The charges of fraud in the several bills must, therefore, have regard to certain acts done by the defendants, which, not being in the estimation of the several complainants legal, and being injurious to their respective interests, they have chosen to characterize as fraudulent. If these several acts are legal, then they are neither fraudulent, nor in the legal sense injurious to complainants.

The Chicago Tribune Company alleges that the town assessor did not call at its place of business and demand a schedule of its personal property, as by law he was required to do. This is denied by an affidavit of the deputy assessor, who asserts that he called at the office of the company and left with its president a blank schedule, to be filled up by him, and that he was then informed by said president that he might assess the personal property of his company at $100,000. But, admitting that the fact is as is stated in the Tribune's bill, this court, in order to give that complainant the benefit of such objection, would be compelled to overrule a decision of the Supreme Court of this State.

In the case of DuPage county *v.* Jenks, 65 Illinois, 287, that court said: "As to the objection that the assessors did not call on persons for a list of their taxable property; that was an omission of duty on the part of the assessors, but is only an irregularity, and affords no ground for restraining the collection of the tax."

It is objected that the State Board of Equalization has acted illegally; that by law it was bound to affix a cash value to railroad and other stocks, whereas it has assessed such stocks at only fifty per cent. of their cash value, and therefore its action in adding the fifty-two per cent. cannot be sustained.

The primary duty of the Board of Equalization in assessing such property, as by law they were compelled to assess, was, to so make their assessments "that every person and corporation shall pay a tax in proportion to the value of his, her or its property." This they were compelled to do, both by the Constitution of the State and by the revenue law.

The requisition to assess at its fair cash value, applies not only to stocks to be assessed by the State Board of Equalization, but to all other property of whatever kind and by whom assessed. Real estate is required, by section four of the revenue act, Stat. of 1874, page 858, "to be valued at its fair cash value, estimated at the price it would bring at a fair voluntary sale." All personal property is to be assessed upon the same standard of value. Section 24 of the revenue act, Stat. of 1874, page 860, has enacted that "it shall be the duty of the assessor to determine and fix the fair cash value of all items of personal property." Indeed I do not know of any revenue act that has not fixed such a standard. The language is not always the same. Sometimes it is said the assessor shall assess property at its "actual value," at other times at its "true value," and then again at its "cash value." They are equivalent expressions, all requiring the assessment to be made at its fair cash value. It is true that the law might require that property should be valued at fifty per cent. or 25 per cent. of its fair cash value for the purposes of assessment, and in the absence of any constitutional limitation, such a valuation would be unobjectionable; but in every case the assessment must have a relation to the cash value, and that must be primarily determined. It is difficult to fix the fair cash value of any property, real or personal, accurately, by estimation. Take a piece of real estate in the central portion of a large city and attempt to fix its value by the opinion of witnesses. Every man having experience in such matters, and especially every judge, knows that honest, intelligent and unprejudiced witnesses will differ from 100 to 150 per cent. in their estimates.

How much more difficult it is to fix the value of stocks by estimation, and more difficult still to estimate the value of franchises. For this reason the law, while it fixes actual cash value as the criterion of valuation, because it is the best possible standard, esteems the attainment of such value as of small moment as compared with uniformity of valuation.

The Constitution of this State says nothing about fixing the actual cash value of property for assessment, but it has provided that laws shall be passed for the raising of revenue which shall make all persons pay *in proportion* to the value of his, her or its property.

The ascertainment of value becomes mainly important in its relation to the primary idea of uniformity. Proportionate taxation is the end; the ascertainment of value the means to such end.

The law has fixed a uniform standard of value for all property, that is, "actual cash value." If property of all descriptions is not assessed at such value, it is through no defect in the law, but owing to the fault of the assessors.

The State Board of Equalization is by law appointed the assessor of the capital stock of corporations. Its duty in assessing is precisely the same as to fixing the valuation of property it may assess as that of other assessors. If any of these assessors make their assessments carelessly, or if they err in judgment, and persons are injured by their action, such conduct does not vitiate the assessment. The Supreme Court has gone even further and declared that the *willful* misconduct of assessors shall not vitiate the assessment. In the Dunham case, 55 Illinois, 361, that court said: "That a a statute which in terms or by necessary implication, authorizes the omission of real or personal property in the city, so as to destroy the uniformity in respect to persons and property within the jurisdiction of the city required by the 5th section of the ninth Article of the Constitution of 1848, would be void, there can be no doubt.

But the position that it lies with ministerial officers to defeat the collection of taxes by such omissions, whether made willfully or from carelessness, is not tenable. Such officers may make themselves amenable to the law for misconduct in office, but cannot thus stop the wheels of government." Scholfield *v.* Watkins, 22 Illinois, 66; Merritt *v.* Farris, 22 Illinois, 303.

If such be the law in reference to careless or willful *omissions* of property by assessors, *a fortiori* it applies to valuation by assessors, which may be too high or too low. In Spencer *v.* The People, 6 Legal News, 215, the court said: "The question presented by the record is, whether, upon an application for judgment against real estate for delinquent taxes, the objection may be made that there was too high a valuation placed upon the land by the assessor in making the assessment," and in passing upon this question the court says:

"The framers of the Constitution could not have contemplated any such consequences as that a tax levy should be void in case an assessor should happen to omit to asses any taxable property, or should make an incorrect valuation of any property, whereby would be produced the result that every person would not actually pay a tax in proportion to the valuation of his property."

The objection we are now considering is not that the Board of Equalization, assessed stocks of corporations out of just proportion to other property, but that they assessed it in contravention of the language of the revenue law.

If the objection is a good one it applies with a like effect to every valuation made under the present law by the town assessors, and if it is a good one there never has been in this county, or perhaps in any county of this State, a valuation in accordance with previous revenue laws The real and personal property of this county has never been valued by any assessor at its real cash value. Uniformity of assessment may sometimes have been approximated, but valuation at actual cash value for county taxation has never been even attempted. The act passed by the General Assembly of this State, in February, 1853, provided that "each separate parcel of property shall be valued at its true value in money * * * and personal property of every description shall be valued at the usual selling price of similar property at the time of listing in the county where the same may then be; and if there be no usual selling price known to the person whose duty it shall be to fix a value thereon, then at such price as it is believed could be obtained therefor in money at such time and place." The valuation of property of individuals in Bureau county, notwithstanding this plain provision of the statutes, as returned by the assessors, ranged from one-fifth to one-third of its cash value, while the C. B. & Q. R. R. had returned their property for assessment at from one-third to one-half its actual value.

The Supreme Court, with these facts before it, in the case of Bureau Co. *v.* The C., B. & Q. R. R. Co, 44 Illinois, 230, held that the requirements of the law that property should be valued at its true value in money, were exceedingly difficult, if not impossible, and, in regard to the rule of valuation adopted in Bureau Co., said: "The rule adopted by the assessors in this State has grown into a custom, and has been tacitly sanctioned by every department of the government for a long course of years, and it is now too late to challenge it. Even so late as the last special session of the legislature, that body, by clear implication, acknowledged the custom and yielded to its influence by the provisions of the act to tax the shares in national banks. They therein impliedly declare that such shares are to be taxed the same as other property. A share of bank stock, under that bill, is not required to pay more State or local taxes than a piece of land or a house of equal value; and the plain inference is, if such property be assessed on only one third of its actual value, bank stock should be assessed on the same per cent. of its actual value."

In the above case the court entirely disregarded the admitted fact that the property of no owner in Bureau county had been taxed at its real value, and found this no objection to the proceedings; while they considered the action of the Board of Supervisors in raising the tax of the defendant, and therefore taxing it disproportionately as "unfounded in justice and in direct opposition to the Constitution." The same positions were substantially reiterated by the Supreme Court in the case of C. & N.W. R. R. Co. *v.* Boone County, 44 Illinois, 243, in which case this language is used: "It cannot be that one portion of the taxpayers in a county, owning taxable property, shall be required to pay more taxes, in proportion to its value, no matter how that may be ascertained, than another portion in the same county. If the assessors, regardless of the strict injunction of law, shall place a value upon property far below its real cash value, and such a practice goes on unchallenged, and is recognized by the authorities having special charge of the revenues of the State, that misconduct must also contain within itself the great and cardinal principle of uniformity. No warrant is given, if the law is not strictly observed in the case of individuals, and their property is not assessed at its actual value, that the property of a corporation situate in the same county shall be assessed at greater proportional value than that of individuals, even though the enhanced assessment is not the actual cash value of the property of such corporation. The same rule which is applied to individuals, justice and the Constitution demand shall be applied to corporations. To demand of appellants that they should schedule their property at its cash value, while individuals may schedule their property at one-third or less of such value, would be to demand of the former three times the amount of taxes demanded of the latter. As we said in the Bureau County case, such a proposition is so monstrous as to be indefensible by fair argument. Such discrimination is condemned not only by the Constitution, but by the indignant yet no less just judgment of an honest people."

Referring to the Bureau case above cited the court continues: "In that (Bureau) case the judgment of the Circuit Court was in favor of the railroad company, holding that their schedule was correct and in compliance with the statute, and the practice under it, which had obtained for such a longseries of years unchallenged and unquestioned. And here (says the court), we might say, more explicitly than was said in that (Bureau) case, that a long, uniform and unchallenged practice under a law is strong evidence of the real meaning of the law. To the hoary maxim, *contemporanea expositia est optima et fortis-ima in lege*, is accorded full force in all courts and we have ever rendered it due respect."

Although the law has, ever since the organization of the State, required all assessments to be made at the actual cash value, I know of no law in relation to valuations more plain and positive than the statute the Supreme Court then had under consideration. And after the decisions upon so clear a statute in both the Bureau and Boone county cases, it cannot be successfully contended that the action of the State Board in fixing the value of railroad stock upon the same basis as other property. Even though that basis be only half its real value, is illegal. This objection has been considered at length, because it was so pressed and relied on in argument. The above reasoning will apply with equal, if not greater force to the objection that the law requires the equalizations as well as the assessments to be made by the State Board upon the cash value. If one re-

quisition may be dispensed with by the Supreme Court, so may the other.

Objection has been made to the action of the State Board in that it has arbitrarily raised the assessed value of personal property in Cook county 52 per cent, and of real estate 62 per cent; and that in defiance of the sworn returns of a multitude of assessors throughout the State, that they had assessed property at its fair cash value, they arbitrarily found that such assessments were upon the average at only 50 per cent. of the cash value. The whole duty of the Board, except in such cases as they were constituted assesors, was to equalize the taxes throughout the several counties of the State, so that each county should bear its just proportion of taxation. In this regard, the Board sustained towards the several counties the same relation, and performed the same duties, which the county Boards of the respective counties sustained and performed for the towns of which said counties were composed.

The right of the county board to equalize taxes between the towns, has never, so far as I know, been questioned. The necessity of such equalization has always been admitted. In no other way could uniformity of taxation for the counties have been secured. The action of the State Board of Equalization is no less important to secure proportionate taxation for the State. The average values in one county, as they are equalized by the county board, is often twice or thrice that of similar property in another county. The possible disproportions in values may be illustrated by the actual disproportions of the valuations of the same property, in the same district and in the same year, made by the city assessor of Chicago, and the assessors for the towns of South, North and West Chicago, as such assessments are set forth in complainant's bills. For the year 1875, the city assessor's valuation of real estate was over $253,000,000, while the aggregate of the three town assessors valuation of such property was less than $129,000,000. It was to remedy such and far greater discrepencies in valuations that the State Board of Equalization was created. It was never designed that they should be bound by the estimates of town assessors. Sections 105, 106, 107, with other sections of the revenue law, have given them extensive powers and large discretions for the purpose of equalizing, while the same law prohibits them from decreasing the aggregate assessed valuation in the State, and from increasing it more than one per cent. By the report of the board for the year 1875, it appears that they found the average valuations of all the counties in the State, as returned by the county board, to be fifty per cent. of the cash value of the property. Taking this as their basis of action, they proceeded to raise the valuations in some counties and lower them in others, in order to secure uniformity of taxation for the entire State. I see nothing to indicate fraud in their action, nor any departure from the law, which has not been justified by the decisions of the Supreme Court. The powers and duties of the board have been so often passed upon and defined by the Supreme Court, that many of them can no longer admit of question.

It was contended in the case of The People *v.* Salomon, 46 Illinois, 333, as it has been in the cases at bar, that the Board of Equalization had no power to equalize assessments by an arbitrary rule which disregarded the rights of the individual tax payer, but the court decided not only that the board was constitutionally created, but that the act defining the powers and duties of the board was based upon a principle which commended itself to the best judgment of the court. In the case of Porter *v* The Rockford & R. I. & St. Louis R. R Co., 6 Legal News, 319, the court not only passed upon the constitutionality of the law, appointing the Board of Equalization, but held that the adoption of rules for the ascertainment of values was legal, and that in no other way could the board properly discharge its duties, and that though the board might have erred in its valuation, no power was given to the courts to arrest the collection of the tax on that account. The decisions in the case of the Republic Life Insurance Co. and in the Adsit case, fully sustain the view in the Porter case.

In these cases, and others of a similar character, the Supreme Court have overruled the objections, which have been earnestly and ably presented upon this argument against the action of the State Board of Equalization. There is not one of these objections to the action of said board which can be sustained without contravening either the express language or the necessary and logical deductions to be drawn from the opinions delivered in the cases above cited.

It was objected that the right of the State Board to equalize applies only with reference to State taxes, and that although it might have the right to add 52 per cent. to the valuation for State purposes, that did not justify the addition of 52 per cent. to the valuations for other taxes. The primary object in the creation of the board was to secure uniformity of taxation for State purposes, but it is equally true that one of the clearest purposes of the revenue law was to secure proportionate valuation, not only for State, but for county purposes. To effectuate this design, section 117 of the Revenue Act, provides that "*all rates for taxes* herein provided for shall be extended by the county clerk on the assessed valuation of property, *as equalized and assessed by the State Board of Equalization.*" Sections 126, 128 and 131, are clear and explicit upon the same subject, and give substantially the same directions. The law is not only exceedingly clear in this regard, but, unless there is a limitation to a rate per cent. and that limitation is exceeded, it is hard to perceive how the citizens of a county can, as to local taxes, be injuriously affected by an increase of the valuations by the State Board. The county of Cook levies a certain specified amount for county purposes, not a certain rate per cent. If that amount is less than 75 cents upon the $100 valuation it matters not whether the county property is valued at one hundred millions or five hundred millions.

The less the valuation the greater the rate per cent. to be paid; the greater the valuation the less the rate.

The Constitutional requirements are two: First, that the assessment shall be proportionate, so that each tax-payer shall bear his due share of the burden; and second, that, except by a vote of the people of the county, the county authorities shall never assess taxes, the aggregate of which shall exceed seventy-five cents upon the one hundred dollars valuation, unless for payment of indebtedness existing at the time of the adoption of the Constitution.

If, then, the State Board of Equalization had raised the valuations of all personal and real property in the county of Cook, or of any other county in the State, one hundred per cent., and such increase had been uniform, it would not have increased the relative burden of the taxpayers.

The only way in which the action of the State Board of Equalization can have occasioned injury to any taxpayers in reference to the State taxes and these all the complainants are willing and offer to pay.

It is said that the city tax is invalid, for the reason that up to Aug. 9, 1875, the city authorities had been proceeding to collect the city taxes under an act commonly known as Bill 300, and that they had no right to abandon said assessment and elect to collect taxes under the general revenue act; that by such election they adopted assessments theretofore made by the assessors of the towns of South Chicago, West Chicago and North Chicago, who had never been up to that time the officers of the city, and who had not, in any respect, acted in its behalf; and by such action the burden of city taxes upon personal property has been doubled.

The bills aver that the valuation of real estate by the city assessor for the year 1875, was over two hundred and fifty-three millions, the valuation of the town assessors in the same territory was about one hundred and twenty-eight millions; the valuation of personal property by the city assessor for the same year was forty-two millions, and of the town assessors about forty-five millions. The city levy for the taxes of the year 1875 was over five millions of dollars. It will be readily seen that a change from the city valuation to the valuation of the town assessors would largely decrease the taxes to be paid upon real property and would largely increase the taxes to be paid by personal property, while it did not change the aggregate taxes, taking the two kinds of property together. It is claimed that this is virtually (in its results) an exemption of about one hundred and twenty-five millions of real estate from the city tax, while it doubles the assessment upon personal property. A change which must result in so great a shifting of the burden of the city taxes as between real and personal property, could only be justified in view of this positive sanction of the law. Did the law sanction such a change?

Bill 300 (statutes of 1874, page 254,) authorized the collection of city taxes under its provisions, but section 270 of the act enacted as follows: "The city council of any city shall have power at any time in lieu of the mode herein provided for the assessment and collection of general city taxes, to, by resolution or ordinance, elect to certify to the county clerk the amount or amounts required to be raised by taxation upon the assessment of property for State and county taxes, and to collect the taxes for said city in the manner provided for in the general revenue laws of this State, and in such case to abolish the office of the city assessor and the city collector, provided, however, that nothing in this section contained shall be so construed as to prevent such corporation at any time thereafter from providing for the assessment and collection of taxes by ordinance and by the manner in this act hereinbefore set forth."

On the 9th. of August last, the City Council by ordinance elected to certify to the County Clerk the aomunts to be raised by taxation, being over the sum of five millions of dollars.

The objections made to such action upon the part of the city authorities are twofold, the first, denying the right of the City Council to make the certificate at any time, and the second denying its power to make it at the time when it was made.

It is argued that, by the Constitution, taxes must be assessed by the Corporate authorities and no one else, and that the town assessors do not answer this description. The last proposition cannot be denied. But if by the assessing of a tax is meant its imposition, then the former proposition might be admitted, and yet the right of the assessors to value the property for the purposes of taxation might exist. For the town assessors had nothing to do with the imposition of the City tax. That was done by the City Council, when by ordinance it determined to raise the $5,000.000 for revenue purposes from the property within its jurisdiction. The duty of the town assessors was in part judicial and in part ministerial, but whether judicial or ministerial and however indespensible to the ultimate collection of the tax, those duties were entirely distinct from that of its imposition. The Constitution has not said that persons performing such duties shall be either officers of or residents in the district for which they act. In the absence of a Constitutional limitation, the power of the legislature as to taxation would be absolute, both as to amount, and as to the method in which the tax should be assessed and collected. Art. 9, Sec. 1, of the Constitution. provides for the valuation of property as follows, "such value to be astertained by some person or persons to be elected or appointed in such manner as the General Assembly shall direct, and not otherwise." The Constitution of 1848 contained a provision precisely similar to the one above quoted, and the Supreme Court held, in the case of DuPage Co. *v.* Jenks, 65 Illinois, 283, that "there was no constitutional provision which has prescribed the details that shall be observed in making assessments for taxation." There was none in the Constitution of 1848, and there is none in the Constitution of 1870. In the case last cited, it was held that if the assessors were appointed in pursuance of an existing statute, it was all that was required. In that case, the assessors whose appointment were complained of, were appointed by the Board of Supervisors, and were not even residents of the towns for which they were assessors, nor were they sworn into office; but the court held that they were officers *de facto*, and that the tax was valid. Independent of that decision, the constitutional limitation being such as I have stated, I fail to see why a law which would require a resident of Cairo to assess property in Chicago should not be valid, however unwise and impolitic.

The tax having been imposed by the City Council, the property upon which it was levied might be valued as truly in accordance with the Constitution by the town assessors, if they were by law designated to perform that service, as by the city assessor. Section 270 of the charter did allow the city, at its election, to avail itself of their assessment, instead of subjecting it to the expense of making a new assessment. They had made an assessment for town, county and State purposes, and the legislature had prescribed that in a certain contingency it should also be for city purposes. It was not only a constitutional, but, apparently, a money saving provision. If there could have previously been any doubt of the legality of such appointment, I am at a loss to see why there should be any since the decision of the case of DuPage Co. *v.* Jenks. Again, it is urged that if the town assessors might have acted for the city, in case the certificate had been made at the commencement of the official year, that the city, having proceeded under bill 300 up to August 9th, had exhausted its election, and could not, at that time, certify as provided by section 270. It is admitted that the city was proceeding with its assessment under bill 300, up to August last; but it is also admitted that the assessment was then, and still is, inchoate. I am not aware of any principal of law which would prevent the city from abandoning an assessment for taxes which had not been perfected, or that would estop the city from perfecting another because it had abandoned one that was still imperfect. The right of taxation by the city is by virtue of a delegation to it of that governmental prerogative by the legislature. The right of eminent domain comes in the same way. If the city had attempted to exercise its delegated right of eminent domain, and the condemnation had been pressed almost to completion, it could at any time before final confirmation, have discontinued its proceedings without prejudice to its rights. 2 Dillon on Munic. Cor., sec. 473.

Why, when it is exercising the delegated right of taxation, should it not be allowed to exercise the same privilege? If it is still said that the city is estopped by its action, of what act or series of acts shall the estoppel be predicated? It ought not to be estopped merely by the lapse of time. It, at least, ought to be permitted to enter upon the fiscal year, and determine what taxes must be raised to meet the current expenses. The statute provides for this The commencement of the official year found the city with an assessor and collector in office. So far as they acted in affecting an assessment, they appear to have done so under existing laws, not because they were under any express orders from the city authorities. The city ought not to be estopped because its officers proceeded with their duties under statutes of the State which they were, as good citizens, bound to obey. Section 270 declares that the Common Council may, "*at any time,*" certify to the county clerk the amount required to be raised by taxation "*upon the assessment of property* for State and county taxes." and to collect, etc. It is *the* assessment, not an assessment, the use of the definite article being more appropriate to an existing assessment than to one which was not commenced.

To qualify and limit the meaning of the words "at any time," counsel would have us interpolate into the section some such words as these: At any time *before the commencement of the fiscal year.* To do this the court must perform a legislative rather than a judicial function. The limit within which the certificate is to be filed is found in sections 111 of the city charter and 122 of the general revenue law. The first provides that the city council shall, on or before the second Tuesday in August, in each year, ascertain the amount necessary to be raised for corporate purposes, and assess the amount upon the property subject to taxation, and certify the ordinance to the county clerk, and the latter fixes the same time for the filing of the certificate by the city of the amount it requires should be assessed with the county clerk. The certificate was made in apt time under these sections. No other time is fixed by the statute, and the courts have no right to limit the city in any other way than the legislature has limited it.

It has been insisted in argument upon behalf of the city that there was, under the present proceeding by virtue of the revenue law, no limitation by statute of the per cent. to be raised by taxation.

As there is a limit in the act under the provisions of which the city is permitted to make its election to certify, it ought not to be permitted to deny the binding force of the limitation contained in the act by which alone it obtains the power to certify. The law permits the city, at its election, again to return to bill 300 for the collection of its revenue, and that act may be used for such purpose one year and the general revenue law the next. If this construction, contended for by the city's counsel, is correct, the city could collect the revenue under bill 300 for a service of years under the limitation, which it is confessed that act contains, and then suddenly and unexpectedly to the citizens, return to the revenue law and assess them at double the previous per cent; or it could assess under limitation one year and without any limitation the next. To be at the mercy of every city council, which could at its will tax the citizens without limit, would be a sad prospect for an already tax-burdened city. A construction of the law which would permit such a result should not be adopted unless compelled by the words of the statute. The fair construction of the law is in favor of the limitation. If there is a limitation of three per cent. the complainants insist that that per cent. must be calculated upon the aggregate valuation of the town assessors, and not upon the valuation as equalized by the State Board. The statute is "three per cent. upon the aggregate assessed valuation of all property assessed." The State Board asses the valuation of a great amount of property. The language of the statute includes that property. If the property they assess is included, what excludes their equalized valuation of that and other property?

The law requires all assessments to be carried out upon the equalized value, and it is that upon which the three per cent. is to be calculated. It is further objected that a portion of the tax was levied for the purpose of paying interest upon illegal indebtedness of the city. But neither of the bills discloses the nature of the illegality, nor sets forth what portion of the tax is assessed to pay illegal interest, and therefore the court cannot know whether any, or if any, how much of the tax should be pronounced illegal. It was also said that the town taxes were not properly certified. They were certified by the town authorities, and a less amount than that required by the town was allowed by the county board. There was, therefore, concert of action to the extent of the tax by both town and county authorities. There would have been more force in the objection had the amount fixed by the county board exceeded the tax imposed by the town. I have noticed the principal objections urged in argument against the validity of the tax. But if there were valid legal objections, what, then, is the duty of a chancellor in these cases? That also has been settled by repeated decisions. In the DuPage county case, 65 Ills., 286, the court said: "It is with reluctance that chancery stays the collection of the public revenue. It is a branch of equity jurisprudence of very modern introduction, and of doubtful expediency. It may well be doubted whether it would not have been better for the public welfare had the parties been left to seek their remedies at law in all cases, as they were until recently, required to do." And the court said it had no inclination to enlarge the rule which limited the relief to cases of fraud, to cases where the tax was unauthorized, or the property exempt from the tax. And even in cases of illegality of the tax, there must also be special reasons alleged in the bill for the interposition of the court, as that the collection of the tax will cause to the complainant irreparable injury, or occasion him a multiplicity of suits, or the court will not interfere to restrain the tax. This doctrine has been clearly announced in the following Illinois cases: 35 Illinois, 466; 6 Legal News, 324; 22 Illinois, 36; 7 Legal News, 321. Dillon on Munic. Corp., Sec. 738, says: "Equity will not restrain even an illegal and void tax assessment where it is sought to be enforced *against personal property only*, since here the party has an adequate remedy at law;" citing, in support of such proposition, a large number of cases decided in various States of the Union.

The case of Dows *v.* The City of Chicago, 11 Wallace, 108, was a suit brought to restrain the collection of a tax levied by the city of Chicago upon personal property. The main ground relied on in the bill was that the tax was illegal. Upon demurrer in the court below the bill was dismissed, and also upon like demurrer a cross-bill filed by the Union Nat. Bk., on substantially the same ground, shared the same fate. The case was taken to the Supreme Court of the U. S., and the decree of the court below affirmed. In that case the court said: "Assuming the tax to be illegal and void, we do not think any ground is presented by the bill justifying the interposition of a court of equity to enjoin the collection. The illegality of the tax and the threatened sale of the shares for its payment, constitute of themselves alone no ground for such interposition. There must be some special circumstances attending a threatened injury of this kind, distinguishing it from a common trespass, and bringing the case under some recognized head of equity jurisdiction, before the preventive remedy of injunction can be invoked. It is upon taxation that the several States chiefly rely to obtain the means to carry on their respective governments, and it is of the utmost importance to all of them that the modes adopted to enforce the taxes levied should be interfered with as little as possible. Any delay in the proceedings of the officers, upon whom the duty is devolved of collecting the taxes, may derange the operations of government, and thereby cause serious detriment to the public. No court of equity will, therefore, allow its injunction to issue to restrain their action, except where it may be necessary to protect the rights of the citizen whose property is taxed, and he has no adequate remedy by the ordinary process of the law. It must appear that the enforcement of the tax would lead to multiplicity of suits, or produce irreparable injury, or, where the property is real estate, throw a cloud upon the title of the complainant, before the aid of a court of equity can be invoked. In the cases where equity has interferred, in the absence of these circumstances, it will be found, upon examination, that the question of jurisdiction was not raised, or was waived." Citing in support, 14 New York, 534; 25 New York, 312; 35 Illinois, 465—to which citation might be added several more cases in the Supreme Court of Illinois, and many cases decided in other courts.

There is nothing in the three cases now under consideration which calls for the interposition of the restraining power of a court of equity. There is no actual fraud upon the part of the assessor. In the Journal and Times case, he assessed it at precisely the sum he was requested to assess it, by the parties most interested in giving a lawful value. The Tribune Company was assessed by him at $15,000 more than its present valuation. But such valuation, if too great, could have been redressed by application to the town board of review, and if not there, by application to the Board of County Commissioners, and the Tribune must suffer in this regard for its own laches. Neither of these bills makes out any special case of injury, and under the many decisions above quoted, even if the tax was void, the injunction ought not to issue except upon such a showing. In each case, if the tax is invalid, and should so be declared by the court of last resort, the complainant has a complete remedy at law by bringing suits against the city and county to recover the taxes it has been compelled to pay illegally.

The city and county are both able to respond to any judgments which may be obtained by either or all the complainants in any suits to be brought to recover money paid illegally, and the complainants would not be compelled to resort to a multiplicity of suits in order to obtain such judgments, if they have legal claims.

If upon the objections presented upon the argument of these several suits, this court should restrain the collection of the City tax, and of parts of the County and Park taxes as asked, the City at least would be almost entirely deprived of revenue, and could not carry on the City government for six months.

Its financial credit would be utterly destroyed. If there have been many instances of gross mistake in this assessment, or of fraud, actual or legal, upon the part of the assessors, as is more than possible, they are not within the scope of this opinion as they would present facts entirely dissimilar to those stated in these bills. Such cases must stand upon their respective merits. If relief should be granted by injunction in such cases, no serious harm need ensue to the City. To restrain the tax for merely legal objections which, if sustained, would invalidate the whole assessment and render the City for the time being bankrupt, for the purpose of protecting a few individuals, who even if the tax is void, have several complete and inexpensive remedies for their wrongs by suits at law, would not be justifiable in view of the numerous decisions above quoted. The prayer of the several complainants for injunctions must therefore be denied.

UNITED STATES SUPREME COURT.

PROCEEDINGS OF.

Thursday, Jan. 27, 1876.

On motion of R. T. Merrick, Thomas Young, of Huntington, New York, and James Hoban, of Washington, D. C., were admitted.

No. 104. (Assigned.) Myra Clarke Gaines v. Joseph Fuentes et al. The argument of this cause was concluded by J. S. Black for plaintiff.

No. 43. (Assigned.) The Town of Concord v. The Portsmouth Savings Bank. This cause was reargued by George H. Williams for plaintiff, and by Sandford B. Perry for defendant.

No. 124. The Home Insurance Company v. Benjamin Luce. Dismissed with costs.

No. 125. Henrietta S. Gould, executrix, v. The Evansville and Crawfordsville Railroad Company. The argument of this cause was commenced by Charles Tracy for plaintiff.

Adjourned until Friday at 12 o'clock.

Friday, Jan. 28.

On motion of Matt H. Carpenter, Samuel Gormley, of Philadelphia, Penn., was admitted.

No. 125. Henrietta S. Gould, executrix, etc. v. The Evansville and Crawfordsville Railroad Company. The argument of this cause was continued by Charles Tracy for plaintiffs, and by Asa Iglehart for defendants, and concluded by Charles Tracy for plaintiffs.

No. 127. Marie Romie et al. v. Teresa Casanover. This cause was submitted on printed arguments by S. C. Houghton and John Reynolds for plaintiffs, and by John A. Grow for defendants.

No. 120. Alfred H. Clements v. Joseph P. Machebonef et al. This cause was argued by J. W. Denver for appellant, and by R. T. Merrick for appellees.

No. 456. James and Squire Williams v. The United States. On motion of Matt H. Carpenter, on behalf of counsel for appellant, dismissed with costs.

Adjourned until Monday at 12 o'clock.

Monday, Jan. 31.

On motion of T. J. Durant, Jose Ignacious Rodrigues, of Washington, D. C., was admitted.

On motion of Matt H. Carpenter, Edward T. Wood, of Brooklyn, New York, was admitted.

No. 83. J. Sherman Hall et al. v. John Weare. In error to the Circuit Court of the United States for the northern district of Illinois. Strong, J., delivered the opinion, reversing the judgment of the Circuit Court with costs, remanding the cause with directions to award a new trial. Davis, J., did not sit during the argument of this cause and took no part in the decision.

No. 546. Frederick J. Mayer and Seth Evans, assignee, etc., v. Mat. Hellman, assignee, etc. In error to the Circuit Court of the United States for the southern district of Ohio. Field, J., delivered the opinion, reversing the judgment of the Circuit Court with cost, and remanding the cause for further proceedings in conformity with the opinion of this court.

No. 105. The Milwaukee and St. Paul Railway Company v. Mary A. F. and D. D. Arms. In error to the Circuit Court of the United States for the district of Iowa. Davis, J., delivered the opinion, reversing the judgment of the Circuit Court with costs, and remanding the cause with directions to award a new trial.

No. 118. The Western Union Telegraph Company v. Charles Eyser. In error to the Supreme Court of the Territory of Colorado. Davis, J., delivered the opinion, reversing the judgment of the Supreme Court with costs, and remanding the cause, with directions to reverse the judgment of the District Court of Arapahoe county, and to direct that court to award a new trial.

No. 86. Robert Dow v. David Humbert et al. In error to the Circuit Court of the United States for the western district of Wisconsin. Miller, J., delivered the opinion, affirming the judgment of the Circuit Court with costs and interest. Dissenting, Clifford and Hunt, JJ.

No. 65. The Propeller Colorado, etc., v. Elon W. Hudson, owner, etc. Appeal from the Circuit Court of the United States for the eastern district of Michigan. Clifford, J., delivered the opinion, affirming the decree of the Circuit Court with costs and interest.

No. 643. The United States v. William Allison. Appeal from the Court of Claims. Waite, C. J., delivered the opinion, reversing the judgment of the Court of Claims, and remanding the cause with directions to dismiss the petition.

No. 545. R. F. Potts, governor, etc., et al., v. William Chumasero and John A. Johnson. In error to the Supreme court of the Territory of Montana. Waite, C.J., delivered the opinion, dismissing the writ of error for the want of jurisdiction.

No. 127. Marie Romie et al. v. Teresa Casanova. In error to the Supreme Court of the State of California. Waite, C. J., delivered the opinion, dismissing the writ of error with costs.

No. 831. Alex. P. Stewart et al. v. Meyer Sonnebron. Waite, C.J., announced the decision, granting the motion to reinstate this cause upon the payment of costs.

No. 527. George D. Crary and Henry Pike v. John Devlin. The motion to dismiss this cause was submitted on printed arguments by Reginald Fendall in support of the same, and by E. T. Wood in opposition thereto.

No. 622. Charles K. Brown, surveyor, etc. v. Frank S. Atwell, administrator, etc. The motion to dismiss this cause was submitted on printed arguments by James Flynn in support of the same, and by John B. Gale in opposition thereto.

No. 811. Charles Rockhold v. Thomas Rockhold et al. The motion to dismiss this cause was submitted on printed arguments by W. W. Boyce in support of the same, and by Henry Cooper in opposition thereto.

No. 128. William Buddell et al. v. Augustus Denig and William E. Ide. Passed.

No. 129. Porter G. Turner et al. v. Charles H. Ward et al. This cause was argued by Charles P. Crosby for appellants, submitted on printed arguments by Ashley Pond for appellees.

No. 130. Cornelius Storm et al. v. The United States. Passed.

No. 131. Alexander M. Earle et al. v. H. McVeigh. This cause was argued by S. F. Beach for appellants, and by P. Phillips for appellee.

Adjourned until Tuesday at 12 o'clock.

Tuesday, Feb. 1.

On motion of T. J. Durant, Ira J. Bloomfield, of Bloomington, Ill., was admitted.

No. 131. The Ætna Insurance Company v. David France and wife. This cause was argued by Samuel C. Perkins for plaintiff, and A. H. Sharpless for defendants.

No. 133. Charles C. Smeltzer v. Miles White. This cause was submitted on printed arguments by Galusha Parsons for plaintiff, and J. H. Ashton and Nathaniel Wilson for defendant.

No. 134. Christian S. Eyster v. Thomas and James W. Gaff. The argument was commenced by J. A. Mills for plaintiff.

Adjourned until Wednesday at 12 o'clock.

THE ILLINOIS REPORTS.—We call attention to the advertisement of Mr. Freeman, on the first page of this issue, announcing that he can furnish Illinois Reports from 47 to 67, also volumes 76 just issued; that volumes 75, 68 and 77 will follow in rapid succession; that full sets of such as he has will be delivered at $4.50 per volume, and that current volumes will be delivered to subscribers for $5.00 per volume.

GEORGE H. HARLOW, the present Secretary of State, will be a candidate before the Republican convention for a re-nomination. He has made an efficient and capable officer, is popular with the people, and will be a hard man to beat.

BANKRUPTCY—PROOF OF DEBT—NOTARY PUBLIC.—Among our new bankruptcy blanks we have a blank for proof of debt, prepared expressly for notaries public.

CREDITOR'S BILLS.—The LEGAL NEWS COMPANY have a very complete creditors bill. It is printed on half a sheet of cap and really contains more than those printed on ten or twelve pages.

CHICAGO LEGAL NEWS.

SATURDAY, FEBRUARY 12, 1876.

The Courts.

THROUGH the courtesy of WILLIAM H. KING, of the Chicago bar, we have received the following opinion:

SUPREME COURT OF ILLINOIS.

OPINION FILED JAN. 21, 1876.

NO. 194.—EDWARD ELY *v.* DAVID J. ELY et al.

Appeal from Superior Court of Cook.

PREMISES DESTROYED BY FIRE—DUTY OF TENANT TO RE-BUILD—COVENANT TO DELIVER IN AS GOOD CONDITION—INSURANCE.

1. This was a bill filed by Edward Ely, the appellant, for the purpose of obtaining the benefit of the insurance upon the premises of which he was the tenant. David Ely, one of the appellees, leased the premises to appellant. The lease contained covenants on the part of the lessee that he had received the premises in good order and condition, that he would keep them in repair at his own expense, and at the end of the term would deliver the same up to his leasor in as good order and condition as when they were entered upon by him. The title to the property was in Mrs. Caroline D. Ely, wife of David J. Ely. She, in her own name, procured policies of insurance on the building upon the premises leased. The building was destroyed by fire October 9, 1871. A new one was erected by the tenant. *Held*, under the covenants in the lease that the tenant must sustain the whole expense of re-building; that a court of equity cannot impose upon the owner a portion of such cost; that this insurance money is as much the money of Mrs. Ely as that derived from any other source.

2. INSURANCE—RE-BUILDING.—That a tenant has no equity to compel his landlord to expend money received from an insurance office, on the demised premises being burnt down, in rebuilding the premises, or to restrain the landlord from suing for the rent until the premises are rebuilt.—[ED. LEGAL NEWS.]

SHELDON, J.—This was a bill filed in the court below by Edward Ely, the appellant, for the purpose of obtaining the benefit of the insurance upon premises of which he was tenant.

By a lease, bearing date, May 4th, 1867, David Ely, one of the appellees, demised to Edward Ely the premises situate in the city of Chicago, known as No. 3, Washington street, to hold from the 15th day of July, 1867, until the first day of May, 1878, at the rent of $3,000 per year.

The lease contained covenants on the part of the lessee, that he had received the premises in good order and condition, that he would keep them in repair at his own expense, and that at the end of the term he would deliver the same up to his lessor, in as good order and condition as when they were entered upon by the lessee.

At the same time of the execution and date of the lease, the following agreement was executed by the parties:

"Chicago, 4th May, 1867.

"It is mutually understood that Edward Ely, the lessee of the property known as No. 3 Washington street, Chicago, has the right to purchase the same, as follows:

"Any time within three years from the date hereof, at twenty eight thousand dollars ($28,000), and within five years as above, at thirty thousand dollars ($30,000), with interest from date and upon the following terms: One-fourth of the purchase money to be paid in cash at the time of giving notice of purchase or desire to purchase; the remainder to be paid in three equal annual installments, from the date of the notice of the desire to purchase, with interest on the full amount of the deferred payments, annually, in advance, at eight per cent. (8 per cent.), all interest to be paid as stipulated, and the deferred payments to be secured to the entire satisfaction of the grantor, his assigns, heirs, executors or administrators, by assignment of proper policies of insurance upon the buildings thereon.

DAVID J. ELY.
EDWARD ELY."

The title to the property was in Mrs. Caroline D. Ely, wife of David J. Ely, and she, in her own name, procured policies of insurance on the building upon the premises. On October 9, 1871, the building was destroyed by fire, and there were paid to her by certain insurance companies, $5,000.

Edward Ely has, since that fire, erected a new building on the lot, better and more expensive than the old one, and claims this insurance money, for the recovery of which this bill was brought. This claim is based upon an alleged express contract, by which David J. Ely agreed to pay for the insurance upon the building, and also upon the ground that the insurance was, even if there had been no such contract, for the benefit of the party who was bound to rebuild. The express contract relied upon is the following:

"For and in consideration of an agreement to pay three thousand dollars per annum, made this day with Edward Ely, for the rent of No. 3 Washington street, I agree to lease said premises to him from the 15th day of July, 1867, to May 1, 1878, and it is agreed that I am to pay the taxes and insurance on the said buildings and improvements, to leave in the present gas-fixtures, and also the furnace and the range; and I also give the option to the lessee to purchase this property at $30,000, any time within five years from this date. In case said purchase, then the terms are to be $7,500 cash in hand, and the remainder in one, two and three years, at eight per cent. per annum interest. DAVID J. ELY."

"If elected to purchase within three years from this date, price to be twenty-eight thousand dollars; terms as before named. DAVID J. ELY."

This paper writing has no date, and the parties are not agreed in their testimony as to the time when it was given, although Edward Ely admits that it was some time previous to the lease and written purchase option contract of May 4th, 1867.

David J. Ely testifies that the paper was procured by Edward Ely the last of February or first of March, 1867, to be used to influence Peter Page, if possible, to lease to Edward Ely at a lower rent than Page was asking, the building on the corner of Wabash avenue and Washington street, in an adjoining block, of which Edward Ely was trying to negotiate a lease, it being the distinct understanding that it was not to be binding on either of the parties. Edward Ely contradicts this, and they are the only witnesses who speak upon the subject. This paper writing bears the appearance of having been hastily drawn up for a temporary purpose, and not as the final contract upon the subject. It is not signed by Edward Ely, and although it speaks of an agreement as made the same day to pay $3,000 rent, there is no other evidence of any such distinct agreement.

The paper, as it purports, is a contract all on the side of David J. Ely, with nothing binding upon Edward Ely. There are absent the usual particular formal covenants which attend the letting of such valuable property for such a length of time and such a large rent.

The lease of May 4, 1867, has no agreement, on the part of the lessor, as has the paper writing, to pay taxes and insurance, to leave in the present gas fixtures, furnace, and range, and says nothing whatever in regard thereto, the lease containing only terms of simple demise on the part of the lessor.

On the part of the lessee, it contains a large number of particular, lengthy, formally-drawn, and very stringent covenants; as, for the payment of the rent, in sums of $750, at the end of every three months — to pay all water rents — to keep the premises in a clean and healthy condition, in accordance with the city ordinances; that the premises are received in good order and condition; that the premises shall be kept in repair by the lessee at his own expense; that he will not underlet or assign, without the written assent of the lessor; to yield up the premises at the end of the term in as good condition as when the same were entered upon; for a forfeiture and right of re-entry for default in the payment of rent or keeping any covenants; and various minute provisions in regard thereto and in favor of the right of distress; that the lessee shall pay all costs and attorney's fees and expenses of enforcing the covenants; and there is a provision that changes, alterations and additions in and about the buildings, convenient for the lessee's business, may be made at his sole expense. There is a variance, too, in the terms of the option to purchase, of May 4, 1867, from the paper writing, in this: that in the former, the lessee's right of purchase is to be *subject to his lease*, the interest on the deferred payments is to be paid annually, in advance, and the deferred payments to be secured to the satisfaction of the grantor, by assignment of proper policies of insurance upon the buildings. Even if we should reject D. J. Ely's statement of the purpose of giving the undated paper, comparing these more full and formal instruments of May 4, 1867, with the previous undated paper writing, the design would seem to be that the two former should take the place of and be in the stead of the latter. The very entering into the subsequent instruments of writing, indicates that they were to be constituted and relied upon as the evidence of what was the contract between the parties.

The terms of the undated writing being, "I agree to lease," and not terms of present demise, tend to show it to be executory, looking for its consummation to a lease afterward to be made. The rule of law upon the subject is familiar—that it is a general rule of evidence that a written contract, executed between parties, supersedes all their prior negotiations and agreements upon the same subject.

This rule has not application sometimes when the last contract covers only a part of the subjects embraced in the prior one, and it plainly appears, from the character of the contracts, that the last one was not intended to be in performance, or supersedure of the former one, and that the provisions in the former not embraced in the latter, were intended to remain unaffected. And as neither the lease nor the option contract of May 4, 1867, refer to the subject of insurance, nor to that of gas fixtures, or furnace or range, mentioned in the undated writing, it is urged that this brings that writing within the exception above named—that a subsequent agreement is not to have the effect of superseding an antecedent one, unless the entire ground of the first one is covered by the latter. That would be to nullify the rule in all cases as to any omitted term of a previous negotiation or agreement which should not be contained in a later contract upon the same subject.

This provision as to insurance in the undated writing does not remain in force, because there is no mention made of it in the lease of May 4th. On comparison of these several writings, the one with the other, no such intention is manifest that this stipulation in the undated writing, relative to insurance, should remain afterward in force, unaffected by the execution of the lease; but the contrary one is evinced, that the lease and option contract of May 4th should be expressive of the entire contract of the parties upon the whole subject.

In confirmation of this, if it were necessary, reference might be made to the letters of Edward Ely to David J. Ely, of 23rd July, and 22nd August, 1867, relative to the construction of the words "subject to his lease," in the optional contract of purchase of May 4th, 1867, wherein Edward Ely states his understanding, that the purchase was not to be subject to the lease, and as to showing he refers to what David J. Ely said to him on the evening of May 4th, 1867, but makes no allusion whatever to the undated writing, which does not contain these words; thus manifesting, that he did not regard that writing as then operative and in force, as otherwise he would have referred to that as determining the question.

We can entertain no doubt that the undated paper writing, if ever of any force, is to be regarded as having been merged in and superseded by the subsequent lease and option contract of May 4th, 1867, and that it was thenceforth inoperative and of no force.

As before remarked, the lease contains no agreement on the part of the lessor, to pay insurance. On May 31, 1872, Edward Ely addressed a letter to D. J. Ely, informing him that he proposed to build upon the premises, giving a general description of the character of the building he intended to erect, that to do it, he required the insurance money, and requesting D. J. Ely to send on the money at once. Edward Ely immediately commenced rebuilding upon this and the adjoining lot of one Martin Andrews, and completed the buildings in the winter following. The appellant, while admitting that D. J. Ely always denied any liability to pay him the insurance money, testifies that in August, 1872, D. J. Ely promised to pay over the insurance money as the building progressed, requiring as the only condition to the payment, the execution of appellant's personal bond against mechanic's liens.

D. J. Ely testifies, that while stating to appellant, that he did not admit but denied all claim of appellant to have from him any portion of the insurance money he did consent to furnish a sum of money equal to the insurance money collected, only upon the condition that his architect in Chicago, Wadskier, should be employed to make the plans and specifications, and superintend the erection of the building; that the plans and specifications should meet his approval, the money to be advanced *pro rata* as the work proceeded, and that the new building should be superior by that sum, to the building he was required to build under the lease. Wadskier was not employed by appellant as the architect, but some other architect was employed. D. J. Ely testifies, that appellant never consulted with him with regard to the character of the building erected; that the architect's plans and specifications were never submitted to him, and that he never approved any plans or specifications. The building erected by appellant was four stories and a basement, the walls of the basement and first floor being sixteen inches, and above that twelve inches. It appears from the evidence that the walls are too slight for a building of that kind. The testimony of the architect, Wadskier, is, that the walls ought to be twenty inches in the basement, and sixteen inches in the first, second and third stories, and twelve inches in the fourth story, and that nothing less would answer for heavy business. It appears, too, that there is no front entrance to the building above the first story, except a centre entrance for both buildings, which would be unadapted to the separate occupancy of the buildings, to remedy which would involve very extensive alterations of the interior of the buildings.

The promise to furnish any money toward rebuilding, without adverting to whether it was supported by a sufficient consideration, was accompanied with material conditions, according to the testimony of D. J. Ely, which were not complied with, and for that reason, there was warrant for the decree, finding there was no liability on the score of such an express promise. It is not sufficient to say that the conditions were substantially complied with, in that the new building is more valuable than the old one, by the amount of the insurance money. The conditions were important in many respects as concerned D. J. Ely, and he is entitled to claim exemption from liability otherwise than according to the terms of his promise.

We do not find then that the claim of the complainant to this insurance money has the support of a promise to pay the insurance, or of any express promise to rest upon.

The further position which is taken, that irrespective of any contract whatever, the insurance was for the benefit of the party, who was bound to rebuild; we know no ground of principle upon which it is to be maintained. The erection of the new building by the lessee, was not done at the instance, or by the procurement of the lessor. It was the voluntary act of the lessee, done in the performance of his own covenants in the lease. He was not entitled to the contribution by the lessor, of any money toward the rebuilding. Had there been no insurance there could be no pretense of a legal claim against the lessor for any portion of the cost of rebuilding. Whence the claim of this insurance money? It belongs to the assured, the owner of the building. The title to it was purchased with her money, not that of the lessee. She had an insurable interest in the premises, and so had the lessee. Either might have insured their own interest, She chose to insure her interest. Appellant did not see fit to insure. The owner might have insured for the benefit of appellant, but did not do so. She insured in her own name, paid the premiums and the insurance was for her benefit. There is nothing looking toward the benefit of appellant in the matter, any more than his having been requested to pay the premiums for insurance, which he absolutely refused to do. He might have done so, and had ground of claim to the insurance money. He did not do so, and is not entitled to the benefit of what he would not pay for.

He was not charged nor chargeable with the premiums. The building to be sure, upon the expiration of the lease, if it then remains will belong to the owner of the premises. But that was an advantage she secured by force of the

covenants in the lease. Appellant saw fit to enter into covenants, and keep the building in repair at his own expense, and to deliver it up at the end of his term in as good order and condition as when he received it, without making any exception of loss by fire.

The legal effect of such covenants is well settled, and appellant must abide by them, as he made them. It is the province of courts to enforce the contracts which parties themselves make, not to make contracts for them. Because it may seem a hardship for the appellant, that he should sustain the whole cost of rebuilding, while the owner of the premises will enjoy the ultimate benefit thereof, should the building remain, a court of equity cannot, for such reason, impose upon the owner, payment of part of such cost. This insurance money is as much the money of Mrs. Ely, as that derived from any other source.

The case is analagous to that of mortgagor, and mortagee, who have each an insuarble interest. When the mortgagee insures, the mortgagor having had no connection with the insurance, cannot claim its benefit. The mortgagee may enjoy the insurance money received and still collect the whole mortgage debt from the mortgagor. Honore *v.* Lamar Fire Ins. Co., 51 Ill., 409; King *v.* The State Mutual Fire Ins. Co., 7 Cush., 10.

In Leeds *v.* Cheetham, 1 Sim. Ch., it was held that a tenant has no equity, to compel his landlord to expend money received from an insurance office, on the demised premises being burnt down, in rebuilding the premises, or to restrain the landlord from suing for the rent until the premises are rebuilt.

We do not find that the court below committed any error in dismissing the bill.

Decree affirmed.

WILLIAMS & THOMPSON for appellant.
WILLIAM H. KING for appellees.

WE have received from F. W. YOUNG, of the Chicago bar, the following opinion:

SUPREME COURT OF ILLINOIS.

OPINION FILED JAN. 21, 1876.

No. 285.—WILLIAM SKELLY *v.* JAMES BOLAND, imp'd, etc.

Appeal from Cook.

REMARKS OF COURT TO JURY.

That while the court expresses its disapprobation of the court in trying a case, interfering by remarks within the hearing of the jury, unless they are in the form of instructions, still, in this case, as the evidence shows that the defendants could not have been prejudiced, the court refuses to set aside the verdict.—[ED. LEGAL NEWS.]

Opinion by BREESE, J.

This was assumpsit in the Superior Court of Cook county, by James Boland against William Skelly and John Gwynn, sued as partners under the firm name of Skelly, Gwynn & Co., to recover for services as clerk to that firm, at the rate of one thousand dollars per annum, by special agreement. Gwynn defaulted and Skelly went to trial on the general issue. The jury found for the plaintiff and assessed his damages, on which the Court rendered a judgment, having denied defendant's motion for a new trial. Skelly appeals, making the point that the Court made improper remarks on the trial of the cause in the hearing of the jury, by which his case was prejudiced, and that there was error in refusing a new trial, insisting the weight of evidence is against the verdict. No point is made on the instructions. The only contest between the parties was this: Were these services rendered by appellee as a clerk in the concern, or as a partner. The defendant, Skelly, contended the plaintiff was a partner, and in that capacity or character rendered the services.

Much testimony was heard on this point, conflicting, of course, appellant being his own principal witness, whilst appellee testified for himself. There were other witnesses on both sides. On the part of appellee the defaulted defendant and partner was examined, and he testified that he and appellant had tried to induce appellee to become a partner with them, but failing in this, they agreed to hire appellee and give him a salary, on account of his acquaintance and influence with vessel men.

Appellee did make the experiment for a few days of acting as a partner, and gave the partnership the benefit of his name in one or two transactions, but the great preponderance of the evidence is that he never was a partner, but a clerk, merely, and as such entitled to wages.

When the plaintiff rested his case, the defendant moved for a non-suit, which motion the Court denied, remarking in the hearing of the jury, "As it now stands upon the evidence now in, the plaintiff has made out a perfect case, and is entitled to a verdict, unless the defendant makes a defense." The defendant objected to this, and we have considered the point; and whilst expressing our disapprobation of any interference of the Court, by remarks or otherwise, within the hearing of the jury, unless they be in the form of instructions, the remark here excepted to, in the view of the testimony then before the jury, could not have prejudiced the defendant's case, and we would not, therefore, set aside the verdict.

There was no error in refusing a new trial on the ground of newly discovered evidence. The evidence was not of a conclusive character; it was cumulative, merely. Perceiving no error in the record, the judgment is affirmed.

MONROE & LEDDY for appellant.
F. W. YOUNG for appellee.

THROUGH the kindness of the law firm of M. A. RORKE & SON, we have received the following opinion:

SUPREME COURT OF ILLINOIS.

OPINION FILED JAN. 21, 1876.

No. 291.—D. E. K. STEWART *v.* THE HIBERNIAN BANKING ASSOCIATION.

Appeal from Cook.

CONFESSION OF JUDGMENT — DEPARTURE FROM POWER—PROOF OF EXECUTION.

1. Where a power of attorney authorized an attorney to appear and waive service of process and confess a judgment, etc., and the attorney entered an appearance and allowed the jury to hear the evidence, held not such a departure from the power as to render all acts done under it erroneous.

2. A judgment entered by confession in term time will not be set aside when the power of attorney is more than a year and a day old because the record does not show that evidence was introduced that the defendant was alive.—[ED. LEGAL NEWS.]

Opinion by CRAIG, J.

Appellee recovered a judgment in the Circuit Court of Cook county against D. E. K. Stewart and Joseph Fitzpatrick upon a promissory note. Stewart alone appeals, and seeks to obtain a reversal of the judgment, solely upon the ground that the court had no jurisdiction, by service of process, or otherwise, over his co defendant, Fitzpatrick. The original record filed in this cause does not show service of process upon Fitzpatrick, or that his appearance was entered; but, by an amended record filed since the cause has been pending in this court, it does appear that on the 11th day of February, 1875, and before the judgment was rendered, the appearance of Fitzpatrick was entered by Andrew M. Rorke, his attorney. It is, however, claimed by appellant that Rorke, the attorney of Fitzpatrick, had no authority to enter such an appearance as was entered in the cause.

We do not regard this position well taken. The record shows a power of attorney was filed with the note upon which judgment was rendered, executed by Fitzpatrick, by which he authorized and empowered Geo. F. Bailey, or any attorney of any court of record, to appear in any court of record, in term time or in vacation, in any of the States, at any time after the maturity of the note, to waive the service of process, and confess a judgment in favor of the payee of the note for the full amount of the note and interest.

The power of attorney confers full authority to do three things: First, to appear for Fitzpatrick; second, to waive the service of process; and, third, to confess a judgment upon the note for the amount due thereon.

It cannot be denied that the attorney possessed the power to waive service of process, and confess a judgment upon the note, in a court of record. The argument of appellant, however, is, as the attorney did not confess the judgment, the appearance that was entered, and the waiving of the service of process, did not confer upon the court jurisdiction over the person of Fitzpatrick. We are unable to appreciate the force of the argument. The fact that the attorney did two acts unauthorized by the power of attorney, but, instead of confessing the judgment, which was the third act authorized, allowed the jury to hear the evidence and return a verdict for the amount of the note and interest, cannot be regarded such a departure from the authority conferred by the power of attorney as to render all the acts done under it erroneous.

The position of appellant might be regarded with more favor if it appeared that Fitzpatrick had been injured by the act of his attorney. Such, however, is not the case. On the other hand, he makes no complaint, but seems to be entirely satisfied with the acts of his attorney and the judgment of the court.

It is, however, insisted that as the power of attorney was more than a year and a day old, the law required an affidavit to be filed to prove the execution of the power of attorney, and to establish that Fitzpatrick was then alive. The record furnishes no information in regard to the nature or amount of evidence heard by the court at the time the judgment was rendered; it contains no bill of exceptions, except on the motion to amend record. We will, therefore, presume the evidence offered and considered sufficient to authorize the judgment. Under the authority, however, of Rising *v.* Brainard, 36 Ill., 80, and Stahl *v.* Shipp, 44 Ill., 134, proof of the execution of the power of attorney, or that Fitzpatrick was then alive, was then unnecessary.

As we perceive no error in the record, the judgment will be affirmed.

Affirmed.

WILLIAM L. MOSS for appellant.
M. A. RORKE & SON for appellees.

WE have received from ADOLPH MOSES, of the Chicago bar, the following opinion:

SUPREME COURT OF ILLINOIS.

OPINION FILED FEB. 4, 1876.

THE PEOPLE OF THE STATE OF ILLINOIS *ex rel.* ADOLPH MOSES, A. M. PENCE AND WILLIAM H. KING *v.* A. GOODRICH.

Motion for rule to show cause.

THE POWER OF THE COURT TO STRIKE A LAWYER'S NAME FROM THE ROLL FOR IMPROPER ADVERTISING FOR DIVORCE CASES.

1. RIGHT OF AN ATTORNEY TO ADVERTISE.—That an attorney may make any one of the branches of the law a specialty, but he must not in so doing and acting, use undignified means, or low, disgusting artifices, and least of all, should not withhold his name to his advertisement, nor should they be false, or contain libel on the courts.

2. POWER OF COURT.—That the court having power by express law to grant a license to practice law has an inherent right to see that the license is not abused, or perverted to a use not contemplated in the grant.

3. THE RESPONDENT DISBARED.—The court finds the respondent guilty of improper practice and improper advertising in divorce cases, and strikes his name from the roll of attorneys.—ED. LEGAL NEWS.]

Opinion by BREESE, J.

On the eighth day of October of this present term an information duly subscribed and sworn to was filed in this court, and a rule thereupon prayed against Alphonso Goodrich, requiring him to show cause by the twentieth day of that month why his name should not be stricken from the roll of attorneys of this court.

The information was filed by three members of the bar, practicing their profession in the city of Chicago, interested as they allege in upholding the integrity of the courts and of the profession of the law, and in the proper administration of the law.

The defendant is alleged to be a licensed attorney and counselor at law in the same city, practicing his profession in the courts thereof.

The information charges that defendant has been guilty of improper conduct in causing false and fraudulent advertisements to be inserted in divers newspapers published in the United States, inviting "so-called" divorce business, and that he has for years past caused to be inserted in the daily newspapers published in Chicago anonymous advertisements, specimens of which are incorporated in the information, one of which, of August 9, 1870, is of the purport following:

"Divorces legally obtained without publicity and at small expense. Address P. O. Box 1037. This is the P. O. box advertised for the past seven years, and the owner has obtained five hundred and seventy-seven divorces during that time."

Another advertisement in a daily paper of October 21, 1871, of the purport following: "Divorces legally obtained for desertion, cruelty, etc. Fee after decree. Eight years experience. Address P. O. Box 1037." Spised in the daily paper of the 28th by adding, "scandal avoided."

It is further charged that the newspaper press of Chicago having exposed the system of anonymous divorce advertisements and fraudulent divorces, mentioned the name of Goodrich as connected therewith, as "A. Goodrich of post-office box 1037 notoriety," after which the divorce advertisements of defendants, as published in a Chicago daily paper of September 30th, 1875, read in this way: "Divorces legally obtained—not fraudulently. Fee after divorce. Ten years practice in the courts of Chicago. Address P. O. Box 1037."

It is further charged that defendant, in the month of August, 1875, caused to be inserted in the Daily Herald of that date, a newspaper of large circulation published in the city of New York, this advertisement: "Divorces legally obtained for incompatibility, etc. Residence unnecessary. Fee after decree. Address P. O. Box 1037, Chicago, Ill."; and that defendant caused the same to be published in the New York Daily Sun of September 14, 1875, and in newspapers of various other States of this Union.

It is further charged that defendant well knew the fact that no divorces could be obtained in any of the courts of this State without publicity, and that he used the phrases, "without publicity" and "scandal avoided," in his advertisements, to impress the public mind that he could procure divorces in the courts of Chicago without the proceedings being made public, averring that the several newspapers published in that city did then publish and have always published the proceedings of the courts, and that for some time past the practice of referring divorce causes to masters in chancery had been abolished. And it is further charged, that defendant well knew the fact that "incompatibility" was not one of the lawful causes for divorce in this State, and that one year's residence in this State was required prior to filing a bill of complaint for divorce, unless the offense complained of was committed in this State, whilst one or both parties resided therein and could only be had in the county where complainant resided.

It is then charged that these advertisements are false and scandalous, calculated to bring the courts of justice into disrepute and contempt, and were published by the defendant with the intention of deception and fraud.

The advertisements were admitted in defendant's answer to be his act, and a printed letter purporting to have been issued from his office, 124 Dearborn street, Chicago, bearing his printed signature, and dated Aug. 21, 1875, ostensibly in reply to a previous letter from some unknown person but really intended as a "circular," was also his act. In this circular, after enumerating the several causes for divorce, as specified in the statute of this State, he states also on his professional reputation "incompatity" as a cause. The "circular" also informs the party of the total amount of charges, one hundred and twenty-five dollars—twenty-five dollars of which was required in hand and the balance when the decree under the seal of the court was placed in the hands of the applicant. If, however, the party perferred, no present payment was required, but a deposit in bank or with an express agent at the residence of the party, with the understanding that it was to be paid to the attorney when he sent the decree. The "circular" contains this further direction: "If the above is satisfactory and you wish me to proceed, please deposit the money in bank or with express agent and have them sign the enclosed receipt and retur' to me."

To indicate further the nature of defendant's special avocation, we give a copy of the required receipt.

$125.00. Aug. 21, 1875.

Received of —— $125 in escrow, to be paid to A. Goodrich upon his presenting to me a certified copy of a decree of divorce under the seal of a court of record, in the case of —— versus ——. In case decree of divorce is not obtained within three months from this date, said sum of money to be refunded to ——."

And this bears as its emblem the figure of Justice, with one hand resting upon a sword, and with the other bearing aloft the scales!

The wiles and arts and contrivances

to which defendant has resorted in his most disgusting cause, are not only not denied but justified, and in explanation of his claim to be able to procure a divorce on the ground of incompatibility, he alleges, by the laws of Utah Territory, that is a ground of divorce. This we regard as the merest subterfuge, for his advertisements are those of a lawyer residing and practising in this State, and the scope of the advertisement is to advise distant parties of the requirements of the laws of this State. Besides, the defendant exhibited no authority to practice law in Utah or any other State than this. It was a false and fraudulent statement, and known to be so when made.

Again, these advertisements, some one or all, convey the idea that by some unexplained means, defendant has such control over the courts of justice in the city of Chicago, as to induce its ministers to conceal from public view and public scrutiny their proceedings in divorce cases, and no matter what the claim of the applicant may be, whether true or false, whether statutory or not, he, by long practice of his arts, can accomplish all that is desired, neither the courts nor the public being the wiser on account thereof. Such shameless effrontery has never before, to our knowledge, been manifested by any member of this or any other bar, and it should stigmatize their author with enduring shame and contumely.

These advertisements are not only a libel upon the courts of justice of this State, but are false in themselves, and put forth to the public by one who would not place his name to them. No high-minded honorable member of our noble profession in this or any other State, so demeans himself, nor does any member of it, jealous of his own honor and duly appreciating his relations to the profession and to the courts, so conduct himself. Look to the distinguished men who have adorned the bar, who have shed lustre upon the profession — the Websters, Wirts, Pinckneys, Emmets, and in our own State, the Kanes, Cooks, Blackwells, Lockwoods, Walkers, and others without number who have passed away, who had their own honor and the honor of their profession in view, with ambition stimulating them to win such trophies as are gladly awarded to well-earned merit. Were they ever concerned in such low, degrading efforts? Never. It is not denied an attorney may make any one of the branches of the law a specialty, but he must not in so doing and acting, use undignified means or low, disgusting artifices, and least of all should not withhold his name to his advertisements, nor should they be false or contain libel on the courts. No honorable, high-minded lawyer, alive to the dignity of his profession and emulous of its honors, could stoop so low as this defendant has. That he should embellish his papers, contrived in a spirit of barratry, with the emblem of Justice, is singularly inappropriate.

We have no patience with one, who, bearing our license to practice law in our courts, has so shocked all sense of propriety of professional decorum, and of respect to the court in which he practices. He is an unworthy member, and must be disbarred. The objections made by the defendant, of want of jurisdiction in this court to entertain the case, the unconstitutionality of the law giving the jurisdiction, the right of a trial by jury on the information, are entitled to no weight.

This court, having power by express law to grant a license to practice law, has an inherent right to see that the license is not abused or perverted to a use not contemplated in the grant. In granting the license, it was on the implied understanding the party receiving it should, at all times, demean himself in a proper manner, and if not reflecting honor upon the court appointing him, by his professional conduct, he would at least abstain from such practices as could not fail to bring discredit upon himself and the courts; and, above all, that he should not publish false and fraudulent advertisements of his capabilities, from the long experience of years, to keep secret judicial proceedings, thereby implying a judicial control, which, of itself, is a libel upon those courts.

The *morale* of defendant's professional conduct deserves special notice. He makes divorce cases a specialty. How many persons in our broad land, weary of the chain that binds them? And how many are eager to seize upon the slightest twig that may offer to aid them in escaping from a supposed sea of troubles, in which wedded life has immersed them? How many are fretting under imaginary ills, and what better devices than those practiced by this defendant could be contrived to increase their disquietude and stimulate to efforts, by perjury, if need be, to free themselves from their supposed unhappy condition? Is it desirable divorce cases should accumulate in our courts? If so, the defendant is justified in the means he has used and is using, to that end. An honorable, high-minded lawyer, will always aid a deserving party seeking a divorce, as coming strictly within his professional duties. He will render the aid, not solicit the case, and he will in all things regarding it, act the man, and respect, not only his own professional reputation, but the character of the courts, and discharge the unpleasant duty in all respects as an honorable attorney and counselor should do. Such a lawyer will never be found stirring up or soliciting such cases, nor disgrace the profession by the dissemination of such a "circular," and "receipt in escrow," as this defendant manufactures and uses.

In view of our duty, as imposed by the statute, and the defendant's rights as guaranteed him by the Constitution and the laws, we are unable to see why this court has not, and should not have the power, to purge itself of all uncleanness which may be found in its cloisters, and ridding itself of any nuisance which may desecrate them.

We are satisfied the defendant has dishonored the profession of the law, and his position as one of its ministers; and that he ought to be, and he is, from this time forth, disbarred.

His name will be stricken from the roll of attorneys of this court.

ADOLPH MOSES, WILLIAM H. KING and A. M. PENCE, appeared for the people.
WILLIAM O'BRIAN, for respondent.

WE are indebted to the law firm of CARTER, BECKER & DALE, of this city, for the following opinion:

ILLINOIS SUPREME COURT.

OPINION FILED JAN. 21, 1876.

No. 167.—C. KASSING *v.* JOHN H. MORTIMER et al.
Appeal from Superior Court of Cook.

MOTION TO SUPPRESS DEPOSITIONS.

That objections to depositions which may be obviated by issuing a new commission and re-examining the witness, cannot be heard after the cause is called for trial. Such objections must be made in time, so as not to unnecessarily delay the business of the court.—[ED. LEGAL NEWS.]

Opinion by SCHOLFIELD, J.

This was an action of assumpsit for merchandise sold and delivered by appellees to appellant.

The only questions discussed in the briefs before us relate to the ruling of the Court below in permitting the reading of the deposition of John G. Schneider in evidence.

The deposition appears to have been taken before one Allen Lee Smidt, of the city of New York, who was appointed a commissioner for that purpose, and it is objected there is nothing in the record showing that he was authorized to administer an oath.

Even if this objection, if made in apt time, would have been tenable, which is not conceded, it is clear it was made too late to be entertained by the court.

The record shows the motion to suppress the deposition, on account of this objection, was not made until the case was called for trial. It has been repeatedly held that objections to depositions which might be obviated by issuing a new commission and re-examining the witness, cannot be heard after the cause is called for trial and submitted to a jury. Kimball *v.* Took, 1 Gilm., 424; Frink *v.* McCluny, 4 Id., 569; Thomas *v.* Dunaway, 30 Ills., 386; Winslow, et al. *v.* Newlan, et al., 45 Id., 145; Moshier *v.* Knox College, 32 Id., 162. It is not material, in the present case, that when the motion was made, no jury had been actually empaneled. It is sufficient the case had been reached for trial in the regular call of the docket, and had been called for trial, before the motion to suppress the deposition was made. Had the motion been sustained, it was then too late to retake the deposition, and either the case must have been continued, or appellees been compelled to try without the evidence. The deposition had been on file for several months. The objection could have been disposed of in ample time, so that, if sustained, the deposition might have been retaken in time to have been used on the trial without any postponement. This course of practice is not allowable. Formal and dilatory objections—that is, those that go to matters that may be corrected, must be made in time so as to not unnecessarily delay the business of the Court.

The objections to the interrogatories and answers belong to the same class—they are formal and were urged too late. But even if they were well taken, there is enough in the deposition that is unobjectionable to sustain the verdict.

The judgment is affirmed.

SUPREME COURT OF NORTH CAROLINA.

E. T. BLUM, EX., *v.* ISAAC W. ELLIS.

THE BANKRUPT LAW LIENS—ALL DEBTS MUST BE PROVED.

The bankrupt law does not divest a lien, but as all the property of a bankrupt, as well that subject to mortgages and liens, as that which is unencumbered, passed to the assignee and is in *custodia legis*, subject to priorities and liens, it follows that the Bankrupt Court is the proper tribunal in which to administer the remedies for the enforcement of liens.

All claimants against the estate of a bankrupt are required to prove their debts, however evidenced.

Motion for leave to issue execution, heard before CLOUD, J., at Spring Term, 1875, Forsythe Superior Court.

At May Term, 1870, of Forsythe Superior Court, the plaintiff's testatrix, Miss M. N. Transon, obtained a judgment for $761.65, and costs, against the defendants, Isaac W. Ellis and Holden Smith, on their promissory note, executed to the testatrix of the plaintiff, as sureties for one S. E. Smith.

A transcript of this judgment was sent to the clerk of the Superior Court of Davie county, on the 12th day of August, 1871, and made a judgment roll of that court, the defendants residing and holding real estate in that county. Both of the defendants at that time had their homesteads laid off, which covered their real estate.

The testatrix of the defendant died on the 7th day of May, 1872. On the 30th day of May of that year, the plaintiff qualified as her executor, and on the 23d day of April, he was made a party plaintiff to said judgment on the docket in Forsythe county, but not on the judgment roll of the court docket in the county of Davie. Since August, 1870, no execution has issued on said judgment.

At May term, 1874, of Forsythe Superior Court, the plaintiff moved for leave to issue an execution against the defendant, Isaac W. Ellis, upon notice duly served upon him, returnable to that term, the defendant, Holden Smith, having prior thereto obtained his certificate of discharge from his debts in the Bankrupt Court. It also appeared that Isaac W. Ellis, on the 30th of June, 1873, obtained his discharge from the Bankrupt Court, and that the reversionary interest in the real estate owned by him in the county of Davie, at the date of the judgment aforesaid was re-conveyed to him by his assignee in bankruptcy, under the order of said court, no creditors having proved their claims in the Bankrupt Court.

It further appeared that the plaintiff's judgment against the said Ellis, was duly scheduled in the name of M. N. Transon, the testatrix, in his bankrupt petition, which was filed in the bankrupt court, March 24th, 1873, and that notice was mailed by the assignee to M. N. Transon, the testatrix, to Salem, her place of residence, which the executor never received. No notice was ever mailed to said executor, nor served on him in any way whatever.

The usual publication in the newspaper was made, and the executor filed an affidavit in which he stated that he did not have any knowledge of the proceedings in bankruptcy, until the defendant, Ellis, had obtained his certificate of discharge, and said real estate had been re-conveyed to him by his assignee, and it was proved that said judgment had not been paid.

Upon this statement of facts the plaintiff insisted that the judgment roll of the Superior Court of the county of Davie, created from its date, to wit: August, 1870, a lien on all the real estate of Ellis, in said county, which was not divested by the proceedings in bankruptcy, and that the plaintiff had the right to enforce this lien in the State Court, and moved the court for leave to issue execution to keep alive said judgment.

The court refused the motion, and the plaintiff appealed.

SETTLE, J. Congress has power, under the Constitution of the United States, to establish uniform laws on the subject of bankruptcies throughout the United States.

In order to make the laws uniform, the bankrupt tribunals must act independently of State tribunals, and must control them in all things pertaining to the bankrupt and his estate, for it would entirely destroy the system, by preventing that uniformity which is enjoined by the Constitution, if suitors should be permitted, at their pleasure, to withdraw from the bankrupt courts into the State tribunals, cases involving any of the questions which grow out of the administration of the assets of a bankrupt.

It is not denied that Congress could have withdrawn from the State courts all cases pending against a bankrupt at the time of the adjudication of his bankruptcy, but for convenience, as it was supposed, this was not done, and the assignee of a bankrupt is permitted to prosecute or defend an action in the State courts, either to recover the estate of the bankrupt or to ascertain the liabilities and liens upon it.

The bankrupt act does not divest a lien, but as all the property of a bankrupt, as well that subject to mortgages and liens, as that which is unencumbered, passes to the assignee, and is *in custodia legis*, subject, of course, to priorities and liens, it follows that the bankrupt court is the proper tribunal in which to administer the remedies for the enforcement of liens. The State courts, as we have said, may be employed to collect the assets of a bankrupt, and also to ascertain the liens which may exist upon such assets, but it is one thing to ascertain a lien, and quite another to liquidate it; and if a party can liquidate his own liens, through the intervention of a State court, in the absence of the assignee, who represents the general creditors, there is no protection to other creditors against collusion and fraud between the bankrupt and such claimant; further, the settlement of the estate of a bankrupt may be indefinitely postponed by tedious litigation in the State courts.

While all subsisting liens are fully protected by the bankrupt act, we think, by the true interpretation of that act, all claimants against the estate of the bankrupt are required to prove their debts, however evidenced. If not so, why, in addition to the requirement that the bankrupt shall enter upon his schedule all secured debts, etc., does the 22d section of the act require the claimant to prove his demand, and "disclose whether any and what securities are held therefor?" The first section confers jurisdiction upon the bankrupt court to ascertain and liquidate the liens and other specific claims upon the assets of the bankrupt. Here are several courses open, in the bankrupt court, to the secured creditor, but he must adopt some one of them; he will not be permitted to sleep upon his lien until everything is closed in the bankrupt court, and then virtually nullify the whole thing by proceedings in the State courts. If he remains outside of the bankrupt court, he does so at the risk of having his debt barred, and he may also lose the benefit of his securities. We are aware that cases may be found, in great abundance, both supporting and opposing the positions here assumed. We do not feel called upon to cite or comment upon them, but feel ourselves at liberty, in this conflict of authority, to adopt what appears to us to be the most reasonable interpretation of the bankrupt act, and one which will lead to the least confusion in the administration of the assets of a bankrupt. Indeed, when we behold the confusion in which this subject has been involved by the conflicting decisions of different courts, we are inclined to think that it would have been better had Congress withheld entirely from State tribunals all questions touching the bankrupt, his creditors, and his assets.

We give no weight to the suggestion that the plaintiff in this case had no notice of the proceedings in bankruptcy, for this debt was entered upon the defendant's schedule, and notice was sent by mail, addressed to the plaintiff's tes-

tatrix, and the usual publication of notice was made in the newspapers.

This court has held, in Knabe & Co. *v.* Hayes, 71 N. C. Rep., 109, that the discharge of a bankrupt does bar the claim of a creditor who had no knowledge of the filing of the petition in bankruptcy, and whose name was not inserted in the schedule of creditors, and to whom no notice was mailed, unless the creditor alleges and can show that the omission to give notice was the result of fraud on the part of the debtor, and not the result of forgetfulness, accident, or mistake.

PER CURIAM. The judgment of the Superior Court is affirmed.

THROUGH the kindness of EARL BILL, clerk of the court at Cleveland, we have received the following opinion:

U. S. CIR. COURT, N. D. OF OHIO.

THE COMMERCIAL NATIONAL BANK, of Cleveland, Ohio, *v.* JOHN G. SIMMONS et al.

THE RIGHT OF NATIONAL BANKS TO SUE IN FEDERAL COURTS.

1. That a national bank does not sue in virtue of any right conferred by the Judiciary Act, but in virtue of the right conferred upon it by the act of 1864, authorizing and creating it, and which constitutes its charter. The charter of the old United States bank was but a law, as this general act is a law, of the United States.
2. That the Judiciary Act does not control the right and power of these banks to sue in the federal courts.—[ED. LEGAL NEWS.]

Opinion of the Court by WELKER, J.

This suit is brought on two promissory notes payable to the order of J. G. Simmons & Co. and indorsed to the plaintiff.

The petition states that the plaintiff is a corporation existing under the laws of the United States, and does not state that the payee of the notes is not a citizen of Ohio.

The defendants, Thompson and Mills, demur to the petition, and assign three grounds of demurrer.

1st. That it appears on the face of the petition in each of said causes of action, that the court has no jurisdiction of the defendants, or either of them, or of the subject of the action.

2d. That the plaintiff and its assignor are both residents of the State of Ohio, and of said district, and have no legal right to bring suit against the defendants in this court.

3d. For other good and sufficient reasons appearing on the face of the petition.

This demurrer raises two questions:

1st. Whether the plaintiff can sue in this court, being located in the State of Ohio, and in this district?

2d. Whether, under the Judiciary Act of 1789, and the limitation of the 11th section thereof, the plaintiff can sue in this court upon the promissory notes in petition described the assignor thereof to the plaintiff, being a citizen of the State of Ohio, and of this district.

In order to dispose of the questions made, it will be necessary to examine the provision of the act of Congress "to provide a national currency, etc." approved June 3d, 1864, under which the plaintiff was organized, and also the act on the same subject, approved in 1863.

The 59th section of the act of 25th February, 1863, provides that "all suits, actions and proceedings *by* or *against* any association under the act, may be had in any circuit, district or territorial court of the United States held within the district where such association was established."

The 57th section of the Act of 1864 provides: "That suits, actions, and proceedings *against* any association under this act, may be had in any circuit, district or territorial court of the United States held within the district in which such association may be established, or in any State, county or municipal court in the county or city in which such association is located having jurisdiction in similar cases."

It is claimed by the defendants that under this section as amended, suit can not be brought *by* national banks in the State in which they were established. That it only applies to suits *against* such associations. That, it is true, would seem to be the provision of the section.

But the Supreme Court of the United States in the case of Kennedy *v.* Gibson and others, 8 Wallace, 498, has given a construction of these two sections that is binding upon this court. Justice Swayne, delivering the opinion of the court, says:

"The 59th section of the act of February 25th, 1863, provides that all suits *by* or *against* such associations, may be brought in the proper courts of the United States, or of the State. The 57th section of the Act of 1864 relates to the same subject, and revises and enlarges the provisions of the 59th section of the preceding act. In the latter, the word *by*, in respect to such suits, is dropped. The omission was doubtless accidental. It is not to be supposed that Congress intended to exclude the associations from suing in the courts where they can be sued. The difference in language in the two sections is not such as to warrant the conclusion that it was intended to change the rule prescribed by the act of 1863. Such suits may still be brought by the associations in the courts of the United States. If this be not the proper construction, while there is provision for suits *against* the associations, there is none for suits *by* them in any court."

Again, in 10 Wallace, 605, The National Bank of Boston sued a State Bank of the same State in the Circuit Court of Massachusetts, and the action was maintained. This case recognizes the construction given to these sections by Justice Swayne by entertaining jurisdiction in that case.

We may then regard the section as reading *by* or *against*, and authorizing suit by or against these associations.

It is claimed also by defendants that the 57th sec. only provides for suits under or authorized by the act, that is for liabilities under the act. This is not tenable. The words "under this act" refer to and apply to *associations* under the act, as descriptive of the *parties* authorized to sue or be sued, and not *liabilities* or *causes of action.*

We now come to the second question made, and a very important one, and about which there well may be difference of opinion. I have examined it with much care, in order to arrive at a correct conclusion, and feel well satisfied at the conclusions to which I have arrived.

Suppose the plaintiff has the right to sue generally in this court as we have determined, has it the right to sue on promissory notes assigned to it by a resident of the district?

I can find no adjudicated case under the banking law, settling this question.

The 11th section of the judiciary act of 1789, after stating that Circuit courts shall have jurisdiction in civil cases, etc., in all cases where the suit is between a citizen of the State where "the suit is brought, and a citizen of another State," provides "nor shall any district or circuit court have cognizance of any suit to recover the contents of any promissory note or other chose in action in favor of an assignee, unless a suit might have been prosecuted in such court to recover the said contents if no assignment had been made except in cases of foreign bills of exchange."

I find two cases in 9th Wheaton, decided by the Supreme Court under a similar question made, which arose under the charter of the old United States Bank.

In the first case, 9 Wheaton, 740, Osborn *v.* The United States Bank, it is decided that the charter of the bank confers on the bank the right to sue in any circuit court of the United States. In delivering the opinion in this case, Chief Justice Marshall says:

"The charter of incorporation not only creates it, but gives it every faculty which it possesses. The power to acquire rights of any description, to transact business of any description, to make contracts of any description, to sue on those contracts, is given and measured by its charter, and that charter is the law of the United States. This being can acquire no right, make no contract, bring no suit, which is not authorized by a law of the United States."

Another case was decided at the same term of the Supreme Court: 9 Wheaton, 905, The United States Bank *v.* The Planters' Bank of Georgia. The suit was originally brought by the United States Bank *v.* defendant in the Circuit Court for the District of Georgia upon notes payable to a citizen of Georgia, and indorsed and transferred to the Bank. The defense set up was that the court had no jurisdiction under the 11th section of the Judiciary Act, or, rather, the limitation to it.

In delivering the opinion of the court, Chief Justice Marshall says:

"We proceed next to inquire whether the jurisdiction of the court is ousted by the circumstance that the notes on which the suit was instituted were made payable to citizens of the State of Georgia. The words of the Judiciary Act, § 11, are:" (He then quotes the part of the act above quoted, being the limitation, and says:) "This is a limitation on the jurisdiction conferred by the Judiciary Act. It was apprehended that bonds and notes given in the usual course of business by citizens of the same State to each other, might be assigned to citizens of another State, and thus render the maker liable to a suit in the Federal courts. To remove this inconvenience, the act which gives jurisdiction to the courts of the Union over suits brought by the citizen of one State against the citizen of another, restrains that jurisdiction where the suit is brought by an assignee to cases where the suit might have been sustained, had no assignment been made. But the Bank does not sue in virtue of any right conferred by the Judiciary Act, but in virtue of the right conferred by its charter. It does not sue because the defendant is a citizen of a different State from any of its members, but because its charter confers upon it the right of suing its debtors in a circuit court of the U. S. * * * There is, consequently, scarcely a debt due to the Bank for which a suit could be maintained in a Federal court, did the jurisdiction of the court depend on citizenship. A general power to sue in anycircuit court of the United States, expressed in terms obviously intended to comprehend every case, would thus be construed to comprehend no case. Such a construction cannot be the correct one. We think, then, that the charter gives to the Bank a right to sue in the circuit courts of the United States, without regard to citizenship."

Now let us examine the banking law itself under which the plaintiff was organized.

Sec. 8, of the act of 1864, provides "That every association formed pursuant to the provisions of this act, shall, from the date of the execution of its organization certificate, be a body corporate. * * By such name it may make contracts, sue and be sued, complain and defend in any court of law and equity as fully as natural persons, * * * and exercise under this act all such incidental powers as shall be necessary to carry on the business of banking, by discounting and negotiating promissory notes, drafts, bills of exchange, and other evidence of debt; by receiving deposits; by buying and selling exchange, coin and bullion; by loaning money on personal security," etc.

Then follows, in the same act, Sec. 57, already quoted, providing "That suits, actions, and proceedings, *by or* against any association under this act, may be had in any circuit, district, or territorial court of the United States within the district in which such association may be established."

To ascertain the privileges and powers conferred upon these banking associations, these sections are to be taken and construed together. It seems to me that these privileges and powers thus given in this act, are as broad and comprehensive as those given to the United States bank by its charter, and referred to in the case in 9 Wheaton.

It must be borne in mind that in the Judiciary Act the right to sue or be sued mainly depends upon citizenship of the parties. That corporations are only allowed to sue or be sued in the Federal courts, under the act, through the legal fiction of citizenship, arising from the presumption that such corporations are citizens of the States under whose laws they are created.

These banking associations, not being created by State laws, have no State citizenship growing out of the presumed residence of the stockholders.

Under the judiciary act, then, they have no power to sue in Federal courts, and must, therefore, derive it from the act creating them. Having no right to sue under that act, the limitation in the 11th section as to suits upon indorsed notes and choses in action does not apply; the right to sue under that section, and the limitation thereto, go together, the one controlling the other.

If the matter of citizenship, in reference to the national banks, is dispensed with in favor of such banks, then what reason is there for the application of the limitation, as to suits on assigned paper? That limitation is only attached to enforce the privileges of citizenship and to prevent its abuse in bringing suits in Federal courts. And, further, the banks, in purchasing notes, etc., only are doing what the law authorizes them to do.

I may, then, well say, as was said in the case in Wheaton, that the bank does not sue in virtue of any right conferred by the Judiciary Act, but in virtue of the right conferred upon it by the act of 1864, authorizing and creating it, and which constitutes its charter. The charter of the old United States bank was but a law, as this general act is a law, of the United States.

That the Judiciary Act does not control the right and power of these banks to sue in the Federal courts.

The demurrer to the petition is overruled.

SUPREME COURT OF TENNESSEE.

[HEAD-NOTES TO CASES IN THE COMMERCIAL REPORTER.]

Nashville, Jan. 15, 1876.

John C. Spence and others, Plaintiffs in error, v. *Crockett and Ransom.*

NOTARY PUBLIC.—CERTIFICATE OF PROTEST.—RECITALS IN, ONLY RAISE A PRESUMPTION.—The statements made by a notary raise only a presumption. They are prima facie true, but they are open to rebuttal. Being but prima facie evidence, it may be overturned by any legal testimony that will satisfy the tribunal having cognizance of the question in dispute that the recitals of the instrument of protest are, in fact, untrue.

Where the circuit judge instructed the jury that "it will require the testimony of one credible witness and corroborating circumstances, or two credible witnesses, to rebut the certificate of a notary public." Held, that this was error. The recitals of the certificate are but recitals of matters of fact, and of the judgment the notary has formed as to matters where there may be difference of opinion.

Nashville, March 6, 1875.

Thomas Robertson, et al., v. *Nelson Walker, et al.*

VOLUNTARY UNINCORPORATED ASSOCIATION—RIGHTS OF MEMBERS.—Where certain members of a voluntary unincorporated charitable association having been expelled therefrom, filed a bill for a dissolution and winding up of its affairs, and for division of effects among the members. Held, that the funds contributed became the money of the association for the purposes of the society, and no member had any individual claim to it, but was only entitled to the benefits provided by the rules of the society.

The parties having no individual property rights to be asserted, and prima facie, the action of the body in expelling them being correct, courts cannot take cognizance of such a case to restore the parties to their position as members of the society.

Nashville, May 21, 1875.

Smith v. *Smith.*

WILL—BURTHEN OF PROOF.—The doctrine of this court has always been uniform, that when a will is produced and its formal execution established by proof, and the will is attacked for fraud or incapacity in the testator, the burthen of proof is upon the assailing party to show the fraud, undue influence or want of testamentary capacity.

Nashville, May 15, 1875.

Mary Bilbrey v. *J. T. Poston.*

HOMESTEAD—CONSTITUTION—WHEN ESTABLISHED.—In pursuance of the ordinance of the convention prescribing the manner and time at which the question of the ratification or rejection by the constitution should be submitted to the vote of the people, etc., the Governor did, on the 5th of May, 1870, "declare and proclaim" the result of the vote, thus attesting that the constitution was established on the 5th of May, 1870.

VOLUNTARY ALIENATION OF BY HUSBAND, BEFORE THE CONSTITUTION.—Where the conveyance of the husband was made on 15th April, 1870, at a time when no constitutional or other legal inhibition existed to restrain the alienation of the homestead by the husband, he being the owner thereof, in the absence of proof of fraud and incapacity, the conveyance is held void.

CHICAGO LEGAL NEWS.

Lex vincit.

MYRA BRADWELL, Editor.

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We call attention to the following opinions, reported at length in this issue:

Landlord and Tenant—Fire—Insurance—Rebuilding.—The opinion of the Supreme Court of this State, by Sheldon, J., holding when a tenant covenants that he has received the premises in good order and condition, and that he will keep them in repair at his own expense, and at the end of the term he will deliver the same up to his lessor in as good condition as when they were entered upon by him, and the premises are destroyed by fire during the term, the tenant must sustain the whole cost of rebuilding the same, and the tenant has no equity to compel the landlord to expend money received from an insurance office on the demised premises in rebuilding.

Remarks to Jury.—The opinion of the Supreme Court of this State, by Breese, J., upon the practice of judges influencing juries by remarks not in the form of instructions.

Confession of Judgment—Practice.—The opinion of the Supreme Court of this State, by Craig, J., upon a question of practice arising in entering up a judgment by confession.

Striking an Attorney's Name from the Roll—Divorce Practice.—The application of the committee of the bar association, composed of William H. King, A. M. Pence and Adolph Moses, in the Supreme Court of this State, to have the name of A. Goodrich stricken from the roll of attorneys for improper practice and advertising in divorce cases, has attracted much attention, This case was brought to a termination on the 4th inst., by an opinion delivered by Judge Breese, holding that the court had full jurisdiction over the respondent, and striking his name from the roll of attorneys.

Suppressing Depositions.—The opinion of the Supreme Court of this State by Scholfield, J., as to when a motion may be made to suppress a deposition.

Bankrupt Law—Liens—All Debts must be Proved.—The opinion of the Supreme Court of North Carolina, by Settle, J., holding that the bankrupt law does not divest a lien; but as all the property of a bankrupt, as well that subject to mortgages and liens, as that which is unencumbered passes to the assignee and is in the custody of the law, subject to priorities and liens, it follows that the bankrupt court is the proper tribunal in which to administer the remedies for the enforcement of liens; that all claimants against the estate of a bankrupt are required to prove their debts, however evidenced.

The right of National Banks to sue in Federal Courts.—The opinion of the United States Circuit Court by Welker, J., holding that a National Bank does not sue in virtue of any right conferred upon it by the act of 1864, authorizing and creating it, and which constitutes its charter; and that the Judiciary Act does not control the rights and powers of these banks to sue in the Federal courts.

Power of a Court of Equity to enjoin the collection of a tax.—The opinion of the Superior Court of Cook County, by Moore. J., as to when a Court of Equity will enjoin the collection of a tax.

NOTES TO RECENT CASES.

DEED—DEFECTIVE ACKNOWLEDGMENT.

The Court of Appeals of Maryland, in Grove *v.* Todd, 3 *Law Times* Reports, 59, hold that retroactive legislation, to cure or confirm conveyances or other proceedings defectively acknowledged or executed, is sustainable, upon the ground that it operates not upon the deed or contract by changing it, but upon the mode of proof only; that the deed, being without acknowledgment, was utterly null and void as against the wife, both at law and in equity; that the statute could not impart life to it as against her, without interfering with her vested rights secured by the Declaration of Rights; and that, therefore, the widow was entitled to have dower assigned in the land conveyed.

PROMISSORY NOTE—WHAT CONSTITUTES.

The Supreme Court of Maine, in Collins *v.* Bradbury, 3 *Am. Law Times*, 67, held that a note, in the ordinary form, payable to order, at a definite time, for a specified sum in money, is negotiable, notwithstanding the words "said promise made for a colt, this day taken; said colt holden for the payment of said amount."

STATUTES TO INVALIDATE VOID JUDGMENTS.

In Pryor *v.* Downey, 3 *Am. Law Times*, 68, the Supreme Court of California hold that an act which has the effect of rendering valid formal judgments entered by a court without jurisdiction, is to be regarded as an exercise of judicial functions by the legislature, and as a contravention of the provisions that no person shall be deprived of property without due process of law, and is, therefore, void.

CONSTRUCTION OF THE STATUTES OF 1874 RELATING TO NOTICES.

The attention of the profession is called to some questions that arise out of § 14, c. 95, p. 713, Statutes of 1874, regulating sales under trust deeds and mortgages made since July 1, 1874.

1. When does the "thirty days previous notice" required by the first sentence of that section begin to run? There would be no difficulty were it not that the third sentence requires "the notice" to be published "once in each week for four successive weeks," thus making *the notice* an entire thing, consisting of these four publications, and that notice to be given thirty days. Does the "thirty days" run from the end of the four weeks when the notice is complete and has been given, or, from the first one, when the notice commences?

On looking at other statutes on the subject of notices to be given more than once, it will be seen that this question is provided for. In the Chancery act, § 13, p. 199, forty days are required to intervene between the *first publication* and the term at which default may be taken. So in Attachment, § 23, p. 156, no default can be taken until after the expiration of ten days after the *last* publication.

2. But a more serious question is what is meant by the words "assigns, if any," in the second sentence. Its connection is, "It shall be sufficient to insert in such notice the date of the instrument, *names of the grantor aad grantee, and of the assigns, if any,*" etc. Now, who are the "assigns?" This term, all know, is of the broadest signification. It includes not only the grantees of the mortgages by deed, but his judgment creditors, and others, having liens on the premises. If their names are left out, and the statute should be held to require them to be put in, it is evident that, as to them, their equity of redemption would not be cut off by the sale. W. T. B.

U. S. DIST. COURT, N. D. OF OHIO.

Opinion Feb. 6, 1876.

John Cunningham *v.* Alson Cady.

BANKRUPTCY—ORDER TO SHOW CAUSE—DEFECTIVE PROOFS.

Before Welker, J.—The following is the statement of the case and the opinion of the court:

On the 8th of January, 1876, John Cunningham filed in this court his petition against said Cady, debtor, containing the necessary allegations required by the bankrupt act, and duly verified. Depositions were also presented in support of the allegations of the petition, and filed with the same. Thereupon an order to show cause was made against the debtor, and served on him as required by the act.

The debtor by his counsel now moves the court to dismiss the petition and proceedings for the following reasons:

1st. That the deposition in proof of the act of bankrupcy charged is insufficient in law.

2nd. That the deposition in proof of the petitioner's claim against the debtor is also insufficient in law.

The first insufficiency complained of is, that while the deposition sets forth the fact of a conveyance by the debtor of his property to his father-in-law, it fails to show or allege that it was done with an intent of a fraudulent nature under the provisions of the bankrupt law. The second insufficiency alleged is, that the deposition in support of the petitioner's claim, fails to show whether the claim is secured or unsecured; or if secured, to what extent—whether it is not wholly secured—so that the court can judge of the amount provable.

As to the act of bankrupcy, the deposition is defective in failing to allege or show fraudulent intent of the debtor in making the conveyance. But as to the second specification of the motion, the petitioning creditor insists that the proof is sufficient; that he need not prove that his claim was not secured; that if it were so secured the fact should have been pleaded in an answer and not by preliminary motion. There is some authority for holding that unless it appears that the claim is fully secured, it is still a provable claim under a proper interpretation of the bankrupt law. But without undertaking to determine that question, it is sufficient to say that it is the better practice to set out in the deposition all the material facts concerning the claim; in other words, to "give a particular description of the debt" as prescribed in the form given by the Supreme Court.

It follows that, owing to the defects of the proofs, they must be amended before the debtor can be required to answer the petition, and that the order to show cause was improvidently issued. The question now arises whether the debtor's motion to dismiss the petition and the whole proceedings on that account, shall be allowed. At this stage of the matter the petitioning creditor interposes his motion for leave to file further and supplemental depositions in proof of his debt, and of the act of bankruptcy in support of his petition.

I think this motion should be allowed for the following reasons:

The jurisdiction of the court over the subject matter of the proceeding is acquired by the filing of a petition framed and verified in accord nce with the provisions of the act, and the rights and liabilities of all the parties relate and are determined by the time at which the petition is filed. On the filing of the petition it is provided bv the act that "if it shall appear that sufficient grounds exist therefor," an order to show cause shall be entered against the debtor, etc. How the sufficient "grounds" shall be made to appear is not shown in the text of the statute, and in the absence of any other construction of this portion of the section, it would be naturally inferred that it would be by an inspection of the petition itself. But the Supremc Court has seen fit to require proofs of the truth of the principal allegations by separate depositions as a condition precedent to the order to show cause, and in fulfillment of the requirements of the language in question. No defect in the petition is complained of, but the defect is in a subsequent and incidental matter. That defect may be cured without prejudice to the regularity or the sufficiency of the petition, in the mode proposed by the motion of the petitioner, and thus the rights and liabilities created by the filing of the petition are preserved without any hardship upon the debtor. The petition, and the depositions in support thereof, are not so intimately connected with each other that if depositions are defective the petition must necessarily be dismissed. It may be sustained while the proofs may not be held sufficient.

The order to show cause is set aside at the cost of the petitioner, and he has leave to file supplemental proofs in support of his allegations as to his claim, and as to acts of bankruptcy, on the filing of which, if found sufficient, an alias order to show cause be entered.

SUPREME COURT OF ILLINOIS.

Opinion Filed Jan. 21, 1876.

No. 316.—N. Boardman *v.* George C. Cook et al.

Appeal from Superior Court of Cook.

MOTION TO SET ASIDE DEFAULT—AFFIDAVIT OF DEFENSE.

Per Curiam.

The pleas of appellant were stricken from the files, on motion of appellees, and the decision of the court on the motion is assigned for error.

The bill of exceptions incorporated in the record does not contain the motion, or the evidence heard by the court in support of the motion, nor was an exception taken to the decision. We can not, therefore, undertake to say, in the absence of proof, that the decision was wrong; but, on the other hand, we must presume the facts presented to the court on the hearing of the motion, were sufficient to justify the decision.

The bill of exceptions shows that appellant entered a motion to set aside the assessment of damages, which was denied, and an exception taken.

It does not appear that any error occurred in the assessment of damages; but the real object of appellant, no doubt, was to set aside the default which had been previously entered. An application, however, to set aside a default is addressed to the sound discretion of the court, and the decision will not be reversed unless it appears that there had been a gross abuse of discretion. Greenleaf *v.* Roe, 17 Ill., 474.

The affidavit of appellant, filed on the hearing of the motion, does not even state that he has a meritorious defense to the action.

It is true, he states he believes he has a defense; but no facts whatever are incorporated in the affidavit from which the court could determine whether that belief was well founded.

Upon a careful inspection of the facts before the court on the motion, we perceive no sufficient cause appearing to justify a reversal of the judgment of the Superior Court. It will therefore be affirmed.

Affirmed.

J. Charles Haines has been appointed United States Commissioner in this district, in place of J. T. Ely, deceased. Mr. Haines is a son of Hon. E. M. Haines, a member of the Chicago bar, and has for the last five years performed the duties of justice of the peace to the entire satisfaction of the public. The appointment is an excellent one.

Receiving the Death Sentence.—One of our exchanges says:

George Morris, whom Judge Steele, of New Orleans, recently sentenced to be hanged, came to the bar whistling and laughing. The judge said: "George, you have been convicted of the murder of Sarah Jones. You pleaded guilty twice, but I insisted that your case should go before twelve citizens of your county. Have you anything to say why the sentence of the law should not be passed upon you?" Morris smiled and said, in a clear voice, "I agree with you, and am now prepared to receive the full extent of the law, which I know is death." After Judge Steele had sentenced him to be hanged, Morris thanked him for his kindness in so doing.

THROUGH the kindness of FRANCIS ADAMS, of the city law department, we have received a copy of the following opinion:

CIRCUIT COURT OF COOK CO.

OPINION, FEB. 1, 1876.

JAMES COUCH et al. *v.* MICHAEL EVANS, collector, etc.

THE POWER OF A COURT OF EQUITY TO RESTRAIN THE COLLECTION OF A TAX BY INJUNCTION.

The opinion of the court was delivered by MOORE, J.

The complainant, James Couch, is the owner and proprietor of the well-known hotel called "The Tremont House," in the city of Chicago. He claims that on the 1st day of May, 1875, "he owned and was possessed of personal property to the value of $40,000 or thereabouts, and no money;" that at that time he gave to the assessor a statement of his personal property in South Chicago; that at that time he was 75 years of age, and quite feeble and unable to write, and that he made said statement in good faith, believing that the assessor would return the same as given him; that the assessor pretended to make up and fill out the schedule with the values given by the complainant; that the assessor assented to the valuations of the complainant; that the total value was $40,000; that afterwards the assessor, or some one for him, without the knowledge or consent of the complainant, changed the valuation from $40,000 to $55,000. He also avers that the assessor acted fraudulently by failing in many cases to assess divers persons and corporations;" that in many other instances he failed to assess the personal property of the owners at a fair value; that in 1874 the city of Chicago proceeded to levy and collect its taxes by and under the provisions of the law approved April 15, 1873; that after the adoption of the charter of 1872, the city council by its ordinance of June 7, 1873, fixed the appropriations for the fiscal year commencing April 1, 1875, and ending May 31, 1876, and providing (*inter alia*) for $55,000 with which to pay tax commissioners and assessors and their assistants; that in so doing the city "proceeded under the statute of April 15, 1875"—called Bill 300—that "to that end" the assessment was made for 1873; that the total valuations of personal and real property made by the assessor for 1875 was $295,586,430; that the total appropriations made June 7, 1875, was "about" $5,120,905.29. He then made averments as to assessments made in the various divisions of the city, conducing to show that valuations in some portions of the city cannot be accurate; that the answer made the assessment roll in disregard of law and of the rights of the citizen and tax-payer; that in August, 1875, the State Board of Equalization added to the assessed value fifty-two per cent. "arbitrarily and without notice to the citizens of Cook county;" that by adding the fifty-two per cent. the Board made the total amount of personal property in the city $44.815,391, and in the same way made the value of real estate $128,791,746 (including $3,297,336 for railway companies), making in the aggregate $174,607,137.

He then avers that August 9, 1875, an ordinance was passed and the city certified to the county clerk the amount of money appropriated, and proceeded to collect the amount required under the general revenue laws of the State. He claims that the city had elected to proceed under the law of April 15, 1875, and could not disregard that election and proceed under the general revenue laws. He complains that he has not been heard, or allowed to be heard, by any Board of Equalization.

There are many other statements in the bill, but they are in the main deductions, inferences and arguments drawn from a base upon the averments hereinbefore recited. He insists from the averments made that both city and county demand a higher rate of "taxation" than is allowed by law.

The affidavit of J. M. Rountree shows that public notice was given through the papers naming the time and place for exceptions to be made to any assessment, and that the complainant did not appear before the committee on equalization, or before the board, and ask to have his assessment corrected. Ryan says he was the deputy assessor who called, and on the 18th of May, 1875, left a blank return at the office of the Tremont House for James Couch to fill up and return; that the blank is the form prescribed by the general revenue law for the return of personal property; that the complainant made no return, and the affiant did not then see him, and he estimated the personal property of the complainant at $125,000; that afterward he saw the complainant, and then erased the valuation, and left it blank, to be filled up by the assessor; that he at no time pretended to make a schedule or list of the personal property of complainant; that he did not write anything; that he did not at any time or place assent to the valuation of $40,000, or to any other valuation; that he told complainant the return must be made to Phillips, the assessor, who would make the valuation.

Edward Phillips, the assessor, in his affidavit, says he had no conversation whatever with the complainant, and that the complainant made no return of personal property for taxation for the year 1875, and that he, the assessor, made the assessment and valuation at $55,000 from the best information he could obtain, and that he regards it as just and equitable, and that Ryan, his deputy, and himself, were the only persons who had any authority in the premises, and that Ryan did not report to him, the assessor, any valuation of the personal property of the complainant.

This is a fair and full statement of the entire case, and making it thus full will very much aid in abbreviating the discussion of the various questions arising on the motion now pending for an injunction.

One question presented for consideration, and perhaps not the least important, is, Has the city the right to collect the taxes under the general revenue law? Has anything been done by the city to preclude it from so proceeding under the general revenue law? To answer these questions in the negative must defeat the city in its present effort to collect revenue, and then every important interest in the city must suffer. But if the rights of the citizen demand it, the courts must even hold that the immensely important interests of the city must suffer, and for the time be held in abeyance.

The constitutional limitations upon the power to levy and collect taxes are few, but well defined. The tax shall be ascertained "by valuation, and in proportion to value," etc. "Taxes shall be uniform in respect to persons and property within the jurisdiction of the body imposing the same." (Constitution, article 9, secs. 1, 9, and 10). It may sometimes be difficult to comply with these just and benign provisions. In fact, imperfect human judgment can at best only approximate perfect "uniformity."

To enable the city of Chicago to provide for the general good of the people, and subject to the limitations of the Constitution, the charter provides that the City Council shall have power to appropriate money for corporate purposes only and provide for the payment of debts and expenses of the corporation. The council shall, within the first quarter of each fiscal year, pass the appropriation ordinance, and in that provide for the payment of all necessary expenses and liabilities of the corporation that may accrue within the fiscal year, and no other appropriation shall be made within the fiscal year—except certain contingent appropriations that need not be considered at this time—vide Gross Statutes, art. 5, sec. 62; sub-sec. 2, page 218; art. 7, sec 89, page 227. It is not denied but that the council complied with these provisions of the charter and that this compliance was in apt time. From this point it is claimed by the complainant that the city proceeded under the statute of April 15, 1873. The defendants claim, however, that the assessors proceeded under that statute simply because the law existed there, and still exists, and required them to make the assessment. There was no ordinance directing them to proceed. After the law is complied with by the assessor why may not the city proceed under the general revenue laws? The council "has power at any time, in lieu of the mode prescribed by the law of April 15, 1873, by ordinance, to elect to certify to the county clerk the anount or amounts required to be raised by taxation upon the assessment of property for State and county taxes, and to collect the taxes for said city in the manner provided for in the general revenue laws of the State. (Gross Stat., section 270, page 259.) By so electing and so proceeding, the statute of April 15, A. D. 1873, is not abrogated. It does not cease to exist. Notwithstanding the fact that the city may proceed under the general law, this law allows the city to again return to the provisions of the law of April 15, 1873, and proceed according to its provisions.

Under this section of the law last named, and under the provisions of section 3, article 8 of the charter, the council did, before the second Tuesday in August, 1875, certify to the county clerk the amount of appropriations for corporate purposes. The rate per centum is then to be ascertained upon the total valuation of all property, subject to taxation within the city, as the same is assessed and equalized for State and county purposes. When this is done it is made the duty of the county clerk to extend such tax in a separate column upon the books of the collector of State and county taxes in the city—vide section 111, article 8, page 231 Gross Statutes. Then by the general revenue law it is provided, in harmony with the provisions of the city charter, that cities collecting taxes under the provisions of said law, shall annually on or before the second Tuesday in August, certify to the county clerk the several amounts required to be raised by taxation. (Chapter 120, section 122, page 878, Gross Statutes.) It is also provided that city and other taxes as well as those for county and State purposes, shall be extended against the assessed and equalized valuation of property, such valuation and equalization having been made by the State Board. (Ch. 120, sec. 128, page 179, Gross Statute.)

This appears to be a concise statement of all the provisions of law in the State, that is necessary to be cited in order that the precise question under discussion may be answered. It is true very many other provisions of law have been referred to, but such provisions do not aid in arriving at correct conclusions on the question now before the court.

The connected statement of all the provisions concerning the subject matter now under consideration, is an argument of itself.

Taxes must be uniform; that is the law imposing a tax must provide that it shall be uniform in respect to persons and property.

The appropriation ordinance must be enacted in apt time—within the first quarter of the fiscal year.

The city may elect to collect its revenue in one of two modes—under one of two laws.

The city in 1874 elected to collect and did collect under the statute of April 15, 1873.

The city in 1875 elected to collect under the provisions of the general revenue law—the other modes allowed by the law.

The appropriation ordinance must be certified to the county clerk, who shall extend the amount, according to the rate to be ascertained from the valuation, as equalized by the State Board.

In this statement is included all the requirements of the law that has anything to do with the question, and all that has been done thereunder. It is true very many other provisions have been cited, but it does not appear that there are any which conflict with, or which change or modify these provisions. No conflict is seen, and none exists. The city having for the year 1875 elected to collect its taxes under the general revenue law, and having made and certified an appropriation ordinance in due form of law, and the clerk having extended the tax according to the provisions of the law, it does not appear that there is any other provision of the law that in any way, or to any extent, changes or limits the provisions recited. The logic of this statement is not destroyed by the limitation of 3 per cent. provided for in the law of April 15, 1873; since it is not pretended or claimed that the appropriation ordinance of June, 1875, appropriates an amount exceeding three per cent of the assessment as equalized by the State Board.

Nor is the force of the argument broken by the claim that the constitutional requirement of uniformity is wanting. The law must conform to the Constitution, and provide for equal and uniform taxes, with respect to persons and property. It is not claimed by any one that the law fails in this respect. It is simply claimed that the officers of the law have failed to observe the rules of uniformity and equality that is enjoined. The Constitution means the law must provide for uniform taxation. It can mean only this. It does not require an impossibility. It can not require that all assessors and that all boards of equalization shall perform their duty so accurately and so perfectly that all valuations shall be according to the same scale and the same measure. The Constitution provides that the General Assembly shall provide that needed revenue may be obtained by levying a tax by valuation, and that the same shall be borne equally and uniformly by every citizen and by every corporation in proportion to the value of the property owned by the respective parties; the value to be ascertained by some person or persons to be elected or appointed, in such manner as the General Assembly shall direct, and not otherwise. The General Assembly having performed its duty, can not undertake to secure perfection in all the practical workings of the law. The assessor is the officer provided by law for fixing valuations. He acts judicially, and from his judgment no appeal lies to this court. If the court undertake to review and correct all the valuations that are not satisfactory to the tax-payer, and that may not have been adjusted by the several boards of equalization, they would perhaps do but little beside, and then might not satisfy the tax-payer as well as the man who is selected on account of his peculiar fitess for that purpose. The law provides for special boards for the revision and equalization of assessments and the valuations of property, but does not authorize the courts to review them. The law must be equal and uniform in all its provisions. That law is not rendered inoperative by the error in assessing values of property, or by the omissions of the assessor to assess some property. Then, in the sense required by the Constitution, these taxes are uniform. Spencer *v.* The People, 6 Legal News, 215; Sleight *v.* The People. 7 Legal News, 292.

The conclusion from all this is irresistible. The tax sought to be enjoined is uniform and constitutional, and has been levied and assessed according to existing laws. The city has the right to collect its revenues under the general revenue laws.

The second and only remaining question to be considered is, was the property of the complainant fraudulently assessed at too high a rate.

It has repeatedly been held by the Supreme court of this State, and of all the States, that a court of equity will not entertain a bill to restrain the collection of taxes, except in cases where it is assessed upon property not subject to taxation, or where the tax is unauthorized by law, or where the property has been fraudulently assessed at too high a rate. The C. B. & Q. R. R. Co. *v.* Cole, 7 Legal News, 333; Porter *v.* R, R. I. & St. L. Railway Co., 6 Legal News, 324; Chicago *v.* Burtice, 24 Ill., 489; Elliott *v.* Chicago, 48 Ill., 294; Dupage County *v.* Jenks, 65 Ill., 275; Munson *v.* Miller, 66 Ill., 380.

This general principle has been announced so frequently, and under such varied circumstances, not only by our own Supreme court, but by so many courts in this country, that it may well be regarded as one of the fixed rules of law. The doctrine is conceeded, and hence the complainant admits the tax to be lawful, and that his property is subject to taxation. His bill must mean that he claims that his property was fraudulently assessed at too high a rate, and it can neither mean more nor less than this. The averments relied on by him to show that the property is fraudulently assessed too high are, that his property was worth only "$40,000 or thereabouts, and no more," and that the assessor promised to assess the property at that amount, and that he was thus induced to disregard the matter. He claims he would have asked for a review of the assessment if he had supposed it would have been valued at a greater sum than $40,000. He also claims that the assessor failed to assess much property of others, and that other property was assessed at a rate below the valuation of the complainant's property. It is not averred that the assessor corruptly, and with a view to favor any one, omitted to assess property, and that too at its proper valuation. No person or corporation is named

whose property is so omitted. It cannot be claimed that simply omitting, without so intending, to assess the property of any one, or even several persons, would render the correct assessment of the complainant's property fraudulent and void. This cannot be claimed; to do so would be to require of the assessor perfection in the discharge of his duties. It is true very many other averments are made, and the words "fraud" and "fraudulent" and "fraudulently" occur frequently in the bill, but it is not clear that any averments except those about the value of the property, connected with the promise (as claimed) of the assessor to fix the valuation at $40,000, can be construed into a charge of fraudulent conduct on the part of the assessor. But how stands this point? The assessor and his deputy do not remember the facts as stated by the complainant. They both deny that any such promise was made. In addition to this denial by these officers, the complainant does not, in very definite terms, say what his property is worth—"$40,000, or thereabouts, and no more," is not very definite. Taking the averments of the bill, and the statements of the assessor and his deputy, it is not clear that very great injustice has been done to the complainant.

The taxpayer is required to list his property with the assessor, and then the asaessor is required to fix the valuation. The owner of the property may then require the assessor to hand him the copy of the assessment and valuation. The citizen can thus, by a little care and precaution, avoid such mistakes and misunderstandings as those now being considered. If, in this instance, the complainant had demanded this statement, this conflict or difference in recollection would have no existence.

It is also claimed by the complainant that he had no opportunity to have the assessment adjusted. It is not admitted by the defendant that any notice to taxpayers of the time and place of making objections to assessments is required, but in this instance it is shown that such notice was given by publication in the papers of the city, and it is also shown that the complainant did not appear and make any objections. It is the duty of every citizen to be diligent in protecting his own interest. If he is negligent, the courts will not be in haste to supply to him what he has lost by his negligence.

Where the officer makes an assessment of property for taxation, the assessment is presumed to be correct and valid. The officer acts judicially, and his acts and judgments will be upheld, unless the same is shown to be tainted with fraud, which always renders void the most binding and most solemn contracts, even the judgments of courts. The courts do not seek to find objections to assessments. They seek to uphold them. They will rather refuse to regard irregularities of minor importance. The most that can be required is that the officer act fairly and approximate correct valuations, and thus comply with the spirit and intention of the revenue laws, which are intended to be based upon the principles of uniformity and equality. In no event will an injunction lie unless it is clearly made to appear that the party complaining has been wrongfully assessed, and will sustain irreparable injury unless the collection of the tax is enjoined. DuPage County *v.* Jenks, 65 Ill.. 275; Munson *v.* Miller, 66 Ill., 380; Porter *v.* R. R. I. & St. L. R. R. Co., 6 Legal News, 319; Downs *v.* Chicago, 11 Wallace, 108.

It may be well to add to what has been said that the power of and the constitutionality of the law establishing the State Board of Equalization are no longer open questions. The Supreme Court has held that the legislature was fully authorized to create the board, and to invest it with ample power to equalize the assessments of the different counties in the State, not having made an arrangement with the assessor as to the valuation of the property, and having failed to require of the assessor a copy of the assessment, and having failed to appear before any committee or board in either town or county, the complainant will not be allowed to complain of what the State Board of Equalization has done. It may be that said board fails in its difficult and intricate task to properly adjust and equalize the taxes throughout the State. But that is only such a mistake and such an error as must be endured for the time. These matters have been determined—they are *res adjudicata*. Adsit *v.* Lieb, 76 Ill., 198; C. B. & Q. R. R. Co. *v.* Cole, 7 Legal News, 332; People *v.* Solomon, 46 Ill., 333.

But it is insisted that the city was at one and the same time proceeding under both laws. It has been found that the two modes of collecting the city revenues exists, and that the law provides for certain offices that may or may not be abolished. Until abolished, as a matter of course, they must perform the duties required by law, and, of course, be paid therefor. Even if this view be not conclusive, it is difficult to see how this error, if error it be, can vitiate the entire tax assessment of the city.

It is, however, in this connection, insisted that the part of the appropriation ordinance of the city appropriating $55,000 for tax commissioners and assessors was unauthorized, and that its enactment, connected with other matters averred in the bill, combined and rendered fraudulent the tax assessment. A sufficient reply to this proposition is that it has ever been held that the tax-payer may at any time have any municipal corporation enjoined from useless and unauthorized appropriations and expenditures. But to prevent such wrongful expenditures direct proceedings must be instituted. It cannot be done by any collateral proceedings. It cannot be thrown in as an additional ground or reason for accomplishing some other end. This is a principle so familiar that the authorities need not be cited to sustain it.

For these and other reasons which need not now be stated, the request of the complainant for an injunction is denied.

SUPREME COURT OF ILLINOIS.

ABSTRACT OF OPINIONS FILED AT SPRINGFIELD IN 1876.

Filed Feb. 1, 1876.—T., W. & W. R. R. Co. *v.* Mary O'Connor, admx.—Appeal from Macon.—Opinion by WALKER, Ch. J.

JURY'S PROVINCE IN CONFLICTING EVIDENCE—COMPARATIVE NEGLIGENCE—LIABILITY OF RAILROAD COMPANIES FOR INJURY TO EMPLOYEES—CITY ORDINANCES.

STATEMENT.—The husband of the appellee, being a laborer in the employ of appellant, was, as usual, returning from his place of labor, in company with other laborers, on a hand-car, at noon, to the city of Decatur. Within the limits of the city an engine and tender met the hand-car, in coming suddenly around a curve. One of the laborers on the hand-car gave the alarm, and all leaped from it, except the appellee's husband, who was killed by the collision which occurred. The evidence was conflicting as to whether the engine was running at a higher rate of speed than allowed by the city ordinances, and as to whether any signal was given. *Held,*

1. That, in cases of conflicting evidence, it is the exclusive province of the jury to decide; and an appellate court will not meddle with their decision thereon, and declare their verdict to be contrary to the evidence.

2. An instruction that deceased must have been free from contributory negligence, in order to a recovery by the administrator, is broader than the law warrants. If a defendant is guilty of gross negligence, and the negligence of the other party is slight, a recovery may be had.

3. It is proper to admit the ordinance of a city, prescribing rate of speed, in evidence as to the question of negligence.

4 The fact of deceased not leaping from the car when the others did, is no proof, in itself, of negligence on his part, because (1) he might not have understood the warning; (2) he might not have been aware of the immediate peril; or, on becoming aware of it, might have been overpowered and incapable of acting; (3) he might have been so situated on the car that he could not so readily escape as the others; (4) he may not have been endowed by nature with the presence of mind and quick perception the others possessed; (5) he might have regarded the peril of leaping from the hand-car as greater than that from which he would escape.

5. The fact that he was an employee of the company does not discharge the liability, since the rule is that where the employment is in diffierent departments, wholly disconnected, and the employees are not associated in the performance of their duties, a company is liable for an injury to one employee resulting from the gross negligence of another.

6. In running through a city with trains or engines, employees are bound to observe the ordinances of the city regulating speed; on failure of which the company are liable for the consequences of their default.

Lewis Mitchell *v.* George E. Mitchell et al.—Appeal from Ford.—Opinion by SCHOLFIELD, J.

SPECIFIC PERFORMANCE—REQUISITES—DEFENSE OF STATUTE OF FRAUDS—FRAUDULENT REPRESENTATIONS.

STATEMENT.—Appellant applied to the owner of land which had been sold to another by a real estate agent acting under the owner's authority, for a deed to the land—representing to the owner that the agent had sent him. The agent had written before that he had sold the land but without naming the purchaser. Under the representation and information, he, the owner, supposing the applicant to be the same to whom the agent had bargained the land, executed a deed. The contract made by the agent was not in writing. On further information, the owner executed another deed to the purchaser from the agent—the other deed being held in *escrow* on conditions. The applicant thereon brought suit for specific performance, and cancellation of the latter deed. The grantee of the latter deed filed cross-bill praying relief from the former. Bill dismissed—cross-bill sustained—decree, and appeal. *Held,*

1. That the contract with the agent, though not in writing, was, nevertheless, morally binding on the owner; and no one but the owner could set up the defense of the statute of frauds.

2. That the former deed being executed by reason of false representations, it had no standing in a court of equity; and the bill for specific performance in the delivery thereof was properly dismissed. One demanding a specific performance must be able to say that his conduct has been clear, honorable and fair.

Thomas B. Trower et al. *v.* William Elder—Agreed case from Shelby.—Opinion by SCHOLFIELD, J.

INTERPRETATION OF WRITTEN AGREEMENT—PENALTY OR LIQUIDATED DAMAGES.

STATEMENT.—Suit on agreement in writing, providing, "that William Elder, party of the first part, hath this day sold all his business interest, influence and patronage in banking; and also his bank safe, together with all the fixtures pertaining to the business of banking in the town of Sullivan, Moultrie county, Illinois; and he also agrees, and hereby binds himself not to engage in the banking business in said town of Sullivan, Illinois. For which franchises, benefits, and privileges, the said T. B. Trower and son, parties of the second part, pay unto the said William Elder the sum of twelve hundred and fifty dollars." A subsequent clause provided that "the said William Elder, party of the first part, on his non-compliance with the foregoing recited engagements, forfeits three fold the amount paid to him by the said T. B. Trower and son, as damages to them for such non-compliance."

The question was, whether this clause provided for liquidated damages, or only a penalty; and *held,*

1. The rule is that where there are several covenants or stipulations in an agreement, the damages for the non-performance of some of which are readily ascertainable by inquiry, and the damages for the non-performance of others are not measurable by any exact pecuniary standard, and a sum is named as damages for the breach of any such covenants, or stipulations, such sum is held to be merely a penalty.

2. While recitals or preambles prefixed to an agreement do not, of themselves, have any obligatory force, yet they may be so referred to in the operative part of the instrument as to make them a part of the instrument.

3. In construing the above language, the safe and fixtures are to be regarded as entering into the consideration, as well as the undertaking not to engage in banking; and the court can not judicially know, nor presume, that the safe and fixtures were not an important part of the consideration.

Filed Feb'y 3, 1876.—The People *v.* Board of Commissioners of Cass County—Appeal from Sangamon.—Opinion by SCHOLFIELD, J.

SUBSCRIPTION BY COUNTY TO RAILROAD STOCK UNDER A VOTE—MANDAMUS IN COMPELLING IT—DISCRETION OF COUNTY BOARDS—PERFORMANCE OF CONDITIONS BY COMPANIES.

STATEMENT.—The question herein was, whether the appellees were under a legal obligation to issue bonds in payment of a subscription of $50,000 to a railroad company under a vote of February 15, 1870. *Held,*

1. That a vote cast at an election under a charter providing that "cities and counties shall be entitled to subscribe for stock in said company, in like manner and with like effect, as is provided in the act to provide for a general system of railroad corporations, approved Nov. 5, 1849, and acts amendatory thereof," only, if favorable, authorizes the authorities of the county to make the subscription in the exercise of their discretion, and is not imperative. And they can not be compelled to make the subscription, as they may be under a peremptory law and vote corresponding.

2. And where the vote has reference to conditions to be performed by the company, which conditions have been complied with by the company, this does not take away the discretion of the county authorities in the matter, in the absence of an actual contract that the subscription shouid be made.

§ 3. A pledge made before the election will not be binding; as before the vote the county authorities have no power to make any pledges, since the vote alone confers that authority under the law.

John Scott et al. *v.* L. Buck.—Error to Sangamon.—Opinion PER CURIAM.

PRACTICE AS TO WRIT OF ERROR.

Held, That where there is no affidavit filed, as required by Rule 20 of this court, and no printed briefs filed as required by the rules, the writ of error will be dismissed.

John White et al. *v.* The People, etc.—Error to Champaign.—Opinion by DICKEY, J.

PRESUMPTION OF REGULARITY—TIME FOR EXECUTING SENTENCE OF DEATH—ACCESSORIES BEFORE AND AFTER THE FACT.

STATEMENT.—Conviction under charge of murder; and sentence of death. On reversing, the court *held:*

1. That, in the absence of anything in the record to the contrary, the court will presume that the lower court was duly convened, and the term continued, or regular adjournments made as required by law; and also that a regular grand jury was properly discharged, and a special grand jury properly summoned.

2. The sentence was erroneous in violating section 439 of the criminal code, (R. S., 1874, p. 412,) which provides that the day set for inflicting the death penalty, shall not recur before the 10th day of the ensuing term of the Supreme court in that grand division.

3. An instruction that "one who stands by, when a crime is committed in his presence by another, and consents to the perpetration of the crime, is a principal in the offense, and is to be punished as such," is erroneous—the law being that one who stands by, and "aids, abets or assists" in the perpetration, is an accessory, and shall be considered as a principal.

4. An instruction is erroneous, that "if both defendants were alone present at the commission of a murder, and both had used the gun of the deceased thereafter, on an understanding between them to that effect, and kept and concealed the gun, and mutually concealed the fact of the crime, the jury ought to find the defendants guilty;" because, under such circumstances even one or the other might have been merely an accessory after the fact, and not guilty of murder.

5. An instruction is erroneous that "an accessory before the fact is one who, being present at the time a crime is committed, aids in concealing the party or parties who actually committed the same, or aids in concealing the evidence of guilt, as to those actually committing such crime; and the law makes such accomplice a principal to such crime, and alike guilty with those actually committing the same"—since such party, so present, may actually have made heroic

efforts to prevent the perpetration of the crime, though afterwards, from unworthy motives, he may have concealed the knowledge and evidence of the crime.

[In remanding, the court ordered separate trials].

Nicholas Staaden *v.* The People, etc.—Error to DuPage.—Opinion PER CURIAM.

REQUISITES OF INDICTMENT AS TO INJURING UNINCORPORATED COMPANIES.

STATEMENT.—The indictment charged that plaintiff in error unlawfully, willfully, feloniously, and maliciously set fire to a building used as and for a store-room and dwelling, which building was insured against loss by fire in the Ætna Insurance Company, of Hartford, Connecticut, with intent to injure that insurance company, contrary to the form of the statute. This was adjudged by the Supreme Court to be insufficient, as to the intent, because, as *held*,

The law is, that where the charge is the intent to injure a body of persons by a company name, unless such company is incorporated it should be averred that the accused set the building on fire with intent to injure the persons composing the company, stating the names of such persons.

Dennis Creed *v.* The People, etc.—Error to Ogle.—Opinion by SHELDON, J.

RIGHT OF TENANT IN COMMON TO CROPS RAISED ON LANDS BY A CO-TENANT—TESTIMONY OF WIFE—MINORS CONVICTED—THE PENALTY — ARSON — ABSTRACT INSTRUCTION—PROOF OF ALIBI.

STATEMENT.—Indictment for burning haystacks—personal property of Day and Young. A question of variance arose as to the ownership; it appearing in evidence that a child, not named in the indictment, was part owner as tenant in common of the land on which the hay was grown. But *held*,

1. That a tenant in common has not in virtue of that relation, a right of property in crops which a co-tenant may raise on the land held in common.

The wife of the defendant was offered as a witness on the trial, but excluded by the court. *Held*,

2. That the statute allowing parties to testify only removes the disqualification of interest. The prohibition as to husband and wife testifying for or against each other, does not rest alone on the matter of interest, but, in part, on that of public policy, which the statute does not reach, either in civil or criminal cases.

3. The defendant, being under age, could not be sentenced to the penitentiary, as the crime of burning haystacks is not arson, either at common law or under the statute.

4. An instruction to the effect that the defendant was not bound to show who burned the hay, was properly refused as abstract and inapplicable, there being no pretense on the part of the prosecution that the defendant was bound to show that fact.

5. An instruction is correct that, in case of an *alibi* pleaded, the proof must cover the entire time within which the crime might have been committed.

263.—John Culver *v.* Hide and Leather Bank.—Appeal from Superior Court of Cook. Opinion by SHELDON, J.

FRAUD AND CIRCUMVENTION IN EXECUTING NOTE—WHAT IT IS AND EVIDENCE THEREOF.

The only point of general interest in this case is that, under the statute allowing against an assignee the defense of fraud and circumvention in obtaining the making of a promissory note, it is not sufficient to show a failure of consideration, nor even fraud in the consideration, which is quite a different thing from the use of fraud and circumvention in procuring the making or executing of the note.

249.—Filed January 21.—Levi C. Marsh *v.* William Green.—Appeal from Iroquois.—Opinion by WALKER, J.

PARTIES IN SUIT TO APPOINT TRUSTEE UNDER TRUST DEED—VOLUNTARY APPEARANCE.

STATEMENT.—Robert Doyle and wife executed a trust deed in favor of Helen T. Green, to one King, trustee. The trustee having died, a bill was brought to have another one appointed to execute the trust. Doyle and wife had, meanwhile, sold the land and conveyed it to Marsh by warranty deed, Marsh to pay the claim. Marsh only was made defendant. On objection made to this, Doyle and wife entered their appearance as defendants. *Held*,

That they were not necessary parties, having parted with their interest; and, even if they were parties in interest, they could properly be permitted to come in and have their rights determined. A mere intermeddler could not do this, but a proper party can at any time come in, waive process, enter an appearance and submit to a decree.

254.—Francis B. Law *v.* People ex rel.—Appeal from county court of Cook.—Opinion by SCOTT, C. J.

DESCRIPTION OF LAND IN TAX ASSESSMENTS—REVENUE ACT OF 1872.

STATEMENT.—Appeal from judgment on a special assessment for park purposes. *Held*,

1. That in actual conveyances of land, and *a fortiori* in tax assessments, land is sufficiently described by any description by which the premises may be established and identified: and a grant or devise will only be declared void for uncertainty where, after a resort to oral proof, it still remains a matter of mere conjecture what was intended by the instrument.

2. As to delinquent tax lists and affidavit thereto, the general revenue act of 1872 must govern; which act necessarily worked a repeal of all prior conflicting laws, whether found in the provisions of general laws, or in those of special city charters.

268.—Warne et al impleaded, etc., *v.* Byron Kendall.—Appeal from Kane.—Opinion by BREESE, J.

JUDGMENT IN GARNISHMENT.

Held, That in a garnishment proceeding under attachment, the issue must be formed between the defendant and the alleged debtor, and not between the plaintiff and the debtor in garnishment; and so judgment, if indebtedness be found, should be rendered against the debtor in favor of the defendant in the original suit, subject, however, to the plaintiff's judgment, operating as a lien thereon.

SUPREME COURT OF INDIANA.

[From the Indianapolis Sentinel.]

RIGHTS OF WIDOW, MARRYING AGAIN, AS TO LANDS ACQUIRED BY PRIOR MARRIAGE—CONSTRUCTION OF SECTION 18, 1 G. & H., 2946.

485. Benjamin F. Small et ux. *v.* William T. Roberts et al., Warrick, C. C. Reversed.

Downey, J., delivering the opinion of the court: The question in this case is as to the rights of the female appellant in the proceeds of certain real estate, which was sold in a proceeding for partition, because it could not be divided. The first husband of the female appellant died seized of the lands in fee, leaving his widow and appellees, his children, surviving him. She married again, her co-appellant, before commencing this action.

The court, in ordering the sale, directed that one third of the proceeds of the sale of the land be paid to her unconditionally, but later, amended the order so as to require the commissioner to invest the one-third of said proceeds claimed by her, under the order of the court, in such manner as to secure to her the interest thereof during coverture with co-appellant, etc.

The question in the case turns upon the construction of Sec. 18, 1 G. & H., 294: "If a widow shall marry a second or any subsequent time, holding real estate in virtue of any previous marriage, such widow may not, during such marriage, with or without the assent of her husband, alienate such real estate, and if, during such marriage such widow shall die, such real estate shall go to her children by the marrige in virtue of which such real estate came to her."

This court is of opinion that the disability of the wife under this statute is not carried on and applied to the proceeds of the real estate when it has been sold. The ruling in Finch *v.* Jackson, 30 Ind., 387, was not called for by the issues in the case. The first order of the court was correct, and the court erred in changing it.

UNITED STATES SUPREME COURT.

PROCEEDINGS OF.

Wednesday, Feb. 2, 1876.

On motion of F. Carroll Brewster, W. H. Armstrong and David C. Harrington, of Philadelphia, were admitted.

On motion of J. B. Sanborn, Henry F. Masterson, of St. Paul, Minnesota, was admitted.

No. 134. Christian S. Ester v. Thomas and James W. Gaff. The argument of this cause was continued by J. A. Mills for plaintiff. The court declined to hear further argument in this cause.

No. 135. William W. Lathrop, assignee, v. Samuel Drake and John Drake, Jr., executors, etc., et al. This cause was argued by D. C. Harrington and F. Carroll Brewster for appellant, and by William H. Armstrong for appellees.

No. 137. Charles D. Maxwell v. The District of Columbia. The argument of this cause was commenced by F. P. B. Sands for plaintiff, and continued by E. L. Stanton for defendant.

Adjourned until Thursday at 12 o'clock.

Thursday, Feb. 3.

On motion of James Lowndes, Le Roy F. Youmans, of Columbia, South Carolina, was admitted.

On motion of E. L. Stanton, Roger Sherman, of Titusville, Pa., was admitted.

No. 137. Charles D. Maxwell v. The District of Columbia. The argument of this cause was continued by E. L. Stanton for defendant, and concluded by James Hoban for plaintiff.

No. 138. Francis X. Dant v. The District of Columbia. This cause was submitted on printed arguments by Reginald Fendall for plaintiff, and by E. L. Stanton for defendant.

No. 139. James L. D. Morrison et al. v. Samuel Jackson.

No. 140. James L. D. Morris et al. v. Wm. H. Benton. The argument of these causes was commenced by Mr. Phillips for plaintiffs, and continued by John R. Shepley for defendants.

Adjourned until Friday at 12 o'clock.

Friday, Feb. 4.

On motion of A. E. Stevenson, Julian Hartridge, of Savannah, Ga., was admitted.

No. 139. James L. D. Morrison et al. v. Samuel Jackson. No. 140. James L. D. Morrison et al. v. William H. Benton. The argument of these causes was continued by John R. Shepley and J. M. Krum for defendants, and by James L. D. Morrison for plaintiffs.

Adjourned until Monday at 12 o'clock.

Monday, Feb. 7.

On motion of George W. Paschal, John S. McCampbell, of Corpus Christi, Texas, was admitted.

On motion of Assist. Atty. Gen. Smith, Benjamin K. Phelps, of New York city, was admitted.

No. 754. Elizabeth Mead et al. v. Daniel Pinyard. Appeal from the Circuit Court of the United States for the western district of Michigan. Hunt, J., delivered the opinion, affirming the decree of the Circuit Court with costs.

No. 440. Daniel Webster v. Clark W. Upton, assignee, etc. In error to the Circuit Court of the United States for the northern district of Illinois. Strong, J., delivered the opinion, affirming the judgment of the Circuit Court with costs and interest.

No. 77. Thomas A. Osborne et al. v. The United States, etc. In error to the Circuit Court of the United States for the district of Kansas. Field, J., delivered the opinion, affirming the judgment of the Circuit Court in all respects except as to costs, and remanding the costs of the proceedings subsequent to the application of the petitioner, and that such costs be apportioned against the parties ordered to make restitution according to the respective amounts they are adjudged to restore.

No. 113. J. Young Scammon, of Chicago, v. Mark Kimball, of Chicago, assignee, etc. The motion to modify the decree heretofore rendered in this cause was argued by R. T. Merrick in support of the same, and submitted by J. Young Scammon in opposition thereto.

No. 44. The Phillips & Colby Construction Company v. Mark T. Seymour et al. The motion for leave to issue the mandate in this cause was argued by H. K. Whiton, of Chicago, in support of the same, and by R. D. Mussey and J. H. Ashton in opposition thereto.

No. 139. James L. D. Morrison et al. v. Samuel Jackson. No. 140. James L. D Morrison et al. v. William H. Benton. The argument of these cases was concluded by James L. D. Morrison for plaintiffs.

No. 866. (Assigned.) Edwin M. Lewis, trustee, etc. v. The United States. The argument of this cause was commenced by R. L. Ashurst and continued by W. P. Clough for the appellant.

No. 120. Alfred H. Clements v. Joseph H. Macheboeuf et al. Appeal from the Supreme Court of the Territory of Colorado. Clifford, J., delivered the opinion, affirming the decree of the Supreme Court with costs.

No. 643. Isabella McManus administratrix, etc. v. C. D. O'Sullivan et al. In error to the Supreme Court of the State of California. Waite, C. J., delivered the opinion, dismissing the writ of error with costs.

No. 338. John L. Macauly et al. v. Charles Clinton et al. The motion to advance this cause was submitted by J. Q. A. Fellows, Durant and Horner in support of the same.

Adjourned until Tuesday at 12 o'clock.

Tuesday, Feb. 8.

On motion of H. K. Whiton of Chicago, E. Walker of Chicago, was admitted.

On motion of P. Phillips, John J. Johnson, of Washington, D. C., was admitted.

No. 866. (Assigned.) Edwin M. Lewis, trustee of Jay Cooke & Co. v. The United States. The argument of this cause was continued by W. P. Clough for the appellant, and by R. C. McMurtrie and Atty. Gen. Pierrepont for appellees, and concluded by William M. Everts in behalf of the creditors of Jay Cooke & Co.

No. 856. (Assigned.) John and J. K. Warren v. Sheridan Shook, late collector, etc. The argument of this cause was commenced by Benjamin K. Phelps for the plaintiff.

Adjourned until Wednesday at 12 o'clock.

THE UNITED STATES SUPREME COURT—A GENUINE COMPLIMENT. — During Mr. Bonney's recent visit to Washington, he had taken his eldest daughter and another young lady to the principal objects of interest at the national capital, including the Senate and House, on the eulogy-day for the late Vice President Wilson, and, when the tour was over, said: "Well, young ladies, everything considered, what is the finest sight you have seen in Washington?" Both replied, simultaneously, and without hesitation, "The Supreme Court!" The calm, majestic dignity of the *sanctum sanctorum* of American justice, with its nine robed high-priests, had made a deeper and more grateful impression than the gayer pomp and circumstance of all the other scenes they had visited.

HAINES' JUSTICES' TREATISE.—We have examined some of the advance sheets of Mr. Haines' new and revised edition of his Justices' Treatise, now being printed. The whole work is re-written and the authorities up to the present time cited. It is a thorough treatise and will be a useful book. Mr. Haines says he will run it through the press with all possible dispatch.

BANKRUPTCY—PROOF OF DEBT—NOTARY PUBLIC. — Among our new bankruptcy blanks we have a blank for proof of debt, prepared expressly for notaries public.

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CHICAGO LEGAL NEWS.

SATURDAY, FEBRUARY 19, 1876.

The Courts.

WE have received from MACK J. LEAMING, of the Jefferson, Mo., bar, the following opinion:

UNITED STATES SUPREME COURT.

OCTOBER TERM, 1875.

M. M. WALTON *v.* THE STATE OF MISSOURI.

In error to the Supreme Court of Missouri.

THE LICENSE TAX LAW OF MISSOURI UNCONSTITUTIONAL.

1. A license tax required for sale of goods is in effect a tax upon the goods themselves.
2. A statute of Missouri which requires the payment of a license tax from persons who deal in the sale of goods, wares and merchandise which are not the growth, produce or manufacture of the State, by going from place to place to sell the same in the State, and requires no such license tax from persons selling in a similar way goods which are the growth, produce or manufacture of the State, is in conflict with the power vested in Congress to regulate commerce with foreign nations and among the several States.
3. That power was vested in Congress to insure uniformity of commercial regulation against discriminating State legislation. It covers property which is transported as an article of commerce from foreign countries, or among the States from hostile or interfering State legislation until it has mingled with and become a part of the general property of the country, and protects it even after it has entered a State from any burdens imposed by reason of its foreign origin.
4. The inaction of Congress in prescribing rules to govern inter-State commerce is equivalent to its declaration that such commerce shall be free from any restrictions.

Mr. Justice FIELD delivered the opinion of the court,

This case comes before us on a writ of error to the Supreme Court of Missouri, and involves a consideration of the validity of a statute of that State discriminating in favor of goods, wares, and merchandise which are the growth, product, or manufacture of the State, and against those which are the growth, product, or manufacture of other States or countries, in the conditions upon which their sale can be made by traveling dealers. The plaintiff in error was a dealer in sewing machines which were manufactured without the State of Missouri, and went from place to place in the State selling them without a license for that purpose. For this offense he was indicted and convicted in one of the circuit courts of the State, and was sentenced to pay a fine of fifty dollars, and to be committed until the samewas paid. On appeal to the Supreme Court of the State the judgment was affirmed.

The statute under which the conviction was had declares that whoever deals in the sale of goods, wares, or merchandise, except books, charts, maps, and stationery, which are not the growth, produce, or manufacture of the State, by going from place to p ace to sell the same, shall be deemed a pedlar; and then enacts that no person shall deal as a pedlar without a license, and prescribes the rates of charge for the licenses, these varying according to the manner in which the business is conducted, whether by the party carrying the goods himself on foot, or by the use of beasts of burden, or by carts or other land carriage, or by boats or other river vessels. Penalties are imposed for dealing without the license prescribed. No license is required for selling in a similar way—by going from place to place in the State—goods which are the growth, product, or manufacture of the State.

The license charge exacted is sought to be maintained as a tax upon a calling. It was held to be such a tax by the Supreme Court of the State; a calling, says the court, which is limited to the sale of merchandise not the growth or product of the State.

The general power of the State to impose taxes in the way of licenses upon all pursuits and occupations within its limits is admitted, but like all other powers must be exercised in subordination to the requirements of the Federal Constitution. Where the business or occupation consists in the sale of goods, the license tax required for its pursuit is in effect a tax upon the goods themselves. If such tax be within the power of the State to levy, it matters not whether it be raised directly from the goods, or indirectly from them through the license to the dealer. But if such tax conflict with any power vested in Congress by the Constitution of the United States, it will not be any the less invalid because enforced through the form of a personal license.

In the case of Brown *v.* Maryland (12 Wheaton, 425, 444), the question arose whether an act of the legislature of Maryland requiring importers of foreign goods to pay the State a license tax before selling them in the form and condition in which they were imported was valid and constitutional. It was contended that the tax was not imposed on the importation of foreign goods, but upon the trade and occupation of selling such goods by wholesale after they were imported. It was a tax, said the counsel, upon the profession or trade of the party when that trade was carried on within the State, and was laid upon the same principle with the usual taxes upon retailers, or inn-keepers, or hawkers, and pedlars, or upon any other trade exercised within the State. But the court in its decision replied that it was impossible to conceal the fact that this mode of taxation was only varying the form without varying the substance, that a tax on the occupation of an importer was a tax on importation, and must add to the price of the article and be paid by the consumer or by the importer himself in like manner as a direct duty on the article itself. Treating the exaction of the license tax from the importer as a tax on the goods imported, the court held that the act of Maryland was in conflict with the Constitution; with the clause prohibiting a State, without the consent of Congress, from laying any imports or exports, and with the clause investing Congress with the power to regulate commerce with foreign nations.

So, in like manner, the license tax exacted by the State of Missouri from dealers in goods which are not the product or manufacture of the State, before they can be sold from place to place within the State, must be regarded as a tax upon such goods themselves. And the question presented is, whether legislation thus discriminating against the products of other States in the conditions of their sale by a certain class of dealers is valid under the Constitution of the United States. It was contended in the State courts, and it is urged here, that this legislation violates the clause of the Constitution which declares that Congress shall have the power to regulate commerce with foreign nations and among the several States. The power to regulate conferred by that clause upon Congress, is one without limitation; and to regulate commerce is to prescribe rules by which it shall be governed, that is, the conditions upon which it shall be conducted; to determine how far it shall be free and untramelled; how far it shall be burdened by duties and imposts, and how far it shall be prohibited.

Commerce is a term of the largest import; it comprehends intercourse for the purposes of trade in any and all its forms, including the transportation, purchase, sale and exchange of commodities between the citizens of our country and the citizens or subjects of other countries, and between the citizens of different States. The power to regulate it embraces all the instruments by which such commerce may be conducted. So far as some of these instruments are concerned, and some subjects which are local in their operation, it has been held that the States may provide regulations until Congress acts with reference to them. But where the subject to which the power applies is national in its character, or of such a nature as to admit of uniformity of regulation, the power is exclusive of all State authority.

It will not be denied that that portion of commerce with foreign countries, and between the States, which consists in the transportation and exchange of commodities, is of national importance and admits and requires uniformity of regulation. The very object of investing this power in the general government was to insure this uniformity against discriminating State legislation. The depressed condition of commerce and the obstacles to its growth previous to the adoption of the Constitution, from the want of some single controlling authority, has been frequently referred to by this court in commenting upon the power in question. "It was regulated," says Chief Justice Marshall, in delivering the opinion in Brown *v.* Maryland, "by foreign nations with a single view to their own interests, and our disunited efforts to counteract their restrictions were rendered impotent by want of combination. Congress, indeed, possessed the power of making treaties, but the inability of the Federal Government to enforce them became so apparent as to render that power in a degree useless. Those who felt the injury arising from this state of things and those who were capable of estimating the influence of commerce on the prosperity of nations, perceived the necessity of giving the control over this important subject to a single government. It may be doubted whether any of the evils proceeding from the feebleness of the Federal Government contributed more to that great revolution which introduced the present system, than the deep and general conviction that commerce ought to be regulated by Congress." (12 Wheaton, 446.)

The power which insures uniformity of commercial regulations must cover the property which is transported as an article of commerce from hostile or interfering legislation until it has mingled with and become a part of the general property of the country and subjected like it to similar protection, and to no greater burdens. If at any time before it has thus become incorporated into the mass of property of the State or nation, it can be subjected to any restrictions by State legislation, the object of investing the control in Congress may be entirely defeated. If Missouri can require a license tax for the sale by traveling dealers of goods which are the growth, product or manufacture of other States or countries, it may require such license tax as a condition of their sale from ordinary merchants, and the amount of the tax will be a matter resting exclusively in its discretion.

The power of the State to exact a license tax of any amount being admitted, no authority would remain in the United States or in this court to control its action, however unreasonable or oppressive. Imposts operating as an absolute exclusion of the goods would be possible, and all the evils of discriminating State legislation, favorable to the interests of one State and injurious to the interests of other States and countries, which existed previous to the adoption of the Constitution, might follow, and the experience of the last fifteen years shows would follow from the action of some of the States.

There is a difficulty, it is true, in all cases of this character in drawing the line precisely where the commercial power of Congress and the power of the State begins. A similar difficulty was felt by this court in Brown *v* Maryland in drawing the distinction between the restriction upon the power of the States to lay a duty on imports and their acknowledged power to tax persons and property, but the court observed that, though the two were quite distinguishable when they did not approach each other, yet, like the intervening colors between white and black, approached so nearly as to perplex the understanding, as colors perplexed the vision in marking the distinction between them, yet that the distinction existed and must be marked as the cases arose. And the court, after observing that it might be premature to state any rule as being universal in its application, held that when the importer had so acted upon the thing imported that it had become incorporated and mixed up with the mass of property in the country, it had lost its distinctive character as an import and become subject to the taxing power of the State, but that while remaining the property of the importer, in his warehouse in the original form and package in which it was imported, the tax upon it was plainly a duty on imports, prohibited by the Constitution.

Following the guarded language of the court in that case we observe here, as was observed there, that it would be premature to state any rule which would be universal in its application to determine when the the commercial power of the Federal Government over a commodity has ceased and the power of the State has commenced. It is sufficient to hold now that the commercial power continues until the commodity has ceased to be the subject of discriminating legislation by reason of its foreign character. That power protects it, even after it has entered the State, from any burdens imposed by reason of its foreign origin. The act of Missouri encroaches upon this power in this respect, and is, therefore, in our judgment, unconstitutional and void.

The fact that Congress has not seen fit to prescribe any specific rules to govern inter State commerce does not affect the question. Its inaction on this subject, when considered with reference to its legislation with respect to foreign commerce, is equivalent to a declaration that inter-State commerce shall be free and untrammeled. As the main object of that commerce is the sale and exchange of commodities, the policy thus established would be defeated by discriminating legislation like that of Missouri.

The views here expressed are not only supported by the case of Brown *v.* Maryland, already cited, but also by the case of Woodruff *v.* Parham, reported in the 8th of Wallace, and the case of the State Freight Tax, reported in the 15th of Wallace. In the case of Woodruff *v.* Parham, Mr. Justice Miller speaking of the court, after observing with respect to the law of Alabama then under consideration, that there was no attempt to discriminate injuriously against the products of other States or the rights of their citizens, and the case was not, therefore, an attempt to fetter commerce among the States, or to deprive the citizens of other States of any privilege or immunity, said: "But a law having such operation would, in our opinion, be an infringement of the provisions of the Constitution which relate to those subjects and, therefore, void."

The judgment of the Supreme court of the State of Missouri must be reversed, and the cause remanded, with directions to enter a judgment reversing the judgment of the Circuit Court, and directing that court to discharge the defendant from imprisonment, and suffer him to depart without day.

J. S. BOTSFORD, for plaintiff in error.
ATTY. GEN. HOCKADAY, for State of Missouri.

H. E. MANN, clerk of the court at St. Paul, has our thanks for the following opinion:

UNITED STATES CIRCUIT COURT, MINNESOTA DISTRICT.

JOHN MINNETT *v.* THE MILWAUKEE & ST. PAUL R. R. CO.

REMOVAL OF CAUSE FROM STATE TO FEDERAL COURT.

1. Where the notice of the motion for removal, which was served upon the plaintiff's attorney, stated that the removal was demanded under the act of 1867, which was repealed: *Held*, that the right of removal does not depend upon the contents of the notice of the motion for removal, and the State court could not withhold the removal, if the existing law in regard to the petition, etc., was complied with.

2. THE TRIAL OR FINAL HEARING.—The court construes the words, "the trial or final hearing," as used in the act of Congress, and holds that where there has been a trial upon the merits and a new trial granted, the defendant is still entitled to a removal of the action—[ED. LEGAL NEWS.]

The plaintiff brought his action in the State District Court, and after a trial upon the merits and a verdict in his favor, the court, upon defendant's motion, granted a new trial, for the reason, as stated, that "said verdict is not justified by the evidence and is contrary to law."

The defendant, on February 13, 1875, presented a petition for the removal of the case to the United States Circuit Court, embodying the substance of the language of the third subdivision of section 639, U. S. Rev. Stat., p. 113, except that it states that there has been "no final hearing or trial of the cause."

The proper security was offered, and the affidavits of the president of the company, defendant, and its general manager, were made and filed at the time of filing the petition.

The defendant's attorney, after these steps had been taken, served a notice upon the attorneys for the plaintiff of a motion before the State District Court for the removal of the suit. In this notice he states that the defendant has filed the affidavit provided for by an act of Congress approved March 2, 1867.

The motion came before the court, and after counsel for the plaintiff and defendant had been heard, the removal was ordered February 23, 1875.

The plaintiff now comes before this court for its order remanding the suit, for the reasons—

1. "Because said cause was sought to be removed under the act of 1867, chap. 196, which act was not in force at the date of the presentation of the petition

for said removal, and of the order granted thereon.

2. "Because the petition, affidavit and bond presented to the State court were not drawn, executed or approved under or by virtue of any law of the United States in such case provided, in force and effect at said date.

3. "Because no removal can or could be had of said cause after a trial thereof upon the merits."

Other reasons were urged, but they are substantially embodied in those above given.

E. C. PALMER for the motion.
GORDON E. COLE, *contra.*

NELSON, J.—If the defendant complied with the law in force at the time it presented the petition, affidavits, and security, it was entitled to have the suit removed, and the judge of the State court had no discretion in the premises. The petition makes no allusion to any particular act of Congress, but states that the petitioner is a citizen of the State of Wisconsin, and the plaintiff a citizen of the State of Minnesota; alleges the amount sought to be recovered sufficiently large to give the Federal court jurisdiction, and in terms embraces all that is set forth and necessary to be done under the 3d subdivision of sec. 639, U. S. R. S.

These statutes embrace all the laws in force Dec. 1, 1873, as revised and consolidated; and section 639 contains all the provisions of the several previous acts relating to the removal of suits from the State to the Federal courts. The only change made is in the act of 1867, by transposition of words in the phrase "at any time before the final hearing or trial," so as to read "at any time before the trial or final hearing."

The notice of the motion which was served upon the plaintiff's attorney, states that the removal is demanded under the act of 1867, which was repealed at the time the defendant presented its petition. The right of removal, however, does not depend upon the contents of the notice of the motion for removal; and the State court, as before stated, could not withhold the removal if the existing law in regard to the petition, affidavits, and security was complied with.

The court is also bound to retain jurisdiction of the suit under like circumstances.

In my opinion, the allegation in the petition that there has been no final hearing or trial of the cause, is a compliance, substantially, with the third subdivision of section 639, which gives the right of removal at any time before "the trial or final hearing;" and, corporations being within its purview, any proper officer—particularly the president, who is the head of the organization—could make the requisite affidavit.

The other question necessary to be determined is, whether, there having been a trial upon the merits, the defendant is entitled to a removal of the action, a new trial having been granted.

The statute requires the petition to be filed before "the trial or final hearing of the cause;" and it is urged that a trial on the merits prevents a removal of the case. "The trial" mentioned in the act, in my opinion, means not *one trial* or *a trial*, but a determination of the rights of the parties forever.

When a new trial was granted, the suit was in the same position that it would have been had no trial taken place. The first trial had been erroneous—it had not been in accordance with the law—and there had been no such examination of the rights involved as was contemplated by Congress in using the word "trial."

Again, "the trial" mentioned in the act means a final investigation of the rights involved in the court of original jurisdiction.

The terms "the trial" and "final hearing" are used by Congress as having a relative connection—a reciprocal meaning—the former applicable to actions of law, and the latter to equity cases. The word "suit" embraces actions at law as well as equity cases, and the conjunction "or" connecting the words "the trial" and "final hearing" is used, as is often is, where it is sought to give an explanation or definition of the same thing in different words. Such must be the true construction of the law, for it is hardly probable that a distinction would be made between actions at law and equity causes, which would present a strange anomaly, as suggested by Mr. Justice Swayne, in Ins. Co. *v* Dunn (19 Wallace, p. 225), that "in equity cases a final hearing only could take away the right of removal, while any trial, however interlocutory in its character, should have the same effect in an action at law." To avoid this, the supreme judicial court of Massachusetts, in Galpin *v.* Critchlow (Am. Law. Reg., vol. 13, page 137, N. S.), construing the law of 1867, which used the language "before the final hearing or trial," said the "trial appropriately designates a trial by jury of an issue which will determine the facts in an action at law; and final hearing, in contradistinction to hearings upon interlocutory matters, the hearing of the cause upon its merits by a judge sitting in equity."

The supreme judicial court of New Hampshire, in Whittier *v.* Hartford Insurance Company (Am. Law Reg., N. S., vol. 14, No. 10, page 621), agree to the decision in the Massachusetts case, and consider the reasoning in that applicable to the law as it appears in sec. 639, sub. 3.

With great respect for these courts, I cannot agree to this interpretation of the statute. In equity practice the term *hearing* has a well-defined meaning, viz: "That stage or proceeding in an equity cause which corresponds to a trial of a cause at law; the hearing of counsel upon the pleadings and proofs" The qualifying adjective *final* makes this *hearing* one that absolutely ends the matter in dispute, and is explanatory of the words "the trial." This is certainly within the spirit of the law, and, in my opinion, within its letter.

The motion to remand is denied.

WE have received from the law firm of SHELDON & WATERMAN, of this city, the following opinion:

SUPREME COURT OF ILLINOIS.

OPINION FILED JAN. 24, 1876.

NO. 246.—THE U. S. LIFE INS. CO. *v.* THE ADVANCE COMPANY.

Appeal from Cook.

THE POWER OF A GENERAL AGENT OF AN INSURANCE COMPANY TO BIND THE COMPANY FOR ADVERTISING—CUSTOM.

PER CURIAM.

This was an action brought by appellee to recover from the United States Life Insurance Company, appellant, on account for advertising, contracted by one Greene, who was at the time general agent for appellant. A jury having been waived, a trial was had before the court on the following agreed facts: "In November, A.D. 1871, one Samuel Greene was general agent for the State of Illinois for the United States Life Insurance Company, of New York, having his headquarters in Chicago; that upon his order the plaintiffs advertised said insurance company in their paper, incurring a just bill of one hundred and twenty dollars ($120), and charged the same, on their books of original entry, to the United States Life Insurance Company; that subsequently said Greene was removed from his position as general agent, the same being known to the plaintiffs, and said advertising bill being unpaid; that the plaintiffs frequently called upon said Greene for payment of said bill after his removal, and he as often promised the bill of $120 should be paid; that after much dunning, Greene agreed to obtain for said plaintiffs, in payment of the bill, a partially paid up life policy upon the life of a person designated by said plaintiffs in said company, said Greene being in the habit, notwithstanding his removal, of soliciting insurance for said company like any other street broker, and having no other connection with the company; that said Greene made application for such a policy, in the usual course of business, and the same was drafted; but the company officers in Chicago then first finding that said advertising bill was to be turned in to pay the premium, refused to deliver the same; that several months afterwards said Greene became a defaulter to the Evanston school funds and absconded; that it is the general custom with life insurance companies not to allow their general agents any discretion about contracting advertising bills, except as hereinafter stated, but that in each case they must get the consent of the company before contracting any bill.

"And further, that in advertising, the general agents pay bills ordered by them and settle with their companies themselves. For instance, in case of the company allowing a stipulated sum per annum toward the advertising, as is sometimes done, the agent settles the bills, and may turn the receipts in to the home office as vouchers for so much money in their settlements with their company to the stipulated amount.

"Sometimes the home office orders special advertising done, through the agent, and he has it done; and sometimes it is done directly from the home office."

The court, upon the agreed state of facts, rendered a judgment in favor of appellee for the amount of the account, and the question presented by the record, therefore, is, whether the judgment was authorized by the agreed state of facts.

It is conceded that Greene was the general agent of appellant, and the debt was contracted by him and charged to appellant while he was acting in that capacity.

The acts of a general agent, or one whom a man puts in his place to trans act all his business of a particular kind, will bind the principal so long as the agent keeps within the scope of his authority, though he may act contrary to his private instructions. 2 Kent, 620. If this case rested upon the fact alone that Greene was the general agent of appellant, and, as such, contracted the advertising for his principal, appellee's right of recovery could not be questioned or denied.

But under the stipulation appellee concedes that at the time the advertising was contracted, there existed a general custom with life insurance companies not to allow their general agents any discretion in contracting advertising bills.

Where a general custom exists the presumption is that the parties were acquainted with it, and contracted in reference to that custom.

If, then, appellee contracted with Greene with full knowledge of the custom and with reference to it, then the conclusion is irresistible, that it knew Greene had no power to bind appellant and knowing that fact it cannot hold appellant for a debt contracted by Greene without authority, although he was the general agent of appellant. It is said by Story on Agency, sec. 96, the known usages of trade and business often become the true exponents of the nature and extent of an implied authority; for in all cases where such usages exist, and an agency is to be exercised touching such matters, the natural presumption, in the absence of all countervailing proofs, is that the agency is to be conducted in the manner and according to the practices which are allowed and justified by such usages.

It cannot be claimed that appellee was misled by the fact that Greene was a general agent, because it knew while he was acting in the capacity of a general agent that he had no authority to incur the debt on the credit of his principal, and hence the rule that would ordinarily apply to the acts of a general agent, has no application here. It is urged by appellee that the last clause in the stipulation shows that no uniform custom existed; we cannot give the stipulation the construction contended for, when appellee stipulated that there was *a* general custom that Green was not allowed to contract the indebtedness. The effect of this admission was not destroyed by the last clause of the stipulation.

Under the agreed state of facts, we are of opinion appellee was not entitled to recover; the judgment will be reversed and the cause remanded.

Reversed and remanded.

WE are under obligations to JAMES SHAW, of the Mt. Carroll bar, for the following opinion:

SUPREME COURT OF ILLINOIS.

OPINION FILED JAN. 21, 1876.

STEPHEN VAN DUSEN *v.* THE PEOPLE, etc.

Error to Whiteside.

THE VENUE TO AN AFFIDAVIT—ASSESSOR NO POWER TO SWEAR TAXPAYER OUT OF TOWN.

1. THE VENUE.—The court states the purposes of the venue preceding an affidavit, and that in the absence of other evidence it will be considered the oath was administered at the place therein named.

2. ASSESSOR MUST ADMINISTER OATH IN TOWN.—That an assessor can not swear a person listing property outside of the township for which he was elected.

3. PERJURY.—That where a person was sworn by an assessor outside of the township for which he was elected, and the person so sworn was convicted of perjury, that the assessor having no authority to administer an oath outside of the town for which he was elected, the conviction was improper.—[ED. LEGAL NEWS.]

Opinion by WALKER, J.

This was an indictment for perjury found by the grand jury of Carroll county against plaintiff in error at the September term, 1873, of the Circuit Court thereof. The affidavit alleged to be false was sworn to before Samuel Lichty, assessor of Wysox township. The indictment contains two counts. The first charges that on the first of May, 1873, there was owing to plaintiff in error for money loaned the sum of $10,811. The second charges that there was owing him the sum of $6,811, specifying the persons and amounts each person owed him on the day named, and it charges that he swore that there was owing him on that day but $1,000 for money loaned.

A change of venue was had to Whiteside county, and at the August term, 1874, plaintiff in error was tried and the jury found him guilty and fixed the time he should serve in the penitentiary at three years. He thereupon prosecuted this writ of error and asks a reversal of the judgment.

It is urged that there is no evidence tending to prove that the oath was administered in the county of Carroll. Counsel misconceive the force and effect of the venue in the caption of the affidavit. It is "State of Illinois, Carroll County," which clearly manifests the place where the oath was administered. In all affidavits and other papers requiring such a venue, it is for the very purpose of indicating the place where the act was done. Finding such a venue in the caption of the affidavit in this case, the proof until overcome by competent evidence is ample of the fact that the oath was administered in Carroll county. There is no force in this objection.

It is further objected that there is nothing to show that the assessor acted in the territorial limits of his township, and in the absence of such proof, the conviction was wrong and the judgment should be reversed. The doctrine will be conceded by all, that unless authorized by the statute, an officer can perform no official act outside of and beyond the territorial limits in which he is authorized and required to act. The clerk of a court in one county has no power to issue a writ or perform any other official act in another county. So of a sheriff in serving process unless expressly authorized. Jackson *v.* Humphrey, 1 L. R., 498. This rule seems to be elementary. It is true that the General Assembly may enlarge the power of courts under the statute, may confer the power by commissioner to take depositions in a foreign government or State, but until thus empowered, the act is extra territorial and is not valid or binding. In this case the assessor was authorized in the discharge of his duty to administer the oath to accused as a tax-payer. He is, by the 26th section of the Revenue law, authorized to administer oaths to persons listing property for taxation whenever he believes the latter has failed to make a fair list of his property.

But that section, or any other, so far as we have been able to find, has not authorized him to administer an oath out of his township. He is elected in it, by the voters thereof, to assess the property therein, and the law contemplates that he will act officially within its territorial limits. The law has imposed no official duty to be performed beyond the territory of his township. It would strike any one that his assessment of property outside of his township and in another, as being *ultra vires* and void, and for the same reason an oath administered by him extra-territorially is equally void. And it is because he is authorized to perform official acts within his township and is not empowered to do so beyond its limits. It will be denied by none that the officer who administers an oath must have legal and competent authority or the person taking it before him, however false, cannot be convicted of perjury.

In this case there is not the slightest evidence to show the affidavit was sworn to in the township It was indispensable that this fact should have appeared from the venue in the caption or otherwise. There being no such evidence the court below erred in not setting aside the verdict and grrnting the accused a new trial.

The evidence as to the falsity of the

oath is loose, uncertain, and to say the least, slight upon which to convict.

We are not prepared to say that we could affirm on the evidence in the record. The loan of money a number of years, or even a shorter period, before the time accused took the oath, is too loose and indefinite upon which to base a conviction. The witnesses testified that they had paid the money which they borrowed of him to one Lane, in Morrison, or that he had sued them in the name of Van Shirley. Lane testified that the notes were delivered to him by Van Shirley for collection, and Van Shirley swears the notes were absolutely his before the 1st of May, 1873. Lane testified that he hardly knew accused by sight and had never spoken to him before he received the notes; that as he made collections he paid the money in person to Van Shirley, or had sent it to him in Iowa by draft. Van Shirley testified, that accused had no interest in the notes nor was he to pay him anything. Nor is this evidence contradicted by any witness. The evidence of Van Shirley may show a transaction out of the usual course of business, by plaintiff in error borrowing money from him and loaning it to others, but we are unwilling to say it was so improbable as to destroy the credibility of his testimony.

All of the evidence considered, we think it fails to sustain the finding, and the judgment of the court below must be reversed and the cause remanded.

Judgment reversed.

W. E. LEFFINGWELL and JAMES SHAW for plaintiff in error.

VOLNEY ARMOUR and DAVID MCCARTNEY for the people.

WE are under obligations to C. C. BONNEY, of the Chicago bar, for the following opinion:

SUPREME COURT OF ILLINOIS.

OPINION FILED JAN. 21, 1876.

JUNIUS MULVEY *v.* DANIEL H. CARPENTER et al.
Appeal from Superior Court of Cook.

SHERIFF'S SALE — VOID JUDGMENT — REDEMPTION.

Held, that the execution issued on the judgment or decree in Monroe *v.* Tompkins et al., under which the property was originally sold at sheriff's sale, and from which it was redeemed by appellant on an execution issued on a judgment in his favor against Tompkins, was void, as having been issued under a judgment or decree rendered in a cause in which the court had no jurisdiction of the person of the defendant Tompkins.—[ED. LEGAL NEWS.]

SCOTT, C. J.—Whether titles which it is said parties have acquired to the lands in controversy, from Wiltberger, while the decree of foreclosure in the case of Wiltberger *v.* Embree, et al., remained in force, and before it was reversed in this court, will prevail over titles previously acquired from Embree, the mortgagor, is a question that has no relation to the merits of the present controversy, and we shall not now discuss that branch of of the case. So far as the mortgage claim was presented by the original bill, it was formally withdrawn on the hearing, it appearing that appellant's wife held that interest, whatever it was, and that he had no direct interest in it. That branch of the case having been dismissed, the remaining controversy is confined within narrow limits and involves the considerations of but few questions, and the discussion of no principles of law, except such as are elementary.

The most important question, and, indeed, the only one which concerns fundamentally the validity of the title appellant claims to the land, is whether the execution issued on the judgment or decree in Monroe *v.* Tompkins, et al., under which the property was originally sold at sheriff's sale, and from which it was redeemed by appellant on an execution issued on a judgment in his favor against Tompkins, was void, as having been issued under a judgment or decree rendered in a cause in which the court had no jurisdiction of the person of the defendant, Tompkins.

The judgment in favor of appellant against Tompkins was entirely regular, and the execution under which the redemption was effected was valid. But if it shall be determined the execution issued under the decree in Monroe *v.* Tompkins was void for want of jurisdiction in the court to award it, the sale under it being void, it would follow the redemption based on it would also be void. The judgment creditor is bound to take notice whether the court that pronounced the decree or judgment under which the sale was made from which he is about to redeem, had jurisdiction in the cause. It is a familiar principle if the court had no jurisdiction all proceedings under this decree or judgment would be a nullity, and a party redeeming from a sale in such a case could acquire no title to the land. His redemption can give no validity to the previous sale, which was absolutely void for want of jurisdiction in the court. Johnson *v.* Baker, 38 Ills., 98.

Whether the sale from which the redemption was made was void is purely a question of law, and is unaffected by the equities arising between the parties. What private contract Tompkins may have had with Monroe or Stewart in regard to the mortgage indebtedness; whether he or Bell should be liable for the amount that should remain after the master's sale of the premises, is wholly immaterial in the decision of the case. It is not shown appellant had any knowledge of the contract, if any existed, and if he had we are not aware it would affect his right in the premises. It may be true, as charged, that the property was, in fact, sold to Bell, but for his accommodation the title was placed in Tompkins. He gave his promissory notes for the purchase money, and executed the mortgage that was subsequently foreclosed by Monroe for the benefit of Stuart and his creditors. No matter what may have been the relations between Bell and Tompkins in regard to the property, the latter was legally bound for the purchase money to the same extent he would have been had he made the purchase on his own account.

In the suit commenced by Monroe to foreclose the mortgage, Tompkins and Bell were both made defendants; the former was alone personally served with process, and the latter was brought into court by publication, under the statute. Bell was defaulted, but Tompkins filed an answer, prepared, perhaps, by Monroe, but, in fact, signed by other counsel, in which he substantially admitted all the allegations of the bill. Accordingly, a decree was entered, finding the amount of the mortgage indebtedness, and directing a sale to be made of the mortgage premises if default should be made in payment of the amount found due by a day fixed. It was recited in the decree that Tompkins was the agent of Bell in purchasing the property, and by a private agreement, made t the time between them, Tompkins was to hold the legal title to the property, for the use and benefit of Bell. The decree provided that if the moneys arising from the sale should be insufficient to pay the amount found to be due, with interest and costs, the master should specify the amount of such deficiency in his report of the sale; and, "on the coming in and confirmation of said report, the defendants, who are personally liable for the payment of the debt secured by the said mortgage, pay to the complainant the amount of such deficiency, with interest thereon from the date of such last mentioned report, and that the complainant have execution therefor."

Having first given the requisite notice, the master, on the 27th day of May, 1865, sold the mortgage premises, under the decree, as directed. On the 7th day of July, 1865, he filed his report of the sale, showing, after the appropriation of the proceeds of the sale according to the direction given in the decree, a deficiency of $1,579.09.

On the 21st day of January, 1869, a further order was entered in the cause, reciting, among other things, the deficiency that remained after applying the proceeds of the sale of the mortgaged premises, as reported by the master; that such deficiency then amounting to $1,893, "and that complainant have execution against the said defendant Tompkins therefor." It was under the latter order the execution was issued on which the sale of Tompkins' property was made, from which appellant redeemed, and under which he acquired the title he now insists upon. On the final hearing of this cause, the court decree the sale and redemption were void, and set aside the sheriff's deed to appellant for the premises, but imposed upon complainants, as conditions upon which the relief would be granted, that they should, within a time fixed, pay to appellant the balance due on the decree on Monroe *v.* Tompkins and Bell, with interest, and the amount of appellant's judgment at law against Tompkins. Appellees, although dissatisfied with the conditions imposed as to the relief granted, have assigned no cross-errors.

We now recur to the principal question first suggested, viz.: Whether the sale made under the execution issued in the decree in Monroe *v.* Tompkins was without authority of law, and hence void.

It cannot be maintained on the ground the original decree awarded execution against "the defendant who are personally liable for the payment of the debt secured by the mortgage," because the execution was not issued under that order, but under the order made January 21, 1869. The first order is indefinite and uncertain. Who was "personally liable for the payment of the debt secured by the mortgage" the court does not indicate by anything contained in the decree. Against whom, then, was the execution to issue? It was recited that Tompkins was the agent of Bell for the purchase of the property, and by a private agreement made between them at the time the title was merely placed in Tompkins for the use and benefit of Bell. What this may mean is not very clear, but if it means anything, it is certainly that the court intended to declare that Bell was the party that was personally liable for the payment of the debts. It is not an unreasonable inference from this recital in the decree that no execution was to be awarded against the property of Tompkins for any deficiency that might remain. But, however this may be, that was a joint decree, and the execution was to issue for any deficiency against the "defendants." There were two defendants; Bell had not been personally served with process, and no execution could rightfully be awarded against him. The decree made no provision for issuing any execution separately against the property of Tompkins for any deficiency that might remain unpaid after the sale of the mortgage premises. It was this fact no doubt that gave rise to the making of the order of January 21, 1869, for a separate execution against the property of Tompkins.

By what authority did the court assume to make the supplemental order of January 21, 1869, and awarding execution against Tompkins for the balance remaining due on the original decree? No notice was given to Tompkins that an application would be made to the court to award an execution against him. It may be he would have been able to show cause against it. It was essentially a new proceeding, and what was done was in effect a personal judgment against him as at law for a large amount of money in a cause where he insists he was not liable personally for anything. Nor was it simply directing the issuing of an execution previously ordered "on the coming in and confirmation" of the master's report. The court found the deficiency to be $1,893, and ordered that "complainant have execution therefor." Under the former decree, if any execution could issue at all against Tompkins, it could only be for $1,579.09, with interest thereon from the date of the master's report. It is indispensable to the validity of the last order that the court in some way should have obtained jurisdiction of the person of the defendant Tompkins. It did not have jurisdiction by any notice given to defendant, and hence there was a total want of jurisdiction, unless it can be maintained, the cause had been continuously pending in court since the original decree in 1865, and that defendant was in court by virtue of the service of the original process and his appearance in accordance therewith. This position can hardly be sustained. It will be borne in mind the original decree was rendered in 1865, the sale of the mortgage premises took place in May thereafter; the master's report of the sale, showing a deficiency of $1,579.09, was filed on the 7th of July, 1865, and on the 25th day of September, 1868, the master's report, by an order entered of record on that day, was by the court confirmed. This would seem to have been an end of the case, and in the absence of anything appearing to the contrary, it will be presumed it passed from the docket. If so, the court manifestly lost all jurisdiction of the cause and the persons of the parties, and unless it was placed back upon the docket upon notice to the parties adversely intended all further orders made in the cause would be without authority of law. There is no pretense Tompkins had any notice the cause was to be re docketed that execution might be awarded against him or for any other purpose. It is apparent that neither Monroe, nor Stewart, on whose behalf Monroe was foreclosing the mortgage, ever intended, when the original decree was rendered, to hold Tompkins liable for the payment of any deficiency after the sale of the mortgage premises. Equitably it was the debt of Bell, and all parties seem to have agreed he ought to be made pay it. The arrangement by which Tompkins permitted the title to the property to be vested in him, and assumed the legal liability to pay the purchase money, was entered into partly at the request of Stewart and to oblige him as well as Bell. After the mortgage sale, neither Monroe nor Stewart gave the matter any further attention. The object was to get the title to the property back into the hands of the original owner, and that was accomplished by the mortgage sale and the deed made in pursuance thereof. The matter rested until it was revived 1869, by appellant, who proposed for a share to collect the balance due on the decree from Tompkins, or in some way make it out of his property. After some negotiations his proposition was accepted by Monroe, and thereafter appellant assumed to manage the affair. Neither Monroe nor Stewart gave it any personal attention. It was found appellant could not obtain an execution as at law for the deficiency, without a further order of court. Accordingly, appellant had some papers prepared which Monroe signed, which enabled him to procure the making of the order of January 21, 1869, and subsequently appellant sued out an execution, under it against Tompkins, on which he caused the property in controversy to be sold. At the sheriff's sale the property was bid off by Latimer, who received the usual certificate that would, under the statute, entitle him to a deed in case it was not redeemed. Subsequently, Latimer assigned the certificate of purchase, but to whom he does not recollect, and the evidence does not disclose. Circumstances proven would seem to warrant the inference the purchase by Latimer was in the interest of appellant and that the assignment was afterwards made to him, but whether this is so is not a matter of any great consequence.

Obviously, when the Master's report of sale and showing what deficiency remained was confirmed by the order of court made on the 25th of September, 1868, the cause passed from the docket. This would have been the ordinary course, and nothing to the contrary appears. It was reinstated at the instance of a stranger to the record, and without any notice to any adverse party whose interests were to be affected. Hence, all subsequent orders in the cause were without authority of law and therefore void. It is doubtless true, as counsel contend, that no execution for the deficiency could properly issue until after the "coming in and confirmation" of the master's report.

But no order had previously been made for an execution against Tompkins alone, and none was then made. Months elapsed before the court assumed to award execution against Tompkins. As we have seen the court had then lost all jurisdiction of the cause or the persons of the parties. The sale under the execution awarded against Tompkins being void, there was nothing from which appellant could redeem. Hence it follows as a deduction from the premises, the redemption being unauthorized by statute, appellant acquired no title to the property redeemed and re-sold on his execution.

Upon the whole record we are of opinion the decree of the court below is just and equitable under the evidence, and is warranted by the law.

Decree affirmed.

SUPREME COURT OF ILLINOIS.

ABSTRACTS OF OPINIONS FILED AT OTTAWA IN 1876.

205.—Seth W. Hardin *v.* James S. Crote. —Appeal from Cook. — Opinion by SCOTT, C. J.

COLOR OF TITLE AND PAYMENT OF TAXES.

The points in this case are, (1) That a sheriff's deed is color of title under the conveyance act; (2) That a contract of sale is not, in itself, color of title, and does not pass the color of title acquired under a sheriff's deed; (3) That, accord-

ingly, payment of taxes under the contract will avail nothing against the deed.

225—Davidson F. Holmes *v.* Nicholas N. Shaver.—Appeal from Carroll.—Opinion by BREESE, J.

CAVEAT EMPTOR IN JUDICIAL SALES.

The principle involved in this case is, that the doctrine of *caveat emptor* applies, in its utmost force, to judicial sales; that there is no warranty of title at such sales; and this must be at the purchaser's risk alone.

183.—Wm. W. Holcomb *v.* The People.—Appeal from Winnebago.—Opinion by WALKER, J.

QUASI CRIMINAL CASE — APPEAL FROM COUNTY TO CIRCUIT COURT.— EFFECT OF REPEALING PRACTICE STATUTES ON PENDING SUITS.

Held, 1, That a bastardy proceeding, though criminal in form, is civil in effect.

2. That, in such cases, under the act of 1874, an appeal lies to the circuit court from judgments in the county court; although such appeal was not allowed by the act of 1872

3. All suits pending are subject to alterations in the rules of practice enacted by a statute made during such pendency, and repealing the former law. Parties do not acquire a vested right in rules of practice, though prescribed by statute.

No. 198.—The Merchants Transportation Co. *v.* Jeremiah Bolles.—Appeal from Superior court of Cook.—Opinion by SCOTT, C. J.

LIABILITY OF CARRIERS AND EXEMPTIONS THEREFROM—INFORMATION CONCERNING KIND OF GOODS SHIPPED—TRIAL BY COURT.

STATEMENT.—Household goods, etc. destroyed by fire in the warehouse of defendant; which goods plaintiff had shipped by a railroad to be delivered at another place to defendant. *Held*,

1. That it is only where a contract is for through transportation, that each connecting carrier will be entitled to the benefits and exemptions of the contract between the shipper and the first carrier. The carrier on whom the loss falls, in such a case, is to be regarded as acting under the contract made with the first carrier, and can claim the benefits of any exemption from liability in favor of the first carrier.

2. Where the contract is not for through transportation, the liability of each successive carrier ends only when the goods are delivered to the next in the order. And if fire destroys the goods *en route* In the warehouse of a carrier, before deivery to the next, the liability remains that of a common carrier, and is not that of a warehouseman merely.

3. A shipper is under no obligation to disclose the contents of boxes delivered to a carrier, except on inquiry by the carrier. Where there has been no improper concealment, the responsibility rests on the carrier.

4. Where a cause is tried by a court without jury, the findings on matters of fact will be treated by the appellate court as are verdicts of juries.

176.—Junius Mulvey *v.* Daniel H Carpenter et al.—Appeal from Superior Court of Cook.—Opinion by SCOTT, C J.

REDEMPTION BY JUDGMENT CREDITOR—SEPARATE EXECUTION IN JOINT CASES—SERVICE.

Held, that a judgment creditor, redeeming, under the statute, from a prior execution sale, is bound to take notice whether the court had jurisdiction in the cause where, in the prior execution, sale was made. Otherwise, all proceedings, including the redemption, would be an utter nullity, since the redemption can give no validity to former void proceedings. And this applies where the want of jurisdiction consists of want of service on defendants, as well as other grounds. And where a judgment is entered against joint defendants, and afterwards, an order is entered to issue execution against either of them separately, the order, and all proceedings under it, are void, unless the defendant against whom the execution was to issue was summoned to show cause against the entering of the order, and that after the confirmation of a master's report on sale under mortgage.

80.—Ira Brown, impleaded, etc. *v.* Rounsevelt.—Error to Cook.—Opinion by SHELDON, J.

PUBLIC POLICY AS TO RESTRAINT OF TRADE—FORM OF VERDICT.

STATEMENT.—Suit on bond given to secure the performance of an agreement with defendant in error, made by plaintiffs in error, to the effect that defendant in error was to sell sewing machines to the plaintiffs in error, who were to engage exclusively in the sale of that kind of sewing machines and purchase their supplies of him at 30 per cent. discount. Judgment for the penalty of the bond and damages. It was claimed that the contract was void on grounds of public policy, because it bound the plaintiffs in error to deal exclusively in that particular kind of machine, and so was in restraint of trade. *Held*,

1. That such a contract does not contravene public policy as being in restraint of trade.

2. A court may properly assist a jury in preparing a verdict, as to the form thereof.

172—Robert W. Robinson *v.* John Ferguson et al.—Appeal from Superior Court of Cook.—Opinion by SHELDON, J.

VOID DECREE — SUBSEQUENT VALID PROCEEDINGS—TESTIMONY OF PARTY AGAINST COURT RECORDS.

STATEMENT.—Bill to clear title under the Burnt Record Act. The case turns largely on evidence of the facts, although the property involved was very valuable. However, an important point was decided therein, namely: *Held*,

1. That where an act is passed, changing the time of the holding of a term of court, and the judge, not noticing the change made, holds the term at the usual time under the prior law, this is fatal to all the proceedings had during such unauthorized term. Yet if, at such term, there be a decree for specific performance, under which the party in whose favor the decree was made fulfills all the conditions imposed thereby, and afterwards, at a lawful term, a further decree is made—as of the delivery of a deed—corresponding with the former decree, the latter decree will cure the error, and be regarded as sufficient. Also,

2. That where a record recites that a defendant appeared and answered in a case, his uncorroborated testimony to the contrary, will not prevail against the record.

117.—Joseph Evans *v.* Milton Anderson. — Error to Iroquois. — Opinion by BREESE, J.

LEX LOCI.

STATEMENT.—Suit on promissory note executed in Indiana; but the place of the execution did not appear on the face thereof. *Held*,

1. That the nature, validity and interpretation of a contract must be governed by the law of the place where it was entered into, and this principle extends to promissory notes.

2. That the place needs not appear on the face of the promissory note, but it is sufficient for the application of the rule that the place appear in the pleadings.

3. The existing laws of a State, at the time of executing a promissory note, enters into the note; and the liability is determined thereby.

30.—Edward Roby *v.* Franklin D. Cossitt et al.—Error to Superior Court of Cook.—Opinion by SCOTT, C. J.

SPECIFIC PERFORMANCE — REQUISITES—DEMURRER.

STATEMENT.—Suit for specific performance of a contract for the sale of lands. The contract was made in February, 1867, and suit brought in July, 1873, the land, having, meanwhile, risen in value from $52,000 to $240,000. All the installments were much past due, nothing having been paid but $400 at the time of making the contract. *Held*,

1. That where time is not made of the essence of a contract, it must be performed in a reasonable time, or equity will not decree specific performance.

2. It is no excuse for delay that the purchaser desired to postpone the agreement until he could settle with other parties claiming to have contracts for the same property. This can not relieve him of the obligation promptly to offer to perform.

3. Where the facts, in a bill demurred to, are not clear and specific, the demurrer does not admit complainant's right; it being the rule merely that a demurrer admits the facts which are well pleaded. It can not help out vague and indeterminate allegations.

296.—Alfred Patmor *v.* G. W. Haggard et al.—Appeal from Iroquois.—Opinion by SHELDON, J.

STATUTE OF FRAUDS—PROMISE TO ANSWER FOR DEFAULT—CONTRACT TO CONVEY.

STATEMENT.—Suit on a penal bond executed by Haggard and Kane to Patmor, to secure the executing of a deed by the former to the latter. On the suit, pleas were filed to the effect that Kane's promise was to answer for the default of Haggard, and that no agreement or memorandum thereof existed wherein the consideration was in writing; and again, that the promises of Hazzard and Kane were for the sale and conveyance of land, and that no agreement or memorandum thereof was in writing wherein the consideration is stated, *Held*,

1. That as to the latter pleas, our statute of 1869, as all statutes containing the word "contract" or "agreement" as to writing, required the consideration to be in writing, since the consideration is an essential part of the contract or agreement—although our statute of frauds of 1874 expressly provides the contrary.

2. But, as to the bond and the undertaking of Kane therein to answer for the default, etc. of another, the law required only that the *promise* should be in writing in such a case.

[But, under the law of 1874, this distinction does not exist, as above stated.]

300.—C. R. I & P. R. R. *v.* Sarah A. Clayton.—Appeal from LaSalle.—Opinion by SCOTT, C. J.

LIABILITY OF COMMON CARRIERS AS TO BAGGAGE.

Held, 1. That the delivery of a baggage check to the owner of the baggage is *prima facie* evidence of a delivery to the carrier; but it may be rebutted.

2. When it is once established that baggage was delivered to a carrier, the liability of the carrier as an insurer immediately attaches, and continues until delivery to the owner again at the termination of the transportation thereof.

3. Where a railroad gives a check to a passenger for baggage not arrived, in exchange for a check of another road, it may be shown as a fact that the baggage never actually came to the hands of the second carrier, giving the last check. But the burden of proof is on the carrier to show that the baggage was not received.

301.—Same *v.* Patrick McKitrick.—Appeal from Cook.—Opinion by BREESE, J.

EXCESSIVE VERDICT IN CASES OF NEGLIGENCE.—PRESUMPTION IN REGARD TO IT.

Held, That, in an action for negligence against a railroad company, the Supreme Court will take cognizance of an excessive verdict, on appeal from a judgment refusing a new trial, and will presume from the fact of excess, that the verdict was not the result of a proper consideration.

313—L. Schoenfeld *v.* Thomas H. Brown et al.—Appeal from Cook.—Opinion by WALKER, J.

STATUTE OF FRAUDS AS TO PROMISE TO PAY DEBT, ETC., OF ANOTHER.

STATEMENT. — Appellant agreed with certain contractors to build a large, brick house. The contractors sub let a part of the contract, as to furnishing materials, to appellees. In part, this furnishing was paid for by appellee on certificate of the architect and contractors. The contractors having failed as insolvent, the appellees desisted from furnishing, but on the promise of the appellant to pay for them they continued afterwards to supply materials. On this promise, suit was brought. It was contended that this promise was within the statute of frauds,

Held, That the promise was not within the statute. In such cases, the test is, whether the promise is direct, or collateral. And the most ready means of solving the question is, whether the credit was given to the person making the promise, or to a third person. Where the credit is alone given to the promissor, the statute can have no operation; since it only relates to verbal promises for the payment of the debt, default, or miscarriage of another person. When a person purchases goods, or agrees to purchase, and they are delivered to him, under such a promise that he will pay for them, the statute does not apply, because there is no undertaking to pay the debt of another, but only his own. In such a case as the present, the difficulty usually arises in determining to whom the credit was given.

314.—O. H. Tobey et al. *v.* R. Foreman. —Appeal from Superior Court of Cook. Opinion by SHELDON, J.

SPECIFIC PERFORMANCE—CROSS-BILLS AND SUPPLEMENTAL BILLS— WAIVER WHERE TIME IS OF THE ESSENCE.

STATEMENT.—Suit, May 9, 1872, for specific performance of a contract for the conveyance of land to Foreman—contract dated March 15, 1872. Booth answered, offering to perform. Tobey answered denying that he made the contract; Booth having signed Tobey's name to the agreement without authority.

November 8, 1873, Foremen filed supplemental bill alleging that, after the contract was made the land advanced in value from $28,000 to $40,000, but during the pendency of the suit, had decreased in value to $25,000, and claiming damages for the delay. This was demurred to, as to the claim for damages, and demurrer sustained. Tobey answered, ratifying the contract and offered to perform, and filed a cross bill to compel Foreman to perform; and stated in the cross-bill that Foreman had filed a claim against Booth's estate (he having died, pending the suit), for damages, in not performing the contract; of which time was of the essence, and prayed that the prosecution of this claim might be enjoined. Foreman dismissed his bills, and the court dismissed the cross-bill on demurrer. *Held*,

1. That a cross-bill must always show grounds for equitable relief, or it will be properly demurrable.

2. That, while the filing of the original bill offering to perform and asking decree, waived the time which was of the essence, yet the filing of the supplemental bill demanding damages for the delay, was not a renewal of such waiver, unless the defendants would accede to the claim for damages.

3. Refusing to convey when property is valuable and waiting until it depreciated, and then offering to perform, vitiates all claim to equitable relief.

4. There was no equitable reason for enjoining the prosecution of the claim for damages in the county court.

370.—Adam Shugart, impleaded, etc., *v.* Ann Egan.—Appeal from Lee.—Opinion by SHELDON, J.

LIABILITY UNDER STATE LIQUOR LAW—EVIDENCE—PROXIMATE CAUSE—GROUNDS OF ACTION—LICENSE.

STATEMENT.—Suit brought, under the liquor law, by the widow of one who, naturally peaceable, yet got into a quarrel after excessive drinking at a saloon; which quarrel resulted in his death. The appeal was by the owner of the building. *Held*,

1. The liability created by the statute does not rest on the ground that the sale of liquor was unlawful, nor does the possession of a license obviate the liability.

2. On the trial of a cause, under the statute, a witness may properly be asked his opinion as to whether the deceased was intoxicated. [BREESE, J., dissenting.] For, although it is the general rule that witnesses are to testify to facts, and not as to their opinions, and that it is only experts on questions of science who are allowed to give their opinions, yet there are cases where the opinions of ordinary witnesses are to be received, as, for example, as to the value of property, as to one's pecuniary responsibility, the identity of a person, or of handwriting, to the questions of sickness and health, or the state of the affections, etc.

3. Proof beyond a reasonable doubt is a measure of proof required only in criminal cases, and not in a civil suit for a penalty.

4. In a case like the present, the doctrine of proximate and remote cause has no application, and it is not proper to instruct a jury that a person can only be responsible for consequences which a reasonable person might foresee as probably resulting.

5. It is not necessary, in order to fix the liability, that the person with whom a quarrel was made, resulting in the death, should also have been intoxicated. It is enough that the deceased was intoxicated, and, in consequence, got into the quarrel, and provoked the injury he received.

[BREESE, J., also dissented on the ground that there was no sufficient evidence connecting appellant with the death of appellee's husband.]

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Lex vincit.

MYRA BRADWELL, Editor.

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We call attention to the following opinions, reported at length in this issue:

The License Tax Law of Missouri Unconstitutional.—The opinion of the Supreme Court of the United States, by Field, J,, holding that s license tax required for the sale of goods is in effect a tax upon the goods themselves, and that a statute of the State of Missouri, which requires the payment of a license tax from persons who deal in the sale of goods, wares and merchandise which are not the growth, produce, or manufacture of the State by going from place to place to sell the same in the State, and requires no such license tax from persons selling in a similar way goods which are the growth, produce, or manufacture of the State, is in conflict with the power vested in Congress, to regulate commerce with foreign nations and among the States; that the inaction of Congress in prescribing rules to govern inter-State commerce is equivalent to its declaration that such commerce shall be free from any restrictions.

Removal of Cause from State to Federal Court.—The opinion of the United States Circuit Court for the district of Minnesota, by Nelson, J., defining the meaning of the words "the trial or final hearing," as used in the act of Congress relating to the removal of causes, and holding that where there has been a trial upon the merits and a new trial granted, the defendant is still entitled to a removal of the cause.

Insurance Agent—Advertising—Custom.—The opinion of the Supreme Court of Illinois, as to the power of a general agent of an insurance company to bind the company for advertising, and how far a party doing advertising would be bound to take notice of a general custom in regard to the authority of such agents.

Assessor no Power to Swear Taxpayer out of his Town.—The opinion of the Supreme court of this State by Walker, J., holding that an assessor cannot swear a person listing property for taxation outside the township for which he was elected, and that a person cannot be legally convicted for perjury in making such an affidavit.

Sheriff's Sale—Void Judgment—Redemption.—The opinion of the Supreme Court of this State, by Scott, C. J., holdiug where a sheriff sold land under a void execution, and appellant redeemed from such sale, that the execution being void there was nothing from which he could legally redeem. The redemption being unauthorized by statute, appellant acquired no title to the property redeemed and resold on his execution.

THE BANKRUPT LAW—SHOULD IT BE REPEALED?

Already a bill has passed the House to repeal the Bankrupt Law, and the question is now being agitated, Should it be repealed? The press throughout the country are pretty generally in favor of its repeal. That it should at least be greatly modified there can be no doubt; that it should be repealed is more of a doubtful question. Upon its repeal, the old practice of making assignments to defraud creditors will be revived, and creditors' bills will be as numerous as they were before the advent of the bankrupt law. Creditors, instead of appearing before the register to prove their claims, will run a race with each other in the State Courts, to see which can secure the most of the debtor's property by attachment. There can be no doubt but what the bar in general would be benefited by the repeal. It would put the collection machinery of the State Courts again in operation, take the collecting business from the great cities where the Federal Courts are held, distribute it through the country and give overy cross-road attorney an opportunity to secure his share. What effect the repeal of the law would have upon the mercantile business of the country it is not easy to foresee. If it is to be continued it should be made less expensive, the practice simplified, the rules adopted by the Supreme Court thoroughly revised and re-written, and the law so changed as to be readily understood by the district judges and the bar. No law was ever passed that has produced so many conflicting opinions as the bankrupt law. We hear of men going through bankruptcy who are reported to succeed in keeping hundreds of thousands of dollars from their creditors, but we seldom hear of their being punished for concealing their property or swearing it away from their creditors. It cannot be denied, in a commercial country like this, but what a proper bankrupt law of uniform operation throughout the United States, must be better than the different insolvent laws of the several States. Can Congress change the present into such a law?

NOTES TO RECENT CASES.

INSURANCE AGENT—AUTHORITY OF.

The Supreme Court of Pa., in Mentz *v* The Lancaster Fire Ins. Co., 23 *Leg. Journal*, 99, held that where agents are acting for an insurance company and are held up to the public as such, the reasonable presumption is that they are authorized to act for the company in a general way, unless the company specify what may be their specific duties and powers

DEED—MINING RIGHTS.

The same court held, in Rahm et al. *v* A. Chadwick, 23 *Leg. Journal*, 98, that a deed by which mineral rights are conveyed, must clearly express that the grantor also gave the right to take away the surface support, otherwise he will be held to retain the proper support of the surface.

WRITTEN DOCUMENT—PAROL EVIDENCE.

The English Court of Common Pleas Division, in Clever *v.* Kirkman, 33 L. T. Rep., N. S. 672, held, where a document appears on the face of it to contain the terms of a written agreement, parol evidence is admissible to show that it was not intended to be an agreement, but was written for some other purpose, and the question whether this is so or not is for the jury.

MANSLAUGHTER—INFANT—NEGLECT OF PARENT TO SUPPLY MEDICAL AID FROM CONSCIENTIOUS BELIEF.

The English case of Reg. *v.* Downes, 33 L. T. Rep., N. S. 675, holds that since the 31 and 32 Vic., c. 122, s. 37, which makes it an offense punishable summarily, for any parent willfully to neglect to provide medical aid for his child being in his custody and under the age of fourteen years whereby the health of such child shall have been, or is likely, to be seriously injured, it is manslaughter if the child die from such neglect, and it is no answer to the charge of manslaughter that the parent so neglected from a conscientious religious belief that it was wrong to call in medical aid, and that medical aid was not required, and not from any intention to disobey the law. This would be regarded as a very severe law in America.

WILL—OBLITERATION OF—REVOCATION.

The English Court of Exchequer, in Swinton *v.* Bailey, 33 L. T. Rep., 695, where a testator by his will devised real property to his mother, her heirs and assigns forever, and he subsequently obliterated the words "her heirs and assigns" by striking them out, held, that the words obliterated were not a devise or clause within the meaning of the sixth section of the statute of Frauds, and that the obliteration was of no effect, and that his mother took an estate in fee simple.

SALVAGE SERVICE—TERMS OF.

The United States District Court of Delaware, in Boyer et al. *v.* The Schooner Ellen Holgate, etc., 8 *Legal Gazette*, 44, held, where the master of a vessel in distress accepts the services of salvors, and permits them to render assistance under the impression that their terms have been assented to by him, he cannot afterwards repudiate those terms, in the absence of evidence that they were compulsory or unconscionable; that in estimating the value of a salved vessel for the purpose of fixing a salvage award, the court will adopt as the standard, the value of the vessel to the owners for the purposes of repair; that a true result is reached by deducting from the value of the vessel, just before the collision, the cost of repair.

COMMON CARRIER—SHIP OWNER—LOSS OUT OF THE REALM—ACT OF GOD.

The English court of common pleas division, in Nugent *v.* Smith, 24 *Weekly Reporter*, 237, held that every ship-owner or master who carries goods on board his vessel for hire, whether inland, coastways, or abroad, outward or inward, is, in the absence of express stipulation to the contrary, subject, by implication by the common law of England adopting the law of Rome, by reason of his acceptance of the goods to be carried, to the liability of an insurer, except as against the act of God or the Queen's enemies; *that*—To amount to an act of God within the meaning of the exception, the damage must have been caused directly and exclusively by such a direct and violent and sudden and irresistible act of nature as the carrier could not by any amount of diligence foresee, or, if he could foresee it, could not by any amount of care and skill resist so as to prevent its effect.

Recent Publications.

A Commentary on the Law of Agency and Agents. By Francis Wharton, LL D., author of Treatises on "Negligence," "Conflict of Laws," etc. Philadelphia: Kay & Brother, 17 and 19 South Sixth street, Law Booksellers, Publishers and Importers. 1876. Sold by Callaghan & Co., Law Booksellers, Chicago.

This new candidate for the favor of the profession is a neat and substantial volume. In appearance it is equal to the best law books. Mr. Wharton, the author, is well known to the profession by his many works. His present Commentary may be divided into two distinct parts. The first eleven chapters contain a general exposition of the law of agency, the twelfth, thirteenth, fourteenth, fifteenth, sixteenth and seventeenth, Mr. Wharton says, present successively treatises on the Law of Attorneys, of Auctioneers, of Brokers, of Factors, and of Salesmen. The eighteenth chapter discusses the Law of Lien, as related to Agency. Some topics frequently associated with the Law of Agency have been designedly omitted. The Law of Shipping, of Partnership and of Insurance, being considered as independent themes, find no place in this volume. Mr. Wharton thought it advisable to introduce all reported cases, no matter how cumulative, which came to his notice, in connection with the topics discussed. The notes are a complete digest of the authorities upon the questions treated in the text. We are among those who believe that a law-writer of the present day should never give Latin quotations of ancient works if he has the ability to translate them into English. While Mr. Wharton has less Latin quotations than some who have written upon the Law of Agency, still we wish he had fewer than he has. It is safe to say, that of the Bar who have a College education, not one out of every six, to say nothing of those who never entered a College, can read readily a Latin quotation of half a dozen lines.

THE ORDINANCE OF 1787 AND THE BIBLE QUESTION.

In Mr. Bonney's lecture before the Law College on the Ordinance of 1787, he made the point that the reading of the Bible, without note or comment, in the public schools was an exact compliance with the provisions of the ordinance in reference to schools and the means of education, for the purpose of inculcating religion, morality, and knowledge, as necessary to good government and the happiness of mankind. The religion here meant was, according to the fixed rules of legal construction, the Protestant form of Christianity, including the King James version of the Sacred Scriptures, being that broad and tolerant form of christianity, without distinction of sect or creed, which the courts and jurists hold to be a part of the common law. This ordinance, irrevocable without the mutual consent of the original States, and the people and States in the northwestern territory, was thus beyond the power of Congress and the State legislature. This ordinance not only declared that the principles of civil and religious liberty were the basis on which the original States, their laws and constitutions were erected, but also that one of the objects of the ordinance was to fix and establish those principles as the basis of all laws, Constitutions, and governments, which forever thereafter should be established in said territory; and that the ordinance was ratified and reaffirmed as an irrevocable compact, by both the general government and the State of Illinois, at the time of the admission of the latter into the Union.

The act of Congress of April 18, 1818, to enable the peopie of Illinois to form their first Constitution, expressly reaffirmed the ordinance of 1787, and in connection therewith provided for the formation of the several public school funds; and thus those school funds are held in a perpetual and irrevocable trust, to teach the religion, morality, and knowledge intended by the ordinance of 1787.

This broad and tolerant Christianity leads to no prosecution for opinion's sake, but to the largest toleration consistent with the public safety; the ordinance

expressly declaring that "no person demeaning himself in a peaceful and orderly manner shall ever be molested on account of his mode of worship or religiou sentiments.

The lecturer contended that the perfect freedom which all other forms of faith had enjoyed under the provisions of the ordinance, was abundant proof of the beneficent sway of legal Christianity, free from sectarian control. In this connection a large number of legal authorities were cited and explained.

SUPREME COURT OF TENNESSEE.

OPINION FILED JAN. 22, 1876.

E. R. PROWELL et al. *v.* H. P. FOWLKES, administrator, et al.

SUMMARY REMEDY—OFFICIAL BOND OF DECEASED CLERK—LIABILITY OF ADMINISTRATOR WITH SURETIES UPON.

The summary remedies given by statute against public officers, being of purely statutory origin and in derogation of the common law, must be strictly pursued, and nothing can be superadded to them by judicial construction. Such statutes do not in terms extend to the personal representatives of such officers, and cannot be so extended by construction. *Held* that a motion is not allowable against the administrator of a deceased clerk and the sureties upon the official bond of the clerk.

CASES APPROVED.—Young *v.* Hare, 11 Humph., 303; State *v.* Deberry, 9 Humph., 605; Park *v.* Walker, 2 Sneed, 509.

CASE OVERRULED.—Smith *v.* Woods, 1 Cold., 539.

SNEED, J., delivered the opinion of the Court.

The counsel for the appellants in this case, insists upon divers grounds of reversal which are worthy of consideration; but in the view we have taken of the case the main question argued must be decisive of it. It is an action instituted by motion in the county court of Williamson county against the administrator of a deceased clerk and the sureties on the clerk's bond for a balance of a fund collected by the clerk, under the orders of the court, belonging to plaintiffs and remaining in the hands of the clerk at the time of his death. The notice of the motion was served upon the administrator alone. A judgment was rendered in favor of the plaintiffs and the case was brought before the Circuit Court by *certiorari*, when on motion of the plaintiffs the petition was dismissed, and an appeal taken to this court by defendants, who have likewise as a measure of precaution, taken a writ of error to the county court.

It is insisted on behalf of the defendants that the summary remedy allowed against the clerk and his sureties in such cases does not lie against the administrator and the sureties of the clerk. And of this opinion is the court. The statute under which the remedy is sought is in the words following: "Judgment may be had summarily by motion against the clerk of any court in this State in the following cases: 1. For failing to pay over to the party entitled on demand money received by him on any judgment or execution, or paid into court upon a plea of tender or any other plea, or under an order or rule of court, judgment for the sum so received with interest and twelve and one-half per cent. damages. 2. For delinquencies in regard to revenue as provided in this code, in Part 1, Titles 4 and 5.

It has been uniformly held in regard to these summary remedies against public officers that they are of purely statutory origin, in derogation of the common law; that they must be strictly pursued and construed, and that nothing can be superadded to them by judicial construction. The very terms of the statute import that the officer himself must be pursued and that the demand must be made upon him. His representative, if he be dead, is the custodian and depository of his personal assets, but the fiduciary trust moneys with which he is charged are supposed to remain *in custodia legis*, in the hands of his successor in office. The adminstrator is not supposed to know anything about his official affairs, and is not in a condition to protect his sureties in the speedy and summary remedy given to the parties in interest, of which they are not even entitled to notice. Young *v.* Hare, 11 Humph., 303. It would be a harsh and unreasonable construction of these statutes to give the remedy against innocent sureties with the adminstrator of the officer, when they are not only deprived of their day in court to make their defense, but are in a condition so utterly helpless, from the fact that the death of their principal has cut off the chances of a well-advised defense.

The case of The State *v.* Deberry was decided in 1848, in which it was held that the act which authorizes a judgment by motion against a sheriff and his sureties, does not authorize such summary proceeding against the executor or administrator of such sheriff. In that case Judge Green said that the act does not in its provisions extend to the executor or administrator of the sheriff, and we do not think it should be so extended by construction. For the default of the sheriff it is much more appropriate to proceed against his executor or administrator upon the bond by a common law action, in which the plea of fully administered might be put in and the issue tried by a jury. We do not think the Legislature intended to extend the remedy by motion te the executor or administrator. 9 Hum., 605.

In the case of Park *v.* Walker, Judge McKinney said: "No latitude of construction is admissible so as to extend the remedy beyond the express provision of the statute, to cases apparently falling within the reason of the law. The remedy is not given by the statute against the personal representative of the deceased sheriff, or surety; and upon no sound principle can it be so applied. Obvious conditions, growing out of the relations, rights and duties of the personal representative, forbid such a construction." "But it is needless," he says, "to reason on the point. We have held that this remedy did not extend to the executor or administrator of the deceased sheriff himself," citing State *v.* Deberry, 9 Hum., "and for the same reason we now hold that it does not apply to the executor or administrator of a deceased surety."—Park *v.* Walker, 2 Sneed, 509. The doctrine of these applies with like force to the summary remedy against clerks, and the statutes have in no manner been extended in their scope and operation since these cases, and many others unreported, have been determined.

But it is said that the doctrine has been modified and departed from in the more modern case of Smith *v.* Woods, 1 Cold., 539. The point was not directly in judgment in that case. The proceeding in that case was by petition against the administrator of the clerk and the sureties on the clerk's bond, to recover certain moneys in the clerk's hands at the time of his death. The proceeding was in the county court, and the clerk had received the money as special commissioner to sell the property out of which the fund was realized. The suit was treated as in the nature of a bill in equity, and as such was sustained, as it well might be under the rules of practice appropriate to that forum. The learned judge delivering the opinion does undoubtedly in the discussion of the case repudiate the early decisions which hold that the motion does not lie against the representative of a deceased officer, and "inclines to the opinion" that the remedy by motion will lie against the personal representative of a delinquent officer. He seems to base his conclusions upon section 3626 of the Code, ch. 14, Art. 7, by which it is provided that "the remedy by motion given by this article will lie both for and against the personal representative of deceased parties." The provision, he says, might seem at first view, from its juxtaposition and terms, to be restricted to the class of motions enumerated in Article 7. But such, he thought, was not the intention. There would be no sense in such a discrimination. 1 Cold., 539. Upon examination it will be seen that this Article 7 applies exclusively to the reciprocal remedies of sureties as against each other, and that the provision as to them was almost literally carried into the Code from the act of 1801, ch. 15, section 1, which is intended exclusively for the protection of securities. We are satisfied that the learned judge in placing this construction on the section of the Code referred to, did not have this act of 1801, ch, 15, from which it was taken, brought to his attention. But in any event we hold that the sounder doctrine is to be found in the earlier cases upon the subject; and while we do not regard the conclusion of the learned judge as an express adjudication of the question, we must, with great deference and respect for his ability and learning, dissent from the views he has announced in that case. We hold that the summary remedy is not allowable in a case like this.

The judgment will be reversed and the motion dismissed, without prejudice to the plaintiffs, however, in any other appropriate remedy to which they may resort.—*The Commercial and Legal Reporter.*

UNITED STATES SUPREME COURT.

PROCEEDINGS OF.

Wednesday, Feb. 9, 1876.

On motion of Matt. H. Carpenter, A. G. Safford and Edward A Sowles, of St. Albans, Vermont, were admitted.

No. 856. (Assigned.) John and J. K. Warren v. Sheridan Shook, late collector, etc. The argument of this cause was continued by Benjamin K. Phelps for plaintiffs, and by Assist. Atty. Gen. Smith, for defendant, and concluded by Benjamin K. Phelps for plaintiffs.

No. 141. John R. Shepley et al., trustees, etc. v. John E. Cowan et al. The argument of this cause was commenced by John R. Shepley for plaintiffs, and continued by M. Blair and B. A. Hill for defendants.

Adjourned until Thursday at 12 o'clock.

Thursday, Feb. 10.

No. 141. John R. Shepley et al., trustees, v. John E. Cowan et al. The argument of this cause was concluded by P. Phillips for appellants.

No. 142. Wm. A. Stone v. Ezra B. Towne, administrator, etc., et al. This cause was argued by R. P. Lowe for appellant, and by Joseph Casey for appellees.

No. 143. Wm. C. Lobenstein v. The United States. This cause was argued by C. F. Peck for appellant, and by Assist. Atty. Gen. Smith for the appellees.

No. 146. Henry H. Raymond v. Wm. M. Thomas. The argument of this cause was commenced by P. Phillips for plaintiff, and continued by W. H. Boyle for defendant.

Adjourned until Friday at 12 o'clock.

Friday, Feb. 11.

On motion of P. Phillips, E. W. Kittredge, of Cincinnati, Ohio, was admitted.

No. 146. Henry H. Raymond v. W. M. Thomas. The argument of this cause was concluded by P. Phillips for plaintiff.

No. 144. Mary R. and John W. Kohl, executor, etc., et al. v. The United States. This cause was argued by E. W. Kettredge for plaintiffs, and by Assist. Atty. Gen. Smith for defendants.

No. 147. William Barnes v. The District of Columbia. The argument of this cause was commenced by R. K Elliott for plaintiff, and continued by E. L. Stanton for defendant.

Adjourned until Monday at 12 o'clock.

Monday, Feb. 14.

On motion of W. M. Springer, Wm. Brown, of Jacksonville, Illinois, was admitted.

On motion of C. Case, James M. Shackelford, of Evansville, Ind., was admitted.

No. 132. The Ætna Insurance Company v. David France and wife. In error to the Circuit Court of the United States for the eastern district of Penn. Hunt, J., delivered the opinion, reversing the judgment of the Circuit Court with costs, and remanding the cause with directions for a new trial.

No. 608. William H. Hoover, assignee, etc., v. Abraham Wise. In error to the Supreme Court of the State of New York. Hunt, J., delivered the opinion, affirming the judgment of the Supreme Court with costs. Dissenting, Miller, Clifford and Bradley, JJ.

No. 539. Marshall O. Roberts et al., surviving trustee, etc. v. The United States. Appeal from the Court of Claims. Bradley, J., delivered the opinion, reversing the judgment of the Court of Claims, and remanding the cause for further proceedings in conformity with the opinion of this court. Dissenting. Swayne, Davis and Strong, JJ.

No. 133. Charles C. Smeltzer v. Miles White. In error to the Circuit Court of the United States for the district of Iowa. Strong, J., delivered the opinion, affirming the judgment of the Circuit Court with costs and interest.

No. 704. The United States v. The Corliss Steam Engine Company. Appeal from the Court of Claims. Field, J., delivered the opinion, affirming the judgment of the Court of Claims in this cause.

No. 134. Christian S. Eyster v. Thomas and James W. Tapy. In error to the Supreme Court of the Territory of Col rado. Miller, J., delivered the opinion, affirming the judgment of the Supreme Court with costs.

No. 557. W. S. Gilman et al. v. The Illinois and Mississippi Telegraph Company. Appeal from the Circuit Court of the United States for the district of Iowa. Swayne, J., delivered the opinion, affirming the opinion of the Circuit Court with costs.

No. 558. H. Coy Kendall, garnishee, v. The Illinois and Mississippi Telegraph Company. In error to the Circuit Court of the United States for the district of Iowa. Swayne, J., delivered the opinion, affirming the judgment of the Circuit Court with costs and interest.

No. 131. Alexander M. Earle et al. v. Jas. H. McVeigh. Appeal from the Circuit Court of the United States for the eastern district of Virginia. Clifford, J., delivered the opinion, affirming the decree of the Circuit Court with costs.

No. 645. The United States v. John M. Ashfield. Appeal from the Court of Claims. Waite, C.J., delivered the opinion, reversing the judgment of the Court of Claims, and remanding the cause with directions to dismiss the petition.

No. 129. Porter G. Turner et al. v. Charles H. Ward et al. Appeal from the Circuit Court of the United States for the eastern district of Michigan. Waite, C. J., delivered the opinion, affirming the decree of the Circuit Court with costs.

No. 812. Charles Rockhold v. Thomas Rockhold et al. In error to the Supreme Court of the State of Tennessee. Waite, C.J., delivered the opinion, dismissing the writ of error in this cause for the want of jurisdiction.

No. 851. Eliza W. Warfield v. John and Charles Chaffee. In error to the Supreme Court of the State of Louisiana. Waite, C. J., delivered the opinion, dismissing the writ of error for the want of jurisdiction.

No. 338. John L. Macauly et al. v. Charles Clinton et al. Waite, C. J., announced the order of the court, granting the motion to advance this cause.

No. 928. James C. Welch v. John F. Cook et al. The motion to advance this cause was submitted by A. L. Merriman for appellant.

No. 147. William Barnes v. The District of Columbia. The argument of this cause was continued by E. L. Stanton for defendant, and by W. D. Davidge for plaintiffs.

Adjourned until Tuesday at 12 o'clock.

Tuesday, Feb. 15.

On motion of W. D. Davidge, George F. Clifford, of Cornish, Me., was admitted.

No. 147. William Barnes v. The District of Columbia. The argument was concluded by W. D. Davidge for plaintiff.

No. 148. Henrietta Hoffman v. The John Hancock Mutual Life Insurance Company. Passed.

No. 149. Henry H. Blease v. Albert C. Garlington. This cause was argued by James Lowndes for appellant, and W. W. Boyce for appellee.

No. 150. G. W. Haischman v. Bates county. This cause was argued by T. K. Skinker for plaintiff, and submitted on printed arguments by John W. Ross, and Grover and Shipley for defendant.

No. 151. G. De Rosset Lamar, executor, etc. v. Albert G. Brown et al., special agents, etc. The argument was commenced by E. N. Dickenson for plaintiff.

Adjourned until Wednesday at 12 o clock.

Wednesday, Feb. 16

On motion of H. L. Dawes, George P. Sanger, of Boston, Massachusetts, was admitted.

On motion of J. E. McDonald, J. C. Black, of Champaign, Illinois, was admitted.

No. 151. G. De Rosset Lamar, executor, etc. v. Albert G. Brown et al., special agents United States Treasury. The argument was continued by E. N. Dickerson for plaintiff and by Assist. Atty. Gen. Smith for defendants, and concluded by George T. Curtis for plaintiff.

No. 152. B. F. Allen v. The United States. Dismissed with costs.

No. 153. The Board of County Commissioners of the County of Laramie v. The Board of County Commissioners of the Counties of Albany and Carbon. The argument was commenced by W. R. Steele for appellants.

Adjourned until Thursday at 12 o'clock.

JUDGE WITHEY, of Michigan, adjourned his court to attend Plymouth Church advisory council, and was elected one of the business committee.

The gown and bands which Dr. Kenealy wore during the Tichborne trial have been presented to the proprietors of MacLeod's waxwork museum and menagerie at Glasgow.

In the circuit court of Havana, Ills., on Monday, two brothers named Poland, refusing to testify before the grand jury from conscientious motives, on the ground that the command of the Lord to "swear not at all" was binding on them, were, by the order of Judge Lacy, committed to the county jail, until they should be willing to state under oath what they knew of the case before the grand jury.

PERKINS & CHASE,
Attorneys, 28, 30 & 32 Major Block.

TRUSTEE'S SALE.—WHEREAS, CARL O. LUNDberg, of the county of Cook, and State of Illinois, by his certain trust deed, duly executed, acknowledged and delivered, bearing date the 1st day of May, 1872, and recorded in the recorder's office of said Cook county, in book 88 of records, at page 43, did convey unto Henry E. Seelye, as trustee, all the following described premises, situated in said county, to wit: The south thirty-five (35) feet of lots number one (1) and two (2), and the north fifteen (15) feet of lot number eleven (11), all in block number two (2), in Julia Foster Porter's subdivision of block number twenty seven (27), in Canal Trustee's subdivision of the north half and the north half of the southeast quarter, and the east half of the southwest quarter of section thirty-three (33), town forty (40) north, range fourteen (14), east of the third P. M., to secure the payment of his principal promissory note, for the sum of three thousand dollars, executed by him, and payable to the order of William J. Davis, five years after date, with interest at the rate of ten per cent, payable semi-annually, at the office of said Davis, said note bearing date the same day as said trust deed.

And, whereas, said Lundberg covenanted in and by said trust deed, that, among other things, he would, until said indebtedness was paid, or the said premises were sold by virtue of said trust deed, pay all taxes and assessments levied or assessed on said premises, when and as the same became due and payable.

And whereas it was also provided in and by said trust deed, that in case of the breach of any of the covenants or agreements in said trust deed contained, then, on the application of the legal holder of said note, it should and might be lawful for the undersigned, Henry E. Seelye, to sell and dispose of said premises, and all the right, title, benefit and equity of redemption of said Carl O. Lundberg, his heirs and assigns therein, at public auction, in the city of Chicago, county and State aforesaid, ten days previous notice of such sale having been given by publication, in one of the newspapers, at the time of sale, published in said city of Chicago, and to make, execute and deliver to the purchaser or purchasers at such sale, good and sufficient deed or deeds of conveyance for the premises sold, and out of the proceeds of such sale, to pay all costs of advertising and of sale, commissions, and all other expenses of said trust, including all money advanced for taxes or other liens and assessments, with interest thereon, and to pay the principal and interest then due on said note, according to the tenor and effect thereof.

And whereas the covenant in said deed contained, as hereinbefore set forth, has been broken by the said Carl O. Lundberg, and the said Lundberg has not paid, or caused to be paid, the taxes and special assessments, or either of them, that have been levied upon said property during the life of said trust deed, but has allowed said property to go to sale for the taxes, and also assessments levied and assessed against it; and the legal holder of said note has made application to me, the undersigned trustee, as aforesaid, and requested me, as such trustee, to sell and dispose of said premises under the power in said trust deed, and for the purposes therein stated.

Now, therefore, public notice is hereby given, that in pursuance of said trust deed, and by virtue of the power and authority to me granted in and by the same, and by virtue of the statute of the State, I, the undersigned, will, on the 25th day of February, 1876, at the hour of ten o'clock in the forenoon of said day, at the west door of the two north doors of the court house, situated on the corner of LaSalle and Adams streets, in said city, sell and dispose of the premises above and in said trust deed described, and all the right, title, benefit and equity of redemption of the said Carl O. Lundberg, or his assigns, therein, at public auction, for the highest and best price the same will bring in cash, for the purpose of paying the said note and interest, and of the sums advanced by the legal holder of said note for the payment of said taxes and assessments, and for the redemption of said premises from said tax sales, and all other expenses of said trust.

Chicago, February 10, 1876.

HENRY E. SEELYE, Trustee.

PERKINS & CHASE Attys. for Trustee. 21-22

TRUSTEE'S SALE. — WHEREAS, EDWARD A Bacheldor, grantor, made his certain deed of trust to the undersigned, as trustee, bearing date December 23d, A.D. 1872, and recorded in the recorder's office of Cook county, Illinois, in book 41 of records, at page No. 267, whereby he conveyed to the undersigned the premises hereinafter described, to secure payment of $3,500, five years after date thereof, with interest at ten per cent. per annum, payable semi annually, for which indebtedness the promissory notes of said Bacheldor were made.

And whereas, default has been made in payment of one of said interest notes for $175 that matured December 24th, A.D. 1875, and the same is past due and unpaid, with interest thereon, at ten per cent. per annum, since that date, and no part of said principal debt has been paid; and application has been made by the legal holder of said notes to the undersigned to advertise and sell under said deed, according to its terms, for the purposes therein expressed.

Now, therefore, notice is hereby given, that I will sell at auction, for cash, at the north door of the court-house, in the city of Chicago, nearest LaSalle street, situated at the southeast corner of the intersection of La Salle and Adams streets, at one o'clock in the afternoon on the 29th day of February, A.D. 1876, said premises, to wit:

Sub-lots four and five, and the north thirteen feet of sub-lot eight, in Huntington's subdivision of lot number six, in block number two, in Ellis' west addition to Chicago, together with all the right and equity of redemption of said grantor, his heirs and assigns therein.

GEORGE SCOVILLE, Trustee.

Chicago, Feb. 12, 1876. 21-23

PUBLICATION NOTICE IN ATTACHMENT.—State of Illinois, county of Cook, ss. Superior court of Cook county, March term, A. D. 1876. Anthony F. Seeberger and Benjamin A. Breakey, partners, etc. vs. —— Finn and —— Finn, partners as Finn Brothers.—Attachment.

Public notice is hereby given to the said —— Finn and —— Finn, partners as Finn Brothers, that a writ of attachment issued out of the office of the clerk of the Superior court of Cook county, dated the 1st day of February, A. D. 1876, at the suit of the said Anthony F. Seeberger and Benjamin A. Breakey, and against the lands, goods, chattels, rights, moneys, credits and effects of the said —— Finn and —— Finn, partners as Finn Brothers, for the sum of one thousand and thirty-five dollars and twenty cents, directed to the sheriff of Cook county to execute.

Now, therefore, unless you, the said —— Finn and —— Finn, partners as Finn Brothers, shall personally be and appear before the said Superior court of Cook county, on or before the first day of the next term thereof, to be holden at the court house, in the city of Chicago, on the first Monday of March, A. D. 1876, give bail and plead to the said plaintiffs' action, judgment will be entered against you, and in favor of the said Anthony F. Seeberger and Benjamin A. Breakey, and so much of the lands, goods, chattels, rights, moneys, credits and effects attached, as may be sufficient to satisfy the said judgment and costs, will be sold to satisfy the same.

JOHN J. HEALY, Clerk.

COOPER, GARNET & PACKARD, Attorneys. 20-22

GEO. C. CHRISTIAN
Attorney, 44 & 46 Major Block.

CHANCERY NOTICE.—STATE OF ILLINOIS, county of Cook, ss. Superior court of Cook county. April term, A. D. 1876. Lizzie E. Groff vs. Jacob K. Groff.—In chancery.

Affidavit of the non-residence of Jacob K. Groff, defendant above named, having been filed in the office of the clerk of the Superior court of Cook county, notice is hereby given to the said Jacob K Groff, that the above named complainant heretofore filed her bill of complaint in said court on the chancery side thereof, and that a summons thereupon issued out of said court against the above named defendant, returnable on the first day of the term of the Superior court of Cook county, to be held at the court house in Chicago, in said Cook county, on the first Monday of April next (1876), as is by law required, and which suit is still pending.

JOHN J. HEALY, Clerk.

GEO. C. CHRISTIAN, Complts. Solr. 22-25

TRUSTEES' SALE.—WHEREAS HENRY TITUS, of Chicago, Cook county, Illinois, by his certain deed of trust duly executed, acknowledged and delivered, bearing date the second day of January, A. D. 1873, and recorded in the recorder's office of Cook county, Illinois, in book 161 of records, page 236, did convey unto the undersigned, Samuel Wing, of Chicago aforesaid, as trustee, all the following described premises, situated in the county of Cook and State of Illinois, to wit:

Lot number three (3), and the east twenty-two (22) feet of lot number four (4), all in block number six (6), in Kinzie's addition to Chicago, to secure the payment of one promissory note made by the said Henry Titus for the sum of fourteen thousand and four hundred dollars, bearing date the second day of January, A. D. 1873, payable to the order of Joseph R. Bickerdike, two years from its date, with interest thereon at the rate of eight per cent. per annum, payable annually. Said note being given for purchase money to be paid for the premises in said trust deed and hereinabove described.

And, whereas, in said trust deed it is provided that in case of default in the payment of said promissory note and interest, or either or any part thereof, or in case of a breach in any of the agreements in said trust deed mentioned, then on the application of the legal holder of said note, it should be lawful for the undersigned, Samuel Wing, trustee, to sell and dispose of said premises, or any part thereof, either in mass or in separate parcels, at public auction, at the north door of the court house, in the city of Chicago in the State of Illinois, for the highest and best price the same will bring in cash, twenty days notice of such sale having been first given in one of the newspapers published in the city of Chicago, and to make and deliver to the purchaser or purchasers at such sale, good and sufficient deed or deeds of conveyance for the premises sold, and out of the proceeds of such sale, after first paying all costs of advertising and sale, commissions and all other expenses of this trust, and all moneys advanced for taxes or other liens and assessments, with the interest thereon, to pay the principal and interest due on said note according to the tenor and effect thereof.

And whereas, default has been made in the payment of said principal note and the interest thereon, being all of said principal sum of fourteen thousand and four hundred dollars, and interest thereon at the rate of eight per cent. per annum from the second day of January, A. D. 1874, and the same remains unpaid.

And whereas, the legal holder of said note has made application to the undersigned, the trustee in said trust deed named, to sell and dispose of said premises under the power in said trust deed, and for the purposes therein stated.

Now, therefore, notice is hereby given, that I, the undersigned trustee, as aforesaid, in execution of the powers by said trust deed in me vested, and in pursuance of the terms thereof, and for the purposes therein stated, will, on Monday, the 28th day of February, A. D. 1876, at the hour of two (2) o'clock P. M., at the north door of the court house, situated at the southeast corner of Adams and LaSalle streets, in the city of Chicago and State of Illinois, being the north door on Adams street nearest LaSalle street of said court house, sell and dispose of the premises above and in said trust deed described, and all the right, title, benefit, and equity of redemption of the said Henry Titus, his heirs or assigns therein, at public auction, for the highest and best price the same will bring in cash.

SAMUEL WING, Trustee.

Chicago, January 28th, 1876. 19-22

OBADIAH JACKSON,
Attorney.

TRUSTEE'S SALE.—WHEREAS, JAMES L CAMPbell and Sophronia R. Campbell, his wife, of the city of Chicago, in the county of Cook and State of Illinois, by their certain trust deed, duly executed, acknowledged and delivered, bearing date the sixteenth day of October, A.D. 1874, and recorded in the recorder's office of Cook county, in the State of Illinois, in book 454 of records, at page 77, did convey unto William Loeb, as trustee, all the following described premises, situated in the county of Cook and State of Illinois, to wit:

Lots numbered forty-seven (47), forty-eight (48), forty-nine (49), and fifty (50), in F. W. and J. L. Campbell's subdivision of block two (2), of Morris' subdivision of the west half of the southwest quarter of section eighteen (18), township thirty-nine (39), N. range fourteen (14), east of the 3d P.M., to secure the payment of one principal promissory note for the sum of three thousand dollars, executed by James L. Campbell and payable to the order of himself, with interest thereon at the rate of ten per cent. per annum, one year after date and bearing date October the sixteenth, A. D. 1874.

And whereas it is provided in and by said trust deed, that in case of default in the payment of the said promissory notes, or either of them, or any part thereof, according to the tenor and effect of said notes, or in case of a breach of any of the covenants or agreements in said trust deed contained, then, on the application of the legal holder of said notes, or either of them, it should and might be lawful for the undersigned, William Loeb, trustee, to sell and dispose of the said premises, and all the right, title, benefit and equity of redemption of said James L. Campbell and Sophronia R. Campbell, their heirs and assigns therein, at public auction, at the court house door in the city of Chicago, in the county of Cook and State of Illinois, or on said premises, for the highest and best price the same will bring in cash, thirty days previous notice of such sale having been given by publication once in each week, for four successive weeks in any newspaper at that time published in the said city of Chicago, and to make, execute and deliver to the purchaser or purchasers at such sale, good and sufficient deed or deeds of conveyance for the premises sold, and out of the proceeds of such sale to pay all costs and expenses incurred in advertising and selling said premises, including attorney's fees, also the principal and interest on said note.

And whereas, it is further provided in said trust deed, that in case of default in any of said payments of principal or interest, according to the tenor and effect of said promissory notes, or either of them, as aforesaid, then and in that case the whole of said principal sum thereby secured, and the interest thereon to the time of sale, may at once, at the option of the legal holder thereof, become due and payable, and the said premises be sold, in the manner and with the same effect as if the said indebtedness had matured.

And whereas, default has been made in the payment of the principal and interest of said note and the legal holder of said note has made application to the undersigned, the trustee in said trust deed named, and requested him as such trustee to sell and dispose of said premises under the power in said trust deed, and for the purposes therein stated.

Now, therefore, public notice is hereby given, that in pursuance of said trust deed, and by virtue of the power and authority to me granted in and by the same, and by virtue of the statute of the State, I, the undersigned, will on Tuesday, the seventh day of March, A. D. 1876, at ten o'clock, A.M., at the north front door of the court house in the said city of Chicago, sell and dispose of the premises above and in said trust deed described, and all the right, title, benefit and equity of redemption of the said James L. Campbell and Sophronia R. Campbell, their heirs or assigns therein, at public auction, for the highest and best price the same will bring in cash.

Dated this 29th day of January, 1876.

WILLIAM LOEB, Trustee.

OBADIAH JACKSON, Attorney for Trustee. 20-23

PEDRICK & MALTMAN,
Attorneys, 25 Ashland Block.

IN THE COUNTY COURT OF COOK COUNTY, State of Illinois. In the matter of the final settlement of the estate of Joseph Clarke, deceased. To Sarah Clarke and Anthony Lewis Clarke, residing at Providence, Pennsylvania, heirs of said deceased:

You are hereby notified that I shall be and appear in the above named court in the city of Chicago, Illinois, at ten o'clock A. M., on the 3d day of April next, to render my final settlement, as administrator of said estate, and to ask for my discharge, when and where you may contest said settlement and discharge, if you see fit. By direction of said court.

Chicago, February 15th, 1876.

NICHOLAS MARTIN,
Administrator of said Estate.

PEDRICK & MALTMAN, Attys. 22 22

HENRY M. SHEPARD,
Attorney, Room 19, 152 Dearborn St.

TRUSTEE'S SALE.—WHEREAS, JONATHAN C. Mitchell (a widower), made his certain trust deed, dated May 1, A. D. 1875, and recorded in the recorder's office of Cook county, Illinois, in book 491 of records, at page 587, for the purpose of securing the payment, five years after the date thereof, of the sum of twenty-one thousand dollars, money loaned, with interest at the rate of ten per cent. per annum, payable semi annually, according to the tenor of his twenty-one certain bonds for one thousand dollars each, and of his ten interest coupons, for the sum of fifty dollars each, attached to each of said bonds, all bearing even date with said trust deed, and did thereby convey unto the undersigned, Henry M. Shepard all the premises, situate in the county of Cook, and State of Illinois, known and described as follows, to wit: The north seventy-three (73) feet of lots seven (7) and eight (8), and the south twenty seven (27) feet of lots five (5) and six (6), in block eight (8), in Cleaverville, according to the plat of said Cleaverville, recorded in the recorder's office of Cook county aforesaid in book 143 of maps, at page 99, all of said premises being situated in the northwest quarter of fractional section two (2), in township thirty-eight (38) north, range fourteen (14), east of the third (3d) principal meridian, in trust, to wit, upon the trusts created by and specified in said trust deed, to which reference is hereby made.

And, whereas default having been made in the payment of ten hundred and fifty dollars, semi-annual interest due on said bonds, November 1, A. D. 1875, according to the tenor of said coupons, and said default having continued for more than the time limited by said trust deed, and Rufus E. Holmes, the legal holder of said bonds, having exercised the option conferred upon him, as legal holder of said bonds, by the terms of said trust deed, as well, also, as by the terms of said bonds themselves, and declared the principal sums of said bonds, and the interest accrued thereon, due and payable, and more than the time limited by said trust deed for the payment thereof having elapsed, and default herein being made, and still continuing, and there being claimed to be due twenty-one thousand dollars, and interest thereon from May 1, A.D. 1875, at the rate of ten per cent. per annum, besides interest on said coupons, for ten hundred and fifty dollars, from November 1, A. D. 1875, and the said legal holder of said bonds and coupons having applied to the undersigned to sell said premises, in order to execute the trusts created by said trust deed.

Now, therefore, public notice is hereby given, that I, the undersigned, Henry M. Shepard as trustee, named in said trust deed, in pursuance of the power thereby in me vested, and in order to execute the trusts ther by created, will, on Wednesday, the 15th day of March, A.D. 1876, at twelve (12) o'clock, noon, of said day, at the south door of the Cook County Criminal Court-house, on Michigan street, in the city of Chicago, and county of Cook, and State of Illinois, sell at public auction, to the highest and best bidder, for cash, the premises in said trust deed, and hereinbefore described, and all the right, title, benefit and equity of redemption of the said Jonathan C. Mitchell, his heirs or assigns therein, or so much thereof as may be necessary.

Chicago, February 11, 1876.

21-24 HENRY M. SHEPARD, Trustee.

ELLIS & FRAKE,
Attorneys, 36 Metropolitan Block.

TRUSTEE'S SALE.—WHEREAS, JACOB RINN, Jr. and Lizzie M. Rinn, his wife, of the town of Evanston, in the county of Cook and State of Illinois, by their certain trust deed, duly executed, acknowledged and delivered, bearing date the fourth day of June, A. D. 1874, and recorded in the recorder's office of Cook county, in the State of Illinois, in book 434 of records, at page 49, did convey unto William P. Kimball, as trustee, all the following described premises, situated in the county of Cook and State of Illinois, to wit:

Lots three (3) and four (4), in block five (5) of the Ridge subdivision in South Evanston, of the south half ($s\frac{1}{2}$) of the southeast quarter ($se\frac{1}{4}$), and the south two hundred and seventeen and 90-100 (s. 217 90-100) feet of the north half ($n\frac{1}{2}$) of the southeast quarter ($se\frac{1}{4}$) of the northeast quarter ($ne\frac{1}{4}$) of section twenty-four (s. 24), town forty-one north (41), range thirteen east (r. 13 e.), being a strip of land 53⅓ rods wide off of the entire south end of the east half ($e\frac{1}{2}$) of the northeast quarter ($ne\frac{1}{4}$) of said section twenty-four (24), to secure the payment of one principal promissory note for the sum of two thousand ($2,000) dollars, executed by the said Jacob Rinn, Jr., and payable to the order of Charles Stinson, dated June 4th, 1874, and payable in five (5) years from date, with interest at the rate of ten per cent. per annum payable semi-annually, as evidenced by ten interest notes for one hundred dollars each ($100), due respectively in 6, 12, 18, 24, 30, 36, 42, 48, 54, and 60 months from date.

And whereas, it is provided in and by said trust deed, that in case of default in the payment of the said promissory notes, or either of them, or any part thereof, according to the tenor and effect of said notes, then, on the application of the legal holder of said notes, or either of them, for the undersigned to sell and dispose of the said premises, and all the right, title, benefit and equity of redemption of said party of the first part, his heirs and assigns therein, at public auction, at either door of any building which then may be occupied as a court house in the city of Chicago, and State of Illinois, for the highest and best price the same will bring in cash, three weeks notice having been previously given of the time and place of such sale, by advertisement in any newspaper at that time published in the said city of Chicago, and to make, execute and deliver to the purchaser or purchasers at such sale, good and sufficient deed or deeds of conveyance for the premises sold, and out of the proceeds or avails of such sale, after first paying all costs of advertising, sale and conveyance, including the reasonable fees and commission of said trustee, and all other expenses of said trust, then to pay the principal of said notes whether due and payable by the terms thereof or not, and interest to the time of such sale.

And whereas, it is further provided in said trust deed, that in case of default in any of said payments of principal or interest, according to the tenor and effect of said promissory notes, or either of them, as aforesaid, then and in that case the whole of said principal sum thereby secured, and the interest thereon to the time of sale may at once, at the option of the legal holder thereof, become due and payable, and the said premises be sold in the manner and with the same effect as if the said indebtedness had matured.

And whereas, default has been made in the payment of the interest note secured by said trust deed, due 18 months after date, and the legal holder of said notes has elected to declare the said principal note due and payable, and has made application to the undersigned, the trustee in said trust deed named, and requested him, as such trustee, to sell and dispose of said premises under the power in said trust deed, and for the purposes therein stated.

Now, therefore, public notice is hereby given, that in pursuance of said trust deed, and by virtue of the power and authority to me granted in and by the same, and by virtue of the statute of the State, I, the undersigned, will, on Thursday, the sixteenth day of March, A.D. 1876, at ten o'clock A. M., at the west door of the north doors of the court house, on Adams street, in the said city of Chicago, sell and dispose of the premises above and in said trust deed described, and all the right, title, benefit, and equity of redemption of the said Jacob Rinn, Jr., and Lizzie N. Rinn, their heirs or assigns therein, at public auction, for the highest and best price the same will bring in cash.

Dated February 11th, 1876.

WILLIAM P. KIMBALL, Trustee.

ELLIS & FRAKE, Attys. for Trustee.

The above property has been sold by Jacob Rinn, Jr., the purchaser assuming the said incumbrance. 21-24

OPTION CONTRACTS.—The opinion of the Supreme Court of this State, in pamphlet form, in the Chicago Board of Trade case, involving the validity of option contracts, will be sent to any address, postage paid, upon receipt of thirteen cents.

W. J. DURHAM.
Attorney, 133 LaSalle Street.

TRUSTEE'S SALE.—WHEREAS, JEAN B. A. LAfont, and M. Mathilda Lafont, his wife of the county of Cook and State of Illinois, by their certain trust deed, duly executed, acknowledged and delivered, bearing date the 22d day of August, A. D. 1873, and recorded in the recorder's office of Cook county, in the State of Illinois, in book 310 of records, at page 5, did convey unto Francis H. Kales, as trustee, all those certain premises situate in the county of Cook and State of Illinois, and known and described as follows, to wit:

Lot thirty-six in Cossitt's addition to Chicago, being a subdivision of the east ten and 186-1000 acres of the north half of the north half of the southeast quarter of section twelve, township thirty-nine north, of range thirteen east of the third principal meridian, to secure the payment of the promissory note of the said Jean B A. Lafont, bearing even date therewith, for the sum of six hundred dollars payable to the order of himself, and indorsed by him in blank, with interest thereon at the rate of ten per cent. per annum payable semi-annually, on the first days of January and July in each year, (except the last installment which is payable on the 22d day of August, 1878), until said principal sum is paid, which said several installments of interest were further evidenced by ten certain interest notes, or coupons, of even date with said note, numbered from one to ten inclusive, and being for the sum of thirty dollars each, excepting number one, which was for the sum of $21 33-100 and number ten, which is for the sum of $38 67-100, payable to the order of said Jean B. A. Lafont, and indorsed in blank, without grace. Both principal and interest payable at the office of the Illinois Trust and Savings Bank, at Chicago, Illinois.

And whereas, default has been made in payment of fifteen and 50-100 dollars of the one of the said interest notes falling due on the first day of July, A.D. 1875, and all of the one falling due on the first day of January, A.D. 1876, and also in the payment of the taxes on said premises for the years 1873, 1874 and 1875, and the holder of said notes having declared the whole of said principal sum now due and payable under and pursuant to the terms and conditions of said trust deed, and there is now due and unpaid thereon the sum of six hundred and forty-five and 50-100 dollars, and interest on fifteen and 50-100 dollars, at the rate of ten per cent. from July 1st, 1875, and on the sum of six hundred and thirty dollars from January 1st, 1876, besides the taxes aforesaid.

And whereas, the holder and owner of said notes has requested and directed me to proceed to enforce the provisions of said deed of trust as therein contained, to make the amount unpaid on said notes, and other sums provided for in said deed of trust.

Now therefore, public notice is hereby given that under and in pursuance of the powers in me vested by the said deed of trust, and in conformity with the requirements thereof, I shall, on the twenty-first day of March, 1876, at one o'clock in the afternoon, at the north door on Washington street, of the Chamber of Commerce, situated on the southeast corner of LaSalle and Washington streets, in the city of Chicago, in said county, sell and dispose of all the above described lands and premises, with the appurtenances thereunto belonging, and all the right, title, benefit and equity of redemption of the said Jean B. A. Lafont, and M. Mathilda Lafont, their heirs and assigns therein, at public auction, to the highest bidder for cash, and will apply the proceeds thereof in the manner directed in said deed of trust, to the record of which reference may be had for more full information as to my powers and duties in the premises.

Dated February 12th, 1876.

FRANCIS H. KALES, Trustee, etc.

W. J. DURHAM, Attorney. 21-22-25

TRUSTEE'S SALE.—WHEREAS, MICHAEL W. Manning, of the county of Cook, in the State of Illinois, and Harriet B., his wife, by their certain trust deed, duly executed, acknowledged and delivered, bearing date September 1st, A.D. 1874, and recorded in the recorder's office of said Cook county September 7th, 1874, in book 420 of records, on page 280, conveyed to the undersigned the south twenty-one (21) feet of lot five (5) of the subdivison of lots five (5), six (6), seven (7), eight (8), nine (9), ten (10), eleven (11), and part of twelve (12) in Thomas' subdivision of block eighty-seven (87), in the Canal Trustees' subdivision of the west half of section twenty-seven (27), township thirty-nine (39) north, range fourteen (14) east of the 3d P. M., situate in the city of Chicago, in the county and State aforesaid, to secure one certain promissory note given by said Michael W. Manning, for the sum of $1,000, payable one year after date, with interest at the rate of ten per cent. per annum, payable semi-annually.

And whereas, said trust deed provides that in case of default in the payment of said note, or the interest thereon, the undersigned shall sell the premises therein described in manner and form and for the purposes therein provided.

And whereas default has been made in the payment of part of said note and interest, and there is now due thereon the sum of $ 00, with interest from November 10th, 1875, at ten per cent. per annum, said note and trust deed having been assigned to James A. Thompson.

Now, therefore, public notice is hereby given, that the undersigned, in pursuance of the power and authority in him by said trust deed vested, will sell and dispose of the premises therein and hereinbefore described, and also all the right, title, benefit and equity of redemption of said Michael W. Manning and Harriet B., his wife, their heirs and assigns therein, at public auction, at the westernmost north door of the court house situate on the southeast corner of Adams and LaSalle streets, in the city of Chicago aforesaid, on Monday, the twentieth day of March, 1876, at 1 o'clock P. M., to the highest bidder therefor, for cash.

HUGH A. WHITE, Trustee.

Dated Chicago, February 12th, 1876. 21-24

TRUSTEE'S SALE.—WHEREAS, CHARLES B. Tolford, of the city of Chicago, in the county of Cook and State of Illinois, by his certain trust deed, duly executed, acknowledged and delivered, bearing date May 2, 1873 and recorded in the recorder's office of Cook county aforesaid May 23, A. D. 1874, in book 402 of records page 232, conveyed to the undersigned all those certain lots, pieces, or parcels of land or ground situate in the town of Lake in the county of Cook and State of Illinois, and known or described as lots one (1), two (2), three (3), eleven (11), and twelve (12), in the subdivision by William M. Whitney and Isaac Claflin of lot two (2) of the assessor's subdivision of the south quarter ($\frac{1}{4}$) of the southwest quarter ($\frac{1}{4}$) of section four (4), in township thirty-eight (38), north of range fourteen (14), east of the third (3d) principal meridian, to secure payment of his two certain promissory notes, bearing even date herewith for the sum of $400 00, each payable in three and five years after date respectively, with eight (8) per cent. interest payable annually.

And whereas, said trust deed provides, that in case of the default in the payment of said notes, or either of them, or any part of principal or interest according to the tenor and effect of said notes, the undersigned, upon the application of the legal holder thereof, shall sell and dispose of said premises in manner and form and for the purposes in said trust deed provided, as by reference to the records still remaining in the recorder's office aforesaid will fully appear.

And default having been made in the payment of interest due on said notes, May 2, A.D. 1875, the legal holder of said notes has elected and declared the whole of said principal sum of $400.00, and the interest accrued thereon, due and payable,

And whereas, there is now due and payable, according to the terms of said notes and said trust deed, for principal and interest, $409.33,

Now, therefore, public notice is hereby given that the undersigned, in pursuance of said application and of the power and authority in him by said trust deed vested, will sell and dispose of the premises in said trust deed and hereinbefore described, at public auction at the north door of the "Chamber of Commerce Building," situate on the southeast corner of LaSalle and Washington streets in the city of Chicago aforesaid, at 10 o'clock A. M., on Tuesday, the 15th day of February, A.D. 1876.

This sale is made subject to a first encumbrance of $2,000.00 due Jan'y 10th, 1878.

Chicago, Jan'y 18, 1876.

ISAAC CLAFLIN, Trustee.

NOTICE.—Chas. B. Tolford having disposed of said lots he is not responsible for the payment of said notes.

The above sale is adjourned to 10 o'clock A. M. on Tuesday, March 7th, 1876. 21-23

TRUSTEE'S SALE.—WHEREAS, ISAAC PFLAUM, of the city of Chicago, in the county of Cook and State of Illinois, by his certain trust deed, duly executed, acknowledged and delivered, bearing date the tenth day of July, A. D. 1872, and recorded in the recorder's office of Cook county, in the State of Illinois, in book 51 of records, at page 257, did convey unto Francis H. Kales as trustee, all the following described premises, situated in the county of Cook and State of Illinois, to wit:

Sub-lot one (1) of lots thirty-two (32), thirty-three (33) and thirty-four (34), in block three (3), in Wentworth's subdivision of the south sixty (60) acres of the west half (W. ½) of northwest quarter (N. W. ¼) of section thirty-four (34), in township thirty-nine (39), north range fourteen, (14) east of the third (3d) principal meridian (P. M.), to secure the payment of his principal promissory note for the sum of four thousand ($4,000) dollars, executed by the said Isaac Pflaum, and payable to the order of the State Savings Institution, on the first day of July, A. D. 1875, at its office in the city of Chicago, with interest thereon at the rate of ten per cent. per annum after maturity.

And, whereas, it is provided in and by said trust deed, that in case of default in the payment of the said promissory note, according to the tenor and effect thereof, then, on the application of the legal holder of said note, it should and might be lawful for the undersigned, Francis H. Kales, to sell and dispose of the said premises, and all the right, title, benefit, and equity of redemption of said Isaac Pflaum, his heirs and assigns therein, at public auction, at the door of the court house, to wit: the north door nearest LaSalle street of the building now used as a court house, on the southeast corner of LaSalle and Adams streets, in the city of Chicago, in the county of Cook and State of Illinois, for the highest and best price the same will bring in cash, twenty (20) days previous notice of such sale having been given by publication in a newspaper at that time published in the said county of Cook, and to make, execute, and deliver to the purchaser or purchasers at such sale, good and sufficient deed or deeds of conveyance for the premises sold, and out of the proceeds of such sale to pay all costs and expenses incurred in advertising and selling said premises, including attorney's fees, also the principal and interest on said note.

And whereas, default has been made in the payment of the said note, which has matured, for the sum of four thousand ($4,000) dollars, no part of the same having been paid, and the legal holder of said note has made application to the undersigned, the trustee in said trust deed named, and requested him as such trustee to sell and dispose of said premises under the power in said trust deed, and for the purposes therein stated.

Now, therefore, public notice is hereby given, that in pursuance of said trust deed, and by virtue of the power and authority to me granted in and by the same, I, the undersigned, will, on Monday the twentieth (20th) day of March A. D. 1876, at twelve o'clock, noon, at the north door nearest LaSalle street, of the building now used as a court house, on the southeast corner of LaSalle and Adams streets, in the said city of Chicago, sell and dispose of the premises above and in said trust deed described, and all the right, title, benefit and equity of redemption of the said Isaac Pflaum, his heirs or assigns therein, at public auction, for the highest and best price the same will bring in cash.

Dated February 11th, 1876.

FRANCIS H. KALES, Trustee.

AYER & KALES, Attorneys for Trustee.

On the 24th day of March, 1874, I sold the above property, and the purchaser assumed the payment of the above encumbrance.

10-14 21-25 ISAAC PFLAUM.

TRUSTEE'S SALE.—WHEREAS, ISAAC PFLAUM, of the city of Chicago, in the county of Cook and state of Illinois, by his certain trust deed, duly executed, acknowledged, and delivered, bearing date the tenth day of July, A. D. 1872, and recorded in the recorder's office of Cook county, in the state of Illinois, in book 51 of records at page 256, did convey unto Francis H. Kales, as trustee, all the following described premises, situated in the county of Cook and state of Illinois, to wit:

Sub-lot two (2) of lots thirty-two (32), thirty-three (33), and thirty-four (34), in block three (3), in Wentworth's subdivision of the south sixty acres of the west half (W. ½) of northwest quarter (N. W. ¼) of section thirty-four (34), in township thirty-nine (39), north range fourteen (14), east of the third (3d) principal meridian (P. M.), to secure the payment of his principal promissory note for the sum of four thousand ($4,000) dollars, executed by the said Isaac Pflaum, and payable to the order of The State Savings Institution on the first day of July, A. D. 1875, at its office in the city of Chicago, with interest thereon at the rate of ten per cent. per annum after maturity.

And whereas, it is provided in and by said trust deed, that in case of default in the payment of the said promissory note, according to the tenor and effect thereof, then, on the application of the legal holder of said note, it should and might be lawful for the undersigned. Francis H. Kales, to sell and dispose of the said premises, and all the right, title, benefit, and equity of redemption of said Isaac Pflaum, his heirs and assigns therein, at public auction, at the door of the court house, to wit, the north door nearest LaSalle street of the building now used as a court house, on the southeast corner of LaSalle and Adams streets, in the city of Chicago, in the county of Cook, and State of Illinois, for the highest and best price the same will bring in cash, twenty (20) days' previous notice of such sale having been given by publication in a newspaper at that time published in the said county of Cook, and to make, execute, and deliver to the purchaser or purchasers at such sale, good and sufficient deed or deeds of conveyance for the premises sold, and out of the proceeds of such sale to pay all costs and expenses incurred in advertising and selling said premises, including attorney's fees, also the principal and interest on said note.

And whereas, default has been made in the payment of the said note, which has matured, for the sum of four thousand ($4,000) dollars, no part of the same having been paid, and the legal holder of said note has made application to the undersigned, the trustee in said trust deed named, and requested him as such trustee to sell and dispose of said premises under the power in said trust deed, and for the purposes therein stated.

Now, therefore, public notice is hereby given, that in pursuance of said trust deed, and by virtue of the power and authority to me granted in and by the same, I, the undersigned, will, on Monday, the twentieth (20th) day of March A. D. 1876, at twelve o'clock, noon, at the north door nearest LaSalle street of the building now used as a court house, on the southeast corner of LaSalle and Adams streets, in the said city of Chicago, sell and dispose of the premises above and in said trust deed described, and all the right, title, benefit and equity of redemption of the said Isaac Pflaum, his heirs or assigns therein, at public auction, for the highest and best price the same will bring in cash.

Dated, February 11th, 1876.

FRANCIS H. KALES, Trustee.

AYER & KALES, Attys for Trustee.

On the 24th day of March, 1874, I sold the above property and the purchaser assumed the payment of the above encumbrance.

10-14 21-25 ISAAC PFLAUM.

JOHN C. BARKER,

Attorney, Room 1, 188 Madison Street.

ESTATE OF JOHN H. CLYBOURN, DECEASED.—Notice is hereby given to all persons having claims and demands against the estate of John H. Clybourn, deceased, to present the same for adjudication and settlement at a regular term of the County court of Cook county, to be holden at the court house, in the city of Chicago, on the second Monday of March, A. D. 1876, being the 13th day thereof.

Chicago, January 13th, A.D. 1876.

SOPHIE CLYBOURN, Administratrix.

JOHN C. BARKER, Attorney. 17-22

ESTATE OF CATHARINE BLATTNER, DECEASED.—Notice is hereby given to all persons having claims and demands against the estate of Catharine Blattner, deceased, to present the same for adjudication and settlement at a regular term of the County court of Cook county, to be holden at the court house in the city of Chicago, on the second Monday of March, A. D. 1876, being the 13th day thereof.

Chicago, January 13, A. D. 1876.

MICHAEL C. KUNKEL, Administrator.

JOHN C. BARKER, Atty. 17-22

TRUSTEE'S SALE.—WHEREAS, CHARLES J. F. Kraft, by trust deed dated November 8th, 1874, and recorded in book 485 of records, page 88, conveyed the premises in Chicago, Cook county, Illinois, to wit:

Lot number six (6), in Call & Kraft's subdivision of the west one hundred and seventy-six and 5 10 feet (176 5-10) of the north half of block fifteen, Union Park second addition to Chicago unto the undersigned, in trust, to secure three (3) notes of the said Charles J. F. Kraft, of even date with said trust deed, each for the sum of six hundred and sixteen and sixty-seven hundredths dollars (616 67-100) due and payable respectively, two, three and four years from date, with interest after 1st of January, 1875, at 8 per cent. per annum, payable semi-annually, and 10 per cent. after maturity, and payable to the order of Samuel D. Weakley.

And whereas, said trust deed provides that in case of default in the payment of the interest on said notes as it falls due, the legal holder thereof may, at his option, declare the principal of said notes due and payable, as well as the interest, and default having been made in the payment of interest due on the 1st of July, 1875, and 1st January, 1876, which default still continues, the legal holder of said notes having declared the whole of said notes, together with the interest thereon, amounting to 2,014.41 dollars, due and payable, and has applied to the undersigned to sell and dispose of said premises in said trust deed conveyed, as therein provided.

Now, therefore, public notice is hereby given that the undersigned will, on Saturday the 18th day of March, 1876, between 11 and 12 o'clock, noon, at the northeast corner of the court house square, in Chicago, Cook county, Illinois, under and by virtue of the powers by said trust deed conferred on him, sell and dispose of the above described premises at public auction to the highest and best bidder, for cash, and all the right, title, benefit and equity of redemption of the said Charles J. F. Kraft, his heirs and assigns therein.

The above premises are subject to a prior incumbrance of twenty-five hundred dollars ($2500).

WM. D. KERFOOT, Trustee.

February 12th, 1876. (6) 21-24

CHARLES M. STURGES,

Attorney, Room 7, Methodist Church Block, Chicago, Ill.

WHEREAS, WILLIAM W. CRAWFORD, PETER Semonin, Fletcher G. Welch and Lyne S. Davison, being indebted unto J. Peter & Co., of Louisville, Kentucky, in the sum of three thousand one hundred and forty-seven dollars and eighty-two cents, to secure the payment thereof, made their promissory note for that sum, bearing date of the twentieth day of October, A.D. 1874, payable to the order of said J. Peter & Co., on the twentieth day of October, A.D. 1875, with interest at the rate of ten per centum per annum until paid, and did, with their respective wives, to wit, Rosanna Crawford, wife of said William W. Crawford, Martha Ann Semonin, wife of said Peter Semonin, Amanda M. Welch, wife of said Fletcher G. Welch, and Nannie S. Davison, wife of said Lyne S. Davison, by their trust deed, of even date with said note, filed for record in the office of the recorder of Cook county, in the State of Illinois, on the ninth day of November, A.D. 1874, and recorded at page 266 of book 447 of records in said office, to secure the prompt payment of said note according to its tenor and effect, convey unto me, the undersigned, Albert R. Cooper, the premises therein and hereinafter described, in trust, among other things, that in case of default in the payment of said note, according to the tenor and effect thereof, the undersigned, Albert R. Cooper, should, on the application of the legal holders of said note, after having advertised such sale twenty days in a newspaper published in the city of Chicago, Cook county, State of Illinois, sell the said premises, or any part thereof, and all the right and equity of redemption of the grantors in said trust deed, their heirs, executors, administrators or assigns therein, at public vendue, to the highest bidder for cash, at the door of the court house of the county wherein said premises are situate, and at the time appointed in said advertisement, and should execute and deliver to the purchaser or purchasers, a deed or deeds for the conveyance in fee of the premises sold, and should apply the proceeds of such sale in the order and manner and for the purposes set forth in said trust deed: to the originals of which note and trust deed, now open to inspection in the custody of Charles M. Sturges, attorney at law, at room No. 7 in Methodist Church Block, in said city of Chicago, as well as to said record of said trust deed, reference is hereby had and made for full particulars of the provisions and contents of said note and trust deed.

And whereas, default has been made in the payment of said note, according to the tenor and effect thereof, so that there remains due and unpaid thereon the sum of three hundred and thirty-six dollars and fifty-four cents, with interest thereon at the rate of ten per cent. per annum from the first day of February, A. D. 1876.

And whereas, the legal holders of said note have made application to me, the undersigned, Albert R. Cooper, to advertise and sell said premises for the purposes and in pursuance of the provisions set forth in said trust deed.

Now, therefore, public notice is hereby given, that, for said purposes, and in pursuance of said provisions, I, the said Albert R. Cooper, on the twenty-first day of March, in the year of our Lord, one thousand eight hundred and seventy-six, at the hour of one o'clock in the afternoon of that day, at the door of the court house of the county of Cook in the State of Illinois, to wit, at the door which fronts on Adams street and is nearest to LaSalle street, of the building occupied as such court house, situate at the southeast corner of Adams street and LaSalle street, in the city of Chicago, in said Cook county, shall sell at public vendue, to the highest bidder for cash, the following described premises situate, lying and being in the county of Cook and State of Illinois, to wit: The southeast quarter of the southwest quarter of section eleven (11), in township thirty-eight (38) north, range thirteen (13) east of the third principal meridian, excepting a strip fifty (50) feet in width off of the east side thereof, granted as right of way to the Chicago, Danville and Vincennes Railroad; together with all and singular the tenements, hereditaments and appurtenances thereto belonging, or in anywise appertaining, and all the right and equity of redemption of the said grantors, their heirs, executors, administrators, or assigns therein.

Dated this twelfth day of February, A.D. 1876.

ALBERT R. COOPER, Trustee,

CHARLES M. STURGES, Atty. 13-18 21-26

TRUSTEE'S SALE.—WHEREAS, STEPHEN PALMER and Alice Palmer, his wife, grantors, made their certain deed of trust, dated the first day of December, A.D. 1874, and recorded in the recorder's office of Cook county, Illinois, in book 41 of records, at page 580, wherein they conveyed to the undersigned, as trustee, the premises hereinafter described, to secure payment of certain promissory notes made by said Stephen Palmer, of even date with said deed, one for the principal sum of $5,000, payable five years after date, and ten others for interest thereon, at ten per cent. per annum, payable at intervals of six months from and after the date thereof, for $250 each.

And default has been made in the payment of the interest note made payable twelve months after date, and application has therefore been made to said trustee to advertise and sell under said deed, in pursuance of its terms, and for the purposes therein expressed.

Now, therefore, notice is hereby given, that I shall sell at auction, for cash, at the north door of the court-house, nearest LaSalle street, situate at the southeast corner of the intersection of LaSalle and Adams streets, in the city of Chicago, at one o'clock in the afternoon, on the twenty-first day of March, A. D. 1876, said premises, to wit:

Lots two and three, in Thomas' subdivision of the west one hundred and fifty-two feet of block fifty-one, in the Canal Trustees' subdivision of section seven, township thirty-nine north, range fourteen, east of the third principal meridian, in the city of Chicago, county of Cook and State of Illinois, together with all the right, title, benefit, equity of redemption, and homestead exemption rights of said grantors, their heirs and assigns therein.

GEORGE SCOVILLE, Trustee.

Chicago, February 12, 1876. 21-26

TRUSTEE'S SALE.—WHEREAS, CHARLES J. F. Kraft, by trust deed dated 8th November, 1874, and recorded in book 485 of records, page 86, conveyed the premises in Chicago, Cook county, Illinois, to wit:

Lot number nine (9), in Call & Kraft's subdivision of the West one hundred and seventy-six and 5-10 feet (176 5-10), of the north half of block fifteen, Union Park second addition to Chicago, unto the undersigned, in trust, to secure three notes of said Charles J. F. Kraft, of even date with said trust deed, each for the sum of six hundred and sixteen and 67-100 dollars (616 67-100), due and payable two, three, and four years from date, respectively, with interest after first January, 1875, at 8 per cent. per annum, payable semi-annually, and 10 per cent. after maturity, and payable to the order of Samuel D. Weakley.

And whereas, said trust deed provides, that in case of default in the payment of the interest on said notes as it falls due, the legal holder thereof may, at his option declare the principal as well as the interest, of said notes due and payable, and default having been made in the payment of the interest which was due July 1st, 1875, and on 1st Jan'y, 1876, and which default still continues, the legal holder of said notes having declared the principal and interest thereon, amounting to $2,014.41-100 dollars now due and payable, and has applied to the undersigned to sell said premises in said trust deed conveyed, as therein provided.

Now, therefore, public notice is hereby given that the undersigned will, on Saturday, the 18th day of March, 1876, between the hours of 11 and 12 o'clock noon, at the northeast corner of the court house square, in the city of Chicago, Cook county, Illinois, under and by virtue of the powers by said trust deed conferred on him, sell and dispose of the above described premises at public auction, to the highest and best bidder, for cash, and all the right, title, benefit and equity of redemption of the said Charles J. F. Kraft, his heirs and assigns therein.

The above premises are subject to a prior incumbrance of twenty-five hundred dollars.

WM. D. KERFOOT, Trustee.

Feb. 12th, 1876. (9) 21-24

TRUSTEE'S SALE.—WHEREAS, CHARLES J. F. Kraft, by trust deed dated 8th, November 1874, and recorded in book 485 of records, page 87, conveyed the premises in Chicago, Cook county, Illinois, to wit: Lot number eight (8) in Call & Kraft's subdivision of the west one hundred and seventy-six and 5-10 feet (176 5-10) of the north half of block fifteen, Union Park second addition to Chicago, unto the undersigned, in trust, to secure three notes of said Charles J. F. Kraft, of even date with said trust deed, each for the sum of six hundred and sixteen and 67-100 dollars (616.67), due and payable, respectively, two, three and four years from date, with interest after 1st Jan'y, 1875, at 8 per cent per annum, payable semi-annually, and 10 per cent. per annum after maturity, and payable to the order of Samuel D. Weakley.

And whereas, said trust deed provides, that in case of default in the payment of the interest on said notes as it falls due, the legal holder thereof may, at his option, declare the principal, as well as the interest thereof, due and payable, and default having been made in the payment of the interest due on 1st July, 1875, and 1st January, 1876, which default still continues, the legal holder of said notes having declared the whole of said notes and interest, amounting to 2014.41 dollars, due and payable, and has applied to the undersigned to sell said premises in said trust deed conveyed, as therein provided.

Now, therefore, public notice is hereby given, that the undersigned will, on Saturday the 18th day of March, 1876, between the hours of 11 and 12 o'clock noon, at the northeast corner of the court house square, in Chicago, Cook county, Illinois, under and by virtue of the powers by said trust deed conferred on him, sell and dispose of the above described premises, at public auction, to the highest and best bidder for cash, and all the right, title, benefit, and equity of redemption of the said Charles J. F. Kraft, his heirs and assigns therein.

The above described premises are subject to a prior mortgage or incumbrance of twenty-five hundred dollars.

WM. D. KERFOOT, Trustee.

February 12th, 1876. (8)21-24

TRUSTEE'S SALE.—WHEREAS, CHARLES J. F. Kraft, by trust deed dated 8th November, 1874, and recorded in book 485 of records, page 89, conveyed the premises in Chicago, Cook county, Illinois, to wit;

Lot number ten (10) in Call & Kraft's subdivision of the west one hundred and seventy-six and 5-10 feet (176 5-10) of the north half of block fifteen (15), Union Park second addition to Chicago, unto the undersigned in trust, to secure three notes of the said Charles J. F. Kraft, of even date with said trust deed, each for the sum of six hundred and sixteen and 67-100 dollars (616 67-100) due and payable two, three and four years from date respectively, with interest from the 1st day of January, 1875, at 8 per cent. per annum, payable semi-annually, and 10 per cent. after maturity, and payable to the order of Samuel D. Weakley.

And whereas, said trust deed provides that in case of default in the payment of the interest on said notes as it falls due, the legal holder thereof may, at his option, declare the principal as well as the interest due and payable, and default having been made in the payment of the interest due on the 1st July, 1875, and 1st January, 1876, which default still continues, the legal holder of said notes having declared the whole amount of said notes and interest thereon, amounting to 2,014.41 dollars, now due and payable, and has applied to the undersigned to sell said premises in said trust deed conveyed, as therein provided.

Now, therefore, public notice is hereby given that the undersigned will, on Saturday the 18th day of March, 1876, between the hours of 11 and 12 noon, at the northeast corner of the court house square, in Chicago, Cook county, Illinois, under and by virtue of the powers by said trust deed conferred on him, sell and dispose of the above described premises at public auction, to the highest and best bidder, for cash, and all the right, title, benefit and equity of redemption of the said Charles J. F. Kraft, his heirs and assigns therein.

The above premises are subject to a prior incumbrance of three thousand dollars ($3,000).

WM. D. KERFOOT, Trustee.

February 12, 1876. (10)21-24

TRUSTEE'S SALE.—WHEREAS, CHARLES J. F. Kraft, by trust deed dated 8th November, 1874, and recorded in book 485 of records, page 48, conveyed the premises in Chicago, Cook county, Illinois, to wit:

Lot number seven (7) in Call & Kraft's subdivision of the west one hundred and seventy six and 5-10 feet (176 5-10) of the north half of block fifteen (15) Union Park second addition to Chicago, unto the undersigned in trust, to secure three notes of said Charles J. F. Kraft, of even date with said trust deed, each for the sum of six hundred and sixteen and sixty-seven one-hundredths dollars ($616.-67) due and payable respectively two, three and four years from date, with interest from 1st Jan., 1875, at 8 per cent. per annum, payable semi-annually and 10 per cent. per annum after maturity, said notes payable to the order of Samuel D. Weakley.

And whereas, said trust deed provides that in case of default in the payment of the interest on said notes as it falls due, the legal holder thereof may, at his option, declare the principal of said notes, as well as the interest due and payable.

And default having been made in the payment of the interest due on the 1st of July, 1875, and 1st Jan'y, 1876, which default still continues; the legal holder of said notes having declared the whole of said notes, principal and interest, amounting to 2,014.41 dollars, due and payable, and has applied to the undersigned to sell said premises in said trust deed conveyed, as therein provided.

Now, therefore, public notice is hereby given that the undersigned will, on Saturday, the 18th day of March, 1876, between the hours of 11 and 12 o'clock, noon, at the northeast corner of the court house square, in Chicago, Cook county, Illinois, under and by virtue of the powers by said trust deed conferred on him, sell and dispose of the above described premises at public auction to the highest and best bidder for cash, and all the right, title, benefit and equity of redemption of the said Charles J. F. Kraft, his heirs and assigns therein.

The above premises are subject to a prior incumbrance of twenty-five hundred dollars.

WM. D. KERFOOT, Trustee.

Feb'y 12th, 1876. (7)21-24

TRUSTEE'S SALE.—WHEREAS, CHARLES J. F. Kraft, by trust deed dated November 8th, 1874, and recorded in book 485 of records, page 85, conveyed the premises in Chicago, Cook county, Illinois, to wit:

Lot number one (1) in Call & Kraft's subdivision of the west one hundred and seventy six and 5-10 feet (176 5-10) of the north half of block fifteen, Union Park second addition to Chicago, unto the undersigned in trust, to secure three notes of said Charles J. F. Kraft, of even date with said trust deed, each for six hundred and sixteen and sixty-seven-hundredths dollars ($616.67) due and payable respectively two, three and four years from date, with interest at 8 per cent. per annum, payable semi-annually from the 1st day of Jan'y, 1875, and 10 per cent. after maturity, and payable to the order of Samuel D. Weakley.

And whereas, said trust deed provides that in case of default in the payment of the interest on said notes as it falls due, the legal holder of said notes has the option of declaring the whole of the principal as well as the interest thereon, due and payable. And the holder having declared the principal and interest, amounting to 2,014.41 dollars, now due and payable.

And whereas, default has been made in the payment of interest, no part of which has been paid, and the legal holder of said notes has applied to the undersigned to sell said premises in said trust deed conveyed, as therein provided.

Now, therefore, public notice is hereby given that the undersigned will, on Saturday, the 18th day of March, 1876, at 11 o'clock, A. M., at the northeast corner of the court house square, of Cook county, Illinois, under and by virtue of the powers by said trust deed conferred on him, sell and dispose of the above described premises at public auction to the highest and best bidder for cash, and all the right, title, benefit and equity of redemption of the said Charles J. F. Kraft, his heirs and assigns therein.

The above premises are subject to a prior incumbrance of twenty-five hundred dollars.

WM. D. KERFOOT, Trustee.

Feb'y 12th, 1876. (1)21-24

TRUSTEE'S SALE.—WHEREAS, CHARLES J. F. Kraft, by trust deed dated November 8th, 1874, and recorded in book 485 of records, page 84, conveyed the premises in Chicago, Cook county, Illinois, to wit:

Lot number two (2), in Call & Kraft's subdivision of the west one hundred and seventy-six and 5 10 feet (176 5-10) of the north half of block fifteen, Union Park second addition to Chicago unto the undersigned, in trust, to secure part purchase money of said premises, evidenced by three notes of said Charles J. F. Kraft, of even date with said trust deed, each for the sum of six hundred and sixteen and sixty-seven hundredths dollars (616 67-100) due and payable respectively, two, three and four years from date, with 8 per cent. interest from the 1st of January, 1875, payable semi-annually, and 10 per cent. interest after maturity, and payable to the order of Samuel D. Weakley.

And whereas, said trust deed provides that in case of default in the payment of the semi-annual interest on said notes as the same becomes due, the legal holder of said notes at his option has the right to declare the whole of the principal as well as the interest due and payable, and the legal holder having declared the principal of said notes as well as the interest thereon, amounting to 2,014.41 dollars, now due and payable, no part of the interest due 1st July, 1875 and 1st January, 1876, having been paid, and the legal holder of said notes has applied to the undersigned to sell said premises in said trust deed conveyed, as therein provided.

Now, therefore, public notice is hereby given that the undersigned will, on Saturday the 18th day of March, 1876, between 11 and 12 o'clock, noon, at the northeast corner of the court house square, in Cook county, Illinois, under and by virtue of the powers by said trust deed conferred on him, sell and dispose of the above described premises at public auction to the highest and best bidder, for cash, and all of the right, title, benefit and equity of redemption of the said Charles J. F. Kraft, his heirs and assigns therein.

The above premises are subject to a prior incumbrance of twenty-five hundred dollars.

WM. D. KERFOOT, Trustee.

February 12th, 1876. (2)21-24

TRUSTEE'S SALE.—WHEREAS, CHARLES J. F. Kraft, by trust deed dated November 8th, 1874, and recorded in book 485 of records, page 83, conveyed the premises in Chicago, Cook county, Illinois, to wit: Lot number five (5) in Call & Kraft's subdivision of the west one hundred and seventy-six and 5-10 feet (176 5-10) of the north half of block fifteen, Union Park second addition to Chicago, unto the undersigned, in trust, to secure three notes of said Charles J. F. Kraft, of even date with said trust deed, each for the sum of six hundred and twenty-seven and fifty hundredths dollars (627.50), due and payable, respectively, two, three and four years from date, with interest after 1st January, 1875, at eight per cent per annum, payable semi-annually, and ten per cent after maturity; said notes payable to the order of Samuel D. Weakley.

And whereas, said trust deed provides, that in case of default in the payment of the interest on said notes as it falls due, the legal holder thereof may, at his option, declare the principal of said notes, as well as the interest, due and payable, and default having been made in the payment of interest due 1st July, 1875, and 1st January, 1876, which default still continues, the legal holder of said notes having declared the whole of said notes and interest, amoneting to 2049.23 dollars, due and payable, and has applied to the undersigned to sell said premises in said trust deed conveyed, as therein provided.

Now, therefore, public notice is hereby given, that the undersigned will, on Saturday the 18th day of March, 1876, between the hours of 11 and 12 o'clock noon, at the northeast corner of the court house square, in the city of Chicago, Cook county, Illinois, under and by virtue of the powers by said trust deed conferred on him, sell and dispose of the above described premises, at public auction, to the highest and best bidder for cash, and all the right, title, benefit, and equity of redemption of the said Charles J. F. Kraft, his heirs and assigns therein.

The above premises are subject to a prior incumbrance of three thousand dollars.

WM. D. KERFOOT, Trustee.

February 12th, 1876. (5)21-24

TRUSTEE'S SALE.—WHEREAS, CHARLES J. F. Kraft, by trust deed dated November 8th, 1874, and recorded in book 485 of records, page 81, conveyed the premises in Chicago, Cook county, Illinois, to wit:

Lot number four (4), in Call & Kraft's subdivision of the West one hundred and seventy-six and 5-10 feet (176 5-10), of the north half of block fifteen, Union Park second addition to Chicago, unto the undersigned, in trust, to secure three notes of said Charles J. F. Kraft, of even date with said trust deed, each for the sum of six hundred and sixteen and 67-100 dollars (616 67-100), due and payable respectively two, three, and four years from date, with interest after first January, 1875, at 8 per cent. per annum, payable semi-annually, and 10 per cent. per annum after maturity, and payable to the order of Samuel D. Weakby.

And whereas, said trust deed provides, that in case of default in the payment of the interest on said notes as it falls due, the legal holder thereof may, at his option declare the principal of said notes due and payable as well as the interest, and default having been made in the payment of interest due 1st July, 1875, and 1st Jan'y, 1876, which default still continues, the legal holder of said notes having declared the whole of said notes and interest amounting to $2,014 41-100 dollars due and payable, and has applied to the undersigned to sell said premises in said trust deed conveyed, as therein provided.

Now, therefore, public notice is hereby given that the undersigned will, on Saturday, the 18th day of March, 1876, between 11 and 12 o'clock noon, at the northeast corner of the court house square, in the city of Chicago, Cook county, Illinois, under and by virtue of the powers by said trust deed conferred on him, sell and dispose of the above described premises at public auction, to the highest and best bidder, for cash, and all the right, title, benefit and equity of redemption of the said Charles J. F. Kraft, his heirs and assigns therein.

The above premises are subject to a prior incumbrance of three thousand dollars.

WM. D. KERFOOT, Trustee.

Feb. 12th, 1876. (4) 21-24

CHICAGO LEGAL NEWS.

SATURDAY, FEBRUARY 26, 1876.

The Courts.

UNITED STATES SUPREME COURT.

No. 546.—OCTOBER TERM, 1875.

In error to the Circuit Court of the United States for the Southern District of Ohio.

FREDERICK J. MAYER and SETH EVANS, assignees under the assignment laws of the State of Ohio, of GEORGE BOGEN and JACOB BOGEN, as individuals and as late partners as G. & J. BOGEN, and of GEORGE BOGEN, JACOB BOGEN and HENRY MULLER, as individuals and as late partners as GEORGE BOGEN & SON, plaintiffs in error,

v.

MAX HELLMAN, assignee in bankruptcy of GEORGE BOGEN and JACOB BOGEN, as individuals and as late partners as G. & J. BOGEN, bankrupts, and of GEORGE BOGEN, JACOB BOGEN and HENRY MULLER, as individuals and as late partners as GEORGE BOGEN & SON.

An assignment by an insolvent debtor of his property to trustees for the equal and common benefit of all his creditors is not fraudulent; and when executed six months before proceedings in bankruptcy are taken against the debtor, is not assailable by the assignee in bankruptcy, subsequently appointed: and the assignee is not entitled to the possession of the property from the trustees.

Mr. Justice FIELD delivered the opinion of the Court.

The plaintiff in the court below is assignee in bankruptcy of Bogen and others, appointed in proceedings instituted against them in the District Court of the United States for the Southern District of Ohio; the defendants are assignees of the same parties, under the assignment laws of the State of Ohio; and the present suit is brought to obtain possession of property which passed to the latter under the assignment to them. The facts as disclosed by the record, so far as they are material for the disposition of the case, are briefly these: On the 3d of December, 1873, at Cincinnati, Ohio, George Bogen and Jacob Bogen, composing the firm of G. & J. Bogen, and the same parties with Henry Muller, composing the firm of Bogen & Son, by deed executed of that date, individually and as partners, assigned certain property held by them, including that in controversy, to three trustees, in trust for the equal and common benefit of all their creditors. The deed was delivered upon its execution, and the property was taken possession of by the assignees.

By the law of Ohio, in force at the time, when an assignment of property is made to trustees for the benefit of creditors, it is the duty of the trustees, within ten days after the delivery of the assignment to them, and before disposing of any of the property, to appear before the probate judge of the county in which the assignors reside, produce the original assignment, or a copy thereof, and file the same in the probate court and enter into an undertaking payable to the State, in such sum and with such sureties as may be approved by the judge, conditioned for the faithful performance of their duties.

In conformity with this law, the trustees, on the 13th of December, 1873, within the prescribed ten days, appeared before the probate judge of the proper county in Ohio, produced the original assignment and filed the same in the probate court, One of the trustees having declined to act, another one was named in his place by the creditors and appointed by the court. Subsequently the three gave an undertaking with sureties approved by the judge, in the sum of five hundred thousand dollars, for the performance of their duties, and then proceeded with the administration of the trust under the direction of the court.

On the 22d of June of the following year, more than six months after the execution of the assignment, the petition in bankruptcy against the insolvents was filed in the District Court of the United States, initiating the proceedings in which the plaintiff was appointed their assignee in bankruptcy. As such officer, he claims a right to the possession of the property in the hands of the defendants under the assignment to them. The validity of this claim depends, as a matter of course, upon the legality of the assignment. Independently of the bankrupt act, there could be no serious question raised as to its legality. The power which every one possesses over his own property would justify any such disposition as did not interfere with the existing rights of others; and an equal distribution by a debtor of his property among his creditors, when unable to meet the demands of all in full, would be deemed not only a legal proceeding, but one entitled to commendation. Creditors have a right to call for the application of the property of their debtor to the satisfaction of their just demands, but unless there are special circumstances giving priority of right to the demands of one creditor over another, the rule of equity would require the equal and ratable distribution of the debtor's property for the benefit of all of them. And so, whenever such a disposition has been voluntarily made by the debtor, the courts in this country have uniformly expressed their approbation of the proceeding. The hindrance and delay to particular creditors in their efforts to reach before others the property of the debtor, that may follow such a conveyance, are regarded as unavoidable incidents to a just and lawful act, which in no respect impair the validity of the transaction.

The great object of the bankrupt act, so far as creditors are concerned, is to secure equality of distribution among them of the property of the bankrupt. For that purpose it sets aside all transactions had within a prescribed period previous to the petition in bankruptcy, defeating, or tending to defeat, such distribution. It reaches to proceedings of every form and kind undertaken or executed within that period, by which a preference can be secured to one creditor over another, or the purposes of the act evaded. That period is four months for some transactions and six months for others. Those periods constitute the limitation within which the transactions will be examined and annulled, if conflicting with the provisions of the bankrupt act.

Transactions anterior to these periods are presumed to have been acquiesced in by the creditors. There is sound policy in prescribing a limitation of this kind. It would be in the highest degree injurious to the community to have the validity of business transactions with debtors, in which it is interested, subject to the contingency of being assailed by subsequent proceedings in bankruptcy. Unless, therefore, a transaction is void against creditors independently of the provisions of the bankrupt act, its validity is not open to contestation by the assignee, where it took place at the period prescribed by the statute anterior to the proceedings in bankruptcy. The assignment in this case was not a proceeding, as already said, in hostility to the creditors, but for their benefit. It was not, therefore, void as against them, or even voidable. Executed six months before the petition in bankruptcy was filed, it is, to the a signee in bankruptcy, a closed proceeding.

The counsel of the defendants have filed an elaborate argument to show that assignments for the benefit of creditors generally are not opposed to the bankrupt act, though made within six months previous to the filing of the petition. Their argument is that such an assignment is only a voluntary execution of what the bankrupt court would compel; and as it is not a proceeding in itself fraudulent as against creditors, and does not give a preference to one creditor over another, it conflicts with no positive inhibition of the statute. There is much force in the position of counsel, and it has the support of a decision of the late Mr. Justice Nelson, in the Circuit Court of New York, in Sedgwick *v.* Place (First National Bank. Reg., 204); and of Mr. Justice Swayne, in the Circuit Court of Ohio, in Langley *v* Perry (Second National Bankrupt Reg., 180). Certain it is that such an assignment is not absolutely void, and if voidable it must be because it may be deemed, perhaps, necessary for the efficiency of the bankrupt act that the administration of an insolvent's estate shall be entrusted to the direction of the district court, and not left under the control of the appointee of the insolvent. It is unnecessary, however, to express any decided opinion upon this head, for the decision of the question is not required for the disposition of the case.

In the argument of the plaintiff's counsel the position is taken that the bankrupt act suspends the operation of the act of Ohio regulating the mode of administering assignments for the benefit of creditors, treating the latter as an insolvent law of the State. The answer is that that statute of Ohio is not an insolvent law in any proper sense of the term. It does not compel, or in terms even authorize, assignments; it assumes that such instruments were conveyances previously known, and only prescribes a mode by which the trust created shall be enforced. It provides for the security of the creditors by exacting a bond from the trustees for the discharge of their duties; it requires them to file statements showing what they have done with the property; and affords in various ways the means of compelling them to carry out the purposes of the conveyance. There is nothing in the act resembling an insolvent law. It does not discharge the insolvent from arrest or imprisonment; it leaves his after-acquired property liable to his creditors precisely as though no assignment had been made. The provisions for enforcing the trust are substantially such as a court of chancery would apply in the absence of any statutory provision. The assignment in this case must, therefore, be regarded as though the statute of Ohio, to which reference is made, had no existence. There is an insolvent law in that State, but the assignment in question was not made in pursuance of any of its provisions. The position, therefore, of counsel, that the bankrupt law of Congress suspends all proceedings under the insolvent law of the State, has no application.

The assignment in this case being in our judgment valid and binding, there was no property in the hands of the defendants which the assignee in bankruptcy could claim. The assignment to them divested the insolvents of all proprietary rights they held in the property described in the conveyance. They could not have maintained any action either for the personalty or realty. There did, indeed, remain to them an equitable right to have paid over to them any remainder after the claims of all the creditors were satisfied. If a contingency should ever arise for the assertion of this right, the assignee in bankruptcy may, perhaps, have a claim for such remainder, to be applied to the payment of creditors not protected by the assignment, and whose demands have been created subsequent to that instrument. Of this possibility we have no occasion to speak now.

Our conclusion is that the court below erred in sustaining the demurrer to the defendant's answer; and the judgment of the court must, therefore, be reversed, and the cause remanded for further proceedings.

UNITED STATES SUPREME COURT.

No. 134.—OCTOBER TERM, 1875.

CHRISTIAN S. EYSTER *v.* THOMAS GAFF AND JAMES W. GAFF.

In error to the Supreme Court of the Territory of Colorado.

BANKRUPTCY—EFFECT OF UPON FORECLOSURE PROCEEDINGS.

Held, that the proceedings in the foreclosure suit after the appointment of the assignee in bankruptcy are not void; that it is a mistake to suppose that the bankrupt law avoids of its own force all judicial proceedings in the State or other courts the instant one of the parties is adjudged a bankrupt.

2. DUTY OF COURT.—That it was the duty of the court to proceed to a decree as between the parties before it, until by some proper pleadings in the case, it was informed of the changed relations of any of those parties to the subject-matter of the suit.

3. PRACTICE ENTERING RULE TO SHOW CAUSE.—That this court has steadily set its face against the practice of bringing any person who contested with the assignee any matter growing out of disputed rights of property or of contracts, into the Bankrupt court by the service of a rule to show cause, and to dispose of their rights in a summary way; that the jurisdiction for the benefit of the assignee in a certain class of cases in the Circuit and District courts, is concurrent and does not divest that of the State courts.—[ED. LEGAL NEWS.]

Mr. Justice MILLER delivered the opinion of the court.

This suit was an action of ejectment brought originally by Thomas and James Gaff against plaintiff in error in the District Court of Arrapahoe county, Colorado, in which the plaintiffs below had a recovery, and that judgment was affirmed on appeal by the Supreme Court of that territory.

The title to certain lots in Denver city is the subject of controversy, and there seems to be no difficulty in considering George W. McClure as the source of title, common to plaintiffs and defendant. McClure had made a mortgage on the lots to defendants in error to secure payment of the sum of $18,000.

A suit to foreclose this mortgage was instituted in the District Court in 1868, which proceeded to a decree and sale, and plaintiffs became the purchasers, receiving the master's deed, which was duly confirmed by the court.

This decree was rendered July 1, 1870. On the 9th day of May preceding, the mortgagor, McClure, filed a petition in bankruptcy, and on the 11th day of May he was adjudged a bankrupt, and on the 4th day of June, John Mechling was duly appointed assignee. The bankrupt filed schedules in which these lots and the mortgage of the Gaffs on them were set out. It will thus be seen that pending the foreclosure proceedings which had been instituted against McClure, he had been declared a bankrupt and Mechling had been appointed his assignee, and that the decree of sale and foreclosure under which plaintiffs asserted title in the present suit was rendered about a month after the appointment of the assignee, and nearly two months after the adjudication that McClure was a bankrupt. The defendant in the ejectment suit was a tenant under McClure, and defends his possession on the ground of the invalidity of the foreclosure proceedings after the adjudication of bankruptcy and the appointment of the assignee.

The plaintiffs in this suit seem to have relied at first upon the right to recover under the mortgage, and did not give in evidence the proceedings in foreclosure; but when the defendant had read them, so far as the decree and sale, in order to show that the mortgage was merged, the plaintiffs then produced the master's deed. The Supreme Court of Colorado held that the mortgage alone was sufficient to sustain the action, one of the judges dissenting; and counsel for defendant below insists here that this was error, because the laws of Colorado give to a mortgage only the effect of an equitable lien, and not that of conveying a legal title. He also insists that all the proceedings in the foreclosure suit after the appointment of the assignee in bankruptcy are absolutely void, because he was not made a defendant.

We will consider this latter proposition first, for if the foreclosure proceedings conveyed a valid title to plaintiffs the judgment must be affirmed, whatever may be the true solution of the question of local law.

It may be conceded for the purposes of the present case that the strict legal title to the land did not pass by the mortgage, and that it did pass to the assignee upon his appointment, and consequently, if that title was not divested by the foreclosure proceedings it was in the assignee at the trial of the ejectment suit. On the other hand, if these proceedings did transfer the legal title to plaintiffs, they were entitled to recover as they did in that action.

At the time that suit was commenced the mortgagor, McClure, was vested with the title and was the proper and necessary defendant. Whether any other persons were proper defendants does not appear, nor is it material to inquire. But for the bankruptcy of McClure there can be no doubt that the sale under the foreclosure decree and the deed of the master would have vested the title in the purchaser, and that this would have related back to the date of the mortgage. Nor can there be any question that, the suit having been commenced against McClure when the title or equity of redemption (no difference which it is) was in him, any person who bought of him or took his title or any interest he had pending the suit, would have been bound by the proceedings and their rights foreclosed by the decree and sale. These are elementary principles. Is there anything in the bankrupt law, or in the nature of proceedings in bankruptcy, which takes the interest in the mortgaged property acquired by the assignee out of this rule?

There is certainly no express provision to that effect. It is maintained by counsel that, because the assignee is vested by the assignment under the statute with the legal title, there remains nothing from that time for the decree of foreclosure to operate on, and it cannot thereafter have the effect of transferring the title which is in a party not before the court. But if this be true in this case it must be equally true in other suits in which the title is transferred *pendente lite*.

We have already said, and no authority is necessary to sustain the proposi-

tion, that a sale and conveyance by the mortgagor pending the suit, would not prevent the court from proceeding with the case without the purchaser, nor affect the title of him who bought under the decree. So in a suit against the vendor of real estate for specific performance, his conveyance of the legal title after suit was brought would not suspend the proceeding or defeat the title under the decree of the court. The obvious reason for this is, that if, when the jurisdiction of the court has once attached, it could be ousted by the transfer of the defendant's interest, there would be no end to the litigation, and justice would be defeated by the number of these transfers. Another reason is, that when such a suit is ended by a final decree transferring the title, that title relates back to the date of the instrument on which the suit is based or to the commencement of the suit, and the court will not permit its judgment or decree to be rendered nugatory by intermediate conveyances.

We see no reason why the same principle should not apply to the transfer made by a bankruptcy proceeding. The bankrupt act expressly provides that the assignee may prosecute or defend all suits in which the bankrupt was a party at the time he was adjudged a bankrupt. If there was any reason for interposing, the assignee could have had himself substituted for the bankrupt, or made a defendant on petition. If he chose to let the suit proceed without such defense, he stands as any other person would on whom the title had fallen since the suit was commenced.

It is a mistake to suppose that the bankrupt law avoids of its own force all judicial proceedings in the State or other courts the instant one of the parties is adjudged a bankrupt. There is nothing in the act which sanctions such a proposition.

The court, in the case before us, had acquired jurisdiction of the parties and of the subject-matter of the suit. It was competent to administer full justice, and was proceeding, according to the law which governed such a suit, to do so. It could not take judicial notice of the proceedings in bankruptcy in another court, however seriously they might have affected the rights of parties to the suit already pending.

It was the *duty* of that court to proceed to a decree as between the parties before it, until by some proper pleadings in the case, it was informed of the changed relations of any of those parties to the subject matter of the suit. Having such jurisdiction and performing its duty as the case stood in that court, we are at a loss to see how its decree can be treated as void. It is almost certain that if at any stage of the proceeding, before sale or final confirmation, the assignee had intervened, he would have been heard to assert any right he had, or set up any defense to the suit. The mere filing in the court of a certificate of his appointment as assignee, with no plea or motion to be made a party or to take part in the case, deserved no attention, and received none. In the absence of any appearance by the assignee, the validity of the decree can only be impeached on the principle that the adjudication of bankruptcy divested the other court of all jurisdiction whatever in the foreclosure suit. The opinion seems to have been quite prevalent in many quarters at one time, that the moment a man is declared bankrupt, the district court which has so adjudged draws to itself by that act, not only all control of the bankrupt's property and credits, but that no one can litigate with the assignee contested rights in any other court, except in so far as the circuit courts have concurrent jurisdiction; and that other courts can proceed no further in suits of which they had at that time full cognizance. And it was a prevalent practice to bring any person who contested with the assignee any matter growing out of disputed rights of property or of contracts, into the bankrupt court by the service of a rule to show cause, and to dispose of their rights in a summary way. This court has steadily set its face against this view.

The debtor of a bankrupt, or the man who contests the right to real or personal property with him, loses none of those rights by the bankruptcy of his adversary.

The same courts remain open to him in such contests, and the statute has not divested those courts of jurisdiction in such actions. If it has for certain classes of actions conferred a jurisdiction for the benefit of the assignee in the circuit and district courts of the United States, it is concurrent with and does not divest that of the State courts.

These propositions are supported by the following cases decided in this court: Smith *v.* Mason, 14 Wall., 419; Marshall *v.* Knox, 16 Wall., 501; Mays *v.* Fritton, 20 Wall., 414; Doe *v.* Childress, 21 Wall., 642. See, also, Bishop *v.* Johnson, — Woolworth, 324.

They dispose of this case, the judgment in which is affirmed,

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UNITED STATES SUPREME COURT.

No. 73.—OCTOBER TERM, 1875.

JOHN S. WILLS, JAMES G. WILLS, WASHINGTON M. WILLS, and RICHARD GREGG, plaintiffs in error,
v.
HORACE B. CLAFLIN, EDWARD E. EAMES, and EDWARD W. BANCROFT.

In error to the Circuit Court of the United States for the Northern District of Illinois.

PROMISSORY NOTE—LIABILITY OF ASSIGNOR—WHEN SUIT NEED NOT BE BROUGHT AGAINST MAKER—PLEADING—BANKRUPTCY OF MAKER.

Mr. Justice DAVIS delivered the opinion of the court.

Horace B. Claflin & Co., assignees of certain promissory notes, sued Wills, Gregg & Co., assignors of said notes, on their contract of assignment, which was made in the State of Illinois, and the inquiry is whether a case of liability was made out on the trial, under the peculiar provisions of the statute of Illinois on the subject. This statute makes promissory notes assignable by indorsement in writing, so as to vest the legal interest in the assignee; but the liability of the assignor is not absolute, but conditional. He agrees to pay the note if the assignee, by the exercise of due diligence, prosecutes the maker to insolvency; but if the institution of a suit against the maker would be unavailing, or if the maker, when the note falls due, is out of the jurisdiction of the court, and therefore beyond the reach of legal process, the assignor is equally as liable as if due diligence by suit had been used. (Gross' Compilation, 1879, 462.)

There was no attempt to coerce payment of the makers by suit, and this action proceeds on the theory that the assignees were excused, under the circumstances, from instituting it. The declaration avers insolvency, non-residence, and that a suit would have been unavailing. On the trial, the Circuit court, against the objection of the defendants, admitted evidence that a petition in bankruptcy was filed January 20, 1870, in the United States District Court of Missouri, at Milwaukee, against Kimball & Butterfield, the makers of the notes sued on, and a judgment of adjudication, January 29, 1870. The admission of this evidence is assigned for error, on the ground that there was no allegation in either count of the declaration which justified it or the charge of the court that the adjudication in bankruptcy excused the assignees from instituting suit against the makers.

There are two averments in the second count of the declaration, as follows:

1st. "And the plaintiffs aver that at the time when each of said promissory notes became, by its terms, due and payable, the said Simeon Pickard, and the said Kimball, and the said Butterfield, were each and all insolvent and unable to pay the amount of the notes by them respectively subscribed as aforesaid, or any part thereof, and hitherto from thence have continued insolvent and unable to pay the amount of the notes by them respectively subscribed as aforesaid, or any portion thereof."

2d. "And the said plaintiffs aver that the institution of a suit against the said Simeon Pickard, or against the said Kimball or the said Butterfield, at the time the notes so by them as aforesaid respectively subscribed, became due and payable, or at any time since, or now, would have been and would be wholly unavailing."

It is contended that these two averments must be treated as one, and that they mean that the suit would be unavailing by reason of the insolvency of the makers.

If this were so, it would by no means follow that the record from Wisconsin was inadmissible to sustain that issue; but be this as it may, as we construe these averments, they are distinct and independent of each other. The first is complete in itself, because, if the makers were insolvent, it would be idle to bring a suit against them. But there are other things besides insolvency which might render a suit unavailing, as, for instance, want of consideration in the note, or, as in this case, an adjudication in bankruptcy.

The second averment was not limited to any particular cause, but was general in its character, and left the pleader free to show on the trial any reason why a suit would be unavailing.

It is true the pleading was objectionable because it did not contain specifications enough to enable the party to defend himself, (Crouch *v.* Hall, 15 Illinois, 264,) and if this objection had been taken by demurrer it would have prevailed. But the question here is not whether a demurrer was sustainable, but whether the pleading was good after verdict.

"At common law, after verdict, if the issue joined be such as necessarily to require on the trial proof of the facts defectively or imperfectly stated or omitted, and without which it is not to be presumed that the judge would direct the jury to give, or the jury would have given, the verdict, such defect, imperfection or omission is cured by the verdict." (1 Chitty's Pleadings, 10th American edition, p. 673, and cases cited in note.) And this rule is adopted in Illinois.

In Greathouse *v.* Robinson (3 Scammon, p. 8), it was held that the defendant, to avail himself of a defective averment in a declaration, must demur to it. "If he elects to plead to the declaration and go to trial, he has no right to insist upon the exclusion of evidence because some necessary averment is omitted or defectively set forth." There was, therefore, no valid reason why the record of the adjudication of bankruptcy should have been excluded. It was not only competent evidence in support of the issue that a suit against the makers would have been unavailing, but conclusive evidence on the point, for the bankrupt act prevents the institution and prosecution of suits against parties in bankruptcy.

The first note was due January 18, 1870, two days before the petition in bankruptcy was filed, and the first term of court held at Chicago after the note became due, was on the first Monday of the following month. At this time, the adjudication in bankruptcy was in force, and a suit against the bankrupts forbidden.

There was parol testimony (received without objection) to show that the debts of the petitioners were settled and the proceedings in bankruptcy dismissed, but there was nothing to fix the time when the order of dismissal was made. The burden of doing this rested on the defendants, and so the jury were told.

As this view of the case is decisive of it, it is unnecessary to notice the other assignments of error.

The judgment is affirmed.

WE have received the following opinion from the law firm of BONNEY, FAY & GRIGGS of this city:

SUPREME COURT OF ILLINOIS.

OPINION FILED JAN. 21, 1876.

THE FIREMAN'S FUND INSURANCE CO. *v.* THE CONGREGATION OF RODEPH SHOLEM.

Appeal from Cook.

INSURANCE—WHEN A BUILDING WILL BE CONSIDERED AS FALLEN.

The clause in an insurance policy that "if a building shall fall, except as the result of fire, all insurance by this company shall immediately cease and determine," construed and held that when a building falls from its blocks and is not reduced to a mass of rubbish, but still retains its form and may be repaired, that it will not be regarded as having fallen.

2. HOW A RELIGIOUS SOCIETY MAY SUE.—That since the decision in the Ada Street Methodist Church under a more recent statute, a religious corporation may sue in its own name.

3. PRESUMPTION.—That there were two statutes in force under which a religious corporation could exist, and it will be presumed the corporation could rightfully sue in the name adopted until that fact is put in issue by a proper plea.—[ED. LEGAL NEWS.]

SCOTT, C. J.—The defense in this case is based principally upon that clause of the policy, upon which the action is brought, that declares "if a building shall fall, except as the result of fire, all insurance by this company shall immediately cease and determine." The position assumed is, the building insured had "fallen," in the sense that term is used in the policy, by the action of the winds upon it, before the fire occurred which consumed it, and hence the insurance by the company had ceased and determined under the exemptions of the contract. The question is argued as one of law, rather than of fact, for the reason there is but little controversy as to what did occur; but the effect of the fact, it is insisted, is a matter of law.

But it would seem to us to be purely a question of fact. Whether the building had fallen or was standing, is a fact easily determined, and about which there ought to be no controversy. Indeed, there is scarcely any conflict in the evidence as to the condition of the building at the time the fire occurred. All the witnesses substantially agree in the description they give of the property.

It was a church building, and stood upon posts or blocks. Not long before the fire, by the violence of the storm, it had been blown partly off the posts upon which it rested, by which it was greatly damaged, and so far rendered unfit for occupancy, that most, if not all, the movable furniture was taken out. After the storm it leaned toward the street, was out of plumb, one end being higher than the other, but the building remained united. It had not fallen, although greatly damaged; that was all. The exemption clause of the policy was not that if the building should be damaged by causes other than fire, but "if a building shall fall" the policy should cease to be binding. These words are to be understood in their ordinary meaning. It may be conceded, which is no doubt the fact, it was not the intention of the parties the company would insure the materials, but the building itself. When that should cease to exist, by any cause, except as the result of fire, the insurance upon it and the contents was to terminate at once. This was the contract, and it was one the parties were competent to make, and when understandingly assented to by the assured, there is no reason why he should not be bound by it.

But all the evidence in this case shows the building insured existed until it was destroyed by fire, but in a damaged condition. So long as the building remained standing, there could be no exemption from liability under this clause of the policy, no matter how much depreciation there may have been by the action of the wind, or any other causes. It may be, the condition of the building after the storm rendered the risk more hazardous; if so, it was, perhaps, the privilege of the company to cancel the policy. Opportunity was afforded the company to rescind the insurance contract, on account of the changed condition of the property, had it chose to do so.

Previous to the fire, the company's agent had visited, and, to some extent, inspected the building. He knew its condition, but did not inform the parties interested that the company would insist upon cancelling the policy, but chose to allow the risk to stand. Had defendant cancelled the policy, it might have been the owners could have effected other insurance. At all events, defendant did not undertake to rescind the insurance contract, although in possession of all the facts, and, after the loss occurs, it is too late to insist the changed condition of the building rendered the risk more hazardous.

The case of Nave *v.* Home Mutual Ins. Co., 37 Mo., 431, to which our attention has been directed, is not analogous with the case at bar. In that case, the insured building was used as a store room and ware house, and by reason of overloading the floors with merchandise, it fell and became a mass of rubbish, and the fire which occasioned the loss arose among the materials. No such condition of the building is shown by the proof in this case.

Workmen, skilled in that department of labor, thought the building could have been repaired and placed back in its original position. When repaired, it would still be the same structure. Had it become a "mass of rubbish," as the building in the case cited, or had it "fallen," in the sense that word is employed in the exemption clause of the policy, no doubt the insurance would have terminated immediately under the contract. The case of Boyd *v.* Dubois, 3 Campbell, 133, cited by counsel, illustrates no phase of the case in hand. A motion was made in arrest of judgment, on the ground plaintiff was a religious society, incorporated under the laws of this State in 1871, and therefore incapable

of suing, except in the names of the trustees. The case of Ada Street Methodist Church *v.* Garnsey, 66 Ills., is cited in support of the position.

But since that decision was rendered, it would seem under a more recent statute, a religious corporation may sue in its own name. R. S., 1874, p. 292, secs. 35 and 41. Notwithstanding this society may have been organized in 1871, it does not appear but it may have become incorporated under the recent statute, and therefore capable of suing in the corporate name adopted. There were two statutes in force under which a religious corporation could exist, and it will be presumed the corporation could rightfully sue in the name adopted, until that fact is put in issue, by a proper plea for that purpose. The fact objected to, not appearing on the record, it can not be reached by a motion in arrest of judgment. The point is made; the damages found are excessive. That was a question for the jury. It will be observed, the evidence as to the value of the insured property, immediately preceding the fire, was quite conflicting. We are not, however, prepared to say it is not sufficient to sustain the verdict. The policy covered the contents, as well as the building itself. It contained the tabernacle, chancel and pulpit, and all were in as good condition as when new.

A good deal of ornamental work had been done on them at considerable costs Upon the whole record, we think justice has been done, and the judgment must be affirmed.

Judgment affirmed.

BONNEY, FAY & GRIGGS, for appellants.
STORY & KING, for appellee.

OUR thanks are due G. D. A. PARKS, of the Joliet bar, for the following opinion :

SUPREME COURT OF ILLINOIS.

OPINION FILED FEB. 4, 1876.

SETH W. HARDIN *v.* U. S. OSBORNE.

Appeal from Will.

TRUST--EXECUTION OF--WHEN LEGAL TITLE REVERTS TO GRANTOR.

1. B. and R., insolvent merchants of N. Y., made an assignment in 1838 to B. and W. in trust for creditors; the creditors not being made parties thereto. Amongst the assigned assetts was a judgment against one Egan, under which, in December, 1840, a sheriff's deed of a large body of lands in Will county, 2480 acres, including the premises in controversy, was issued to B. and R., the *assignors*, by quit-claim deed dated in 1841, but not acknowledged till September, 1842, and not recorded till 1844, they conveyed these lands to their assignees: the conveyance, which was otherwise in ordinary form, reciting generally the fact of the prior conveyance which was otherwise in ordinary form reciting generally the fact of the prior assignment and purporting to be made to the grantees in their capacity as assignees. *Held, semble*, that such deed was virtually an ancillary or supplemental assignment, and the title derived under it substantially of the same nature as if the lands had been specifically embraced in the original deed of assignment.

2. Reaffirming the doctrine of Reece *v.* Gibson et al., 50 Ills., 404; Harris *v.* Mills, 28 Ills., 44; Pollock *v.* Maison, 41 Ills., 517: *Held*, that assignments in trust for creditors although conveying an estate in fee in the ordinary terms, are yet *sui generis* in their nature, as made merely to secure debts; and, as in case of a mortgage or deed of trust to secure a single creditor, instead of the whole body of creditors, if the debt itself is extinguished by the statute of limitations, the trust itself expires, and the legal title vested in the trustee is executed in the beneficiary entitled thereto.

3. In analogy to the rule under our statute of uses, as expounded in Witham *v.* Brooner, 63 Ills., 344: *Held*, where an originally active trust becomes passive, or nominal, by the full execution, or expiration of all its functions, the legal title conveyed to the trustee for the purposes of the trust reverts to the grantor, without the necessity of a formal re-conveyance or judicial decree.

SCHOLFIELD, J.—This was ejectment for certain lands in Will county. The judgment below was in favor of the defendant, and the plaintiff brings the case to this court by appeal.

We deem it necessary to examine but one of the many points which have been discussed, as, in our opinion, the decision of that must be against the plaintiff and conclusive against his right to recover; and it will therefore be immaterial whether other questions were improperly ruled against him upon the trial or not.

The plaintiff derived title by conveyance from Brower and Wynkoop, made on the 13th day of August, 1860. The only title they had to convey was derived by deed from Bailey and Reynolds, dated May 1st, 1841, and acknowledged by them at a subsequent date. In this deed it is recited that the object of the conveyance was to consummate a voluntary assignment made by Bailey and Reynolds to Brower and Wynkoop, as assignees, for the benefit of their creditors, on the 5th day of April, 1838. On the 7th day of March, 1842, Bailey was adjudged a bankrupt by decree of the District Court of the United States for the southern district of New York, and, on the 23d day of July, of the same year, Reynolds was also adjudged a bankrupt by decree of the same court, and one Waddell was appointed assignee of each of them. There is no evidence showing the specific indebtedness which was to be paid by Brower and Wynkoop as assignees under the voluntary assignment; but the schedules of the indebtedness of each of the parties, filed in the District Court of the United States for the southern district of New York, should have shown, and we must presume did show, all their outstanding indebtedness at that time. By them it appears that all of their indebtedness was due and payable as early as February the 3d, 1840, and by decree of that court, rendered in 1842, Bailey and Reynolds were each discharged from any farther liability on account of their prior indebtedness.

Brower and Wynkoop exercised no control or supervision over the land, either by themselves or agent, later than December, 1843. They permitted it to be sold for taxes, effected no redemption therefrom, and paid no taxes on the land after that time.

We can see no difference in principle between the title conveyed to them and that conveyed to a trustee for the payment of a single specific debt, in the event of its non-payment within a prescribed period. In either case the only duty in the trustee is to sell the property and apply the proceeds to the payment of the indebtedness, in conformity with the terms of the power. If the indebtedness is paid or legally extinguished before a sale, the power to sell is presumably revoked, and if the trustee thereafter continues to hold the title, he has no duties to perform, and having no beneficial interest in the property, he necessarily holds as a dry trustee.

In Pollock et al. *v.* Maison et al., 41 Ill., 516, it was held that a mortgagee can not maintain ejectment against the mortgagor, after the debt secured by the mortgage is barred by the statute of limitation.

And in Gibson et al. *v.* Rees et al., 50 Ill., 383, it was held, where the creditors for whose benefit an assignment is made delay asserting any claim to the trust fund for such length of time, that the debts designed to be secured are barred by the statute of limitation it is the duty of the trustee after such lapse of time to refuse to pay the debts, and a court of equity will refuse to enforce the trust. In discussing the question, in the opinion of the court, the deed was assimilated to a mortgage, and it was said: "When the debt, the principal thing, is gone, the incident, the mortgage, is gone. And then a foreclosure cannot be had in any of the various modes given by the law. Thus it is seen, that although the statute of limitation does not run to bar the entry where the relation of mortgagor and mortgagee exist, still it does not run to bar the debt; and if it does in such case, why not when property is conveyed to a trustee for the benefit of his creditors?

In principle there would seem to be no difference. In each case the debtor transfers or conveys property as a security for the payment of debt. In either case they are but a security and nothing more. They do not belong to the class of trusts to which the law of trusts usually applies, but partake in some respects of their nature and incidents, but not in all of them. Such assignments do not create a pure trust, but only a *quasi* trust, being intended to secure debt, and are not designed to endure for long periods of time like most trusts that are created. Hence no reason is perceived why the statute should be suspended merely to keep a debt alive, intended to be paid out of the trust fund, any more than a mortgage debt or other debt secured by a pledge."

Applying the principle here, and waiving the consideration of what effect the discharge of Bailey and Reynolds, by the District Court of the United States for the Southern District of New York, may have had upon the debt, for the payment of which the assignment to Brower and Wynkoop was made, it is plain that all powers vested in Brower and Wynkoop with regard to the land terminated, by the bar of the debt by limitation, as early as in February, 1856. If they held title to the land after that time, it was but the naked legal title—nothing more. But did they hold such title, after their duties ceased?

It is said in Perry on Trusts, § 351: "Where the *cestui que trust* becomes absolutely entitled to the whole beneficial interest in the trust estate, and the active duties of the trustee have ceased, the statute of uses generally execute the legal title of the trustee to the *cestui que trust*, and he obtains the legal as well as the beneficial estate." And again, at the conclusion of § 521, the author says: "It is further to be remarked, that there can be but few of these dry trusts, for where there was no control and no duty to be performed by the trustee, it becomes a simple use, which the statute of uses executes in the *cestui que trust*, and he thus unites both the legal and beneficial estate in himself."

In Withaum *v.* Brower, 63 Ill., 344, it was held that, under the operation of section 3, chapter 24, Revised Statutes of 1845, a conveyance in trust, or to the use of any person, which requires no duties, which prescribes the execution of no trust, but leaves the trustee only a passive title, carries to the *cestui que trust* lawful seizin, estate and possession; that in such case, there is not a mere equitable title, but an actual seizin and possession; not only a right of entry, but an actual estate, and the same principle, we think, is equally applicable where, although a trust was declared by the deed, it has subsequently been satisfied, This is fully sustained by Welch *v.* Allen, 21 Wend., 147; Nicholl *v.* Walworth, 4 Denio, 386; Ross *v.* McJunkin, 14 Sargeant & Rawle, 369; Drysdale's Appeal, 14 Penn. St., 531; Brown *v.* Doe, 7 Howard (Miss.), 181, as well as by the language we have quoted, *supra*, from Perry on Trusts.

If this view be correct, Brower and Wynkoop, at the time they conveyed to the plaintiff, having neither the actual possession of nor the legal title to the land, conveyed nothing by their deed to the plaintiff of which he can avail in the present suit.

The judgment is affirmed.

BREESE and SHELDON, JJ., dissent.

G. D. A. PARKS for appellee, with whom in the Supreme Court, were GOUDY & CHANDLER.

E. G. HOLBROOK for appellant.

THROUGH the courtesy of W. SCOTT AGNEY, of the Freeport bar, we have received the following important opinion :

SUPREME COURT OF ILLINOIS.

OPINION FILED FEB. 4, 1876.

JACOB SOLT et al. *v.* JACOB WINGART.

Appeal from Stephenson.

SALE UNDER TRUST DEED—RIGHTS OF PURCHASER AT SHERIFF'S SALE IN THE SURPLUS.

1. SALE UNDER TRUST DEED—SURPLUS.—Where there was a sale under a trust deed and a judgment had been obtained against the grantor of such deed soon after it was recorded, and a sale was made under such deed which brought enough to pay off the trust deed and the judgment: *Held*, that the holder of the sheriff's certificate of sale under such judgment, which had only run fourteen months, was not entitled to the surplus money under such trust deed sale.

2. PURCHASER'S RIGHTS AFTER FIFTEEN MONTHS.—That had the fifteen months expired and appellee had obtained a deed from the sheriff, he would have been entitled to the surplus, but his rights had not advanced to that point, as it lacked about one month of the expiration of fifteen months.—[ED. LEGAL NEWS.]

WALKER, J.

On the 10th day of January, 1871, Jacob Solt executed a deed of trust to John Hart, on seventy acres of land, to secure the payment of a note of $350 he owed to one Cyrus A. Shutz, due in two years from that date. About two months thereafter, Jacob Wingart recovered a judgment against Solt for about $207.17, including costs. In October of that year, he caused an execution to be issued on the judgment, and had the sheriff to levy it on the land conveyed in trust to Hart, and, after advertising it, offered it for sale, and Wingart became the purchaser at $234.12, the amount of his judgment and costs, and received a certificate of purchase therefor. The note to Shutz fell due on the 10th of January, 1873, and after advertising the time and place of sale, Hart, the trustee, offered it, on the 9th of April, 1873, and one Thomas K. Best became the purchaser at $1,000; and, having paid the money, received a deed from the trustee. As soon as the land was struck off at the sale, and before the money was paid to the trustee, Wingart's attorney showed to the trustee the certificate of purchase, and demanded for Wingart the surplus over and above the amount necessary to pay the debt the trust deed was given to secure, and the costs and expenses of the sale.

This the trustee declined to do, but paid the debt to Shutz, and the expenses of the sale. The surplus amounted to $543.60, a part of which the trustee paid, under directions of Solt, to one of his creditors, and the remainder to him.

Wingart thereupon filed a bill against Hart, the trustee, and Solt, to compel the payment of the entire surplus to him. On a hearing in the court below, the relief was granted, and Hart was decreed to pay it to Wingart, and that Solt pay the costs; and from that decree they appeal to this court, and ask a reversal.

The question presented by this record is novel in its character. Appellee had constructive, if not actual, notice of the existence of the prior incumbrance of the trust deed when he recovered his judgment and purchased the trust property at the sheriff's sale. He then occupied the position of a junior incumbrancer with notice. Hence he acquired his lien, entirely subject to the trust deed. His sale was liable to be defeated by a sale of the land under the trust deed. He could, no doubt, have redeemed from the incumbrance of the trust deed, and could have thus virtually tacked the lien of the trust deed to the lien he had acquired on the land subject to the trust, and could have thus compelled any one redeeming from his sale under the execution to pay him both incumbrances, and thus have either obtained the land or the payment of his judgment, with the interest, necessary to authorize a redemption.

All that appellee acquired by his purchase was a lien, which, if no redemption should be made, or if not cut off by a prior lien, would ripen into a conveyance of the title held by the judgment debtor. But in this case it never did ripen into a title, but his purchase and his lien were cut off and wiped out by the sale under the trust deed. When that sale was made, all his claim to the land, or a lien on it, was gone. Then did his purchase, under the circumstances of the case, become a lien on the surplus on the trustee's sale, had it been made within twelve months from the day he purchased? We presume no; and would seriously contend that appellee then had any right to demand the surplus, for the reason that he had but an inchoate right to the land that was cut off and defeated by the trustee's sale. By his purchase he acquired no right to the possession of the land, or the rents, issues, or profits arising therefrom. Had Solt, after appellee purchased, planted and cultivated crops that matured after the expiration of twelve and before the termination of fifteen months, does any one suppose that he could, by virtue of his certificate of purchase, have sued the defendant in execution for removing them, and appropriating them to his own use? The defendant in execution is entitled to the possession of the land thus sold until the purchaser is at least entitled to a deed. Nor does the failure of the debtor to redeem confer any title or greater legal or equitable rights upon the purchaser. The debtor has lost a right, but it is only cut off, but not transferred to any one. In contemplation of law, he is still the owner of the title, but it is but a naked title, without power to sell it, so as to cut off or in any wise prevent the purchaser from obtaining the title through the conveyance from the sheriff if his purchase should not be destroyed by sale under a prior incumbrance, or by a redemption by a judgment creditor.

Had the fifteen months expired, and appellee had obtained a deed from the sheriff conveying Solt's equity of redemption to him, then there would have been no doubt of his right to the surplus; but his rights had not advanced to that point, as it lacked about one month of the expiration of the fifteen months. And the question then occurs, whether he, intermediate the expiration of twelve and fifteen months, may claim, by virtue of his purchase, all or any portion of this surplus. All the rights he acquires are statutory. He could only sell the equity of redemption, or even the land itself, by virtue of the statute. He only acquired, therefore, legal rights governed entirely by the statute. Then does any provision of the statute confer upon him this right, either in terms or by fair and

reasonable intendment? We have been referred to none; nor are we aware that any such exists. The statute confers a contingent right, that may or may not become a vested right to the title to the land sold. But it is a mere contingency. It is not such a right as may be subjected to execution or sale, even by a court of chancery. It may by the force of the statute be assigned; but until the expiration of fifteen months from the sale, without redemption, or being otherwise defeated, it is but in the nature of a bid for the land. The sheriff's certificate shows that he has bid the amount, and that his bid will be approved and adopted by the law, if no one else shall bid more, before the expiration of the time limited by the statute. The only right he acquires is this, until he shall be entitled to a deed. Hence, he acquired no right to the surplus, after satisfying the trust debt. He could not, unless he had acquired the equity of redemption; and this he never had.

But if it could be said, that equity would intervene, still it could only be on the grounds that there was a fund growing out of the sale of trust property, which had belonged to the judgment debtor. If that view could be taken of the case, then equity would say, that all debts he owed were equally just and meritorious, and shall be paid from the fund if sufficient for the purpose, but if not, then *pro rata*. Having acquired no advantage by his sale, not having the remaining interest or title of Solt, by his judgment, or the sale under it, the law will give him no advantage over others, whether contract or judgment creditors. The mere fact that he had reduced his claim, being reduced to a judgment, does not render it more just or more equitable, than any other honest debt owing by the judgment debtor. The judgment, by becoming a lien, is, of course, preferred to debts not being a lien. His judgment was more a lien on the surplus money in the hands of the trustee than was an account or a note owing by the judgment debtor. The statute has not made it so, nor has natural equity or the principles of justice. If it be said that his judgment was a lien on the land sold, which was carried one step farther, by sale and purchase, the obvious answer is, that the lien was subject to the trust previously imposed upon it, and which overrode, and wiped out and extinguished it, before he had a right to the land or the surplus.

Suppose another judgment creditor had, after the trustee's sale, redeemed from appellee's sale, would he, in that case, have obtained the entire surplus? Obviously not: even on appellee's theory of his rights or on any other. If it were conceded that appellee held a lien of any kind, he, in the case supposed, could only have received his purchase money, with interest at the rate of ten per cent. And if this is true, and we think it must be conceded, then by what process did the lien expand, when the land was gone, his lien cut off and extinguished, so as to embrace the entire surplus? He could only obtain a vested right to the equity of redemption, by the land remaining unsold by the trustee, and unredeemed from his sale, and not having acquired the equity of redemption, he did not acquire the right to the surplus. If he acquired by his purchase no right to the rents, issues and profits before the expiration of the fifteen months, although matured after the time allowed for the judgment debtor to redeem, on what principle did he acquire the right to the surplus? Not because the debtor's right to redeem had been cut off and extinguished. If that could be held to transfer all of the debtor's rights to him, then when his rights were cut off and extinguished by the trustee's sale, by the same process all of his rights were transferred to the purchaser at the trustee's sale.

A careful consideration of all the questions involved, satisfies us that appellee failed to make a case which entitles him to recover. But even if the theory upon which appellant has proceeded could be conceded to be correct, the decree was manifestly erroneous in not decreeing that Solt, who received the surplus, or its benefit, should at least be jointly liable to pay the money. But we have seen the trustee was not liable, whether Solt is or not, of which we express no opinion. The decree of the court below must be reversed and the cause remanded.

Decree reversed.

SHELDON, CRAIG and DICKEY, JJ. dissent, except so far as the opinion holds the decree should have been joint against Solt and the trustee.

W. SCOTT AGNEW and W. D. MEACHAM for appellants.

MESSRS. BAILEY & NEFF for appellee.

SUPREME COURT OF ILLINOIS.

ABSTRACTS OF OPINIONS FILED AT OTTAWA IN 1876.

415.—Elisha Buck *v.* The People.—Appeal from County Court of Kankakee.—Opinion by WALKER, J.

TECHNICAL OBJECTIONS AGAINST TAXES—DESCRIPTION OF LANDS—OBJECTIONS AVAILABLE—MUST BE SIGNED—LEGAL PRESUMPTIONS.

STATEMENT.—Appeal from judgment for current and past taxes. The objections were: (1) The notice and application, as published, failed to confer jurisdiction on the court, either of the subject matter or of the persons against whose lands the taxes were assessed. (2) The various local taxes were not legally assessed. (3) Insufficient description of the lands. (4) The equalization, by the board of supervisors, raised the aggregate valuation of the property in the county. (5) The county taxes were in excess of the per cent. allowed by law. (6). The local taxes were not levied within the time prescribed by the statute.

Held, 1. That all these are technical objections merely, and so devoid of merit. For it is not claimed that the property was not liable to taxation, nor that it was unfairly or unjustly assessed, nor that a greater rate was imposed than on other citizens, nor that the sum levied was not indispensable to the operations of the county and township governments. Citizens who enjoy the benefits of government and improvements, must expect to share the corresponding burdens, and cannot readily be heard on mere technical objections. Yet all persons have a right to a fair and strict application of the law to tax assessments.

2. In describing lands, common abbreviations may properly be used. And even misdescriptions do not vitiate unless they render it impossible to locate the lands.

3. One person can not use an objection to taxes which applies only to assessments against his neighbor's property, and not to those against his own. Each citizen must leave others to pay, or resist, at their option.

4. Where objections to tax assessments are filed, those objections must be signed by parties or attorneys, on the rule of practice requiring all pleadings, or matters in the nature of pleadings, to be so signed. And, on technical objections, especially technical rules of practice must be enforced.

[The statute as to the substantial justice of the matter is cited here, as in the Chiniquy case, *supra*.]

5. The statute allows a necessary increase of valuation by the board of equalization.

6. The legal presumption is, that taxes are properly assessed, and are legally and justly due, and the return of the collector of taxes as delinquent rebuts the presumption that they have been paid. So with a treasurer's return to the court.

7. And on these, judgment may properly be entered unless the tax-payer can interpose a legal defense.

17 P D.—Jacob Albrecht *v.* The People.—Error to Bureau.—Opinion by BREESE, J.

CONSTRUCTION OF LIQUOR LAW, R. S. 1874, P. 438.

STATEMENT.—Prosecution under R. S. 1874, p. 438, the defendant being a wholesale brewer. *Held*,

1. That this being a highly penal statute, must be strictly construed with regard to the intent of the law-making power.

2 It must be therefore construed to apply only to "dram-shops," and not to breweries, and the like, where liquors are not sold under license by small quantities.

430.—Benjamin F. Pixley et al *v.* Charles L. Boynton et al.—Appeal from Superior Court of Cook.—Opinion by SCOTT, J.

REMITTITUR IN THE SUPREME COURT—LEGITIMATE TRANSACTIONS ON EXCHANGE AND GAMBLING CONTRACTS DEFINED.

1. *Held*, That the statute now allows a remittitur to be entered in the Supreme Court; but in such case the costs will be taxed to the appellee.

2. The terms used on the Board of Trade "seller, July," and the like, are to be considered, in the custom of exchange as time contracts only, leaving the seller no option but the time at which delivery shall be made. But "puts," and "calls," on the contrary, are held gambling contracts, because they leave the buyer or seller, as the case may be, the option of delivering or not, or calling for delivery or not, and are void on grounds of public policy.

2 P. D.—S. VanDusen *v.* The People.—Error to Carroll.—Opinion by WALKER, J.

EXTRA-JUDICIAL OATHS NO GROUND FOR INDICTMENT FOR PERJURY.

STATEMENT.—Indictment for perjury in making an affidavit before a tax assessor. It did not appear whether the oath was administered in the township wherein the assessor was elected. *Held*,

That an oath administered outside the township of the assessor would be extra-judicial, as the statute gives him no official power outside of his territorial limits; and, however false such oath might be, it would not support a charge of perjury. The place of administering the oath must be shown to be within the territorial limits of the official authority of the officer.

[But the court held it doubtful on the evidence whether the oath was actually false.]

John L. McCormick *v.* William L. Huse.—Appeal from County Court of La Salle.—Opinion by BREESE, J.

CONSTRUCTION OF GOVERNMENT PATENT.

STATEMENT.—Conflict of title in ejectment suit. The opinion largely turns on the state of the evidence. *Held*,

That in construing a patent from the United States, which describes the land granted by the numbers of the township, section, and range, the court will look to the plat and field notes of the government survey returned to the surveyor-general, in order to locate the land. And although quantity is the least reliable, and the last to be resorted to, as to a grant, in determining boundaries, yet it may sometimes be considered as corroborative evidence.

354.—Harriet Steele *v.* Susannah Thatcher.—Appeal from Superior Court of Cook.—Opinion by SCOTT, J.

PLEADING—ISSUES WHERE ADMINISTRATOR IS PARTY—DESTRUCTION OF LETTERS, ETC., PENDING SUIT—MOTION TO VACATE THEREON.

Held, That where there is no plea putting in issue the right of a plaintiff to sue as administrator, and, pending the suit, the records of the probate court are destroyed by fire, and a motion is made to vacate all orders made since the destruction by fire, on the ground that the plaintiff had not restored the files, bond, and letters of administration, the motion is properly overruled.

382.—Oliver W. McKenzie *v.* Joseph M. Remington.—Appeal from Bureau.—Opinion by SHELDON, J.

MARKING OF INSTRUCTIONS.

Held, That a judgment will not be reversed by the Supreme Court, merely because instructions were not marked "given" by the court below, if the record shows what was done with them.

414.—Charles Chiniquy, et al., *v.* The People.—Appeal from Kankakee.—Opinion by WALKER, J.

TAX NOTICE AND CERTIFICATE—COURT TERM—TECHNICAL OBJECTIONS AND THE STATUTE—COLLECTOR'S AUTHORITY—CLERK'S DUTY—R. R. BONDS—OBJECTIONS NOT RAISED BELOW.

STATEMENT.—This was a tax case; and the court remark that "this record presents several questions which were not discussed in the case of Buck *v.* The People, of the present term." (See infra.)

Held, 1. That where a delinquent list is headed thus: "The prefix of the letter *a*, italic, indicates a back tax for the year ——," and the letter *a*, accordingly, is prefixed to some of the taxes assessed; this is a sufficient notice of back taxes for the year specified.

2. A certificate filed during a term, will be held to have been filed "on the first day of the term," as required by the statute, on the familiar principle that, for most purposes, a term of court is considered as but one day.

3. The statute (R. S. 1874, § 191,) provides that no error or informality in proceedings of any officers connected with the assessment, levying or collecting of the taxes not affecting the substantial justice of the tax itself, shall vitiate, or in any manner affect the tax or the assessment thereof, and any omission can, by leave of court, be supplied during the term.

4. A collector needs only produce his warrant as a complete justification of his acts. The burden of proof is on the owner to show the injustice, if any, of the tax. Nor does the fact that the collector has been compelled to return his warrant unsatisfied, in any wise affect the presumption of correctness in the proceedings.

5. Nor need the people produce the proceedings of the county board showing the levy, since the burden of proof is on the person resisting the judgment against the land.

6. It is the duty of the clerk to extend taxes under the statute without a mandate from the county board.

7. In taxes to pay the interest on railroad bonds, it is not needful that the bonds were actually issued, but a vote before the Constitution of 1870, authorizing the issue, so that a mandamus would lie to compel the executing of the bonds, may establish the debt as binding on the county.

8. And if bonds are actually issued, it must clearly be shown to have been without authority, before a tax levied to pay the interest can be defeated; even if that defense could be interposed against a judgment for delinquent taxes.

9. Objections not raised in the court below will not be considered in an appelate court.

Eli Tuttle et al. *v.* Wm. Robinson.—Appeal from Peoria.—Opinion by CRAIG, J.

REPLEVIN—DEMAND—WHEN NECESSARY—FRAUDULENT SALE—TRANSFER OF POSSESSION—SUBSEQUENT CREDITORS.

STATEMENT.—Suit in replevin for the recovery of property, levied on by a writ of attachment against one Ames; which property, at the time of the levy, was in the care of Heraldson, one of the appellants, who occupied, as tenant, a farm belonging to appellee. After the levy, the officer left the property with Heraldson for safe keeping.

Previously, the property had been turned over to appellee by Ames, to secure a debt; Ames at that time occupying the farm, which formerly belonged to him, but had been sold to appellee, and, on the transfer, appellee left the property in the hands of Ames, but exercised acts of ownership over it, paying the taxes, selling portions of it, etc. Ames absconding, the farm and the property came into the possession of Heraldson, as tenant. *Held*,

1. That where property is taken unlawfully, no demand needs be made before bringing a suit in replevin.

2. A tenant having charge of property levied on, which property, after levy, is left with him for safe keeping, becomes thus the agent of the officer, and if the levy is unlawful, he may be joined with the officer in a replevin suit.

3. Even if a sale of personal property, without delivery, actually made, might be impeachable by creditors, yet, where there are no such creditors to impeach it, the transaction is good and binding as between the parties; and subsequent creditors have no right to impeach it.

4. Whether there has been a sufficient transfer of possession where property is sold, is a question for the jury.

5. A purchaser is not necessarily bound, in order to hold property, to take the actual possession himself; but he may properly leave it on land he owns, and employ others to care for it in his behalf.

P. P. & J. R. R. Co. *v.* Wm. C. H. Barton.—Appeal from Peoria.—Opinion by SCOTT, J.

LIABILITY OF R. R. FOR STOCK KILLED.

Held, That, under the statute, a railroad company is under obligation, where the track runs through a "common field," to place cattle-guards at a public road crossing through the field, and gates or bars across a private-road crossing—failing in which, it is liable for stock killed in consequence of such neglect.

CHICAGO LEGAL NEWS.

Lex vincit.

MYRA BRADWELL, Editor.

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We call attention to the following opinions, reported at length in this issue:

Bankrupt Law—Assignment for Benefit of Creditors.—The opinion of the Supreme Court of the United States, by Field, J., holding that an assignment of an insolvent debtor of his property to trustees for the equal and common benefit of all his creditors, is not fraudulent; and when executed six months before proceedings in bankruptcy are taken against the debtor, is not assailable by the assignee in baukruptcy, subsequently appointed; and the assignee is not entitled to the possession of the property from the trustees.

Bankruptcy — Jurisdiction of State and Federal Courts.—The opinion of the Supreme Court of the United States, by Miller, J., holding that the proceedings in a foreclosure suit, after the appointment of an assignee in bankruptcy for the mortgagor, are not void, and censuring the prevalent practice of bringing any person who contested with the assignee any matter growing out of disputed rights of property into the bankrupt court, by the service of a rule to show cause, and to dispose of their rights in a summary way.

Promissory Note—Liability of Assignor.—The opinion of the Supreme Court of the United States, by Davis, J., deciding several interesting questions relating to the liability of the assignor of a promissory note.

Insurance — Fallen Building. — The opinion of the Supreme Court of this State, by Scott, C. J., stating when a building will be considered as fallen, within the meaning of a clause in a policy providing that if it shall fall, except as the result of fire, all insurance by the company should immediately cease and determine.

Trust—Execution of—When Legal Title Reverts to Grantor.—The opinion of the Supreme Court of Illinois, by Scholfield, J., holding where an original active trust becomes nominal by the full execution, or expiration, of all its functions, the legal title conveyed to the trustee for the purposes of the trust, reverts to the grantor, without the necessity of a formal re-conveyance or judicial decree. We regard this as an important opinion, and one that will well repay a careful reading.

Sale under Trust Deed—Rights of Purchaser at Sheriff's Sale in the Surplus.—The opinion of the Supreme Court of this State, by Walker, J., holding, where a judgment was obtained against the grantor in a trust deed after the trust deed was recorded, that the holder of a certificate of purchase at the sheriff's sale, which had run fourteen months, was not entitled to the surplus money made upon a sale under the trust deed; that had the fifteen months expired and the purchaser had received a deed from the sheriff, he would have been entitled to the surplus money obtained under the trust deed sale. Judge Walker says, the point settled in the opinion is a novel one. Three of the judges dissent from the opinion of the court.

Pleading and Evidence—Action for Causing Death.—The opinion of the Supreme Court of this State, by McAllister, J., deciding several interesting questions of pleading in a suit brought under the statute giving an action for wrongfully causing the death of a human being.

NOTES TO RECENT CASES.

WILL—MARRIAGE, RESTRAINT UPON.

The English Court of Appeals, in Allen *v* Jackson, 33 Law Times Rep., N. S. 713, *held*, reversing the decision of Hall, V. C., where there was a bequest to husband and wife for their lives and the life of the survivor, with a gift over in the event of the husband surviving and marrying again, that the gift over took effect on the second marriage of the husband, as it would have done if the limitation in the will had applied to the second marriage of a woman.

PROMISSORY NOTE—FRAUDULENT ALTERATION.

We have received the head-note to the case of Gerrish *v.* Glines, from the reporter, John M. Shirley. The case will appear in the LVI. New Hampshire. The court held, where a negotiable promissory note was made payable upon a condition, and the condition was written below the note on the same piece of paper, that the note and condition were parts of a single entire contract, and that the fraudulent removal of the condition, by tearing the paper, was such a material alteration as rendered the note void in the hands of a *bona fide* holder.

FRAUDULENT PREFERENCE.

The United States District Court of Maine, by Fox, J., in Buckman, assignee, *v.* Goss, 13 N. B. Reg., 337, held that if a mortgage is made in part to prefer the mortgagee as to his claim, and in part to secure a present loan made for the purpose of enabling the debtor to prefer another creditor, it is entirely void.

BANKRUPTCY—PLEA IN BAR.

The Supreme Court of Vermont, in The B. M. Co. *v.* Frazer et al., 13 N. B. Reg., 363, held that a plea in bar since the commencement of the suit, that the defendant has been adjudged a bankrupt, and the plaintiff has proved his debt in bankruptcy, and that the bankruptcy proceedings are still pending, is insufficient.

REVERDY JOHNSON.

Reverdy Johnson was one of the most eminent of the members of the American bar. The announcement of his death has been received with the deepest sorrow by the bar everywhere, but nowhere with more deep regret than at the capital of the nation, which was the place where his greatest triumphs were achieved.

The members of the United States bar assembled in the court room in the capitol building at Washington, to pay respect to his memory.

Mr. P. Phillips called the meeting to order and nominated Hon. Matt. H. Carpenter as chairman, and Mr. D. W. Middleton as secretary. Mr. Carpenter, on taking the chair, made the following eloquent remarks:

Gentlemen: We have met to express our deep sorrow at the death of Reverdy Johnson, who, long ago, was Attorney General of the United States, and who, amid the cares and responsibilities of many high political stations, at home and abroad, never abandoned the practice of his profession; and for more than fifty years he has been rising higher and higher, and came at length to be regarded by all as one of the leaders and chiefs of this bar.

Beginning his practice here in early life, he became the worthy successor of Harper, Martin, Pinckney and Wirt, men who shed such resplendent lustre upon the old Maryland, and considering the extent and variety of his practice, his natural resources and professional attainments, his thorough self-possession and steadiness of nerve when the skill of an opponent unexpectedly brought on the crisis of a great trial, when feeble men lose first themselves and then their cause; the fidelity he always manifested to the oath which was anciently administered to all the lawyers of England, to present nothing false, but to make war for their clients; the audacity of his valor when the fate of his client was trembling in the balance; when he believed his client was right and everybody else believed he was wrong. Remembering all these traits, we must rank him with the greatest lawyers and advocates this or any other country has ever produced.

He retained full possession of his faculties to the moment of his death, and, not long since, appeared to argue some important causes at this bar, and, although his eye was dimmed, all who heard him felt that his natural force was not abated. As with Milton, from his natural eye the beauties of the earth and the heavens were excluded; to him, as to Milton, there returned not

> "Day, or the sweet approach of ev'n or morn,
> Or sight of vernal bloom, or summer's rose,
> Or flocks, or herds, or human face divine;"

but upon his intellectual comprehension, upon his mind and heart, the light of heaven never ceased to shine.

Nature sets indelible marks upon the products of which she is most proud. His outward form proclaimed the man he was. His compact, firm-knit frame, his heavy shoulders, his bullet head, his striking face, not remarkable for beauty, but bearing the traces of many sharp professional and political conflicts, and lighted up by the intelligence, charity and love that shone through his rugged features, all indicated a man genial in nature, but resolute of purpose; a man easy to court, but dangerous to oppose. We are taught to pray for deliverance from "sudden death."

But the life of our distinguished brother had been long extended, even to nine years beyond "three score and ten," and without pain, without parting from those he loved (more cruel than death itself), possessing all his faculties in full vigor, rich in honors and glorious with praise, he passed in an instant from the known to the unknown, from earth to the hereafter of hope and faith. And if it was ordered that the scene of his mortal life must end that moment, who can say that the manner of its close was not also ordered, in mercy, by that God who doeth all things well. I should do violence to the impulses of my heart if I did not say one thing more—I loved that old man.

When I came first here with trembling and fear, inspired by the glorious memories of this court, over which John Marshall once presided, Mr. Johnson took me by the hand, extended to me a fatherly recognition, became my adviser and ever after remained my friend. For all his kindness, professionally and socially, I would be less than a man did I not cherish the profoundest gratitude.

COMMITTEE ON RESOLUTIONS.

Mr. John F. Edmunds, Chairman; Phillip Phillips, R. T. Merrick, A. G. Thurman, W. D. Davidge, William Pinkney Whyte, George Ticknor Curtis, J. H. B. Latrobe, S. Leackle Wallis, William Pitt Lynde, J. Randolph Tucker, T. O. Howe, John T. Morgan, J. A. Garfield, T. J. Durant, Montgomery Blair.

THE RESOLUTIONS.

Resolved, That the Bar of the Supreme Court of the United States has received with deep sorrow the intelligence of the death of Reverdy Johnson, for more than half a century an eminent and honored practitioner in this Court.

Resolved That the memory of Mr. Johnson deserves to be cherished by the Bar, as most honorable to the profession of which he was a distinguished member, as dear to the Court that has benefited by his great contributions to the science of jurisprudence, and as valuable to the Republic, in whose service, as citizen, Attorney General, Senator and Diplomatist, he was wise and faithful.

Resolved, That the Attorney-General be requested to communicate these resolutions to the Court, and to move that they be entered on record; and,

Resolved, That they be communicated to the family of Mr. Johnson, with the expression of the earnest condolence of the Bar.

After appropriate remarks by Messrs. Edmunds, Phillips, Frelinghuysen, Curtis, Dickerson, Garfield, Tucker and Foote, the meeting adjourned.

Wednesday, February 23.

In presenting the proceedings of the bar in relation to the death of the late Reverdy Johnson, Mr. Attorney-General Pierrepont addressed the Court as follows:

May it please Your Honors:

When an eminent citizen of the Republic, whose eminence has been achieved by an honorable career in the public service, in professional life, or in the less conspicuous but not less useful walks of private benevolence, dies, it is fit that some public notice be taken of the event, and that some permanent record be made to encourage and inspire those who are to come after us.

Reverdy Johnson, who recently departed, full of years and of honors, was, during a long period, one of the most eminent lawyers of this country, and one of the very foremost counsellors of this High Court. He held, with distinguished honor and ability, respectively, the great offices of Minister to England, Senator, and Attorney General of the United States. He has left a fame and an honored memory of which his descendants and his country may be justly proud.

The Bar of the Supreme Court met to do honor to his name, and passed the resolutions of which I now have the honor to read:

[The resolutions appear above.]

I ask your honors to receive this tribute to the memory of a great lawyer and an eminent public man, and to order these resolutions to be entered in the permanent records of this court.

Mr. Chief Justice Waite then replied as follows:

The court gives its ready assent to the sentiments so well expressed in the resolutions of the bar. Mr. Johnson was admitted to practice here on the first day of March, 1824. The first case in which he appeared in counsel was that of Brown *v.* the State of Maryland, argued and decided at the January term of 1827. Associated with him was the late Chief Justice Taney, and opposed were the then Attorney-Generals, Mr. Wirt and Mr. Meredith, all names familiar in history. The opinion was delivered by Chef Justice Marshall, and it stands to-day as a monument marking the boundary line between the powers of the United States under the Constitution on the one hand, and those of the States on the other. From the commencement of his practice here until his death, Mr. Johnson was extensively employed, with scarcely an interruption, in the most important causes. He was always welcome as an advocate, for he was always instructive. His friendship for the court was open, cordial, and sincere. We mourn his loss both as counselor and friend. The request of the bar is cheerfully acceded to. The resolutions are received in the same spirit they have been presented, and the clerk will cause them to be entered upon the records of the court.

A Curious Bankrupt Case—A Bankrupt's Discharge — A Nice Point. — A curious point under the English bankrupt law, was decided by Vice Chancellor Bacon last month. A man by the name of Pettit was a bankrupt; his bankruptcy was closed three hours before the death of his father, who left him a fortune. The bankrupt had not obtained his order of discharge. The Vice Chancellor held that the bankrupt was entitled to the amount of the legacy. If the father had died three hours before, the legacy would have gone to the creditors. In this case, as in many others, time was money.

RE-ORGANIZATION OF THE JUDICIARY OF THE UNITED STATES.

The following is the substitute reported back by Mr. McCRARY, of the Judiciary Committee, for House-bill 598:

A BILL to re-organize the Judiciary of the United States.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That a circuit court shall be held in every judicial district of the United States at the same time and place at which a district court shall or may be held; and such circuit court is hereby created and established in every district where no such court now exists, and shall belong to the circuit in whose territorial limits it is embraced; and when more than one judge competent to hold such circuit court is present, each judge may hold a separate session thereof, in which case the presiding justice or judge shall, from time to time, designate the causes to be tried or heard before the other judge or judges. And when no separate terms or sessions are prescribed by law for the circuit and district courts of the same district, the panel of jurors selected and summoned for the district court shall also be the panel of the circuit court, unless a special order to the contrary be made by one of the judges of said circuit court at least thirty days before the term.

SEC. 2 That the several circuit courts of the United States shall have and exercise no jurisdiction in cases of appeals or writs of error allowed, taken, or sued out after the first day of September, eighteen hundred and seventy-six, except that writs of error, appeals, and reviews in bankruptcy cases may be had as heretofore provided.

SEC. 3. That there shall be established in each of the circuits of the United States, a court and be called the court of appeals, which shall have appellate jurisdiction, subject to the provisions of this act of all cases arising in the several circuit and district courts within said circuits respectively. The justice of the Supreme Court assigned to the circuit, the circuit judge thereof, and the several district judges of the districts composing the circuits shall be judges of said court of appeals, any three of whom shall be a quorum: *Provided, however*, That no judge who has heard a cause in the court below shall sit in the court of appeals upon the hearing of the same cause, or be consulted, or give any opinion to the other judges in relation thereto. The justice of the Supreme Court, or, in his absence, the circuit judge, if present, shall preside; if both be absent, the district judge senior in office present shall preside. In the absence of a quorum, any judge may adjourn the court from day to day.

SEC. 4. That such court of appeals shall be a court of record, and shall have a seal, the form and device of which it shall devise. It shall also have a clerk, to be appointed by, and removable at the pleasure of, the presiding justice. Such clerk may, with the approval of the court, to be entered of record, appoint a deputy, who, in case of the death or resignation of the clerk, shall be the clerk until another shall be appointed. Every such clerk shall take the oath and give the bond, with sureties, prescribed by law for clerks of district courts. Process shall run in the name of the United States, and be tested in the name of the Chief Justice of the United States, and shall be under the seal of the court, and signed by the clerk.

SEC. 5. That it shall be the duty of the marshal of the district in which said court of appeals shall be held to attend the sittings of said court, and, under the direction of the Attorney General of the United States, and with his approval, to provide such rooms as may be necessary, and for all incidental expenses of the court, including crier, bailiff and messenger: *Provided*, That no building or rooms shall be rented or leased for the use of said court in any city where a building of the United States is situated, and which can be used for the purpose: *And provided further*, That no lease of any building or rooms for this purpose shall be valid until approved by the Attorney General; and any such lease shall be subject to be terminated at any time by the Attorney General or by Congress.

The crier, bailiff, and messenger shall receive the same compensation as is now given by law to such officers of the Supreme Court of the United States.

SEC. 6. That a writ of error in cases proper for such writ, and in all other cases an appeal may, except as herein otherwise provided, be taken to the court of appeals, from any final judgment or decree of any circuit or district court within the circuit, when the amount claimed or the value of the property in controversy exceeds five hundred dollars, and in other cases where an appeal or writ of error now lies from such judgment or decree, or where the circuit or district judge shall certify that the adjudication involves a question of general importance: *Provided*, That no appeal, writ of error, or review in any case of bankruptcy, shall be taken to the court of appeals, except from the final judgment or decree of a circuit court, when the amount in controversy shall exceed two thousand dollars. Such appeal shall be taken, or such writ of error sued out, within ninety days after the entry of the judgment or decree sought to be reversed. Upon such writ of error or appeal, the court shall review such judgment or decree, and may affirm, modify, or reverse the same, or may order a new trial or such other proceedings to be had in the proper court as shall be just. The judgment or decision of such court of appeals shall be remitted to the court appealed from, to be enforced according to law. The said courts shall have power to issue writs of error, *mandamus*, *scire facias*, *habeas corpus*, and all other writs which may be necessary or proper to the exercise of their jurisdiction, and agreeable to the principles and usages of law.

SEC. 7. That to render an appeal or writ of error under the provisions of the foregoing section effectual for any purpose, a bond shall be executed, on behalf of the appellant or plaintiff in error, by at least one sufficient surety, to the effect that the appellant or plaintiff in error will pay all costs which may be awarded against him on appeal. If the appeal or writ of error be from a judgment or decree directing the payment of money, it shall not stay the execution of the judgment or decree unless a bond, with surety as aforesaid, to be approved by the court or clerk, shall be executed, to the effect that if the judgment or decree appealed from, or any part thereof, be affirmed, or the appeal or writ of error be dismissed, the appellant or plaintiff in error will pay the amount directed to be paid by the judgment or decree, or the part thereof as to which the judgment or decree shall be affirmed. The bonds prescribed by this section may be in one instrument or several, at the option of the appellant or plaintiff in error. Such bonds shall be of no effect unless they shall be accompanied by the affidavit of the surety or sureties, showing that he or they are worth double the amount specified therein over and above all debts, liabilities, and exemptions, and until such bond and affidavits are filed with the clerk with whom the judgment or decree appealed from was entered. In other cases, a stay of execution or proceedings may be granted, upon such terms as any judge of the court may prescribe.

SEC. 8. That cases pending in any circuit court on the said first day of September upon appeal or writ of error shall be heard and determined by such circuit court in the same manner as if this act had not been passed.

SEC. 9. That the said courts of appeals shall, respectively, adopt such rules as they may deem proper to regulate the manner of taking such appeals and suing out such writs of error. They may also establish such other rules as they may deem necessary for the regulation of the practice of their respective courts, and not inconsistent with law, and may, from time to time, alter and revise the same.

SEC. 10. That a writ of error may be sued out from the final judgment of a circuit or district court in any criminal action to the proper court of appeals within ninety days after the entry of such judgment; but such writ of error shall not operate as a stay of proceedings, except in capital cases, unless it is so ordered by a judge of the court of appeals. The judgment or decision upon such writ of error shall be remitted to the circuit or district court appealed from, to be enforced according to law.

SEC. 11. That terms of the said courts of appeals shall be held in the several judicial circuits at the following places: In the first circuit, in the city of Boston; in the second circuit, in the city of Albany; in the third circuit, in the city of Philadelphia; in the fourth circuit, in the city of Richmond; in the fifth circuit, in the city of New Orleans; in the sixth circuit, in the city of Louisville; in the seventh circuit, in the city of Chicago; in the eighth circuit, in the city of Saint Louis; in the ninth circuit, in the city of San Francisco. The first term of said court of appeals shall be held at each of said places on the first Tuesday in November, eighteen hundred and seventy-six, at which time the several courts shall, by an order to be entered of record, fix the times at which said courts shall be thereafter held, which times may be from time to time changed by the court in the same manner. Adjourned terms may also be held from time to time, as, in the judgment of the court, the public interests shall require.

SEC. 12. That the decision of the court of appeals upon questions of fact shall in all cases, except as hereinafter provided, be final and conclusive; but a review upon the law may be had, upon writ of error or appeal, in the manner now provided by law, to the Supreme Court of the United States from every final judgment or decree rendered upon any decision of a court of appeals where the matter in controversy exceeds the sum or value of ten thousand dollars, or where the adjudication involves a question upon the construction of the Constitution of the United States, or any treaty or law of the United States, or where the court shall certify that the adjudication involves a legal question of sufficient importance to require that the final decision thereof should be made by the Supreme Court. Such writ of error or appeal shall be sued out or taken within one year after the entry of the judgment or decree sought to be reviewed: *Provided*, That if within the year after the entry of the judgment or decree sought to be reversed, any party shall die, the personal representative or heir, as the case may require, may sue out, or be made party to a writ of error without reviving the judgment or decree in the court in which the same was entered. The Supreme Court may affirm or modify or reverse the judgment or decree brought before it for review, or may direct judgment or decree to be rendered, or such further proceedings to be had as the justice of the case may require. The judgment or decision shall be remitted to the proper circuit or district court, to be enforced according to law. Appeals in chancery shall be allowed from the said court of appeals to the Supreme Court of the United States in cases where the matter in controversy exceeds the sum or value of ten thousand dollars, in the manner now provided by law for taking and hearing appeals in like cases from the circuit court.

SEC. 13. That any district judge who shall, in the pursuance of the provisions of this act, attend any court of appeals at any place other than his own residence, shall be allowed his reasonable expenses for travel and attendance, not to exceed ten dollars per day, to be certified by the clerk and paid by the marshal of the district in which such court shall be held, and allowed to him in his accounts with the United States.

SEC. 14. That the clerks of the said courts of appeals and the marshals attending the same, shall be allowed the same compensation for their services, respectively, as is now allowed by law to the clerk of the circuit courts of the United States and the marshal of the United States for similar services in the circuit courts, in the circuits in which said court of appeals shall be held, and shall have the like remedies for collecting the same.

SEC. 15. That section six hundred and ten of the Revised Statutes of the United States be, and it is hereby, repealed, and the following is enacted in lieu thereof: "The Chief Justice and each justice of the Supreme Court may attend any term of the circuit or district court within his circuit, and when so attending shall sit in and preside over said court."

SEC. 16. After the said first day of September, all appeals and writs of error taken or sued out from the final judgment or decree of any court of the United States within a Territory, shall be taken as provided by this act, and shall lie to such court of appeals as may be designated by general order of the Supreme Court of the Territory.

If this bill becomes a law, we have no hesitation in saying that the litigation in the Federal courts will double in less than three years. That there should be some change in the organization of the federal judiciary is generally admitted, but we do not believe if this bill is passed without amendment, that it will be an improvement upon the present system. The judges of the supreme court are made also judges of the appellate court. In re-organizing the courts they should be relieved from all judicial labor except that of the supreme court. The time that the district and circuit judges will have to spend in the court of appeals will prevent them from properly attending to the circuit and district courts, and as a consequence, the business will accummulate. Take, for instance, this circuit, with Judges Davis, Drummond, Blodgett and Treat of this State, Hopkins and Dyer of Wisconsin, and Gresham of Indiana, constituted an appellate court, to meet at Chicago to try all the cases that are appealed under this act to such court from the great States of Illinois, Indiana and Wisconsin, and how much time will they have to attend to their home judicial duties after having properly performed their labors in the court of appeals. Under section 9 of the act, each court can establish such rules of practice as it may deem necessary. This would make as many different rules of practice as there are circuits in the United States, and would greatly increase the labor of the supreme court, as the cases that may be taken to that tribunal by appeal from such appellate courts are numerous. Under this act an appeal or writ of error may be taken from a decision of a court of appeals where the matter in controversy exceeds $10,000, or where the adjudication involves a question upon the construction of the Constitution of the United States, or any treaty or law of the United States, or where the court shall certify that the adjudication involves a legal question of sufficient importance to require that the final decision thereof should be made by the supreme court. With such a list of cases that may be taken by appeal from the appellate court to the supreme court, how much would the creation of such a court aid the supreme court in clearing its docket and dispatching its business. If appellate courts are to be created, their rules and practice should be uniform throughout the United States, or else made to conform to the rules and practice of the courts of the States where they are located.

SUPREME COURT OF ILLINOIS.

[To appear in 71 Illinois Reports.]

THE QUINCY COAL COMPANY *v.* JAMES HOOD, Admr.

Appeal from the Circuit Court of McDonough county.—The Hon. CHAUNCEY L. HIGBEE, judge, presiding.

1. ARREST OF JUDGMENT—WAIVER OF RIGHT TO.—Where a defendant demurs to a declaration, and, after his demurrer is overruled, pleads over, he will be precluded from insisting upon a motion in arrest of judgment for insufficieney of the declaration.

2. PLEADING AND EVIDENCE—PLAINTIFF LIMITED BY HIS DECLARATION AS TO ELEMENTS OF DAMAGES.—In an action to recover damages for the death of a party, occasioned by negligence, the declaration limited the next of kin of the deceased to his father, and, on the trial, the court admitted proof that the deceased left a father, mother and five brothers and sisters, against the objection of the defendant: *Held*, that the court erred in allowing the evidence, as it was variant from the declaration.

3. DEATH—NECESSARY INGREDIENTS TO CAUSE OF ACTION FOR WRONGFULLY CAUSING THE DEATH OF A PERSON.—Under the statute giving an action for wrongfully causing the death of a human being, the following ingredients must concur: a wrongful act, neglect, or default of the defendant, causing the death of the intestate under such circumstances as would entitle him to maintain an action if death had not ensued, and he must have left a widow or next of kin. These are indispensible prerequisites to a cause of action, and being shown, they entitle the plaintiff bringing the action as required, to nominal damages at least.

4. FACT OF NEXT OF KIN MUST BE ALLEGED IN THE DECLARATION.—The fact of the survivorship of a widow or next of kin being an essential element in the cause of action, renders it indispensa-

ble that it should be alleged in the plaintiff's declaration, and, under the general issue, he is bound to prove it.

5. DAMAGES DEFENDANT UPON, PECUNIARY INJURY.—If the next of kin are collateral kindred of the deceased, and have not been receiving from him pecuniary assistance, and are not in a situation to require it, it is immaterial how near the relationship may be, only nominal damages can be given, because there will be no pecuniary injury; but if they were, dependent upon the deceased for support, in whole or in part, it is immaterial how remote the relationship may be, there will be pecuniary loss, for which compensation, under the statute, must be given.

6. PROOF ADMISSIBLE IN REDUCTION OF DAMAGES.—In the case of collateral kindred, it will be admissible for the defendant to controvert the fact of dependency upon the deceased for support: and in the case of a father, as the next of kin, to show that he was not entitled to the services of his minor child, in reduction of the damages.

7. NEGLIGENCE—NOTICE TO AGENT OF UNSAFE CONDITION OF MINE IS NOTICE TO PRINCIPAL.—Where a servant of a mining company was killed by the falling of a rock from the roof of a common gang way in a coal mine, and it was sought to charge the company with negligence in not keeping the roof in a safe condition, it was *held*, that notice to the superintendent of the dangerous situation of the roof, was notice to the company; and if this was long enough before the accident to have given time to repair, the same was sufficient to fix negligence upon the company.

8. PLEADING—OBJECT OF.—The primary object of pleading is, to apprise the opposite party of the nature of the plaintiff's claim or the defendant's defense, or, in other words, to apprise the opposite party of what he will be called upon to meet upon the trial.

9. PLEADING AND EVIDENCE.—It is an elementary rule of pleading, that every fact essential to a cause of action is issuable, and must be proved upon the trial, unless admitted by the defendant, substantially as alleged.

C. F. WHEAT and D. G. TUNNICLIFFE, for the appellant.

WM. H. NEECE, for the appellee.

MCALLISTER, J. delivered the opinion of the court.

John Allen Hood, being a minor, of the age of fourteen years, was killed by the falling of a rock from the roof of a common gang-way at the foot of the shaft of appellant's coal mine, and while in the employment of the latter in shoving cars in the mine. Appellee, his father, taking out letters of administration, brought this action under the act of 1853, to recover damages, upon the ground of negligence in the employer in not supplying a safe support for the roof of said gang-way.

The declaration contains two counts, in in each of which the age of deceased was stated, and the only allegation in respect to deceased leaving widow or next of kin, in either count, is, that he left plaintiff, his father, to whom the damages recovered can be distributed.

There was a demurrer to the declaration, which was overruled, and plea of not guilty filed.

On the trial, it appeared that deceased left a mother, as well as father, and five brothers and sisters, and, upon request of plaintiff's counsel, the court instructed the jury that, if they found defendant guilty, then they should assess the plaintiff's damages at the amount of the pecuniary loss sustained, if any, by the next of kin to deceased, "that is to say, his father, mother, and brothers and sisters."

The jury, finding the defendant guilty, assessed the damages at $1,142.

A motion for new trial and in arrest of judgment was made and overruled. Judgment passed upon the verdict, from which the defendant appealed, and numerous points are urged for reversal.

We do not understand appellant's counsel as insisting here that the motion in arrest of judgment should have been allowed for insufficiency of the declaration. They are precluded from assigning error for the denial of that motion, because they demurred to the declaration and pleaded over after decision overruling the demurrer. Am. Express Co. *v.* Pinckney, 29 Ill., 392. The question which they raise is not affected by the ruling in that case. It is, that the plaintiff, having specified himself in the declaration as the only next of kin left by deceased, and alleged that the latter was a minor, and he his father, it was incompetent, and calculated to take the defendant by surprise, to enlarge the scope of damages on the trial by proving, and the jury taking into consideration, other next of kin, whose right to damage must be based upon another and different ground from that of the father.

The declaration limited the next of kin to the father. The plaintiff introduced proof, against defendant's objections, of others, viz: a mother and five brothers and sisters.

The court expressly instructed the jury that, if they found defendant guilty, they should take into consideration, in assessing damages, the pecuniary loss of the mother, brothers and sisters.

The precise question is, whether, under the rules of pleading and evidence, it was competent, where the plaintiff had specified only one next of kin—the father—to prove that there were others, and superadd their pecuniary loss to that of the father.

The statute declares that the amount recovered shall be for the *exclusive* benefit of the widow and next of kin of the deceased. Whatever might have been the claims of natural justice, the common law recognizes no pecuniary interest in the life of any member of a family. But the theory of the statute is, that the widow, if there be one, and next of kin, or the latter only, if the deceased had no wife, have a pecuniary interest in the life of the person killed. The right is not extended to creditors, or anybody else not belonging to the class designated. If no one be left of such class, then there is no interest to be affected. The value of that interest is the amount which a jury may ascertain to be the damages sustained by some of that class in consequence of the destruction of that life in which they had such pecuniary interest, and the statute declares what shall be the measure of such damages, which is such sum as the jury shall deem a fair and just compensation with reference to the pecuniary injuries resulting from such death to the wife and next of kin of such deceased person, not exceeding $5 000.

When all the provisions of the act are regarded, it is apparent that, by its force alone, a legal pecuniary interest is created in favor of certain members of a family in the life of another upon whom the former may be dependent for support, or to whose services one of the former may be entitled; and that interest is invested with all the essential attributes of property, subject to the laws for the distribution of personal estate. In this last particular, alone, consists a similarity between this action and an ordinary action by an administrator. While the action itself is purely statutory, there is nothing in the act giving it which expressly or impliedly affects any of the established rules of pleading and evidence.

All of the ingredients which must necessarily concur to give a cause of action, are, wrongful act, neglect or default of the defendant, causing the death of the inte tate under such circumstances as would entitle him to maintain an action if death had not ensued, and he must have left a widow or next of kin. These are indispensable prerequisites to a cause of action, and being shown, they entitle the plaintiff bringing the action as required, to nominal damages, at least. But the fact of the survivorship of a widow or next of kin, being an essential element of the cause of action, renders it indispensable that it should be alleged in the declaration, and it was so decided in Chicago and Rock I. R. R. Co. *v.* Morris, 26 Ill., 400.

It is an elementary rule of pleading, that every fact essential to a cause of action is issuable. It is equally a fundamental rule of our system of practice, that whatever it is indispensable to allege in order to entitle a party to recover, must be proved upon the trial, unless admitted by the defendant, and it must be proved substantially as alleged.

It will not be denied that the primary object of pleading is, to apprise the opposite party of the nature of the plaintiff's claim, or the defendant's defense, or, in other words, to apprise the opposite party of what he will be called upon to meet upon the trial, and the policy of the general rules of pleading is the promotion of that object.

If the fact of a survivorship of a widow or next of kin be an essential element of the cause of action, necessary to be alleged and proved on the part of the plaintiff, it follows that the allegation and proofs of the plaintiff in this behalf may be controverted by the defendant. If so, why, under the rules of pleading, should not the names of those claiming to be invested with the pecuniary interest in the life of the person killed, by operation of the statute be stated? The suit is brought to recover for the destruction of a life in which they had such interest, and consequent deprivation of the benefits of that interest. The plaintiff is bound to allege there was some such person surviving, and, under the general issue, the burden is upon him of proving it. When he brings the action, therefore, he assumes to know there was some such person, and what hardship can there be in requiring him to state who it is?

There is no instance we can call to mind, where, in an action to recover damages for taking property, or for the deprivation of a legal right or interest, the person to whom such property belonged, or in whom such right or interest is vested, is not required to be named in the declaration; and where one is named, it is exclusive of others not mentioned.

The father being named in this case, the person killed being his son, and a minor, the *prima facie* damages to the father would be the loss of services to which he was entitled. But suppose the defendant came prepared to show that the father had legally emancipated the deceased, and thus divested himself of the right to his services, would it not be competent to give such matter in evidence, upon the question of damages? But even that might not disentitle the father from all damages beyond nominal, there being no widow or other next of kin, if he was nevertheless dependent upon deceased for support.

In Chicago and Alton R. R. Co. *v.* Shannon, 43 Ill., 346, this court said: "If, then, the next of kin are collateral kindred of the deceased, and have not been receiving from him pecuniary assistance, and are not in a situation to require it, it is immaterial how near the degree of relationship may be, only nominal damages can be given, because there has been no pecuniary injury. If, on the other hand, the next of kin have been dependent on the deceased for support, in whole or in part, it is immaterial how remote the relationship may be, there has been pecuniary loss, for which compensation, under the statute, must be given. So, also, if the deceased was a minor, and leaves a father entitled to his services."

In the case of collateral kindred here supposed, it would be admissible for defendant to controvert the fact of dependency upon deceased for support; and in the case of the father, to show he was not entitled to the services of his minor child during any of the time of his minority. This must be so, because the measure of damages is what the jury, under all the circumstances, ought to deem to be a fair and just compensation, with reference to the pecuniary injuries resulting from such death, to the wife and next of kin of such deceased person.

Hence it will be perceived, both the basis and amount of damages depend upon circumstances of relationship, dependency for support, which may be various in character and degree.

If there had been a general allegation that deceased left a widow, or that he left next of kin, without naming or specifying the person, or alleging any more specific relationship, the admissibility of evidence upon the trial would depend upon an entirely different principle. No question of either variance or surprise could be raised. But the pleader having named the father, and defined his relationship to the deceased, as showthe pecuniary interest in the deceased, which had been taken away, the defendant would be justified in supposing that to be the only interest affected, and come prepared to meet the case as made by the declaration.

The introduction, upon the trial, of the interests of other next of kin, under such a declaration, would have a clearer tendency to work surprise upon the defendant than the ordinary case of proving special damages without averring them, for in the latter case, the damages, whether general or special, must be the natural consequence of the act complained of. The general rule is that the plaintiff is entitled to recover, as a recompense for his injury, all the damages which are the natural and proximate consequence of the act complained of. Those which *necessarily* result from the injury are termed general damages, and may be shown under the general allegation at the end of the declaration. But such as are the *natural*, although not the *necessary*, result of the injury, are termed special damages, and must be stated in the declaration, to prevent surprise upon the defendant; and being so stated, may be recovered. Vanderslice *v.* Newton, 4 Comstock, 130.

Here, the distinction is only between consequences which are the *necessary* result of the act complained of, and those which are not.

In the case at bar, from the frame of the declaration, the defendant would be misled into the belief that the person specified was the only one upon whose interest in the life destroyed damages would be predicated.

The court are of opinion that this exception is well taken. The others, however, will be overruled. The declaration is to be taken as stating a cause of action, and, in respect to the negligence complained of, is broad enough to admit the evidence given.

The omission in plaintiff's instruction to submit the question to the jury, whether plaintiff was administrator, was immaterial. Letters in due form had been given in evidence. There was no ground upon which their validity could be assailed.

The defendant had a superintendent of the mines and work in charge. Evidence was given tending to show notice in him of the dangerous situation of the roof of the gang-way, at the bottom of the shaft. This was notice to the company, and it was long enough anterior to the accident to fix negligence upon the company.

Whether contributory negligence was imputable to deceased, a witness of the name of Slocum gave testimony tending to show the boy knew of the dangerous situation of the roof. We can not say but the jury were justifiable in disbelieving that witness upon the inherent improbabilities of his story, or from his manner of testifying. Besides, upon that question, there was evidence tending to show a promise by the superintendent to have the rock removed, thus taking the risk upon the master during the time following the notice and promise to repair. 2 Whart. on Neg., sec. 220.

The age, and the circumstance of the boy being under the control of his father, were also to be considered.

We express no opinion as to the damages being excessive, but, for the error pointed out, the judgment will be reversed, and the cause remanded, with leave to plaintiff to amend his declaration.

Judgment reversed.

UNITED STATES SUPREME COURT.

PROCEEDINGS OF.

Thursday, Feb. 17, 1876.

On motion of Matt H. Carpenter, Lott M. Morrill, of Augusta, Maine, and H. B. Johnson, of Jefferson City, Mo., were admitted.

On motion of P. Phillips, John S. Cooper, of Chicago, was admitted.

No. 153. The Board of County Commissioners of the County of Laramie v. The Board of County Commissioners of the Counties of Albany and Carbon. The argument of this cause was continued by W. R. Steele for appellants, and A. H. Jackson for appellees, and concluded by W. R. Steele for appellants.

No. 154. The Republican River Bridge Company v. The Kansas Pacific Railroad Company. The argument of this cause was commenced by R. McBratney for plaintiff.

Adjourned until Friday at 12 o'clock.

Friday, Feb. 18.

No. 154. The Republican River Bridge Company v. The Kansas Pacific Railroad Company. The argument of this cause was continued by W. T. Otto for defendant, and concluded by R. McBratney for plaintiff.

No. 11. (Assigned.) Samuel A. Burbank, tutor, etc. v. E. B. Bigelow et al. This cause was argued by B. F. Butler for appellant, and T. J. Durant for appellees.

No. 155. John N. Hall et al. v. The United States.

No. 156. John N. Hall et al. v. The United States. These causes were argued by Assist. Atty. Gen. Smith for defendants, and submitted on printed arguments by H. J. Horn for plaintiffs.

No. 157. Walter A. Haldema et al. v. The United States. This cause was argued by Assist. Atty. Gen. Smith for defendants, and submitted on printed arguments by John M. Harlan for plaintiffs.

No. 158. The Propeller John Taylor, etc. v. The New Jersey Railroad and Transportation Company. The argument of this cause was commenced by C. Van Santvoord for appellant.

Adjourned until Monday at 12 o'clock.

Monday, Feb. 21.

On motion of J. B. Sanborn, William Lochren, of Minneapolis, Minn., was admitted.

On motion of A. H. Jackson, Homer Merrell, of Rawlins, Wyoming Territory, was admitted.

No. 664. James M. Townsend v. Alfred Todd et al. Appeal from the Circuit Court of the United States for the district of Connecticut. Hunt, J., delivered the opinion, affirming the decree of the Circuit Court with costs.

No. 856 John & J. K. Warren v. Sheridan Shook, late collector, etc. In error to the Circuit Court of the United States for the southern district of New York. Hunt, J., delivered the opinion, affirming the judgment of the Circuit Court with costs.

No. 135. William W. Lathrop, assignee, etc. v. Samuel John Drake, Jr., executors, etc. Appeal from the Circuit Court of the United States for the eastern district of Pennsylvania. Bradley, J., delivered the opinion, reversing the decree of the Circuit Court, and remanding the cause for further proceedings in conformity with the opinion and decree of this court.

No. 869. Samuel B. Lower, supervisor, etc., et al. v. The United States ex rel. George O. Marcy. In error to the Circuit Court of the United States for the northern district of Illinois. Davis, J., delivered the opinion, modifying the judgment of

the Circuit Court, so as to direct the Board to assemble at their next regular semi-annual meeting, and allow said judgment, and affirming the judgment in all other respects, with costs.

No. 142. Wm. A. Stone v. Ezra B. Towne, administrator, etc. Appeal from the Circuit Court of the United States for the southern district of Mississippi. Miller, J., delivered the opinion, reversing the decision of the Circuit Court with costs, and remanding the cause with directions to dismiss the bill.

No. 866. Edwin M. Lewis, trustee of Jay Cooke & Co. v. The United States. Appeal from the Circuit Court of the United States for the eastern district of Pennsylvania. Swayne, J., delivered the opinion, affirming the decree of the Circuit Court in this cause.

No. 125. Henrietta S. Gould, executrix, etc. v. The Evansville and Crawfordsville Railroad Company. In error to the Circuit Court of the United States for the district of Indiana. Clifford, J., delivered the opinion, affirming the judgment of the Circuit Court with costs. Dissenting, Bradley, J.

No. 143. Wm. C. Lobenstein v. The United States. Appeal from the Court of Claims. Waite, C. J., delivered the opinion, affirming the judgment of the Court of Claims.

No. 622. Charles K. Brown, etc. v. Frank S. Atwell, administrator, etc. In error to the Supreme Court of the State of New York. Waite, C. J., delivered the opinion, dismissing the writ of error in this cause for the want of jurisdiction.

No. 527. George D. Crary and Henry Pike v. John Devlin. In error to the Court of Appeals of the State of New York. Waite, C.J., delivered the opinion, dismissing the writ of error in this cause with costs.

No. 928. James S. Welch v. John F. Cook et al. Waite, C. J., announced the decision of the court, denying the motion to advance this cause.

No. 113. J. Young Scammon v. Mark Kimball, assignee. Waite, C. J., announced the decision of the court, denying the motion to modify the judgment heretofore rendered in this cause.

No. 321. The United States v. Mary B. Habersham, executrix, etc. Reversed and remanded, per stipulation of counsel.

Waite, C. J., announced to the bar that after the argument of the cases assigned for Monday next, the court will take a recess until Wednesday, the 15th of March next.

No. 158. The Propeller John Taylor v. The New Jersey Railroad and Transportation Company. The argument of this cause was continued by T. Van Santvoord for appellant, and by W. R. Beebe for the appellee, and concluded by T. Van Santvoord for the appellant.

No. 834. Chester N. Arthur, collector, v. James P. Cumming et al. The argument of this cause was commenced by Assist. Atty. Gen. Smith for plaintiff.

Adjourned until Wednesday at 12 o'clock.

Wednesday, Feb. 23.

On motion of L. Trumbull, Henry I. Sheldon, of Chicago, Illinois, was admitted.

On motion of J. R. Sanborn, Austin A. Young, of Minneapolis, Minnesota, was admitted.

On motion of W. W. Rogers, A. R. Lawton, of Savannah, Georgia, was admitted.

On motion of W. M. Springer, John M. Rountree, of Chicago, Illinois, was admitted.

No. 831. Chester A. Arthur, collector, etc. v. James P. Cumming et al. The argument of this cause was continued by Assist. Atty. Gen. Smith for plaintiff, and by Stephen G. Clark for defendants, and concluded by Assist. Atty. Gen. Smith for plaintiff.

No. 159. The Mutual Life Insurance Company of New York v. C. S. Jeffries, administrator, etc. This cause was argued by Matt H. Carpenter for plaintiff, and submitted on printed arguments by T. W. B. Crews and Joseph S. Lawrie for defendant.

No. 160. Wm. A. Cheatem and wife v. Wm. H. Trafford, executor, etc. This cause was argued by Henry Cooper for plaintiffs, and Assist. Atty. Gen. Smith for defendant.

No. 161. The Connecticut Mutual Life Insurance Company v. Louisa Coverston. This cause was argued by L. B. Wheat for plaintiffs, and submitted on printed arguments by A. J. Bently for defendant.

No. 162. John W. Morsell et al. v. The First National Bank of Washington. The argument of this cause was commenced by J. J. Johnson for appellants, and continued by Enoch Tollen for appellee, and by R. K. Elliot for appellants.

Adjourned until Thursday at 12 o'clock.

KANSAS REPORTS.

[From W. C. WEBB, reporter, to appear in XV. Kansas Reports.]

Thomas Royal et al v. *Annie L. Lindsay.*

EXTENSION OF NOTE—CONSIDERATION—INTEREST.

1. When, after the maturing of a note running one year and bearing interest at the rate of twelve per cent. per annum until paid, the payee agrees to extend the note for another year upon the promise of the payor to pay interest at the rate of fifteen per cent. per annum, payable monthly; *Held*, That such promise was sufficient consideration to sustain the agreement.

2. A payment of a part of an amount due is not sufficient consideration to sustain an agreement to extend the time of payment of the residue.

KINGMAN, C. J., concurring.

Frank J. Robinson et al. v. *Hiero T. Wilson.*

BANKRUPTCY—CERTIFICATE OF DISCHARGE—PROPERTY EXEMPT.

1. While section 3 of chapter 12 of the General Statutes is general in its terms, and directs the court on production of a certificate of discharge in bankruptcy to enter a discharge upon the record of any judgment against such bankrupt, it can not and does not apply to any other judgments than such as are legally discharged by the proceedings in bankruptcy.

2. When premises which have been seized under a valid order of attachment become thereafter the homestead of the defendant in the attachment, the homestead right is subject and subordinate to the attachment lien. Bullene *v.* Hiatt, 12 Kan., 98.

3. Property exempt by the laws of the State from seizure on attachment or execution, does not pass by the assignment to the assignee in bankruptcy, but remain the absolute property of the bankrupt, unaffected by the bankrupt proceedings and subject to any specific liens created by the voluntary act of the bankrupt or through legal proceedings.

4. The State courts have jurisdiction to enforce any specific lien upon such exempt property.

5. The assignment in bankruptcy operates to dissolve only such attachments as were made within four months prior to the commencement of the bankruptcy proceedings, and only such as were levied upon property passing to the assignee, and does not dissolve attachments levied upon property remaining the bankrupts.

H. F. Wooley et al. v. *P. Vanbolkenburg et. al.*

PROTEST FEES.

1. Protest damages are recoverable in this State only when protest is legally necessary to fix the liability of some party to the note or bill.

2. Protest is not necessary in order to fix the liability of a guarantor; hence, in an action by the payee of a note against the maker and a guarantor, protest damages are not recoverable.

A. Ballenger v. *Lizzie Lantier, administratrix of the estate of H. Lantier, deceased.*

ATTACHMENT—NON-RESIDENCE.

1. In all cases where an order of attachment is issued, except where the defendant is a non-resident of the State or a foreign corporation, an attachment bond must be given by the plaintiff (Code, section 192, laws of 1870, page 172, section 5.) And where the defendant is not a non-resident of the State or a foreign corporation, and no such bond is given, the attachment should be dissolved on motion of the defendant.

2. A resident of the State of Kansas can become a non-resident, only by leaving the State with the intention of becoming a non-resident, hence, where a person leaves his former home in this State and starts for another State, with the intention of becoming a non resident of this State and a resident of said other State, he is still not a non-resident of this State until he gets out of the State.

3. Where a plaintiff sets forth in his petition a cause of action for goods sold and delivered, and does not mention that any promissory note or notes were given for the price of the goods, and the defendant afterwards sets forth in his answer that the goods were sold on credit, and that three promissory notes were given for the price thereof, and that neither of said notes is yet due; *Held*, That this answer of the defendant sets forth new matter constituting a defense to the plaintiff's action, and that it requires a reply from the plaintiff to put it in issue. (General Statutes, 653, section 128.)

Recent Publications.

BRYANT & STRATTON BUSINESS ARITHMETIC. By H. B. Bryant, E. E. White and C. G. Stowell. Published by Albert Mason, New York. 8vo., 564 pp.

Here we have a book for the business man and commercial student, that surpasses anything of the kind before published. It is full of important business computations. Part 1st embraces the Science of Numbers. Part 2d covers the great mass of computations that are continually arising in business offices, with the most approved methods of solving them. Part 3d embraces a large number of valuable tables, and other condensed matter of great moment to the business man, arranged in convenient manner for reference.

LAW BOOKS.—We call attention to the advertisement of Callaghan and Company, of law books just published by them.

WALTER BUTLER.
Master, 8 Kendall Building.

STATE OF ILLINOIS, COOK COUNTY, SS.—CIRcuit Court of Cook County.—In chancery. William Hearson and Eli Payne vs. Wellman M. Burbank, petition; and John Hughes and Kendrick Hughes vs. Wellman M. Burbank and John H. Avery, intervening petition; and Charles Gladding and Harrison H. Remington vs. Wellman M. Burbank and John H. Avery, intervening petition; and Francis Agnew, surviving partner, etc., vs. Wellman M. Burbank and John H. Avery, petition; and the Chicago Composition Granite Company vs. Wellman M. Burbank and John H. Avery, petition; and —— Bliss and —— Brown vs. Wellman M. Burbank and John H. Avery, petition; and Richard Parry and Edward Francis vs. W. M. Burbank and John H. Avery, intervening petition; and John B. Whitney vs. Hearson and Payne et al., intervening petition.

Public notice is hereby given that in pursuance of a decree entered on the fourteenth day of July A. D. 1875, and of a further order entered on the twenty-ninth day of January, A. D. 1876; both said decree and said order being entered by the said court in the above entitled causes, as consolidated, I, Walter Butler, master in chancery of said Cook county, will, at the hour of ten o'clock in the forenoon, on Thursday, the thirtieth day of March, A. D. 1876, at the north door of the Chamber of Commerce, a building situated at the southeast corner of Washington and LaSalle streets, in the city of Chicago in said Cook county, sell at public auction to the highest and best bidder for cash, the following described premises, to wit:

Lots twenty (20), twenty-one (21), twenty-two (22), twenty-three (23), and twenty-four (24), in Husted's subdivision of the south part of block thirteen (13) in the Canal Trustees' subdivision of parts of section thirty-three (33), township forty (40) north, range fourteen (14), east of the third principal meridian, fronting on Webster avenue, in Chicago, Cook county, Illinois.

Chicago, February 26th, 1876.

WALTER BUTLER,
23-27 Master in Chancery of Cook County.

STATE OF ILLINOIS, COOK COUNTY, SS. CIRcuit Court of Cook county. In chancery.—Charles B. Forrest vs. James F. Keeney, trustee, Lucien B. Hart and Love M. Hart, heirs at law of Georgiana B. Hart, deceased, and M. C. Bishop, in her own right and as executrix of the last will and testament of Georgiana B. Hart, deceased.

Public notice is hereby given that in pursuance of a decree entered on the fourth day of February, A. D. 1876, by the said court in the above entitled cause, I, Walter Butler, master in chancery of said Cook county, will, at the hour of ten o'clock in the forenoon, on Saturday, the eighteenth day of March, A. D. 1876, at the west door of the two north doors of the building now used as a court house for said Cook county, situate on the southeast corner of LaSalle and Adams streets, in the city of Chicago, Illinois, sell at public vendue to the highest and best bidder for cash, the following described premises, to wit:

Lots numbered nine (9) and ten (10), in block number twenty-two (22), and lots fifteen (15) and sixteen (16) in block number twenty-three (23), all in Ravenswood, Cook county, Illinois, being a subdivision of part of the northeast quarter and northeast quarter of the southeast quarter of section eighteen (18), and part of section seventeen (17); all in town forty (40) north, range fourteen (14), east of the third principal meridian.

Chicago, February 26th, 1876.

WALTER BUTLER,
Master in Chancery of Cook County.
A. E. GUILD, Jr., Solr. 23-25

SAM'L STRAUS,
Attorney, No. 184 S. Clark Street.

ESTATE OF JOHN JACOB SCHMIDT, DECEASed.—Notice is hereby given to all persons having claims and demands against the estate of John Jacob Schmidt, deceased, to present the same for adjudication and settlement at a regular term of the County court of Cook county, to be holden at the court house, in the city of Chicago, on the third Monday of April, A. D. 1876, being the 17th day thereof.

Chicago, February 17th, A. D. 1876.

ELIZABETH SCHMIDT, Administratrix.
SAM'L STRAUS, Atty. 22-27a

TRUSTEE'S SALE.—WHEREAS, DWIGHT A. NORton, of the city of Chicago, in the county of Cook and State of Illinois, by his certain deed of trust, bearing date the twenty-second day of October, A. D. 1873, and filed of record in the recorder's office of said Cook county on the twenty-first day of November, A. D. 1873, and duly recorded in book 347 of records, at page 242, did convey unto the undersigned as trustee, all the following described premises situated in the town of Lake, county and State aforesaid, to wit:

Lot numbered five (5), in block four (4) of James Goo speeds' subdivision of part of the northwest quarter (¼) of the northeast quarter (¼) of section nine (9), township thirty-eight (38), north range fourteen (14), east of the third principal meridian, (for further description see above named book of records,) to secure the payment of his three promissory notes, executed by the said Norton, bearing even date therewith, payable to the order of Josiah Carpenter, for the sum of one hundred dollars ($100) each, all of which said notes are made payable at the First National Bank, Chicago, and each drawing interest at eight per cent. per annum payable annually, one of which said notes is made payable two years after the date thereof, another three years after the date thereof, and the third four years after the date thereof.

And whereas, it is provided in and by said trust deed that in case of default in the payment of the said promissory notes, either of them or any part thereof, according to the tenor and effect thereof, then, on the application of the legal holder of said notes, it should and might be lawful for the undersigned to sell and dispose of the said premises, and all the right, title, benefit and equity of redemption of said Dwight A. Norton, his heirs and assigns therein at public auction at either door of whatever building then used as court house in the city of Chicago, in the State of Illinois, or on said premises, or any part thereof, as may be specified in the notice of such sale, for the highest and best price the same will bring for cash, three weeks' notice having been previously given of the time and place of such sale by advertisement in the Chicago Legal News, or in any other newspaper at that time published in said city of Chicago, and to make, execute and deliver to the purchaser or purchasers at such sale, good and sufficient deed or deeds of conveyance for the premises sold, and out of the proceeds of such sale, after first paying all costs of advertising sale and conveyance, including the reasonable fees and commissions of said trustee, and other possible expenses therein named, then to pay the principal of said notes, whether due and payable by the terms of said trust deed or not, and interest on said notes up to the time of such sale.

And whereas, it is further provided in said trust deed that in case of default in any of said payments of principal or interest, according to the tenor and effect of said promissory notes, or either of them, or any part thereof, as aforesaid, then in that case the whole of said principal sum thereby secured and the interest thereon to the time of sale may at once, at the option of the legal holder thereof, become due and payable, and the said premises be sold in the manner and with the same effect as if the said indebtedness had fully matured.

And whereas, default has been made in the payment of the promissory note first above named, and the interest for two years on each of said three promissory notes, and the legal holder of said notes has made application to the undersigned and requested him as such trustee to sell and dispose of said premises under the power in said trust deed, and for the purposes therein stated.

Now, therefore, public notice is hereby given, that in pursuance of said trust deed, and by virtue of the power in me vested by the same, and for the uses and purposes therein expressed, I shall, on Monday the thirteenth (13th) day of March, A. D. 1876, at the hour of 10 o'clock A. M., at the west door of the two north doors of the building now used for a court house, in the city of Chicago and State of Illinois, being the building situate at the southeast corner of Adams and LaSalle streets, in said city, sell at public auction, to the highest bidder, for cash, pursuant to the terms of said deed of trust, and all the right, title, benefit and equity of redemption of the said Dwight A. Norton, his heirs or assigns therein.

Chicago, February 18, 1876.

22-24 CALEB J. RICHARDSON, Trustee.

LANDLORD'S SALE OF BUILDING.—WHEREAS, Pollock Barbour did, on the 20th day of July, A.D. 1874, enter into a certain written lease with one J. D. Jensen, in and by which said Barbour leased to the said Jensen lot No. 13 in block 136 in the school section addition to Chicago, for a term ending on the first day of September, A. D. 1879, at a rent of $3,750, payable in monthly installments of $62.50 on the first day of each month, commencing September 1st, 1874, which said rent, together with taxes and water rents, was to be paid by said Jensen.

And whereas, it was and is provided in and by said lease, that the rent therein reserved, and each installment thereof, should be a valid and first lien upon any buildings and improvements upon said premises, or that might at any time be erected, placed or put on said premises by said Jensen, and upon his interest in said lease, and that whenever any rent should become due and remain unpaid one day said Barbour, his agents, attorney or assigns might sell at public auction to the highest bidder for cash, after having first given ten days' notice of the time and place of such sale in some newspaper published in the city of Chicago, all the buildings and improvements on said premises, and all the right, title and interest acquired by said Jensen under said lease to the premises therein described, for the purpose of paying said rent so due, and the expenses of sale.

And whereas, the said Jensen has erected and put upon said lot a certain building and certain improvements, and whereas, one Cyrus H. Meacham and L. A. Brown & Co. claim some interest in said building by virtue of pretended chattel mortgages or otherwise.

And whereas, the sum of 455 dollars of the said rent became and was due on the first day of February, A. D. 1876, and still remains unpaid.

Now, therefore, public notice is hereby given that in pursuance of the power given in and by said lease, I, Lyne S. Davison, attorney in fact for said Pollock Barbour, will, on Tuesday the seventh (7th) day of March, A. D. 1876, at the hour of ten (10) o'clock in the forenoon of that day, on the sidewalk immediately in front of the building known as Number 384 South State street, Chicago, Illinois, sell to the highest bidder, for cash, at public auction, the building and all the improvements situated and being on said lot 13, in block 136, in the School Section addition to Chicago, and known as number 384 South State street, Chicago, and all the right, title and interest acquired by the said J. D. Jensen, under the said lease.

Chicago, February 5th, 1876.

LYNE S. DAVISON,
Attorney in fact for Pollock Barbour.
SAMUEL KERR, Attorney. 26-24

E. L. BARBER.
S. E. Corner State and 20th Streets.

CHANCERY NOTICE.—STATE OF ILLINOIS, county of Cook, ss. Circuit Court of Cook county, March term, A. D. 1876. Daniel D. Emmett vs. Mary A. Wharton, Thomas Rives and the unknown heirs of Catharine Emmett, deceased.—In chancery.

Affidavit of the non-residence of Mary A. Wharton and Thomas Rives, defendants above named, having been filed in the office of the clerk of said Circuit court, of Cook county, notice is hereby given to the said Mary A. Wharton and Thomas Rives, that the complainant heretofore filed his bill of complaint in said court, on the chancery side thereof, and that a summons thereupon issued out of said court against said defendants, returnable at the court house in the city of Chicago, in said county, on the third Monday of March next, (1876), as is by law required.

Now, unless you, the said Mary A. Wharton and Thomas Rives and the unknown heirs of Catharine Emmett, deceased, shall personally, be and appear before said Circuit court of Cook county, on the first day of a term thereof, to be holden at Chicago, in said county, on the third Monday of March, 1876, and plead, answer or demur to the said complainant's bill of complaint, the same, and the matters and things therein charged and stated, will be taken as confessed, and a decree entered against you according to the prayer of said bill.

JACOB GROSS, Clerk.
E. L. BARBER, Com'pts. Solr. 21-22-25

CHICAGO LEGAL NEWS

SATURDAY, MARCH 4, 1876.

The Courts.

Through the courtesy of CLARK W. UPTON, of the law firm of UPTON, BOUTELL & WATERMAN, of this city, we have received the following opinion:

UNITED STATES SUPREME COURT.

OCTOBER TERM, 1875.

DANIEL WEBSTER, plaintiff in error,
v.
CLARK W. UPTON, assignee in bankruptcy of the Great Western Insurance Company.

In error to the Circuit Court of the United States for the Northern District of Illinois.

BANKRUPT INSURANCE COMPANY—ASSESSMENT ON STOCK—LIABILITY OF TRANSFEREE TO PAY ASSESSMENT ON UNPAID STOCK.

Held, that the transferee of stock on the books of an insurance company, on which only twenty per cent. of its nominal value has been paid, is liable for calls for the unpaid portion made during his ownership, without proof of any express promise by him to pay such calls.

2. CAPITAL STOCK.—That the capital stock of an insurance company, like that of any other business, is a trust fund for the protection of its creditors, or those who deal with it. Neither the stockholders nor the directors can lawfully withhold any portion of the stock from the reach of those who have lawful claims against the company; that the stock held in trust is the whole stock, not merely that percentage of it which has been called in and paid.

3. In Upton, etc. *v.* Tribilcock, it was held that the original holders of the stock are liable for the unpaid balances at the suit of the assignee in bankruptcy, and that without any express promise.

4. LIABILITY OF THE TRANSFEREE OF STOCK.—That the transferee of stock in an incorporated company is liable for calls made after he has been accepted by the company as a stockholder and his name has been registered on the stock books as a corporate; and being thus liable there is an implied promise that he will pay calls made while he continues the owner.

5. RELEASING STOCK.—That the stock cannot be released: that is, that the liabilities of the stockholders cannot be discharged by the company, to the injury of creditors, without payment.

6. NON-ASSESSIBLE.—That the fact the certificate taken by the defendant was marked "non-assessable" is of no importance.

7. A court of equity will compel a transferee of stock to record the transcript, and to pay all calls after the transfer.—[ED. LEGAL NEWS.]

Mr. Justice STRONG delivered the opinion of the court.

The Great Western Insurance Company, of which the plaintiff below is the assignee in bankruptcy, was incorporated under the laws of Illinois in 1857, with general power to insure all kinds of property against both fire and marine losses. Subsequently to its organization its capital was increased to more than one million of dollars, and it was authorized by law further to increase its capital to $5,000,000. It does not appear, however, from the record, that of the stock subscribed more than about $222 000 was ever paid in, a sum equal to nearly twenty per cent. of the par value, leaving over $965,000 of subscribed capital unpaid. In this condition the company went into bankruptcy in 1872, owing a very large sum, equal to, if not greater than its entire subscribed capital, and Clark W. Upton, the plaintiff, became the assignee. The district court then directed a call to be made for the eighty per cent. remaining unpaid of the capital stock. A call was accordingly made, and payments having been neglected, the assignee brought this suit against the defendant, averring that he was the holder of one hundred shares, of the par value of one hundred dollars each, and, as such, responsible for the eighty per cent. unpaid. On the trial, evidence was given tending to show that one —— Hale was the owner of a large amount of the stock of the company, for which he held the company's certificates, and that he had, through his brother, sold one hundred shares to the defendant, on which twenty per cent. had been paid. The books of the company had been destroyed in the great fire in Chicago in 1871, but there was evidence tending to show that the defendant's name was on the stock ledger, and that the defendant transferred, or caused the stock bought from Hale to be transferred to himself on the books of the company. The district judge submitted to the jury to find whether the defendant actually thus became a stockholder, recognized as such on the books of the company, instructing them that if he did he was liable for the eighty per cent. unpaid as if he had been an original subscriber. A verdict and judgment having been recovered by the plaintiff, the case was removed by writ of error to the circuit court, where the judgment was affirmed, and the judgment of affirmance we are now called upon to review.

The leading assignment of error here is that the court below erroneously ruled that an assignee of stock, or of a certificate of stock in an insurance company, is liable for future calls or assessments without an agreement or promise to pay. This, however, is not a fair statement of what the court did rule. The court instructed the jury, in effect, that the transferee of stock on the books of an insurance company, on which only twenty per cent. of its nominal value has been paid, is liable for calls for the unpaid portion made during his ownership, without proof of any *express* promise by him to pay such calls. This instruction, we think, was entirely correct. The capital stock of an insurance company, like that of any other business corporation, is a trust fund for the protection of its creditors or those who deal with it. Neither the stockholders nor their agents, the directors, can rightfully withhold any portion of the stock from the reach of those who have lawful claims against the company. And the stock thus held in trust is the whole stock, not merely that percentage of it which has been called in and paid. This has been decided so often that it has become a familiar doctrine. But what is it worth if there is no legal liability resting on the stockholders to pay the unpaid portion of their shares unless they have expressly promised to pay it? Stockholders become such in several ways; either by original subscription, or by assignment of prior holders, or by direct purchase from the company. An express promise is almost unknown, except in the case of an original subscription, and oftener than otherwise it is not made in that. The subscriber merely agrees to take stock. He does not expressly promise to pay for it. Practically, then, unless the ownership of such stock carries with it the legal duty of paying all legitimate calls made during the continuance of the ownership, the fund held in trust for creditors is only that portion of each share which was paid prior to the organization of the company, in many cases not more than five per cent.; in the present, only twenty. Then the company commences business and incurs obligations, representing all the while to those who deal with it that its capital is the amount of stock taken, when in truth the fund which is held in trust for creditors is only that part of the stock which has been actually paid in. This cannot be. If it is, very many corporations make fraudulent representations daily to those who give them credit.

The Great Western Insurance Company reported to the auditor of public accounts, as required by law, that the amount of its capital stock outstanding (par value of shares $100 each) was $1,188,000; that the amount of paid up capital stock was $222,831.42, and that the amount of subscribed capital for which the subscribers or holders were liable was $965,168 58. This report was made on the 10th of January, 1871. Thus, those who effected insurances with the company were assured that over one million of dollars were held as a trust fund to secure the company's payment of their policies. But if the subscribers and holders of the shares are not liable for the more than eighty per cent. unpaid, the representation was untrue. Persons assured have less than one-fifth the security that was promised them. This is not what the statutes authorizing the incorporation of the company contemplated. The stock was required to be not less than a given amount, though the company was authorized to commence business when five per cent. of that amount was paid in. Why fix a minimum amount of stock if all of it was not intended to be a security for those who obtained insurance? There is no conceivable reason for such a requirement, unless it be either to provide for the creditors a capital sufficient for their security, or to secure the stockholders themselves against the consequences of an inadequate capital. The plain object of the statute, therefore, would be defeated if there is no liability of the stockholder to pay the full prescribed amount of each share of his stock. With this plain object of the legislature in view it must be assumed, after the verdict of the jury, the defendant voluntarily became a stockholder. Either he must have designed to defeat the legislative intent, or he must have consented to carry it out. The former is not to be presumed. And if the latter was the fact, coming as he did into privity with the company, there is a necessary implication that he undertook to complete the payment of all that was unpaid of the shares he held whenever it should be demanded. To constitute a promise binding in law, no form of words is necessary. An implied promise is proved by circumstantial evidence—by proof of circumstances that show the party intended to assume an obligation. A party may assume an obligation by putting himself into a position which requires the performance of duties.

What we have said thus far is applicable to the case of an original subscriber to the stock, and equally to a transferee of the stock who has become such by transfer on the books of the company. There are, it is true, decisions of highly respectable courts to be found, in which it was held that even a subscriber to the capital stock of an incorporated company is not personally liable for calls, unless he has expressly promised to pay them, or unless the act of incorporation or some statue declares that he shall pay them. Such was the decision of a Supreme Court of New York, reported in 17th Barbour, page 567, the case of The Fort Edward and Fort Miller Plank Road Company *v.* Payne. A similar ruling was made in The Kennebec and Portland Railroad Company *v.* Kendall, 31 Maine, 470. A like ruling has also been made in Massachusetts. In most, if not all of these cases, it appeared that the law authorizing the incorporation of the companies had provided a remedy for non-payment of calls or assessments of the unpaid portions of the stock taken. The company was authorized to declare forfeited, or to sell the stock for default of the stockholder, and the law having given such a remedy, it was held to be exclusive of any other. Yet in them all it was conceded that if the statute had declared the calls or assessments should be paid, an action of assumpsit might be maintained against the original stockholder on a promise to pay, implied only from the legislative intent. Surely the legislative intent that the full value of the stock authorized and required to be subscribed, in other words, the entire capital, shall be in fact paid in when required, that it shall be real, and not merely nominal, is plain enough when the authority to exist as a corporation and to do business is given on condition that the capital subscribed shall not be less than a specified sum. A requisition that the subscribed stock shall not be less than one million of dollars, would be idle if the subscribers need pay only a first installment on their subscriptions, for example, five per cent. Manifestly that would not be what the law intended, and if its intent was that the whole capital might be called in, it is difficult to see why a subscriber, knowing that intent and voluntarily becoming a subscriber, does not impliedly engage to pay in full for his shares, when payment is required. It is, however, unnecessary to discuss this question farther, for it is settled by the judgment of this court. In Upton, assignee of The Great Western Insurance Company *v.* Tribilcock, decided at this term, we ruled that the original holders of the stock are liable for the unpaid balances at the suit of the assignee in bankruptcy, and that without any express promise to pay. The bankrupt corporation in that case was the same as in this.

But if the law implies a promise by the original holders or subscribers to pay the full par value when it may be called, it follows that an assignee of the stock, when he has come into privity with the company, by having stock transferred to him on the company's books, is equally liable. The same reasons exist for implying a promise by him as exist for raising up a promise by his assignor. And such is the law, as laid down by the text writers generally, and by many decisions of the courts.—(Bond *v.* The Susquehanna Bridge, 6 Har. & Johnson, 128; Hall *v.* United States Insurance Company, 5 Gill, 484; Railroad Company *v.* Boorman, 12 Conn., 530; Haddersfield Canal Co. *v.* Buckley, 7 T. M., 36.) There are a very few cases, it must be admitted, in which it has been held that the purchaser of stock, partially paid, is not liable for calls made after his purchase. Those to which we have been referred are Canal Co. *v.* Sansom, 1 Binney, 70, where the question seems hardly to have been considered, the claim upon the transferree having been abandoned; and Palmer *v.* The Ridge Mining Company, 34 Penn. State, 288, which is rested upon Sansom's case, and upon the fact that, by the charter, the company was authorized to forfeit the stock for non-payment of calls. We are also referred to Seymour *v.* Sturgess, 26 New York, 134, the circumstances of which were very peculiar. In neither of these cases was it brought to the attention of the court that the stock was a trust fund held for the protection of creditors in the first instance, a fund no part of which either the company, or its stockholders, was at liberty to withhold. They do not, we think, assert the doctrine which is generally accepted. In Angell & Ames on Corporations, sec. 534, it is said: "When an original subscriber to the stock of an incorporated company who is so bound to pay the installments on his subscription, from time to time as they are called in by the company, transfers his stock to another person, such other person is substituted not only to the rights, but to the obligations of the original subscriber, and he is bound to pay up the installments called for after the transfer to him. The liability to pay the installments is shifted from the out-going to the in-coming shareholder. A privity is created between the two by the assignment of the one and the acceptance of the other, and also between them and the corporation, for it would be absurd to say, upon general reasoning, that if the original subscribers have the power of assigning their shares, they should, after disposing of them, be liable to the burdens which are thrown upon the owners of the stock." So in Redfield on Railways, 53, sec. 7-4, it is said the cases agree that whenever the name of the vendee of shares is transferred to the register of shareholders, the vendor is exonerated, and the vendee becomes liable for calls. We think, therefore, the transferee of stock in an incorporated company is liable for calls made after he has been accepted by the company as a stockholder, and his name has been registered on the stock books as a corporator; and being thus liable, there is an implied promise that he will pay calls made while he continues the owner.

All the cases agree that creditors of a corporation, may compel payment of the stock subscribed, so far as it is necessary for the satisfaction of the debts due by the company. This results from the fact that the whole subscribed capital is a trust fund for the payment of creditors when the company becomes insolvent. From this it is a legitimate deduction that the stock cannot be released, that is, that the liabilities of the stockholders cannot be discharged by the company, to the injury of creditors, without payment. The fact, therefore, that in this case the certificate of stock taken by the defendant below was marked "non-assessable" is of no importance. The suit is brought by the assignee in bankruptcy, who represents creditors, and, as against him, the company had no right to release the holders of the stock from the payment of the eighty per cent. unpaid.

The second assignment of error and the third are in substance that the court should not have admitted in evidence the order of the district court directing a call by the assignee of the unpaid balance of the stock, and should not have ruled that the call made under the order was effective to make the liability of the defendant complete. That these assignments cannot be sustained was decided in Carver *v.* Upton, a case before us at this term. Nothing more need be said in reference to them.

The last assignment of any thing that can be assigned for error is that the court charged the jury as follows: "The only question is, was the defendant a stockholder of the company? If the testimony satisfies you that the defendant purchased of —— Hale one hundred shares of this stock, and that it was transferred in the books of the company, either by Webster, the defendant, or by Hale, who sold the stock, or by the direction of either of them, then the defendant is liable the same as if he had subscribed for the stock." The objection urged against this is that a transfer on the books directed by Hale, after the

purchase by Webster, could not affect the latter's liability. But if Webster became the purchaser, it was his vendor's duty to make the transfer to him, where only a legal transfer could be made, namely, on the books of the company, and the purchase was in itself authority to the vendor to make the transfer. Still further it was Webster's duty to have the legal transfer made to relieve the vendor from liability to future calls. A court of equity will compel a transferee of stock to record the transfer, and to pay all calls after the transfer.—(3 De Gex & Smale Ch., 310.) If so, it is clear that the vendor may himself request the transfer to be made, and that when it is made at his request, the buyer becomes responsible for subsequent calls. This, however, does not interfere with the right of one who appears to be a stockholder on the books of a company, to show that his name appears on the books without right, and without his authority.

The judgment of the circuit court is affirmed.

E. VAN BUREN for plaintiff in error.

BOUTELL and WATERMAN for defendant in error.

UNITED STATES SUPREME COURT.

OPINION DELIVERED FEB. 7, 1876.

THOMAS A. OSBORN, JAMES S. EMERY and JAMES L. MCDOWELL, plaintiffs in error,
No. 77 *v.*
THE UNITED STATES.

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

1. A pardon by the President restores to its recipient all rights of property lost by the offense pardoned, unless the property has by judicial process become vested in other persons, subject to exceptions prescribed by the pardon itself.
2. A condition annexed to a pardon, that the recipient shall not by virtue of it claim any property, or the proceeds of any property, sold by the order, judgment, or decree of a court under the the confiscation laws of the United States, does not preclude him from applying to the court for the proceeds of money-bonds secured by mortgage, confiscated, the proceeds being collected by the officers of the court in part by voluntary payment by the obligors, and in part by sale of the lands mortgaged. The condition is only intended to protect purchasers at judicial sale, decreed under the confiscation laws, from any claim of the original owner, for the property sold or the purchase-money.
3. The proceeds of property confiscated paid into court, are under the control of the court until an order for their distribution is made, or they are paid into the hands of the informer entitled to them, or into the treasury of the United States.
4. Where moneys belonging to the registry of the court are withdrawn from it without authority of law, the court can by summary proceedings, compel their restitution; and any one entitled to the moneys may apply to the court by petition for a delivery of them to him.

Mr. Justice FIELD delivered the opinion of the Court.

The material questions presented in this case for our determination relate: first, to the effect of the President's pardon upon the rights of the petitioner to the proceeds of his property confiscated by the decree of the district court; and, second, to the power of the court to compel restitution to its registry of moneys illegally received by its former officers.

In May, 1863, the District Court, of Kansas decreed the condemnation and forfeiture to the United States of the several bonds and mortgages described in the information filed by the government. In June following it ordered that the several debtors on these bonds should, within five months thereafter, pay into court the money due by them respectively, and that in default of such payment, the clerk should issue to the marshal orders for the sale of the mortgaged property, upon which he should proceed as on execution under the laws of Kansas. Some of the debtors paid the amounts due by them into the court; but the majority of them failed in this respect, and orders for the sale of the property mortgaged were issued to the marshal. To him the greater number paid without sale, but in some instances sales were made. Over twenty thousand dollars in this way came into the possession of officers of the court.

There were at the time numerous other confiscation cases pending in the court, and the moneys received from them were indiscriminately mixed with the moneys received in the cases against the property of the petitioner. None of the moneys received in any of the cases was paid into the treasury of the United States, and no order was made by the court for any such payment. Some of them were deposited in a banking-house at Leavenworth, designated as the place of deposit of moneys paid into court, and afterwards drawn out. Some were obtained by officers of the court, and to an extent greatly in excess of their legal charges; and some of them were paid to the judge. The moneys from the different confiscation cases being indiscriminately mixed, would seem to have been taken by the officers of the court whenever funds were needed by them, without regard to the sources from which they were derived, or the propriety of their application to the purposes for which they were used.

In April, 1866, the petitioner applied to the court for leave to file a petition for the restoration to him of the proceeds of his property, after deducting the costs of the legal proceedings, alleging that he had ben pardoned by the President of the United States, and setting forth a copy of the pardon. The pardon was issued in September, 1865, and was in terms a full pardon and amnesty for all offenses committed by the petitioner, arising from participation, direct or indirect, in the rebellion, subject to certain conditions. One of these conditions provided that the petitioner should pay all costs which may have accrued in proceedings instituted or pending against his person or property before the acceptance of the pardon. Another condition was that the petitioner should not by virtue of the pardon claim any property, or the proceeds of any property, which had been sold by the order, judgment, or decree of a court under the confiscation laws of the United States.

The district court refused the application, but the circuit court, on appeal, reversed its order and allowed the petition to be filed. The district court held, it would seem, that the conditions attached to the pardon precluded the petitioner from seeking to obtain the proceeds of his property. But the circuit court was of opinion that the effect of a pardon was to restore to its recipient all rights of property lost by the offense pardoned, unless the property had, by judicial process, become vested in other persons, subject to such exceptions as were prescribed by the pardon itself; that until an order of distribution of the proceeds was made in these cases, or the proceeds were actually paid into the hands of the party entitled as informer to receive them, or into the treasury of the United States, they were within the control of the court, and that no vested right to the proceeds had accrued so as to prevent the pardon from restoring them to the petitioner. Woolworth's Rep., 198. This ruling is here assailed by officers of the court, who are called upon to make restitution of a portion of the proceeds they obtained, not by the United States, who are alone interested in the decision. It is not a matter for these officers to complain that proceeds of property adjudged forfeited to the United States are held subject to the further disposition of the court, and possible restitution to the original owner. That is a matter which concerns only the United States, and they have not seen fit to object to the decision. But independently of this consideration we are clear that the decision was correct. The pardon, as is seen, embraces all offenses arising from participation of the petitioner, direct or indirect, in the rebellion. It covers, therefore, the offenses for which the forfeiture of his property was decreed. The confiscation law of 1862, though construed to apply only to public enemies, is limited to such of them as were engaged in and gave aid and comfort to the rebellion. Sec 7, 12 Statutes at Large, p, 590. The pardon of that offense necessarily carried with it the release of the penalty attached to its commission, so far as such release was in the power of the government, unless specially restrained by exceptions embraced in the instrument itself. It is of the very essence of a pardon that it releases the offender from the consequences of his offense. If, in the proceedings to establish his culpability and enforce the penalty, and before the grant of the pardon, the rights of others than the government have vested, those rights can not be impaired by the pardon. The government having parted with its power over such rights, they necessarily remain as they existed previously to the grant of the pardon. The government can only release what it holds. But unless rights of others in the property condemned have accrued, the penalty of forfeiture annexed to the commission of the offense must fall with the pardon of the offense itself, provided the full operation of the pardon be not restrained by the conditions upon which it is granted. The condition annexed to the pardon of the petitioner does not defeat such operation in the present case. The property of the petitioner forfeited consisted of numerous money-bonds, secured by mortgage on lands in Kansas. These bonds were not sold under the confiscation laws; they were collected by the officers of the court, in part by voluntary payments by the obligors, and in part by sale of the lands mortgaged. These lands did not belong to the petitioner, A mortgage in Kansas does not pass the title of the property mortgaged; it is a mere security for the debt, to which the creditor may resort to enforce payment. The property mortgaged was not confiscated nor sold under the confiscation laws. When a bond of one of the debtors was not voluntarily paid, the court proceeded to enforce its payment by the ordinary measure resorted to in the case of mortgages, that is, a sale of the security.

The object of the condition in question annexed to the pardon was to protect the purchaser of property of the petitioner at a judicial sale, decreed under the confiscation laws, from any claim by him, either for the property or the purchase-money. Numerous sales had been made under decrees in confiscation cases, and a similar condition was usually inserted in pardons to secure the purchasers from molestation. Full effect is thus given to the condition; and as a pardon is an act of grace, limitations upon its operation should be strictly construed.

But it is contended that as the bonds were forfeited to the government by the decree of the district court, there can be no restitution except by grant or conveyance of some kind from the government, and that the proprietary interests of the government can only be disposed of by act of Congress. The answer is that the forfeiture results, not from the decree of the court, but from the offense which the decree establishes and declares. The pardon, in releasing the offense, obliterating it in legal contemplation, Carlisle *v.* United States, 16 Wallace, 151, removes the ground of the forfeiture upon which the decree rests, and the source of title is then gone.

But were this otherwise, the constitutional grant to the President of the power to pardon offenses must be held to carry with it, as an incident, the power to release penalties and forfeitures which accrue from the offenses.

The petitioner being restored by the pardon to his rights in the proceeds of the property forfeited, after deducting from them the costs of the legal proceedings, naturally invoked the aid of the court in which the proceedings were had, or to which they were transferred, for restitution of the proceeds. Proceedings in confiscation cases are required by the statute to conform as nearly as may be to proceedings in admiralty or revenue cases. And in admiralty it is the constant practice for persons having an interest in proceeds in the registry of the court, to intervene by petition and summary proceedings to obtain a delivery of the moneys to which they are entitled. The 43d admiralty rule recognizes this right; and in cases without number the right has been enforced. The power of the court over moneys belonging to its registry continues until they are distributed pursuant to final decrees in the cases in which the moneys are paid. If from any cause they are previously withdrawn from the registry without authority of law, the court can, by summary proceedings, compel their restitution. In the present case it is no answer to the order for restitution that the appellants received the moneys they obtained as officers of the court, and that they have long since ceased to be such officers. If the moneys were illegally taken, they must be restored, and until a decree of distribution is made and enforced, the summary power of the court to compel restitution remains intact. The power could be applied in no case more fittingly than to previous officers of the court.

The careful and labored reports of the commissioners appointed by the court to examine into the proceedings in the confiscation cases, ascertain the expenses incurred, and trace out as far as possible the moneys received, were properly confirmed. There is no objection to their findings which merits consideration.

The decree brought before us for review must be affirmed, except as to the costs of the proceedings subsequent to the presentation of the application of the petitioner. Those costs should be apportioned against the parties ordered to make restitution, according to the respective amounts they are adjudged to restore. The cause will, therefore, be remanded, with directions to modify the decree in this particular; but in all other respects the decree is affirmed.

UNITED STATES SUPREME COURT.

OPINION DELIVERED JAN. 31, 1876.

THE MILWAUKEE AND SAINT PAUL RAILWAY COMPANY, plaintiffs in error,
v.
MARY A. F. ARMS and D. D. ARMS.

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

ACTION TO RECOVER FOR PERSONAL INJURIES—NEGLIGENCE—MEASURE OF DAMAGES.

1. GROSS NEGLIGENCE.—The court states what is to be regarded as gross negligence. It is the absence of the care that was requisite under the circumstances.
2. PUNATIVE OR EXEMPLARY DAMAGES.—The court states when punative or exemplary damages may be awarded.—[ED. LEGAL NEWS.]

Mr. Justice DAVIS delivered the opinion of the Court.

This action was brought to recover damages for the injury received by Mrs. Arms by reason of a collision of the defendant's train of cars, upon which she was a passenger, with another train upon the same track moving in an opposite direction, which resulted in a verdict and judgment for $4,000. The plaintiffs in error insist that they were severely dealt with in the court below, and that they are entitled to redress in this court.

The bill of exceptions discloses this state of facts: Mrs. Arms, in October, 1870, was a passenger on defendant's train of cars, which, while running at a speed of fourteen or fifteen miles an hour, collided with an engine on the same track. the jar occasioned by the collision was light, and more of a push than a shock. The fronts of the two engines were demolished, and a new engine removed the train. This was all the testimony offered by either party as to the character of the collision and the cause of it, but there was evidence tending to show that Mrs. Arms was thrown from her seat and sustained the injuries of which she complained. After the evidence had been submitted to the jury, the court gave them the following instruction: "If you find that the accident was caused by the gross negligence of the defendant's servants controlling the train, you may give to the plaintiffs punitive or exemplary damages."

The court doubtless assumed that the mere fact that two railroad trains collide is, *ipso facto*, evidence of gross negligence on the part of the employes of the company, justifying the assessment of exemplary damages, for a collision could not well occur under less aggravated circumstances, or cause slighter injury. Neither train was thrown from the track, and the effect of the collision was only to demolish the fronts of the two locomotives. It did not produce the "shock" even which usually happens in case of a serious collision. The train on which Mrs. Arms was riding was moving at a very moderate rate of speed, and the other train must have peen nearly if not quite stationary. There was nothing, therefore, save the fact that a collision happened, upon which to charge negligence upon the company. This was enough to entitle Mrs. Arms to full compensatory damages, but the inquiry is whether the jury had a right to go further and give exemplary damages.

It is undoubtedly true that the allowance of anything more than an adequate pecuniary indemnity for a wrong sufferred is a great departure from the principle on which damages in civil suits are awarded, but although, as a *general rule*, the plaintiff recovers a mere compensation for his private injury, yet the doctrine is too well settled now to be shaken, that exemplary damages may in certain cases be recovered. As the question of intention is always material in an action of tort, and as the circumstances which aggravate the transaction are, therefore, proper to be weighed by the jury in fixing that compensation, it may well be considered whether the doctrine of exemplary damages cannot be reconciled with the idea that compensation alone is the measure of redress.

But jurists have chosen to place this doctrine on the ground not that the sufferer is to be recompensed, but that the

offender is to be punished, and although the soundness of it has been questioned by some text-writers and courts, it must be accepted as the general rule in England and in most of the States of this country.—(1 Redfield on Railway, p. 576; Sedgwick on Measure of Damages, 4th edition, chapter XVIII, and note, where the cases are collected and reviewed).

And it has received the sanction of this court. It was discussed and recognized in Day *v.* Woodworth, (13 Howard, 371,) but the rule was more accurately stated in the Philadelphia, Wilmington, and Baltimore Railroad Company *v.* Quigley, (21 Howard, 213,) which was an action against the company for libel. One of the errors assigned was that the circuit court did not place any limit on the power of the jury to give exemplary damages, if in their opinion they were called for. Mr. Justice Campbell, who delivered the opinion of the court, said: "In Day *v.* Woodworth this court recognized the power of the jury in certain actions of tort to assess against the tort feasor punitive or exemplary damages. Whenever the injury complained of has been inflicted maliciously or wantonly, and with circumstances of contumely or indignity, the jury are not limited to the ascertainment of a simple compensation for the wrong committed against the aggrieved person. But the malice spoken of in this rule is not merely the doing of an unlawful or injurious act. The word implies that the wrong complained of was conceived in the spirit of mischief or criminal indifference to civil obligations." As nothing of this kind, under the evidence, could be imputed to the defendants, the judgmen was reversed.

Although this rule was announced in an action for libel, it is equally applicable to suits for personal injuries received from the negligence of others. The aggrieved person is entitled to redress commensurate to such injuries, and in order to ascertain its extent the jury may consider all the facts which relate to the wrongful act of the defendant and its consequences to the plaintiff, but they are not at liberty to go further unless it was done wilfully or was the result of that reckless indifference to the rights of others, which is equivalent to an intentional violation of them. In that case, the jury are authorized, for the sake of public example, to give such additional damages as the circumstances of the case require. The tort is aggravated by the evil motive, and on this rests the rule of exemplary damages.

It is insisted, however, that where there is "gross negligence" the jury can properly give exemplary damages. There are many cases to this effect. The difficulty is that thev do not define the term with any accuracy, and if it is made the criterion by which to determine the liability of the carrier beyond the limit of indemnity, it would seem that a definite meaning should be given to it. This the courts have been embarrassed in doing, and this court has expressed its disapprobation of these attempts to fix the degrees of negligence by legal definitions. In The Steamboat New World *v.* King, (16 Howard, 474,) Mr. Justice Curtis, in speaking of the three degrees of negligence, says: "It may be doubted if these terms can be usefully applied in practice. Their meaning is not fixed or capable of being so. One degree thus described not only may be confounded with another, bnt it is quite impracticable exactly to distinguish them. Their signification necessarily varies according to circumstances, to whose influence the courts have been forced to yield until there are so many real exceptions that the rules themselves can scarcely be said to have a general operation. If the law furnishes no definition of the terms gross negligence or ordinary negligence, which can be applied in practice, but leaves it to the jury to determine in each case what the duty was and what omissions amount to a breach of it, it would seem that imperfect and confessedly unsuccessful attempts to define that duty had better be abandoned." And some of the highest English courts have come to the conclusion that there is no intelligible distinction between ordinary and gross negligence.—(Redfield on Carriers, section 376.)

Lord Cranworth, in Wilson *v.* Brett, (11 M. & W., 113,) said that gross negligence is ordinary negligence with a vituperative epithet, and the Exchequer Chamber took the same view of the subject.—(Beal *v.* South Devon Railway Company, 3 H. & C., 327.)

Grill *v.* General Iron Screw Collier Company (Law Reports, C. P., 1, 1865-6) was heard in the common pleas on appeal. One of the points raised was the supposed misdirection of the Lord Chief Justice who tried the case, because he had made no distinction between gross and ordinary negligence. Justice Willes, in deciding the point, after stating his agreement with the dictum of Lord Cranworth, said: "Confusion had arisen from regarding negligence as a positive instead of a negative word. It is really the absence of such care as it was the duty of the defendant to use. Gross is a word of description and not of definition, and it would have been only introducing a source of confusion to use the expression gross negligence instead of the equivalent—a want of due care and skill in navigating the vessel, which was again and again used by the Lord Chief Justice in his summing up."

Gross negligence is a relative term. It is, doubtless, to be understood as meaning a greater want of care than is implied by the term ordinary negligence, but after all it means the absence of the care that was requisite under the circumstances. In this sense the collision in controversy was the result of gross negligence, because the employes of the company did not use the care that was required to avert the accident. But the absence of this care, whether called gross or ordinary negligence, did not authorize the jury to visit the company with damages beyond the limit of compensation for the injury inflicted. To do this there must have been some willful misconduct or that entire want of care which would raise the presumption of a conscious indifference to consequences. Nothing of this kind can be imputed to the persons in charge of the train, and the court, therefore, misdirected the jury.

For this reason the judgment is reversed and a new trial ordered.

We are indebted to the law firm of Nissen & Barnum, of this city, for the following opinion:

SUPREME COURT OF ILLINOIS.

Opinion Filed Jan. 21, 1876.

No. 192. Michael Harber et al. *v.* Deborah Wallner.

Appeal from Superior Court of Cook.

DEED TO HUSBAND AND WIFE, WHEN WIFE IS A MINOR—CONVEYANCE BY HUSBAND AND WIFE, WHILE WIFE IS A MINOR—STATUTE OF LIMITATIONS—NATURE OF ESTATE OF HUSBAND AND WIFE IN SUCH LANDS.

1. Appellee and Wallner intermarried in Feb., 1852, and soon after, her step father, Thomas Jaworski, conveyed to them two twenty-acre tracts of land. The husband deserted the wife within three months after the marriage and did not live with her again. It was claimed that the husband and wife subseqeuntly conveyed the land to Jaworski; that appellee was under fifteen when she was married and when she joined in the deed. And if this is true, then she had the right within three years after coming of age to repudiate the conveyance. But she was then under the disability of marriage, which did not cease until she obtained a divorce on the 6th of January, 1874.

2. Deed of Minor.—Not being of age, the deed was unauthorized and passed no title.

3. Power of Married Women to Convey at Common Law.—The power of a married woman to convey at common law is stated.

4. Void Deed—Repudiation.—This deed was void under the statute, and being void she was not bound to repudiate it three years after arriving at the age of eighteen. Had she been under that age and unmarried, and had made a deed, it would have been only voidable, and she would have been required, within three years after coming of age, to take the necessary steps to avoid it.

5. Statute of Limitations—Act of 1861.—That appellee was married when every act was done, which is claimed to conclude her rights; but in 1861, the act was passed authorizing married women to hold separate property to sue, etc., held, that this did not in this case remove her disability so as to require her to assert her rights, until she became discovert in January, 1874.

6. The Nature of their Estate.—The court states the nature of the estate where land is conveyed to husband and wife, and holds that neither can have partition, nor can either sell the estate so as to effect the rights of the other, and when their rights to the property are invaded a suit for the recovery of the injury or for the property must be joint; hence, the appellee being under the disability of coverture until January, 1874, she had no power to sue until that relation was terminated.

7. Effect of Divorce on Estate.—After the parties were divorced, they were no longer entitled to hold jointly, but from thenceforth they held in severalty.—[Ed. Legal News]

Walker, J.—Appellee and Herman Wallner intermarried sometime in the month of February, 1852; and about that time, and soon after, her stepfather, Thomas Jaworski, conveyed to them two twenty acre tracts of land, on section 26, township 41 N., range 13, E. 3rd pr. M., in Cook county. As the evidence shows, Herman deserted Deborah within about three months after the marriage, and they have not lived together since. There is no question in the case that Jaworski purchased the land from Tuthill King the patentee from the Government, and thereby became invested with the title in fee. But it is claimed that Herman and Deborah subsequently reconveyed the land to Jaworski, but, in so doing, a mistake was made, in describing the grantee as Lawreski—on the 24th of December, 1852. And that afterwards Jaworski conveyed these and other lands about this same time, to Newkirk and Ward, from whom appellants claim by mesne conveyances to have derived title.

It is claimed, and we think the evidence shows, that appellee, at the time of her marriage, was not of age, nor was she when it is claimed she and her husband reconveyed to Jaworski, in December, 1852, although there may be some criticism of the testimony of the witnesses, as to other dates and facts connected with their testimony as to her minority. She and her mother both testify that she was but fourteen years of age when she was married. She fixes the date of her marriage at the 24th of February, 1852. It appears that the deed from Jaworski to appellee and husband bore date on the 25th of March, 1853, and the mother says it was made about a month after the marriage. Thus this date is fixed with reasonable certainty. As to appellee's age, both she and her mother must be likely to have rembembered. Marriage is always considered so important an event that most persons always remember it with certainty, and also the age at which it occurs. These things are seldom forgotten whilst memory lasts, by even the most illiterate, and those who can neither read nor write generally know, and seldom forget their own ages; and mothers of that description are believed to remember the ages of their children quite as well as the educated and more gifted. And although both have mistaken other dates, we are satisfied that they were not likely to be mistaken as to that fact.

If this, then, be true, appellee was not quite fifteen when she is claimed to have joined in the execution of this deed to Jaworski, by her and her husband, and if so, then she had the legal and undoubted right within three years after coming of age to repudiate the conveyance, even if it was made as claimed. Again, she was then under the disability of marriage, which did not cease until she obtained a divorce, on the 6th of January, 1874.

Not being of the age required by the statute to convey, by joining with her husband, the deed was unauthorized, and possessed no title for want of power to make the deed claimed by appellants, as reinstating the title in Jaworski, if it was made as claimed. The seventeenth section of the Conveyance Act of 1845, (R. S, 1845, p. 106,) provides that: "Whenever any husband and wife residing in this State, shall wish to convey the estate of his wife, it shall and may be lawful for said husband and wife, she being above the age of eighteen years, to execute any grant, bargain, sale, lease, release, feoffment, deed, conveyance, or assurance in law whatever, for the conveying of such lands, tenament and hereditaments." The remainder of the section relates to the execution and acknowledgment of the deed when so made, but has no relation to this case.

Has, then, this requirement been answered? The husband and wife were residents of this State, the wife had an interest in the land, but she was not eighteen years of age, and hence was not authorized to join with her husband to make the conveyance, but it was, as declared, negatively unlawful for her to do so, before she was of age. Married women were not then empowered to make a conveyance in any manner, without joining with their husbands, and then only when they were of the age of eighteen years or upwards. This deed, if it was ever made, was without the pretence of power on the part of the wife.

This is better illustrated and made more obvious, by a reference to the common law on this subject. By it a married woman was utterly powerless to convey her real estate by deed, poll, feoffment or other instrument. She could only accomplish that purpose by levying a fine, or suffering a recovery. Hence it is seen that there is no authority in the common law that can be invoked to aid the execution of this deed, or to make the conveyance operative. Not being enabled by the common law to so convey, married women derive all of their power to convey from the statute alone, and a conveyance to be valid or to pass any rights, the party must conform to the substantial requirements of the statute, and that she should be of the age of eighteen years or upwards, is made by the statute absolutely essential to the validity of the deed, or to pass title. This deed under the statute was void; and being void, she was not bound to repudiate it, three years after arriving at the age of eighteen. Had she been under that age, and unmarried, and had made a deed, it would have been only voidable, and she would have been required, within three years after coming of the age of eighteen, to take the necessary steps, as this court has repeatedly held, to avoid it. But the statute having declared that it shall only be lawful for a married woman who is over eighteen years of age to make a deed to her property, by joining with her husband in a conveyance for the purpose. A deed made contrary to its provisions is void, and not merely voidable. This view of the question was not presented by appellee's counsel, but it is so obvious and essential to a current decision of the case, that we have deemed it proper to give it full weight in its decision. There was much evidence on the question, whether or not appellee and her husband made a deed reconveying the lands in controversy to Jaworski. All the evidence considered, the question is left, we think, in great doubt. It is contradictory, uncertain, and perhaps irreconcilable. But from what we have said, it will be seen that it is wholly immaterial whether or not the deed was made, and hence we have not discussed the evidence on that question.

We now come to the question, whether or not appellee has now the right to urge the invalidity of this deed, against the claims of appellants, or is she bound by laches or the statutes of limitations from asserting her rights. Appellant's claim to deny title by a connected chain from King to themselves, through Jaworski, he having subsequently conveyed to Newkirk and Ward, from whom appellants derive title. And it is not questioned that they have claim or color of title made in good faith, with the requisite possession, and payment of taxes to create an absolute bar, under the act of 1839, if appellee is not within the saving clause of the statute, and she is bound under the act of 1835. Appellants having regular connected chain of title in law, deducible of record from the United States government, unless she is within the savings of that law.

The evidence, we think, sufficiently establishes the fact, that appellee became of the age of eighteen in 1856, and the three years expired within which she would have been required to take the requisite steps to assert her title under the act of 1839 had she been sole, but she then was, and had been before this adverse claim arose, a married woman. Had she been sole, and a minor at the time of the adverse possession was taken and the payment of taxes were commenced, then a different question would have been presented. But she was married when she became of age, and when the taxes were paid, in connection with possession under claim and color of title made in good faith. In fact she was married when every act was done which is claimed to conclude her rights.

But in 1861, the act was adopted authorizing married women to hold separate property, as though they were sole and unmarried, free from all control of their husbands. And if it be contended that by that act her disability was removed and she was free then to declare the deed from herself and husband, to Jaworski void; and assert her rights to the law, if such a deed was made, or to assert her claim, before the bar of the Statute had arisen in 1868, after the passage of that law the question is presented, whether she was under such disability as to bring her within the savings of the statutes, until she became discovert in January, 1874.

Under the law prior to the act of 1861, the conveyance Jaworski made to appellee and her husband created joint estate in them by the entirety during their

natural lives, and to the survivor, on the death of either. And under the law as it then stood, the parties to a vested and absolute title to such an estate, was not and could not be changed, modified or affected by the act of 1861. We have heretofore held that prior vested estates and rights were in nowise affected by that act, and that it was incompetent for the General Assembly to divest or change such rights. Hence, they took an estate by the entireties, and not an estate as tenants in common, as seem to be supposed by appellee's counsel. In the case of Cooper *v.* Cooper, (Jan'y term, 1875), the conveyances were made to husband and wife, after the passage of the law of 1861. And the decision was placed on the grounds that the rule was changed by that enactment from an estate by the entireties to an estate in fee, held by the grantees as tenants in common. That decision was placed on that act, and hence it has no bearing on this question, as this estate was created before that statute was adopted.

Now this estate by the entireties is peculiar. The possession of one is the possession of both. The estate is joint for life, and descends or vests in the survivor absolutely and in fee. And by the destruction of the estate of one, it inures to the other. Neither can have partition, nor can either sell the estate so as to effect the rights of the other. And when their rights to the property are invaded, a suit for a recovery for the injury or for the property must be joint, because the property and the right to its enjoyment is joint during coveture. Then appellee could not sue for and recover any interest in the land without joining her husband in the action, until the coveture ceased, and inasmuch as she had no right to sue alone, and could not compel the husband to join her in an action during coveture, it is unlike tenants in common, where either may sue and recover for an injury to the estate, and may use the names of its co tenants. Hence it follows, that appellee being under the disability of coveture until January, 1874, she had no power to sue until that relation was terminated. Had they been tenants in common, it might have been otherwise, but we do not decide that question, as it is not before the court in this case.

From the very nature of the estate and the rights of the parties therein, the act of 1861 could not, as to appellee's rights, remove her disabilily. She had not, nor could she have any more right to sue for the property, or any interest in it after the passage of the law, than she had before that time, until coverture was removed. Hence the statutes of limitation and all that was done under them did not operate to produce a bar.

What effect, then, did the granting of the divorce have on this estate or the rights of the parties therein? The relation of husband and wife were thereby terminated, and with it all martial duties. Their interests and duties from thenceforth, as related to each other, were as though they never existed. This estate, by the enterelies, is essentially a joint estate, although it differs in one or two particulars therefrom. The enterelies are the same, and the *jus accriscendi* obtains; but they only hold severally *per tout et non per my*, whilst joint tenants hold by halves and by the whole. But it is believed that when the estate of one is destroyed, it insures to the other, as in case of death or otherwise, so when the unity of the husband and wife is destroyed by death, the survivor takes the whole estate. Blackstone says there are several means of destroying or of severing a joint estate. As by disuniting their possession: "If two joint tenants agree to part their lands, and hold them in severalty, they are no longer joint tenants, for they have no joint interest in the whole, but only a several interest respectively in the several parts." And the jointure may be destroyed by one selling his share and thus converting it into a tenancy in common. It is further said that where by any act or event, different interests are created in the several parts of the estate, or they are held by different titles, or if merely the possession is separated. So the joint tenants have no longer the former indispensable properties of sameness of interest and undivided possession, a title resting at one and the same time, and by one and the same grant, the jointure is instantly divided. In this case the husband conveyed his interest, which would have been a joint tenancy, and destroyed the unity of title, and it would have been a tenancy in common. This of itself, had this been a joiut tenancy, would have changed the entire relation of the parties, and his conveyance had that effect if he had power to sell. But the power to hold jointly arose from the fact that they were married, when the conveyance was made. Had it not existed, the parties would have taken as tenants in common. It was that circumstance, and that alone, which gave to them the joint life estate, and the right to joint possession. The divorce destroyed the relation which gave the joint right, and with it, the right itself. After parties were divorced they were no longer entitled to hold jointly, but from thenceforth they held in severalty, nor were they entitled to joint possession. When the very thing which, by operation of law, gave them a joint estate was destroyed by operation of the same law, the joint estate ceased and they became vested with an estate *per my* as tenants in common. They, by that act and operation of law flowing from it, are not jointly entitled to possession, but the entirety of title and the unity of estate no longer exising with the incidental right of joint possession, it inevitably follows that they became tenants in common. Our statute has destroyed joint tenancies unless the parties expressly stipulate in the deed of conveyance, that such an estate is thereby created. The estate with the *jus accrescendi* not being favored by our law and the termination of the marriage relation, having marked a change in the rights of the parties in the estate, the courts should rather hold that the charge is broad enough to convert it into an estate in common than to hold that whatever change was made, that it left the right of survivorship. But, on principle, we are satisfied the decree of divorce had the effect to make them tenants in common, and that appellee thereby became entitled to partition.

There is another question which may deserve a notice. And that is, whether appellee had a right to file a bill for partition until after she was divorced. Situated as this case is, we can see no objection to it. She applied for a divorce in the same bill and had a right to claim alimony in this land, and in the same case to have her rights in this property settled between her and her husband. Thus far, all will concede, that there was no error. And if so, why not make appellants parties, as they were claiming that they had acquired, not only her right, but that of her husband, in the property. They claimed to have an interest in the property, and she had a right to bring them before the court that they might be bound by the decree of the court, settling her rights, and to be freed from again litigating all the facts, and settling all of the legal questions in another suit with them for the recovery of her interest in the land. We perceive no error in the record, and the decree of the court below must be affirmed.

Decree affirmed.

Through the kindness of DANIEL J. AVERY, of the law firm of AVERY & COMSTOCK, of this city, we have received the following opinion:

SUPREME COURT OF ILLINOIS.

OPINION FILED JAN. 21, 1876.

GEORGE WEBSTER ET AL. *v.* FLAVEL K. GRANGER ET AL.

Appeal from Superior Court of Cook.

SALE—SAMPLE—BILL OF LADING—DELIVERY TICKET—WHEN TITLE PASSES.

The flax seed was shipped by appellees to their commission merchants, Foss & Co., of Chicago, for sale on the track. Foss sold the flax by sample to appellants, delivering them a sample and a delivery ticket therefor. At noon, on the 7th of Oct., 1871, the flax was destroyed by the October fire: *Held*, that the title vested in appellants by their purchase and the acceptance of the delivery ticket.

2. SALE BY SAMPLE.—That the purchaser did not have twenty-four hours to examine the goods. After taking possession the purchaser buys by sample, and has no occasion to examine the goods. Should they prove, on examination after he has them in his possession, to be not equal to the sample, he may return them or sue for and recover the difference.—[ED. LEGAL NEWS.]

Opinion by BREESE J.

This was assumpsit on the common counts for goods (flax seed) sold and delivered by the plaintiffs to the defendants, brought to the Superior Court of Cook county, resulting, on a trial by the court without a jury, in a finding and judgment for the plaintiffs.

The defendants appeal, and insist the finding is not sustained by the evidence; that at most it establishes a contract of sale, and not an actual sale of the flax seed.

Appellants contend they had a reasonable time in which to examine and remove the goods, and until that time elapsed the title was not in them.

The flax seed was shipped by appellees to their commission merchants, Foss & Co., of Chicago, for sale. There were one hundred and thirty-four sacks "on the track" at the Galena depot, and Foss sold them by sample to appellants, at one dollar and fifty-five cents per bushel, delivering them a sample and a delivery ticket therefor. This was on Saturday, 7th October, 1871, about noon of that day. The goods were destroyed by the October fire.

It was held in Mich. Cen. R. R. Co. *v.* Phillips, et al., 60 Ills., 190, that the delivery of a bill of lading, unindorsed, did not transfer a barely equitable title, like the delivery of an unindorsed note, it gave as valid and effectual title to the goods as could be obtained by the actual delivery of the goods themselves.

The only difference between the bill of lading and a delivery ticket is that in the former the goods may not have started on their destination, in the latter the purport of the ticket is they have actually arrived ready to be delivered to the holder of the ticket.

It is understood this ticket is in the form of an order from the proper railroad or station agent to deliver the goods described in the ticket to the person named in it, or to the bearer, and is in common use for the delivery of grain.

By this order to deliver the goods to bearer, and appellants being the bearer, they were thereby vested with all the necessary evidence of ownership of the goods, and could have transferred the title to them to a purchaser from them. They had full power to sell the moment they became possessed of the ticket, even if the payment of the money was a condition precedent, the circumstances proved showing a waiver of this condition by the seller. Can it be doubted, if on the receipt of this delivery ticket by appellants, they had soon after found a purchaser for these goods at an advance, that they must not have sold them? The purchaser from them would certainly have acquired the title to the goods.

We have no doubt the title vested in appellants by their purchase and acceptance of the delivery ticket.

It is urged by appellants that the custom governing sales of this character is that the purchaser has twenty-four hours in which to examine the goods after taking possession. This can hardly be when the sale is by sample. The purchaser buys by sample, and has no occasion to examine the goods. Should they prove on examination after he has them in possession to be not equal to the sample, he may return them, or sue for and recover the difference. It would be impossible to do business in any great mart of trade in any other way. Millions are involved in purchases by samples, and they with tickets pass as readily as current bank notes. It is absurd to say that purchasers have twenty-four hours or any other time in which to inspect the goods. Here was a full delivery of the goods by symbol, and appellants could have passed the title to their vendee in the same way. M. C. R. R. Co. *v.* Phillips, *supra*.

We repeat, after the delivery ticket was passed to appellants, there was nothing for appellees to do. They had parted with their control over the goods, and the same became vested in appellants, who were to weigh them and pay for them.

This purchase was made at noon of Saturday, and appellants had several business hours of that day in which to remove the goods. They were at their risk and could have maintained a replevin for them.

We cannot appreciate the argument of appellants that the delivery ticket was not a delivery of the goods for any other purpose than for examination. The examination of the sample was an examination of the goods, and there was an implied warranty that the bulk should equal the sample.

It is said by appellants that delivery alone does not pass title. This may be in some cases, they depending on the circumstances, nor is delivery necessary to pass title as between the parties, as this court has often held.

But in this case every element of a sale and delivery exists, the sellers having nothing more to do with the goods but to receive the account of weight from appellants, and the agreed price The price was fixed and the goods placed under the control of appellants, and they should pay for them, as they agreed. See Peters et al. *v.* Elliott et al. decided at this term.

The judgment is affirmed.

SCOTT, C. J., dissenting.

Howe and Russell for appellants.

Runyan Avery and Comstock for appellees.

JUDICIAL TITLES.

In this country it is getting quite common to call justices of the peace, judges, and to address them as "your honor." In fact, when a person is spoken of as "Judge D.," we cannot tell by his title whether he is a judge of the Supreme Court of the United States, or a U. S. circuit judge, a State Judge, or a justice of the peace. It would seem that in England almost every judge is addressed as "my lord." The *London Solicitor's Journal* says:

It is interesting to note the rapid growth of the practice of using reverential titles in addressing judges. We pointed out some time ago that a puisne judge, even when presiding over a court, ought not to be spoken *of* as "my lord"—that title being reserved for the chiefs; but we believe that some learned members of the bench are disposed to dissent from this view, and to establish a usage which the reports show to be unfounded in precedent. The old style of addressing the judges of the common law courts was "sir," and Serjeant Hill, to the end of his life, adhered to this title; but in the course of the last century the custom of speaking *to* the judges as "your lordship" became gradually established, and now, as we all know, the judges of first instance in the chancery division have cast off "your honor" and assumed "your lordship." The latest example of a like change is related by the Melbourne correspondent of a daily journal, who states that Sir W. Hackett, the new chief justice of the Fiji Islands, has caused himself to be addressed by the bar as "your lordship" instead of "your honor," which is, it appears, the old-established titular form of addressing the presiding judge in all Australian supreme courts. The correspondent adds that a question arose some twenty years ago in the colony of Victoria as to the proper form of addressing county court judges, and a circular was sent to each of them asking whether the practice of calling him "your honor" obtained in his court. To this one of the judges replied "that it certainly was the custom of some barristers and other persons to address him as 'your honor,' but he had been addressed by so many and various titles that he had come to disregard them. He had not only been styled 'his honor' frequently, but had often been called 'his lordship.' Occasionally he had been addressed as 'your grace,' 'your worship,' 'your excellency,' 'your reverence' and 'your eminence,' and on one occasion as 'your holiness.'" The judge or the correspondent may be joking, but flowery as some of these titles are, they are prosaic to those which are employed by the native pleaders in India in petitions addressed to the judges of the various courts. 'Cherisher of the poor," is the most favorite form of address. But "protector of the poor" and "benefactor of the poor" are frequently used, and the court is constantly alluded to as "the Presence."

CHICAGO LEGAL NEWS

Lex vincit.

MYRA BRADWELL, Editor.

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We call attention to the following opinions, reported at length in this issue:

Bankrupt Insurance Company—Liability of Transferee to pay Assessment on Unpaid Stock.—The opinion of the Supreme Court of the United States, by Strong, J., holding that the transferee of stock on the books of an insurance company on which only twenty per cent. of its nominal value has been paid, is liable for calls for the unpaid portion made during his ownership, without proof of any express promise by him to pay such calls.

Effect of a Pardon by the President.—The opinion of the Supreme Court of the United States, by Field, J., holding that a pardon by the President restores to its recipient all rights of property lost by the offense pardoned, unless the property has by judicial process become vested in other persons, subject to exceptions prescribed by the pardon itself. The court states the effect that will be given to a condition annexed to a pardon.

Personal Injuries — Negligence — Measure of Damages.—The opinion of the Supreme Court of the United States, by Davis, J., as to what is to be regarded as gross negligence, and when punative or exemplary damages may be awarded in an action to recover for personal injuries.

Deed to Husband and Wife Jointly—Effect of Conveyance when Wife a Minor—Limitations.—The opinion of the Supreme Court of Illinois by Walker, J., in a case where the appellee and one Wallner inter-married in February, 1852, and soon after the wife's step-father conveyed to the husband and wife certain land. The husband deserted the wife within three months after the marriage, and did not live with her again. It was claimed that the husband and wife subsequently conveyed the land to the step-father. Appellee was under fifteen years of age when she was married, and when, it is claimed, she joined in the deed. And if this is true, that she had the right within three years after coming of age to repudiate the conveyance. It also appeared that she was under the disibility of marriage until she obtained a divorce on the sixth of January, 1874. The court held that the deed was void under the statute, and being void she was not bound to repudiate it three years after arriving at the age of eighteen. Had she been under that age and unmarried, and had made a deed, it would have been only voidable, and she would have been required within three years after coming of age to take the necessary steps to avoid it. The court states the effect of the statute of limitations and of the act of 1861, giving to married women the right to sue, etc., upon the rights of appellee, and holds that she being under the disibility of coverture until January, 1874, she had no power to sue until that relation was terminated.

Sale by Sample—Delivery Ticket.—The opinion of the Supreme Court of this State by Breese, J., as to when the title vests in the purchaser by sample, of goods on the track, he receiving a delivery ticket therefor at the time of the purchase.

Guaranteed Note—Collateral Security.—The opinion of the Supreme Court of this State, by Breese, J., holding that the taking of collateral security for the payment of a guaranteed note does not release the guarantor.

Removal of Cause.—The opinion of the United States circuit court for the District of Indiana by Gresham, J., construing the law relating to the removal of causes from State to federal courts.

Suit on Land-contract.—The opinion of the Supreme Court of this State, by Scott, C. J., in a suit brought to recover back money paid on a land-contract.

NOTES TO RECENT CASES.

PRACTICE—GUARDIAN AD LITEM—CONSENT—EVIDENCE.

The English Chancery Division court by Hall, V. C., in Fryer *v.* Wiseman, 33 L. T. Rep. N. S., 779, held that a guardian *ad litem* may, on behalf of an infant, consent to the evidence being taken bv affidavit without obtaining an order of the court.

BANKRUPTCY—COSTS—SHORT-HAND WRITER'S NOTES.

The English court of bankruptcy held in *Ex parte* Sawyer, 33 L. T. Rep. N. S., 759, that in taxing the costs of an appeal, the costs of a transcript of the short-hand notes of the proceedings in the court below, which were taken by the direction of the judge, and placed upon the file of proceedings, will be allowed as part of the necessary costs of the appeal.

Recent Publications.

A Treatise on the Law of Receivers, by James L. High, author of "Treatises on the Law of Injunctions," "The Law of Extraordinary Legal Remedies," etc. Chicago: Callaghan & Company. 1876. Price, $7.50.

This volume is the completion of a series of legal text-books by Mr. High, upon the general subject of extraordinary legal and equitable remedies, upon which the author has been engaged, in connection with the practice of his profession, during the past eight years. The first of these was upon the Law of Injunctions, and is now acknowledged to be the leading work upon that branch of equity jurisprudence in America. This was followed by his work upon "Extraordinary Legal Remedies," embracing mandamus, quo warranto and prohibition. The present volume treats of the extraordinary equitable remedy of "Receivers." It is divided into twenty chapters, as follows: 1. Of the General Features of the Jurisdiction. 2. Of the Courts Exercising the Jurisdiction. 3. Of the Selection and Eligibility of the Receiver. 4. Of the Practice. 5. Of the Receiver's Bond and Liability thereon. 6. Of the Receiver's Possession. 7. Of the Receiver's Functions. 8. Of Actions by and against Receivers. 9. Of the Receiver's Liabilities. 10. Of Receivers over Corporations. 11. Of Receivers over Railways. 12. Of Receivers in aid of Judgment Creditors. 13. Of Receivers over Partnerships. 14. Of Receivers over Real Property. 15. Of Receivers in Cases of Mortgages. 16. Of Receivers in Cases of Trusts. 17. Of Receivers in Connection with Injunctions. 18. Of the Receiver's Compensation. 19. Of the Receiver's Accounts. 20. Of the Removal and Discharge of Receivers. The second subdivision of chapter II discusses quite fully the conflict of jurisdiction which so often occurs in the appointment of receivers between the State and Federal Courts. Aside from the general chapter on corporations there is a separate chapter devoted to receivers over railways, which will be of unusual interest at this time, when nearly half the railroads in the country are in the possession of receivers. Mr. High has wisely given a chapter upon receivers in aid of judgment creditors. Should the bankrupt law be repealed or modified, this chapter will be one of the most valuable in the book. Chapter seventeen is one of the most carefully prepared. It treats of the remedy and shows the points of resemblance, and the points of divergence between the remedy by injunction and the appointment of a receiver, and also in what cases the two remedies are granted in connection with each other, and separately. An appendix of valuable forms concludes the work. This volume is not the work of a mere theorist but of an able lawyer, engaged in the active duties of an extensive and varied chancery practice. Mr. High, in his citations, is thorough and accurate: in his arrangement, methodical; in his style, clear and concise. The work shows that years of patient labor have been spent in its preparation. The cases are brought down to the time of going to press, and in his citations, Mr. High has not confined himself to the regular series of reports, but has made free use of the various law periodicals. For many years we have been well acquainted with the usual practice of authors in making law-books, and must say that Mr. High exercises more care in the preparation of his books than any other author that ever came under our observation. Before allowing them to go to press, he always has page proofs and compares them with the citations in the library, to make sure that neither he nor the printer has made any mistakes. The mechanical execution of this volume is excellent. It was stereotyped and printed for the distinguished law publishing house of Callaghan & Co. by the Chicago Legal News Company.

A Treatise on the Law of Estoppel and its Application in Practice. By Melville M. Bigelow. Second Edition. Boston. Little, Brown and Company, 1876.

The first edition of this work has received the approval of the bar and is acknowledged to be a treatise of great value. The present edition is from the press of John Wilson and Son, and in mechanical execution is one of the best productions that ever eminated from that distinguished printing house. Mr. Bigelow has introduced several improvements in the second edition. Many extended quotations from the opinions of the judges have been dropped from the text and incorporated in the notes. Mr. Bigelow says he has encountered about four hundred and fifty new cases in preparing this edition, and made the best use of them he was able to make. That nearly every chapter has received some addition, and the additions to some of the chapters have been extensive and not unimportant; that this is especially true of the chapters on Title by Estoppel, Estoppel by Conduct and Estoppel by Election; that much of the first named subject has been carefully re-written and the whole presented in a clearer light. The bar will find this work well worthy of their patronage.

THE FLAGLOR CASES.

A DESPERATE CHANCERY CONTEST.

These cases, after occupying the courts of this State for the last ten years, appear at length to be concluded. The end has finally been reached only after a great struggle, in which the *prestige* of victory has sometimes been with one side, and sometimes with the other. Aside from the principles established by the decisions themselves, a brief outline of the origin and progress of this remarkable contest is therefore a matter of interest. These suits, commenced in 1866, originated from a *friendly* partition suit in equity, brought in the Cook Circuit court in 1851, to divide the Garrett estate, then one of the largest in Chicago. In May of that year a decree, purporting on its face to be by consent, was passed, which in the absence of actual consent was, as the court has held, unjust towards Charles D. Flaglor, one of the defendants, since it declared his estate in the property partitioned to be for life only with remainder in fee to his daughter, when in truth his estate was *in fee*, with executory devises over to his daughter and others on a contingency which never happened. Flaglor had in fact given no consent to this part of the decree; and he afterwards, in 1853, filed a bill of review to avoid the declaration that his estate was for life only, contained in it. But this bill had no allegations impeaching or explaining the recital of consent appearing in the original decree. To this bill the *infant* daughter of Flaglor, who was also a party defendant to the original bill, was made a defendant, and the court, in 1854, entered a new decree, repealing the old one, and declaring the estate of Flaglor to be in fee, etc. In 1858, Flaglor, who had sold and conveyed the property in fee, died, leaving his daughter surviving; and she, in February, 1866, sued out a *writ of error* from the Supreme Court to reverse the decree made on the bill of review, alleging for error, in effect, that there were no allegations, questioning, or impeaching the *consent* appearing on the face of the original decree; and, for that reason, she claimed that the bill of review was insufficient. For this error the Supreme Court, in Flaglor *v.* Crow, 40 Ill., 410, reversed the decree of 1854 made on the bill of review, thereby reviving and leaving in force the original decree of partition entered in May, 1851. This gave the Flaglors their first success. But the decree of 1851 omitted to order the necessary deeds, without which, at law, its declarations of an estate in fee in favor of the daughter could not operate. To overcome this difficulty, Elizabeth Flaglor, the daughter, in 1867, commenced these suits against Seth Wadhams and other purchasers in possession from and under her father.

She claimed in her bills that her father never had but a life estate; but if otherwise, still that by force of the decree in partition she had acquired of him the equitable title in fee by an estoppel of record or *res judicata;* and she accordingly demanded of his grantees a conveyance of the legal title, and an accounting from the time of his death. The first one of these cases, that against *Wadhams et al*, was tried before Judge Jameson, in the spring of 1871. While he yet held that case under advisement, the great fire of October occurred, destroying the original papers, but copies were saved and at once furnished to the court, and in June, 1872, Judge Jameson delivered an opinion deciding the whole case in favor of the Flaglors, and referring it to the master to take the accounts.

This was a second victory on that side. In December, 1872, another of these cases, that against *Miller et al.*, resting substantially upon the same facts and points as the Wadhams case, was heard by Judge Gary, who within a few weeks after delivered an opinion holding with the defendants and deciding the whole case against the Flaglors, who then sustained their first reverse. At the September term, 1873, of the Supreme court, the Wadham's case, there pending on appeal, was submitted to the court on arguments by F. H. Kales for Wadhams, one of the appellants, and by George Herbert and L. H. Boutell for the others, and by A. W. Windett and W. C. Goudy for Mrs. Flaglor Gay. In June, 1874, the Supreme court entered an order affirming the decree of the court below, by which the Flaglor side gained a third victory. Immediately, the counsel of Wadhams et al. filed their petition under the rules of the court for a rehearing, and obtained a stay of proceedings; and at the September term, 1874, a rehearing was granted them and an oral argument was ordered by the court for the last day of the term. At the time appointed, the case was orally argued by F. H. Kales for Wadhams, and by Messrs. Herbert and Boutell for the Engles and Day, and by Messrs. Goudy and Windett for Mrs. Flaglor Gay. On the 30th of January, 1875, the Supreme court gave judgment, reversing its own former decision and also that of Judge Jameson of June, 1872, and, on the merits, decided the whole controversy in favor of Wadhams et al. The opinion by SHELDON, J., is exhaustive and able, and is given in full in 7 LEG. NEWS, p. 169. The counsel of Mrs. Gay at once moved for a rehearing, and her application was considered at the September term, 1875. At the same term of the court, the appeal of Mrs. Gay in the Miller case came on to be heard, and was then orally argued for her by A. W. Windett, and for *Miller et al.* by F. H. Kales. At the close of that term the court denied the motion of Mrs. Gay for rehearing in the Wadhams case, thus leaving Wadhams and others completely victorious. On the 4th of February, 1876, the Supreme court gave final judgment in the Miller case, deciding against Mrs. Gay and affirming the decision of Judge Gary, made by him in the same case in 1873. The last opinion of the Supreme court in *Gay* v. *Miller* is very brief, and is here given in full, as follows:

"PER CURIAM: This cause rests upon the same state of facts, substantially, as that of Wadhams et al. *v.* Gay decided at the September term, 1875, of this court, and is governed by the decision in that case; and for the reasons expressed in the opinion filed therein, the decree is affirmed."

Thus, the final decision in *Wadhams* v. *Flaglor Gay*, a case argued on both sides by some of the most able counsel at the bar, comes to the profession well authenticated; for, like a *common recovery* well suffered in the olden time, it hath its *double voucher*, and on the whole the result is a valuable contribution to jurisprudence.

While arguing a case before the United States Supreme Court in Washington, a few days ago, Albert Pike made a clever reply to an objection of Attorney General Pierrepont. The Attorney General had questioned the evidence of one of Mr. Pike's witnesses on the ground of the extreme age of the man—73 years—and presumptive failure of his faculties. "Well, your honors," said Mr. Pike, "I don't altogether like that myself, for I am now 66 years old, and in a little while I shall be 70, and even 73, and I am somewhat sensitive about old men with no memories. I see on the bench before me one justice hearing this case who is 69 years old, another who is 72, and I would like to ask with what force the Attorney General's argument strikes them that a man has no memory at their ages." Mr. Pierrepont yielded the point. Curiously enough, the client for whom Mr. Pike was arguing was ex-Governor Rector, of Arkansas, with whom he had once fought a duel.

WE have received of the law firm of CRANE & TATHAM, of this city, the following opinion:

SUPREME COURT OF ILLINOIS.

OPINION FILED JAN. 21, 1876.

LAURA M. PENNY
No. 218. *v.*
CRANE BROS. MANUFACTURING CO.

Appeal from Superior Court of Cook.

A GUARANTEED NOTE—COLLATERAL SECURITY.

Held, that taking collateral security for the payment of a guaranteed note does not release the guarantor.—[ED. LEGAL NEWS.]

BREESE, J.—This was assumpsit in the Superior Court of Cook county by Crane Brothers Manufacturing Company against Laura M. Penny, as guarantor of a promissory note, made by the firm of Penny, Weeks & Company to I. J. Spaulding and Company, for eighteen hundred dollars, payable forty days after date, at the First National Bank, with interest thereon at ten per cent., and indorsed to plaintiff. The defendant filed three special pleas, upon which issues were made up and afterward by leave of the court, filed the plea of the general issue. The cause was tried by a jury, and resulted in a verdict for the plaintiff, on which a motion for a new trial having been overruled, judgment was rendered. To reverse this judgment the defendant appeal.

Two points are raised by the pleadings. First, defendant was discharged by reason of the *laches* of the plaintiff in failing to prosecute the makers of the note. That plaintiff should have proceeded against them, they having property subject to execution, citing Allison *v.* Waldham, 24 Ill., 132, in support of this position. In the opinions of the court in that case, this language is used: "The evidence shows that the plaintiff should have sued the maker of the note, and tried at least to have collected the debt before resorting to this special guarantor. What was the extent or terms of this special guaranty, the case does not inform us. They may have required the maker of the note should be prosecuted to insolvency before the guarantor should be liable. It could not have been an unconditional guaranty, for this court had held in Heaton *v.* Hulbert, 3 Scam., 489, that the liability of a guarantor when guaranty was absolute and unconditional, as in this case, does not depend upon the solvency or insolvency of the maker or indorser of the note and the holder is not required to institute any proceedings against the maker. The same doctrine was held in Rich *v.* Hathaway, 18 Ill., 548, and again in Parkhurst *v.* Vail, adm., decided at September term, 1874. This we believe, is the accepted doctrine of all courts. The next point is, that taking a new note for fifteen hundred dollars, as collateral security for the balance due on the note in suit, and the transfer of the collateral note, before its maturity, to the First National Bank, the note in suit, all the time remaining in the possession, custody and control of appellees, and no transfer thereof having been made to the bank, without the knowledge or consent of appellant, discharged her from liability on her guaranty.

Appellant claims the rule is, that the holder of the paper must hold himself in readiness to give the guarantors an immediate right of action against the maker of the note, at any time the guarantors chooses to pay up the claim.

This was the ground assumed by appellant in her second special plea, which alleges that appellees agreed with the makers of the note in suit, after it became due and payable, to receive and accept of them a promissory note for the amount then remaining due and unpaid, as and for collateral security for this note, and that the makers of this note in suit made another note, dated July 3, 1873, whereby they promise to pay, two months after its date, to the order of H. I. Robinson, the sum of fifteen hundred dollars, at No. 91 Washington street, for value received; that Robinson endorsed and delivered this note to plaintiff, and that plaintiffs accepted it as and for the note in suit as collateral security, without the consent of the defendant, and that plaintiffs afterwards sold, transferred and delivered this note to the First National Bank of Chicago, and which then and there became the property of that bank, (and without any notice to the bank that the note was executed and delivered merely as collateral security for the note in suit,) and so remained the property of said bank until the maturity thereof.

The facts here stated were traversed by the plaintiffs' replication, and on the trial by the jury; the object and intention of the giving the secured note, and its transfer to the bank, was for the consideration and determination of the jury. The claim of appellant is, this Robinson note was received by the plaintiffs in payment of the balance due on the note in suit, and asked this instruction, which was given: If the jury believe from the evidence, that by the agreement between the plaintiffs and Penny Weeks and Company, the note for $1,500 introduced in evidence, if paid at maturity, was to be payment of the balance due on the 3d day of July, 1873, on the note for $1,800, then the defendant was discharged from her liability by the taking such new notes, and the verdict must be in her favor. The finding of the jury negatives this hypothesis, and is conclusive the Robinson note was received with no understanding or agreement it was to be in discharge of the note in suit. From all that appears in this record, this note was held as collateral merely to the note in suit, and though discounted by the bank, was, at maturity, not being paid by the makers, returned to the plaintiffs, who offer it in court to be surrendered. Admitting the rule to be as claimed by appellant, she always had it in her power to sue makers of this note, she guaranteed. It was never at any time out of the possession and control of appellees, and all she had to do was to call at their house of business and take it up. She was never, for one moment, prevented of a timely action against the makers. Appellant is mistaken in supposing her right of action against the makers of this note was at any time suspended. On its maturity she could have paid it, and then brought her action,—there was no obstacle in her way. The note of Robinson was received only as collateral, and taking it as such, could not by any possibility release this note. The jury, under a proper instruction, have found the note was taken as collateral only, and we know of no rule of law forbidding the holder of a guaranteed note taking collaterals.

It is true, as argued by appellant, if one takes a note for goods sold and delivered, or for a like consideration, and the vendor transfers the note by endorsement, placing the title in another, the vendor cannot recover on the original consideration, and that is the doctrine of the case of Harris *v.* Johnston, 3 Cranch, 311, cited by appellant. And the reason is obvious, the vendor might be subject to two judgments—the one on the original consideration, the other on the note outstanding in the hands of another party, and double satisfaction might be received.

Admit, as argued by appellant, that when a debt is transferred as collateral security for another debt, the creditor becomes the agent for the collection, and the amount collected, after deducting proper charges, is a proper credit on the debt intended to be secured. Now does this affect appellee's right to recover, in this case, so far as appellant is concerned? It is most clearly, for her interest the debt she has guaranteed should be reduced to the smallest dimensions before a recovery is brought against her.

Whatever amount, then, appellees might have collected, or did collect, on the Robinson note, would go to her credit. She certainly cannot complain of such a transaction. The proof is quite conclusive in this case that the note was taken as collateral, and not as a conditional payment.

The undertaking of appellant, being absolute and unconditional, and the Robinson note being received by appellees as collateral only, appellant cannot escape from her guaranty.

As to the instructions, we are of opinion they were properly disposed of by the court, and finding no error in the record, the judgment must be affirmed.

COOPER, GARNETT & PACKARD, for Appellant.

CRANE & TATHAM, for Appellees.

Our thanks are due FRANK J. CRAWFORD, of the Chicago Bar, for the following opinion:

SUPREME COURT OF ILLINOIS.

OPINION FILED JAN. 21, 1876.

DANIEL EVANS *v.* HENRY P. GEORGE et al.

Appeal from Superior Court of Cook.

SUIT TO RECOVER BACK MONEY PAID ON LAND CONTRACT—RECORDING CONTRACT NO DEFENSE—INDIVIDUAL DEBT NO SET-OFF TO JOINT-CLAIM—INSTRUCTIONS.

Defendants, as agents for one H., made a contract with plaintiff to procure for him a warranty deed of certain lands from H., supposed to be the owner thereof, on which plaintiff, at the date of the contract, made a payment to defendants. The contract provided that defendants were to procure for plaintiff such deed within a reasonable time or refund the money thus paid, and that the sale was made subject to owner's ratification. H., on being applied to by defendants for such deed, refused to ratify or carry out the sale, of which they notified plaintiff. He then put the contract on record, and afterwards sued defendants to recover back the money he had paid. *Held*,

1. The recording by plaintiff of the contract, whether by direction of defendants, or of his own motion, had nothing to do with his right to recover in the action. The court's instructions on behalf of defendants, to the effect that such recording was a bar to plaintiff's right to recover, unless he had "released or offered to release the rights *thereby* acquired by him," were calculated to mislead the jury.

2. The subsequent contracts between the parties could have no possible connection with the transaction on which this suit was brought, unless it was shown that in making the same the money paid by plaintiff to defendants was in some way adjusted with him.

3. INSTRUCTIONS.—An instruction which directed the attention of the jury only to facts favorable to defendants, and left out of view all that tended to illustrate plaintiff's theory of the case was improper.

4. Instructions based on hypothetical cases, supposed to have been made by irrelevant testimony admitted by the court, had the effect to confuse the jury.

5. An instruction which asserted that the jury have the right to disbelieve such witnesses as in their judgment, under all the circumstances of the case, are unworthy of belief, is not the law.

Opinion by SCOTT, C. J.

This action was brought to recover money paid on a contract made with defendants as agents for one Hynes, supposed to be the owner, for the sale to plaintiff of a certain tract of land. The contract was in writing, was signed by defendants as agents, and contained this clause. "We to procure for him said deed within a reasonable time, or refund the sum now paid." That sum was two hundred and fifty dollars. The agreement contained the further provision, "sale made subject to ratification of owner." Hynes lived in Vermont, and when applied to for that purpose refused to ratify the contract.

Afterwards, defendants made another contract with plaintiff for the sale of a part of the same tract of land, upon which he advanced the further sum of $360. This contract was subject to the same conditions as the former one. On application to Hynes, he refused to ratify the second contract, and thereupon the $360 advanced upon it was returned to plaintiff.

It is not contended that at this or any other previous time defendants had refunded to plaintiff $250 advanced to them under the first contract, but plaintiff insists he was urged by defendant George and under his advice placed the agreement on record in the recorder's office of the county, and that defendants promised to refund him the $250 in a short time.

Shortly after these transactions it was discovered that Hynes was not the owner of the lands about which the parties had been negotiating, but one Morse was the real owner. After the dissolution of the co-partnership between the defendants, such negotiations were had with George by which plaintiff purchased the lands of Morse. The latter sale was effected April 10, 1872. There is no pretence the $250 advanced on the first contract has ever been refunded unless it was done in some way on the Morse contract. But we are unable to find any satisfactory evidence that it was adjusted in that way.

It will not do to say the case presents a conflict of evidence, was properly submitted to the jury on proper instructions, and for that reason the verdict ought to be permitted to stand. Upon looking into the instructions we find every one of the series given on behalf of the defendant in some particular, faulty. We

cannot undertake to comment on each of them, but will speak of them in a general way that will indicate our disapproval of the whole series.

The proposition asserted that the jury have the right to disbelieve such witnesses as in their judgment, under all the circumstances of the case, are unworthy of belief, is not the law. The jury, although they are the judges of the credibility of the witnesses, have no right, arbitrarily, to disbelieve the testimony, unless where such witness has wilfully and knowingly sworn falsely to material facts in the case.

Whether plaintiff had placed the first contract on record in the proper office by the direction of George or of his own motion had nothing to do with his right to recover in this action, and the instructions of the court on that subject were highly calculated to mislead the jury. It was shown not only that Hynes had refused to ratify the contract, but that he had no interest whatever in the land. Whether the contract was on record or not could make no difference. It bound no one and it is not claimed that it did.

Much irrelevant testimony was admitted, and some of the instructions are based upon hypothetical cases supposed to have been made by such evidence. The effect was to confuse the jury. The subsequent contracts between the parties can have no possible connection with this transaction unless it is proposed to show that in making such contracts the matter of the $250 was in some way adjusted with plaintiff. The note given by plaintiff to George was an individual transaction, and in no view was it proper evidence in this case.

In the last instruction of the series, the court undertook to give the jury a summary of the principal facts which they were to consider in their deliberations on their verdict. It directed their attention only to facts favorable to defendants, and left out of view all that tended to illustrate plaintiff's theory of the case. It is the duty of the jury to consider all the facts, and when the court assumes to direct their attention to the facts it should refer them to all the facts, so as to present the case fairly for both parties; otherwise the jury might understand the facts stated in the instructions are the only ones necessary to be considered in deliberating on their verdict. C. B. & Q. R. R, *v.* Griffin, 68 Ill.

The judgment will be reversed and the cause remanded.

Judgment reversed.

FRANK J. CRAWFORD for appellant.

HAMMER & SMITH for appellees.

EVIDENCE OF FOREIGN LAW.

The law of evidence has been thought to constitute the most praise-worthy portion of our jurisprudence, and, indeed, to have been brought very near perfection by the efforts of Bentham, and the other eminent text-writers who have followed him. But there are some obvious defects even in this department of jurisprudence, and it is well that in a period of legal reform like the present the attention of the Profession and of the general public should be drawn to them with a view to their rectification, when any instance of the inconvenience resulting from them occurs. The recent case of *In the goods of Bonelli* affords a salient example of such a defect. In that case, in order to prove the Italian law on the subject of the position of a "curator of the dormant inheritance" of one Gaetano Bonelli, a native of Turin, an affidavit of a "certified special pleader," who stated that he was "familiar with Italian law," was produced. Sir J. Hannen, however, rejected an application for administration with the will annexed, based on this affidavit, and held, following Bristow *v.* Sequeville (5 Ex., 275), that "the law of a foreign country cannot be proved even by a jurisconsult, if his knowledge of it be derived solely from his having studied it in a foreign university."

This statement of the existing law is undoubtedly correct. The laws of a foreign country must be proved as facts, or, in other words, whenever foreign law, whether written or unwritten, is to be proved, that proof cannot be taken from the book of the law, but must be derived from some skilled witness who describes the law: (Taylor on Evidence, 1231, 2; Best on Evidence, 31, 653; Powell on Evidence 302.) Strong doubt indeed appears to be thrown on the correctness of this rule, or at any rate on its application to every species of foreign law, by the *dicta* of various judges in some of the earlier cases: (R. *v.* Picton, 30 How. S. T., 491, *per* Lord Ellenborough; Clegg *v.* Levy, 3 Ca., 166, *per* Lord Ellenborough; Miller *v.* Heinrick, 4 Id., 155, *per* Gibbs, C. J.; Boehthinck *v.* Schneider, 3 Esp., 158, *per* Lord Kenyon, where it was held that the proper mode of proof of foreign written law was by copy properly authenticated), but it has been thoroughly; established by several modern decisions (Dalrymple *v.* Dalrymple, 2 Hagg. Cons. R., 54; Sussex Peerage Case, 11 Cl. & F., 85, 114–117; Baron de Bode's Case, 8 Q. B., 208, 250–267; Lord Nelson *v.* Lord Bridport, 8 Bl., 527; Vander Donckt *v.* Thellusson, 8 C. B., 812; Perth Peerage Case, 2 H. L. Cas., 865, 873; Duchess di Sora *v.* Phillips, 33 L. J., 129, Ch., quoted in The Stearine, &c. Company *v.* Heintzmann, 17 C. B., N. S., 60.) At present, therefore, the laws, usages and customs of foreign States must be proved either by a professional man, as a judge, an advocate, a barrister, or an attorney, or by a person holding some official situation in the State in question (Taylor on Evidence, 1233, and the cases there cited), whilst, apparently, no assistance is rendered to litigants by the 7th section of Lord Brougham's Evidence Amendment Act of 1851 (14 & 15 Vict., c. 99), which, though rendering certain foreign and colonial instruments provable by duly certified copies, only applies to proclamations, treaties, and other acts of state, and to judgments, decrees, orders, and other judicial proceedings.

That under such a state of things great inconvenience must frequently arise, will be obvious when it is considered how many points both of written and unwritten foreign law come before our courts, and how difficult, in a great number of cases, it must be to procure the direct evidence of a legal expert as to the existence or nature of the particular foreign enactment, custom or usage in dispute. The occurrence of the hardship to which we have alluded is calculated to become more frequent with the extension of our foreign relations, and it is probable that public opinion would welcome from the Legislature a short enactment to the effect that foreign law might be proved by books purporting to be printed or published under the authority of the government of the country in question, and to contain an exposition of such law. A provision to this effect has been inserted in the last Indian Evidence Act (Act No. 1 of 1872, § 38), and a similar rule obtains in many American States with respect to printed copies of the statutes of any other State of the Union (Story's Conflict of Laws, § 641*n*, and see the important case of Ennis *v.* Smith, 14 How., 400, there quoted, in which a copy of the civil code of France, purporting to be printed at the Royal Press, Paris, was held admissible in evidence) and apparently also in some cases, with respect to unwritten law (*Ib.*, § 642; Carnegie *v.* Morrison, 2 Met. (Mass.), 381, 404, *per* Shaw, C. J.; Young *v.* Templeton, 4 Louis, Ann, 254).—*The London Law Times.*

MISS GOODELL'S APPLICATION DENIED.

A WOMAN CANNOT EARN HER LIVING BY THE PRACTICE OF LAW IN WISCONSIN.

The Wisconsin *State Journal* of the 15th ult. says:

On the 16th of December, we published the petition of Miss Lavinia Goodell, of Janesville, asking to be admitted to practice in the Wisconsin Supreme Court. She was regularly admitted to the bar in the 12th Judicial Circuit over a year ago, and is now engaged in practice there. She had a case which was appealed to the Supreme Court, and she wished to appear for her clients in that tribunal.

The court denied the application on the 15th. The opinion is elaborate, and critically examines the statutes and fortifies and illustrates the opinion advanced. It is held that if the legislature has power to prescribe terms of admission to practice in courts, and that is a legislative and not a judicial power, there is no Wisconsin statute authorizing the admission of females to the bar, from which the common law has always excluded them. The rule of construction, applying words of masculine gender to females, is only permissive to and in construing statutes according to legislative intent, and neither in or out of the statute can any such intent to admit women to the bar be found. If this rule of construction were applied to other statutes, to which it was equally applicable, it would break down all distinctions of sex in the State government, and also admit women to nearly all public offices, legislative, executive and judicial. It would also subject women to prosecution for paternity of bastards and for rape. The court says it is not sorry that no statute can be found admitting women to the bar of State courts, for it does not think it the proper place for the exercise of her peculiar qualities, or for the preservation of her purity.

There will be very decided dissenting opinions expressed by members of the bar and by the people, respecting the policy of excluding from the bar a citizen over twenty-one years of age, of good moral character, learned in the law, and well qualified to practice, solely on the ground that the applicant is a woman. If her purity is in danger, it would be better to reconstruct the court and bar, than to exclude the women.

UNITED STATES SUPREME COURT.

PROCEEDINGS OF.

Thursday, Feb. 24, 1876.

On motion of W. W. Warren, Samuel W. Creech, Jr., of Boston, Mass., was admitted.

On motion of J. A. Garfield, H. L. Terrell, of Cleveland, Ohio, was admitted.

On motion of T. J. Durant, William H. Scott, of New York City, was admitted.

No. 933. The Selma and Meridian Railroad Company et al. v. the Louisiana National Bank of New Orleans et al.; appeal from the Circuit Court of the United States for the southern district of Alabama. On motion of William H. Scott, docketed and dismissed with costs.

No. 162. John W. Morsell et al. v. The First National Bank of Washington. The argument of this cause was concluded by R. K. Elliott, for appellants.

No. 164. Elan Farnsworth et al. v. The Minnesota and Pacific Railroad Company et al. The argument of this cause was commenced by Henry F. Masterson, for appellants, and continued by H R. Bigelow and William H. Scott, for the appellees.

Adjourned until Friday at 12 o'clock.

Friday, Feb. 25.

On motion of William Pinckney Whyte, Frederick O. Prince, of Boston, was admitted.

On motion of J. B. Sanborn, Stanford Newel, of St. Paul, and John H. Baker, of Goshen, Indiana, were admitted.

No. 164. Elon Farnsworth et al. v. The Minnesota and Pacific Railroad Company et al. The argument of this cause was concluded by Henry F. Masterson, for appellants.

No. 165. The Piedmont and Arlington Life Insurance Company v. Ashley W. Ewing, administrator, etc. This cause was argued by E. C. Carrington, for plaintiff, and submitted on printed arguments by B. A. Hill for defendant.

No. 166. Harvey Terry v. Emily H. Tubman. This cause was argued by Harvey Terry, the plaintiff in error, and submitted on printed arguments by William H. Hull for defendant.

No. 148. Henrietta Hoffman v. The John Hancock Mutual Life Insurance Company. The argument of this cause was commenced by J. A. Garfield for appellant.

Adjourned until Monday at 12 o'clock.

Monday, Feb. 28.

On motion of Matt. H. Carpenter, George L. Chapin, of Chicago, and Jesse J. Finley, of Jacksonville, Fla., were admitted.

No. 157. Walter N. Halderman et al. v. The United States. In error to the Circuit Court of the United States for the district of Kentucky. Davis, J., delivered the opinion affirming the judgment of the Circuit Court.

COUNCIL BLUFFS, WISCONSIN—THE WESTERN TERMINUS OF THE UNION PACIFIC RAILROAD DECLARED TO BE THE IOWA SHORE OF THE MISSOURI RIVER.

No. 584. In the case of the Union Pacific Railroad Company against Hall and Morse, it is held that Hall and Morse, residents of Council Bluffs, have sufficient interest as citizens to maintain the suit, and that it is the duty of the company, under the acts of Congress, to operate the whole road as one connected, continuous line, and that the bridge over the Missouri river, between Omaha and Council Bluffs, is a part of the road, to be used in connection with and as a part of the entire line. It is said that if Congress did not intend to require the construction of the road from the imaginary line in the middle of the river channel (which would be an impossibility), which is the legal boundary of Iowa, the intention must have been that the initial point should be either on the Iowa shore or on the Nebraska shore; and if the Nebraska shore was intended, why was it not designated? It is impossible to give a satisfactory answer to the question, say the court, or to the question why the Iowa boundary was designated, if the eastern or Iowa shore of the river was not intended to be the terminus of the road.

The authority of the company to build the road to the Iowa shore was within itself power to build a bridge over the Missouri river. No express grant to bridge the river was needed, as whatever bridges were needed on the authorized line were as fully authorized as the line itself. All authority given to the company was as a railroad and not as a bridge company. The bridge was to enable the road to connect with other roads, and it was to be built for no other uses. They were not allowed to charge rates of toll over it which they did not charge over other portions of their line. The acts chartering the company manifest no intention to distinguish between the bridge over the Missouri and other bridges on the line of the road. If it is not a part of their road, neither is any bridge between the Missouri and the western boundary of Nevada; for the power to build all bridges was given in the same words. Affirmed.

STRONG, J., delivered the opinion.

BRADLEY, J., dissenting, is of the view that the Missouri river is generally understood to be the western boundary of Iowa, and that the fair construction of the character of the Union Pacific Company is that their road was to extend from that river westwardly.

No. 141. John R. Shepley et al., trustees, etc. v. John E Cowen et al. In error to the Supreme Court of the State of Missouri. Field, J., delivered the opinion, affirming the decree of the Circuit Court with costs.

No. 154. The Republican River Bridge Co. v. The Kansas City Railroad Company. In error to the Supreme Court of Kansas. Miller, J., delivered the opinion of the court, affirming the judgment of the Supreme Court, with costs.

MILITARY AUTHORITY IN THE STATES SUBSEQUENT TO THE CLOSE OF THE WAR—WHEN THE WAR ENDED IN SOUTH CAROLINA.

No. 146. In the case of Raymond against Strauss, from the Supreme Court of South Carolina, the Supreme Court of the United States that the war of the rebellion ended in South Carolina on the 2d of April, 1866, and that the military officers remaining in command there between that date and the return of the State to the Union had no authority under the acts of March and July, 1867, to annul a decree of a court of equity of the State. Hence, such an order made by Gen. Canby was an arbitrary stretch of authority, and was properly disregarded by the court below. Affirmed. SWAYNE, J., delivered the opinion.

No. 139. James L. D. Morrison et al. v. Samuel Jackson, and

No. 140. James L. D. Morris et al. v. Wm. H. Benton. In error to the Circuit Court of the United States for the Eastern District of Missouri. Clifford, J., delivered the opinions affirming the judgments of the said Circuit Court in these causes, with costs.

No. 159. The Mutual Life Insurance Company of New York v. C. S. Jeffries, administrator, etc. In error to the Circuit Court of the United States for the Eastern District of Missouri. Waite, C. J., announced the decision of the court, reversing the judgment of the said Circuit Court in this cause, with costs. On authority of Jeffries, administrator, v. Economical Insurance Company, 22 Wall., 47, and Ætna Insurance Company v. France, decided at this term.

No. 158. The Propeller John Taylor, etc. v. The New Jersey Railroad and Transportation Company. Appeal from the Circuit Court of the United States for the southern district of New York. Waite, C. J., announced the decision of the court, affirming the decree of the Circuit Court, with costs.

No. 161. The Connecticut Mutual Life Insurance Company v. Louisa Coverston. In error to the Circuit Court of the United States for the district of Kansas. Waite, C. J., announced the decision of the court, affirming the judgment of the Circuit Court, with costs.

No. 576. David F. Barney v. The Steamboat D. R. Martin, etc. The motion to dismiss this cause was submitted on printed arguments by Thomas Young in support of the same, and by J. M. Guiteau in opposition thereto.

No. 508. Peter B. Amory v. Samuel B. and John Amory, executors, etc.

No. 509. Peter B. Amory v. Samuel B. and John Amery, executors, etc. The motions to dismiss these causes were submitted on printed arguments by Matt H. Carpenter in support of same, and by George F. Edmunds in opposition thereto.

No. 684. The State of Louisiana, *ex rel.*, John L. Macauley v. Charles Clinton, auditor, etc. The motion to dismiss this cause was submitted on printed argument by J. Q. A. Fellows and Durant and Hornor in support of the same, and by Chipman and Hosmer in opposition thereto.

No. 148. Henrietta Hoffman v. The John Hancock Mutual Life Insurance Company. The argument of this cause was continued by J. A. Garfield for appellant, and by H. L. Terrell for appellee.

Adjourned until Tuesday at 12 o'clock.

Tuesday, Feb. 29.

No. 935. The Home Insurance Company v. George Newman, in error, to the Circuit Court of the United States for the District of Minnesota. On motion of J. B. Sanborn, docketed and discharged with costs.

No. 936. The United States v. Francisco M. Alvarado. Appeal from the District Court of the United States for the District of California. On motion of A. A. Sargent, docketed and dismissed with costs.

No. 148. Henrietta Hoffman appellant, v. The John Hancock Mutual Life Insurance Company. The argument of this cause was concluded by J. A. Garfield for appellant.

No. 701. (Assigned.) Henry B. Miller, Collector

of Cook County et al., appellants, v. Morris K. Jessup et al, This cause was argued by J. K. Edsall for the appellants, and by Obadiah Jackson and P. Phillips for appellees.

No. 702. (Assigned.) Isaac Taylor, Collector of Peoria County et al., v. James F. Secor and William Tracy. The argument of this cause was commenced by Lyman Trumbull, of the counsel for appellants.

Adjourned until Wednesday at 12 o'clock.

U. S. CIRCUIT COURT D. OF INDIANA.

OPINION, FEB. 28, 1876.

WM. P. BURDICK *v.* JUDSON HALE et al.

REMOVAL OF CAUSE FROM STATE TO FEDERAL COURT—ACTS CONSTRUED.

Opinion by GRESHAM, J.

On the 15th day of December, 1869, judgment was rendered in the Marion civil Circuit Court in favor of the defendant, Julia Hunt, against her co-defendant, Judson Hale, on her cross-complaint, in which she alleged that she was the owner of the note sued on by the plaintiff. On the 10th day of December, 1873, the Supreme Court of the State reversed this judgment and remanded the cause for a new trial. On the 14th day of October, 1874, the plaintiff, who was a citizen of the State of New York, filed his petition in the State court for the removal of the cause to this court, on the ground that from prejudice and local influence he would not be able to obtain justice in the State court, and with said petition he filed a bond.

On the 29th day of May, 1875, the State court, on the motion of the plaintiff, accepted the bond and ordered that no further steps be taken in the cause in that court.

The defendants now appear and move to remand. It will be observed that the application for removal was under the act of March 2, 1867, and action by the State court was delayed on the same until after the passage of the act of March 3, 1875.

Was there such a compliance with the act of 1875 as divested the State court of jurisdiction?

The bond is penal in form, but the place where the penal sum should have been inserted is left blank. An undertaking to pay an indefinite amount would have satisfied the act, but this instrument is not an agreement to pay anything. No sum being named as a penalty in the contract, it created no liability. But if the bond were not open to this objection, it is insufficient for other reasons. The condition is that the plaintiff shall file in the Circuit Court of the United States "copies of all process" in the action and cross-action.

Section 3 of the act of 1875, declares that the party entitled to remove the suit shall file with his petition for removal a bond, with good and sufficient surety, for entering in the Circuit Court of the United States, on the first day of its next session, a copy of the record in such suit, and for paying all costs that shall be awarded by the said Circuit Court, if said court shall hold that said suit was wrongfully or improperly removed thereto. The act clearly requires that the party on whose petition the suit is removed shall give a bond to do more than file copies of the process in the Federal court. The surety in this bond will be liable for no costs if this suit is sent back to the State court.

If, as was intimated in argument, the act of 1867 was not repealed by the act of 1875, the plaintiff is equally unfortunate, for he failed to comply with the requirements of that act by offering good and sufficient surety for his entering in the court copies of "all process pleadings, depositions, testimony and other proceedings in said suit, and for doing such other appropriate acts."

But it was held in the Danville railroad case, reported in the 7 Chicago Legal News, p. 241, that the act of 1875 repealed the act of 1867, and that ruling must be accepted as law in this district.

It will not do to say that the requirements of the act as to the filing of a petition and bond in the State court are merely directory, and that such defects in the bond as have been pointed out in this case may be cured by amendment in this court.

Congress has prescribed the mode for removing causes from the State to the Federal courts. The Federal courts have no power to dispense with or modify or change any of the provisions of the statutes authorizing the removal of causes from one jurisdiction to the other. Unless the requirements of the act, which are jurisdictional pre-requisites, are substantially complied with, the power of the State court remains undisturbed. If in this case the requirements of the statutes have been substantially complied with, the State court has lost jurisdiction over the suit, and no amendment of the bond is necessary to complete the jurisdiction of this court. If, on the other hand, the requirements of the act have not been complied with, the suit is still in the State court, and there is nothing in this court to amend. The jurisdiction of the State court over a controversy rightfully in its possession, as in this case, cannot be dislodged except by fully complying with the requirements of the act of Congress authorizing the transfer of causes from the State to the Federal tribunals.

It was further urged in support of the motion to remand, that the suit having been once tried in the State court, it was too late to remove it to this court under the act of 1875. But in view of what has been already said as to the insufficiency of the bond, it is not necessary to rule upon that question. The motion to remand is sustained.

Edwin H. Lamme, for plaintiff; Harrison, Hines & Miller, for defendant.

POLITICS AND THE JUDICIARY.

We notice in a recent issue of the Quincy *Herald*, the announcement that an election for Judge of the Supreme Court for this the Fourth District, occurs on the first Monday in June. The *Herald* then says: "The present incumbent from this district is Judge Walker, who is a candidate for re-election; but as there will be other candidates in the field, *it will be necessary to call a convention* to consider their respective merits. With a view to arranging the time and place for holding such convention, the chairman of the Adams county democratic committee has issued a circular to the committees of the other counties inviting a consultation at Mt. Sterling at an early date." The *Herald* then adds this significant suggestion: "The district is overwhelmingly democratic, and the choice of the proposed convention will undoubtedly be ratified by the people." Now, we cannot yield to the suggestion of the *Herald* that a partisan convention should be called to determine upon the respective merits of candidates for the Judicial office.

Such a course is vicious in principle and dangerous in its tendency. The Supreme Court is the final arbiter between men of all shades of political opinions, of every variety of religious creed, and of every degree of wealth and poverty. No conditions of the election of a Judge should exist, which, by possibility, suggest that he goes upon the bench as the representative of a political party, or of anybody else, as a class. If we, *as democrats* may with propriety nominate a candidate for Judge, *because he is a democrat*, then the Methodists, the Presbyterians, or the Roman Catholics may, with the same propriety, insist that their respective creeds shall be represented upon the bench. A man's religion has as much to do with his fitness for the office of Judge as his politics, and probably a good deal more. We are glad to be able to protest against so dangerous a principle in a district which the *Herald* says is "*overwhelmingly democratic.*" We want democrats to be consistent with themselves, not advocate one rule of conduct in a district "overwhelmingly democratic," and exactly the opposite in a district which is overwhelmingly Republican. We cannot afford to stultify ourselves after this fashion. If we are to look at this subject *as democrats* at all, we should bear in mind that four of the seven Judicial Districts in this State are *Republican* in politics; yet of the seven Judges on the Supreme bench *five are democrats.*

Since 1860, this State has been "overwhelmingly" Republican, and still so consistently have the people acted on the idea that politics had nothing to do with the Judiciary, that during all these years of Republican domination, a majority of the judges of the Supreme Court have been democrats.

The people seemed to have ignored politics in selecting the men who are to sit in judgment upon their rights. The recent Judicial election in the Chicago district suggests a lesson of peculiar significance to politicians. Judge Dickey, a Democrat, was elected in a Republican district by a large majority over Mr. Hurd, who was the nominee of a Republican convention. Nine years ago, the second or middle grand division was Republican in politics by a majority of nearly three thousand—yet Judge Walker, a Democrat, was elected by a majority of six or seven thousand over his competitor, Judge Emerson, who was the nominee of a Republican convention. We do not now call to mind a single instance where the people have not defeated the nominee of a political convention for the office of Judge, and we hope they will always continue to do so. The *Herald* suggests that as other candidates besides Judge Walker will be in the field. "*it will be necessary to call a convention to consider their respective merits.*" Why such a necessity? Are not the people competent to determine for themselves who is competent to be a Judge? The masses of the people are not all statesmen, nor lawyers, nor "college-bred," and thank God they are not all politicians, but they have an element in their make-up which stands them well in hand whenever an emergency arises; and that which sometimes overwhelms statesmen and lawyers and college-bred folks, and even politicians themselves. That element in the people is their broad *common sense.* You may go right out here in the country and find a farmer feeding his stock, and ask him who is the best lawyer in Jacksonville, and, although he may not know a demurrer from a piece of cheese, he will pick out the right man. If you have a land suit, he will select the very one; if you want a patient chancery lawyer, he will unerringly name him; and, if you have a nasty, scandalous suit, he will tell you to a dot who can throw more dirt with a wider shovel than any other lawyer in town. If there are to be other candidates besides Judge Walker, let them announce themselves, and the people will "consider their respective merits" without the advice of a partisan convention. We have heretofore announced our willingness to support Judge Walker for re-election. We did so, not because he is a *democrat*, but because he is an able and experienced Judge, and of the purest personal character as a man. We could not, however, even support Judge Walker as the *democratic* candidate of a *democratic* convention. Politics and the Judiciary should be as separate as the poles.

We copy the above from the *Jacksonville Sentinel* of this week, and fully endorse all it says about keeping the election of the judges of the Supreme Court out of politics. Judge WALKER is known to the people to be strictly honest. He has spent the best years of his life in their service. His experience on the bench, and his knowledge of the history of the jurisprudence of the State, will greatly add to his efficiency as a judge and the value of his services to the people should he be again elected, which we have no doubt he will be. When a judge has served many years faithfully and with distinguished ability, and is still able to properly perform the duties of his office, it is neither right or prudent to try a new man in his place.

THE COURT KNEW ALREADY.—The Nevada *Silver State* gives the following amusing account of the examination of a witness:

At a recent trial in the Elko county court our friend Bishoff, of the Humboldt brewery, was called as a witness. Mr. Bishoff is one of the "solid men" of Elko, where he has been in business since the town was started, in the winter of 1858. Upon being sworn, Counsellor Rand, one of the attorneys in the case, who, by the way, is an old resident of Elko, said: "Mr. Bishoff, where do you reside?" "Where I reside? What for you ask me such foolish things? You drink at my place more as a hundred times." "That has nothing to do with the case on trial, Mr. Bishoff. State to the jury where you reside." "De shurry! de shurry! Oh, by jiminy! effery gentleman on dis shurry has a string of marks on mine cellar door just like a rail fence." His honor here interceded in the counsellor's behalf, and, in a calm, dignified manner, requested the witness to state where he resided. "Oh, excuse me, shudge. You drinks at my blace so many times and pays me nothing, I dinks you know old Bishoff, vat keeps the brewery."

OPTION CONTRACTS.—The opinion of the Supreme Court of this State, in pamphlet form, in the Chicago Board of Trade case, involving the validity of option contracts, will be sent to any address, postage paid, upon receipt of thirteen cents.

TRUSTEE'S SALE.—WHEREAS, WILLIAM CUNningham and Ellen Cunningham, his wife, did, on the twenty-fifth day of November, 1874, execute and deliver to the undersigned, as trustee, their trust deed dated on the day and year aforesaid and recorded in the recorder's office of Cook county, Illinois, on the 5th day of December, 1874, in Book 420 of records, on page 534, which said trust deed was given to secure the payment of said William Cunningham's certain promissory notes, of same date as trust deed, and due two years after the date thereof, for the sum of two hundred ($200.00) dollars, with interest at the rate of ten per cent. per annum, payable semi annually, the several semi-annual interest installments being evidenced and secured by his four notes of even date with said trust deed, payable to himself or order in six (6), twelve (12), eighteen (18), and twenty-four (24) months after the date thereof, respectively, for the sum of ten ($10.00) each, with interest, after due, at ten per cent. per annum, all payable at the office of A. Loeb & Brother, Chicago, Ill.

And whereas, default has been made in the payment of two semi-annual interest notes for ten ($10.00) dollars each, due respectively in six (6) and twelve (12) months after the date thereof, and whereas, in accordance with the terms of said trust deed, the legal holder of said principal note for two hundred ($200.00) dollars, and of said interest notes, has elected to consider the whole of said principal sum secured by said trust deed due and payable, and the amount now claimed due, with the interest to date is two hundred and twenty-five 39-100 ($225.39) dollars.

And, whereas, the legal holder of said principal and interest notes has made application to the undersigned, the trustee in said trust deed named, and requested him as such trustee to sell and dispose of said premises under the power in said trust deed, and for the purposes therein stated.

Now, therefore, notice is hereby given, that I, the undersigned, by virtue of the authority in me, by the said trust deed vested, will, on Wednesday the 5th day of April, 1876, at ten o'clock in the forenoon, at the north door of the Board of Trade building, in the city of Chicago, county of Cook and State of Illinois, at public auction, to the highest and best bidder for cash, sell the premises described and conveyed by said trust deed, to wit:

That certain part of lots number eight (8) and nine (9), in C. J. Hull's subdivision of block number six (6), in the Canal Trustees' subdivision of the southeast quarter of section number seventeen (17), township number thirty-nine (39) north, of range number fourteen (14), east of the third (3d) principal meridian, described as follows, to wit: Commencing on the southwest corner of said lot eight (8), running thence north along the west line of said lot eight (8), eighty (80) feet, thence east on a line parallel with the south line of lot number forty-three (43), in same subdivision, thirty-seven and a half (37½) feet, thence south on a line parallel with the west line of lot eight, twenty (20) feet, thence west on a line parallel with the south line of mentioned lot forty-three (43), twelve and a half (12½) feet, thence south along the east line of said lot eight (8) to the south line of said lot eight, thence west along the south line of lot eight (8), to the place of beginning, situate in the county and State aforesaid, with all the right, title, interest and equity of redemption of the said William Cunningham and Ellen Cunningham, his wife, their heirs and assigns in and to the said above described premises.

Chicago, March 1st, 1876.

24-27 WM. LOEB, Trustee.

CHICAGO LEGAL NEWS

SATURDAY, MARCH 11, 1876.

The Courts.

UNITED STATES SUPREME COURT.

OPINION FILED FEB., 1876.

HOOVER, Assignee of OPPENHEIMER, v. WISE et al.

COLLECTION OF CLAIM AGAINST A PERSON AFTER AN ACT OF BANKRUPTCY—KNOWLEDGE BROUGHT HOME TO ATTORNEY EMPLOYED BY COLLECTING AGENCY.

1. Where a creditor gave his claim against a debtor in a distant State to a collecting agency for collection, and such agency employed an attorney, who procured a confession of judgment thereon from the debtor, well knowing at the time that he was insolvent, and collected the money on such judgment and sent it to the collecting agency, but it was not paid over to the creditor, and proceedings in bankruptcy were commenced against the debtor within four months after the confession of judgment, and were prosecuted to a decree. *Held*, in an action by the assignee in bankruptcy against the creditor to recover back the amount of the judgment, that the attorney who made the collection was the agent of the collecting agency and not of the creditor, and that the knowledge of the financial condition of the debtor, which the attorney had was not the knowledge of the creditor, and that the action could not be sustained.—[ED. LEGAL NEWS.]

Mr. Justice HUNT delivered the opinion of the Court.

This action is brought by an assignee in bankruptcy to recover back a sum of money collected from the bankrupt after the occurrence of several acts of bankruptcy.

Under the practice of the State of New York the case was referred to a referee upon whose report judgment was entered at the special term in favor of the plaintiff. From this judgment an appeal was taken by the defendants to the general term.

Upon the hearing at the general term this judgment was reversed and a new trial was ordered.

When a judgment is reversed and a new trial ordered, two modes of proceeding are open to the defeated party in the practice of the State of New York. He can accept the terms of the order, and take a new trial in the court below. If he supposes that he can make a better case upon the facts than is contained in the report of the referee, this will be his proceeding. If he can make no improvement in this respect, or if he is satisfied to risk his case upon the facts as found, he may take an appeal to the Court of Appeals from the order granting a new trial. To make this appeal effectual his notice of appeal must contain "a consent on the part of the appellant that if the order appealed from be affirmed, judgment absolute shall be rendered against him.—(Code, §11.) The order for a new trial thus becomes a final judgment in the case.

The latter course was adopted in the present instance. The plaintiff appealed to the Court of Appeals, giving the stipulation required for that purpose. The Court of Appeals affirmed the judgment of the general term, and remitted the record to the Supreme Court, that the judgment might be there entered and enforced. From this judgment, entered upon that *remittitur*, the present writ of error is brought.

It appears from the record that an account or money demand was delivered by its owners to Archer & Co., a collecting agency in the city of New York, and received by them, with instructions to collect the debt, and with no other instructions; that this agency transmitted the claim to McLennan & Archibold, a firm of practicing lawyers in Nebraska City. Several acts of bankruptcy had been committed by Oppenheimer when Mr. McLennan persuaded him to confess judgment for the debt thus sent to him. Proceedings in bankruptcy were instituted against Oppenheimer within four months after such confession, and were prosecuted to a decree of bankruptcy. At the time of receiving the confession McLennan was well aware of the insolvency of Oppenheimer and that the confession was taken in violation of the provisions of the bankrupt act.

The money collected was remitted to the collection agents in New York, from whom he received the claim, but never paid by them to Wise & Greenbaum, the creditors.

When the debt in question was delivered to the collection agency in New York, it was so delivered, as testified by one of its owners, "for collection." "Archer & Co.," he says, "were collection agents in New York. I gave them no directions except to try their best to collect it. They told me they would send it out (to Nebraska). I gave no other instructions." "The business of Ledyard, Archer & Co. (he says) was to take claims for collection in different parts of the country, and if necessary have them sued."

Mr. Archer, of the collection firm, testifies that he received the claim for collection; that he told the defendants if sent on at once he thought it could be collected; that the account was verified by one of the defendants and sent by the witness to Mr. McLennan, a lawyer, at Nebraska City; that he afterwards told the defendants the account had been put in judgment and that he hoped to make the money, or the greater part of it. When he made this communication he had McLennan's letter in his hand, and communicated it to the defendants. He further testified that the money had been received by him from McLennan. but had never been paid over to Wise & Co.

The referee held that the knowledge of the condition of the bankrupt by the attorneys residing in Nebraska, who took the confession of judgment, was the knowledge of the creditors in New York. The Supreme Court and the Court of Appeals adjudged otherwise, holding them to be the agents of Archer & Co., and not of Wise & Greenbaum, the creditors. It is upon this point of difference that the case is presented for decision.

The general doctrine that the knowledge of an agent is the knowledge of the principal cannot be doubted. (Bk. *v.* Davis, 2 Hill, 451; Ingalls *v.* Morgan, 10 N. Y., 178; Fulton Bk. *v.* N. Y. & S., 4 Paige, 127.)

It must, however, be knowledge acquired in the transaction of the business of his principal, or knowledge acquired in a prior transacrion then present to his mind, and which could properly be communicated to his principal. (The Distilled Spirits, 11 Wall., 356; Weeser *v.* Morgan, 10 N. Y., 178.)

Neither can it be doubted that where an agent has power to employ a sub-agent, the acts of the sub-agent or notice given to him in the transaction of the business, have the same effect as if done or received by the principal. (Story Ag., §§ 452, 454; Storrs *v.* City of Utica, 17 N. Y., 104; Boyd *v.* Vandenberg, 1 Barb. Ch., 273; Rourke *v.* Story, 4 E. D. Smith, 54; Lincoln *v.* Battle, 6 Wend., 475.)

It is no answer to this liability to say that the act done by the agent was of a fraudulent character, and that the principal did not authorize the commission of a fraud. For a fraud committed by a partner or an agent the principal is not liable criminally, but he is liable in a civil suit if the fraud be commited in the transaction of the very business in which the agent was appointed to act. (Story Ag., § 452-4; Griswold *v.* Haven, 25 N. Y., 600, 602; Farmers' & M. *v.* B. & D. P., 16, 125; 3 Ch. Com. L., 209; N. R. Bk. *v.* Aymar, 3 Hill, 262; Davis *v.* Bemis, 40 N. Y., 453, n.; Attorney-Gen. *v.* Sidden, 1 Cromp. & Jer. 219.)

Upon these general principles we find no difficulty. But the real question still remains. Was McLennan, of Nebraska, the agent and attorney of Wise & Company, the owners of the debt, or were Archer & Co., the collection agents, his principals, and was it to them only and not to Wise & Co., that he stood in the relation of agent and attorney?

The evidence was uncontradicted in every particular. It became, therefore, as stated in the opinion of the Court of Appeals, a question of law whether the evidence sustained the findings of the referee.

The rule of law is undoubted that for the acts of a sub-agent the principal is liable; but that for the acts of the agent of an intermediate independent employer he is not liable. It is difficult to lay down a precise rule which will define the distinctions arising in such cases. The application of the rule is full of embarrassment. For a collection of the cases and illustrations of the doctrine, reference may be had to Story on Agency, § 454, and following.

Without attempting to harmonize or to classify the conflicting authorities, we think the case before us falls within a particular range of decisions, in which the preponderance is undoubted.

Among these are the following:

In Reeves *v.* The State Bank of Ohio, (8 O. Stat. Rep., 465), the case was this: Reeves & Co. deposited for collection in the Commercial Bank of Toledo, their draft for $500 on Buckingham & Co. of New York. The draft was forwarded to the American Exchange Bank in New York, and on the 31st of November, 1854, it was paid and the amount credited to the Commercial Bank. On the 27th of the same month, the Commercial Bank became insolvent and its assets passed into the possession of the State Bank. Reeves & Co. sued the State Bank as the representative of the Commercial Bank, alleging that the latter bank was their agent and that the money collected in New York for the latter bank on their draft, belonged to them. In an elaborate and exhaustive opinion, in which all the cases, English and American, were reviewed, the Supreme Court of Ohio held, among other things: 1. That the Commercial Bank was responsible to Reeves & Co. for the conduct of the New York bank, and was liable to them for the amount of the draft immediately on its collection in New York. 2. That the New York bank was the agent of the Commercial Bank and not the sub-agent of Reeves & Co. The action was sustained.

In Mackay *v.* Ramsay, 9 Clark & Fin. 818, "M. employed R. & Co., bankers in Edinburg, to obtain for him payment of a bill drawn on a person resident at Calcutta. R. & Co. accepted the employment, and wrote promising to credit M. with the money when received. R. & Co. transmitted the bill in the usual course of business to C. & Co. of London, and by them it was forwarded to India, where it was duly paid. R. & Co. wrote to M. announcing the fact of its payment, but never actually credited him in their books with the amount. The house in India having failed, it was held that R. & Co. were agents of M. to obtain payment of the bill, that payment having been actually made, they became *ipso facto* liable to him for the amount received and that he could not be called upon to sustain any loss from the conduct of the sub-agents as between whom and himself no privity existed." "To solve the question, says Ld. Cottenham, it is not necessary to go deeper than to refer to the maxim: *qui facit per alium, facit per se.* R. & Co. agreed for a consideration to apply for payment of the bill; they necessarily employed agents for this purpose who received the amount; their receipt was in law a receipt by them and subjected them to all the consequences. The appellants, with whom they so agreed, cannot have anything to do with those whom they so employed, or with the state of the account between different parties engaged in this agency." The banker thus receiving the draft from its owner was held liable for the acts of the person employed by him, although free from negligence or fraud.—(Cited 8 Oh., sup., p. 481.)

In 3 Seld., 459, The Montgomery Co. Bk *v.* The Albany City Bk. and Bk. of The State of New York, the former bank sent to the Albany City Bk., for collection, a draft for $1,800, payable 30 days after date. The Albany bank transmitted the same for collection to its correspondent, the Bank of the State of New York, in the city of New York who neglected to present the same for payment on its maturity, by means of which negligence the amount thereof was lost. The Court of Appeals of the State of New York held that the Albany bank was the agent of the Montgomery bank, that the bank of New York was the agent of the Albany bank and not of the Montgomery bank, and that the Albany bank was liable to the Montgomery bank for the neglect of its New York correspondent. To this many cases are cited. The recovery below against the Albany bank was affirmed, and the judgment against the New York bank was reversed.

To the same effect is The Com. Bk. of Pen. against The Union Bk. of New York, 1 Kern., 203, and Allen *v.* Merchants' Bk., 22 Wend., 215.

These cases show that where a bank, as a collection agency, receives a note for the purposes of collection, that its position is that of an independent contractor, and that the instruments employed by such bank in the business contemplated are its agents, and not the said agents of the owner of thenote. It is not perceived that it canmake any difference that such collection agency is composed of individuals, instead of being an incorporation. These authorities go far towards establishing the position that Archer & Co., in the case before us, were independent contractors, and that the parties employed by them were their agents only, and not the agents of Wise & Co. in such manner that Wise & Co. are responsible for their negligence or chargeable with their knowledge. There are, doubtless, cases to be found holding to the contrary of these views, but the principle they decide is nevertheless well established.

Cases, no doubt, may also be found where actions have been sustained by the creditor against the last agent, or where he is charged with his acts, in which the point before us was not raised or brought to the notice of the court. Such cases are not authority on the point. Nor do we think any great difficulty arises from the case of Wilson *v.* Smith, 3 How., 770. That decision is based upon the case of Commonwealth Bk. *v.* Bank of New England, (1 How., 234,) (which is the only case referred to in the opinion,) and in which case the question was not raised. The question there was not of privity, but of the right to retain under the circumstances stated. Again, in that case, it was held, from the course of dealings between the banks, that it was fairly to be inferred that it was understood between them that the collections should be held subject to a settlement of accounts.

There is, however, another class of cases still more to the point.

In Bradstreet *v.* Everson, 72 Pa. St. Rep., 124, the case was this: The defendants were a commercial agency in Pittsburg, with agents throughout the United States, for the collection of commercial paper. The plaintiffs delivered to them, for collection, four drafts payable in Memphis, Tennessee. They sent them to Mr. Wood, their agent in Memphis, who obtained the money upon them, and, becoming embarrassed, failed to remit. On being called upon for the money the defendants attempted to excuse themselves on the ground that they followed the instructions of the plaintiffs, and were their agents merely, reporting from time to time, and that Wood. who received the money, was not their agent, that he was a reputable man, and that they had never received the money from him.

Among other points they insisted upon the following, viz: 7. If the plaintiffs placed the acceptances in the defendants' hands for collection, and knew that their personal attention and direct service in such collection would not, in the usual course of business, be given to it at Memphis, and that the employment of an attorney to attend to it at Memphis was necessary, or the proper and usual course of doing such business, then the plaintiffs thereby made either such person or defendants their agent therein, with power to employ an attorney or sub-agent therein at Memphis, and their immediate agent under such authority would not be responsible for any default of such sub-agent, if selected with reasonable care and diligence. And again they insisted —9. If the plaintiffs gave defendants at Pittsburg acceptances to collect at Memphis, they thereby constituted defendants their agents therein, and such agents are not responsible for any loss so long as they have used the usual diligence and conducted themselves according to the usual course of doing such business. The questions now before us were thus directly presented. In a careful opinion delivered by Mr. Justice Agnew, citing many authorities, these propositions are overruled. The court hold that the receipt for collection imported an undertaking by the collecting agent himself to collect, not merely that he receives it for transmission to another for collection, for whose negligence he is not to be responsible. He is, therefore, liable by the very terms of his receipt, for the negligence of the distant attorney who is his agent, and he cannot shift the reponsibility from himself upon his client.

Lewis & Wallace *v.* Peck & Clark, 10 Ala. R., 142, and Cobb *v.* Beake, 6 Ad. & Ellis, 930, are to the same purport. The last-named case is especially full and explicit.

We are of the opinion that these authorities fix the rule in the class of

cases we are now considering, to wit, that of attorneys employed, not by the creditor, but by a collection agent who undertakes the collection of the debt. They establish that such attorney is the agent of the collecting agent, and not of the creditor who employed that agent. We concur, therefore, in the conclusion reached by the Court of Appeals of the State of New York, that McLennan was not the agent of Wise & Greenbaum, the New York creditors, in such a sense that his knowledge of the bankrupt condition of Oppenheimer is chargeable to them. Whether a different conclusion would have been reached if the money had come to the hands of Wise and Greenbaum, we are not called upon to consider.

The judgment is affirmed.

Mr. Justice MILLER dissenting.

I feel constrained to express my dissent to the opinion of the court just delivered. Wise & Greenbaum were the *owners* of the notes in this case. The judgment, which was undoubtedly a preference within the meaning of the bankrupt law, was taken in their name and for their use and benefit. The attorney who procured the bankrupt to confess judgment acted for them, and was compelled to use their name. If the notes had been sent by them directly to McLennan, the attorney, it is conceded that they would have been liable in this action. I am at a loss to see how their liability is changed by the fact that the notes were sent to him through a commercial or collecting agency. This agency had no interest in the notes, was not liable to the attorney for his fees, nor to the bankrupt for costs, if an unsuccessful suit had been brought. The notes were not endorsed to this agency, nor could it in any manner have prevented Wise & Co. from controlling all the proceedings of the attorney for collecting the money.

The numerous cases cited from various courts of the relations between banks acting as collectors of money, among themselves and with others, stand on a different basis.

In all such cases the note or bill is either endorsed to a bank or made payable to it. The bank sues, if necessary, in its own name. It passes the amount usually to the deposit account of the person from whom received originally, and the account is so passed as between corresponding banks.

It is from this course of dealing that the series of decisions have been made referred to in the opinion.

So, also, there are numerous cases in which the first agent of a note, or claim owner, may have acquired vested rights, as for fees or advances, or other considerations, which, as between themselves, authorized the first agent to control the debt.

But these cases differ very widely from the case before us, in which there is no evidence that the collection agency had a particle of interest or any right to control the proceedings for collection adversely to the owner of the notes.

The effect of the decision is that a non-resident creditor, by sending his claim to a lawyer through some indirect agency, may secure all the advantages of priority and preference which the attorney can obtain of the debtor, well knowing his insolvency, without any responsibility under the bankrupt law.

Very few creditors, when this becomes well known, will fail to act on the politic suggestion.

Mr. Justice CLIFFORD and Mr. Justice BRADLEY concur in this dissent.

UNITED STATES SUPREME COURT

OPINION DELIVERED JAN. 24, 1876.

No. 61—THE WESTERN UNION TELEGRAPH COMPANY, Appellants,
v.
THE WESTERN AND ATLANTIC RAILROAD COMPANY.

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

A CONTRACT AND LEASE RELATING TO THE RUNNING OF A TELEGRAPH LINE BY A RAILROAD CONSTRUED.

Mr Justice MILLER delivered the opinion of the court.

The State of Georgia, which was the sole owner of a railroad called the Western and Atlantic Railroad, desiring the use of the telegraph for the purposes of the road along its lines an instrument of writing was signed on that subject by William Orton, president, on behalf of the Western Union Telegraph Company, and by Foster Blodgett, superintendent of the railroad, which was approved by Rufus B. Bullock, governor, and countersigned by H. C. Carsen, secretary of the executive department. This instrument was dated August 18, 1870.

The substance of this agreement was that the telegraph company should put up and set apart on its line of poles already there, along said railroad, a telegraph line for the exclusive use of the railroad; and equip it with as many instruments, batteries, and other necessary fixtures as might be required for use in the railroad stations; to run the wire into all the offices along the line of the road, and put the same in complete working order. Other provisions of the agreement related to the terms on which the officers of the road might transmit and receive messages through the connecting lines of the telegraph company; to the right of way of the telegraph company along the line of the road, and other matters regulating the use of the wire and compensation for it. The sixth article of the agreement bound the State to pay the cost of constructing the wire and of equipping the same at railroad stations not already supplied with instruments, batteries, and other necessary fixtures, as soon as this cost could be ascertained.

Shortly after the wires were put up and the instrument in working order, the governor of the State leased the road for twenty years, under authority of an act of the legislature, to certain persons, who became a body corporate by the name of the Western and Atlantic Railroad Company.

The instrument witnessing the contract, professed to grant, convey and lease to the Western and Atlantic Railroad Company, "the Western and Atlantic Railroad, which is the property of the State of Georgia, together with all its houses, work shops, depots, rolling-stock, and appurtenances of every character, for the full term of twenty years."

The railroad company took possession of the road and its appurtenances under the lease, including the wire and batteries and instruments put upon the road and in its offices by the telegraph company under the contract with the State. But having this possession, they refused to pay for the transmission of messages over connecting lines, according to the terms of the contract, and claimed that they were not bound by it, and that in fact a true construction of that agreement was that the State had bought and paid for the wire and instruments, and owned them, and as lessees of the State, the company had the right to control and use them without any liability to the telegraph company.

The bill of complaint of the telegraph company, after stating the refusal of the railroad company to recognize its rights in any respect, while they insisted on using the wire and apparatus, refusing also to allow complainants any use of the wires and instruments in their offices and depots, alleges that these considerations induced complainants to treat as revoked and withdrawn all power and privilege on the part of defendants to use said wire and apparatus, or to receive compensation therefor, and that complainants, seeking to recover possession of them, had been hindered and obstructed by the defendants in so doing. The bill prays that defendants be enjoined from using said wire, from hindering or obstructing plaintiffs in the use of it, or in severing it from all the offices of defendants, and for such other and further relief as the nature of the case requires.

Defendants in their answer deny that the contract between the telegraph company and the State is valid, being without authority of law; deny that, if valid, they, as lessees of the railroad, are bound by its terms; and assert that, by the true construction of the contract, the State became the purchaser and owner of the wire and instruments, and that the company succeeded to this ownership without being bound by the other terms of the agreement.

The railroad company also filed a cross-bill, setting up this view of their rights, and praying an injunction against the telegraph company to restrain it from interfering with the use of the wire and apparatus so acquired from the State.

The district court dismissed this cross-bill on demurrer, and, on hearing the original bill of complainants on the answer and evidence, decreed that the wire and instruments in question are the property of the State of Georgia, and are included in the lease to the railroad company, and that this company is not bound by the terms of the contract in other respects, unless adopted by it, and therefore dismissed the bill.

We differ with the district court as to the construction of the instrument. We do not think that the State simply bought a wire and batteries and other instruments, and became absolute owners of them. On the contrary, we think that the contract was for the use of a wire and instruments of the telegraph company.

The language of the first covenant of the telegraph company is that it agrees "to set apart on its line of poles along said railroad a telegraph wire for the exclusive use of said party of the second part." The further covenants are all consistent with this. The contract for the use of this wire in connection with the others, and for the use of one of the wires already there, when this shall be disabled, the fact that it is placed upon the poles of the company already in use for two other wires, the agreements regulating the offices, and, in short, the whole frame of the contract shows that the wire, the poles, the instruments, were the property of the telegraph company, with exclusive use of *this* wire transferred to the railroad.

This view is perfectly consistent with the idea that the State should pay the cost and expense of the additional wire and instruments rendered necessary by this agreement for its exclusive use, which does not prove that anything more than this right to exclusive use passed to the State.

If this be true, the railroad company, taking possession of this wire and instrument under claim of right from the State, must use it on the terms which bound the State, or not use it at all.

The ownership being in the telegraph company, the road could only have such use of it, lawfully, as it acquired from the State; and the right of the State to the use of it is governed by the terms of the agreement.

It is said the contract between the State and the telegraph company is void because the superintendent and the governor had no power to make it, and because it is oppressive and extortionate.

We do not decide whether this be so or not. Whenever the railroad company or the State shall cease to use the wire, shall abandon the contract and leave the instruments severely alone, and the complainants shall seek to compel compliance with the contract after that, it will be time to decide that question. But so long as this company gets the benefit of the contract by the use of the wire and the apparatus, it must also abide its terms in other respects.

We are embarrassed in this view of the subject by the unskillful character of the bill. The relief it seeks is the very last one would think of, namely, to enjoin the railroad company from the use of a wire and battery and instruments running along their line, and fixtures in their offices and depots, where they may remain until it be the pleasure of the complainants to take them away. The right to compensation for what the complainant has suffered by the failure of defendants, while using the wire, to comply with the covenants of the State, can be understood; and the right of defendants to use the wire when they perform the covenants of the State, can be understood: the right to a rescission of the contract, if either party prayed for it, can be understood; but this right which each claims, that he shall be let alone by the other to do as he pleases in regard to this wire, is very diffiault to understand.

Plaintiff also says he treats as revoked the power and privilege of defendant to use the wire and instruments. Is this an abandoument of the contract by plaintiff?

But there is in the bill a prayer for such other and general relief as the case may require. There is also the following stipulation after the pleadings are all in, which relieves us of much difficulty:

"It is agreed by counsel that if the use of the wire by the defendant is affected by the contract entered into between the complainant and the State (which contract is copied in the exhibit to the bill) in such manner as that the terms of said contract must be observed and complied with by defendant in order to retain the right to such use, the case is one proper for reference to the master to take an account, unless the court should adjudge that there is no right in complainant to relief in equity."

Now, we are of opinion that the use of the wire by defendant *is* affected by the contract between complainant and the State, in such manner that if they choose to use it they must comply with its terms as we have already said.

We are also of opinion that, to prevent multiplicity of suits, and to have an accounting, instead of bringing a suit on every specific violation of the covenants of the State, complainants have a right to relief in equity.

The decree of the circuit court is, therefore, reversed, with directions to refer the case to a master to state an account on the terms of the contract between the State and the telegraph company, as between the complainant and defendant, for the time defendant has used the wires, batteries and equipments put up under that contract, and to render a decree for that amount.

Mr. Justice FIELD dissents.

DISTRICT COURT OF THE NORTHERN DISTRICT OF OHIO.

OPINION, MARCH 4*th*, 1876.

C. S. Barrett et al. v. *Schooner Wacousta.*

WHAT ARE "GOING RATES."

WELKER, J. The libellants, on the 15th of November, 1873, entered into a charter party with the defendant, whereby it was agreed that said schooner should carry a cargo of coal for the libellants, from the port of Cleveland to the port of Toronto, Canada, for two dollars and twenty-five cents in gold per ton, or the *going rates*, at the time the schooner should report for loading. The capacity of the vessel was four hundred tons. The vessel, through the master, reported for load on the 20th of November, 1873, to the libellants, and the master then claimed that $2.50 in gold per ton was the going rate, which was denied by the libellants, they asserting that $2.25 was then the going rate, and refused to agree to pay more. Thereupon the master refused to load the coal, which was then ready to be loaded, or take it upon the vessel, and the vessel did not carry the coal for the libellants; and they, after the refusal, contracted with the schooner Moss to carry the coal to Toronto at the rate of $2.50 in gold per ton, which difference in price they seek to recover in this suit. The contract was proven to be as above stated.

There was a good deal of evidence given on both sides to ascertain and settle what was the *going rate* at this port for the port of Toronto on the 20th and at the time the defendant reported, the libellant claiming it was $2.25, and the defendant it was $2.50. Several experts were examined and much difference of opinion was manifested as to how "going rates" were established and ascertained, some claiming that the prices fixed in the last charter party made at the port for the port of Toronto determined the rate, and others that whatever might be offered vessel owners by shippers made the "going rate." The testimony showed that in the forenoon of the 20th, and up to the time the defendant reported for load, the last contract of shipment for Toronto made between shipper and carrier was $2.25 in gold per ton. That before the master reported for load, he had been offered by Mr. Crawford $2.50 in gold per ton, and that when he reported to libellants, he informed them of the offer, and proposed to carry for them at the same rate, which they refused, and said they would rely on their contract. Afterwards, on the same day, the master made a contract with Crawford at the rate of $2.50 in gold, which was the first contract for that price made on that date and was followed by the one made by the libellants with the schooner Moss, at $2.50.

The question to settle is: What was the going rate at the time the defendant reported to take load? If $2.25, then the libellants are entitled to recover; if $2.50, then they must fail in their suit. It will be necessary, before determining the question, to understand what is meant by "going rate," and how it is established or ascertained in the port. Rate means price, value. "Going rate" as to freight, like "market price" for

produce, means a fixed and established price for the time. To make a market price there must be buying and selling, purchase and sale. The price of gold on 'Change is fixed by sales made. A price cannot be established by a mere offer to sell or an offer to purchase. Sales must be consummated by agreement to make a market price. The minds of the buyer and seller must unite on a price. So of a rate for freight. It cannot be established by the mere offer of a shipper or demand of a carrier. It can only be done by an actual contract having been made in the port, and the last one so made for the same port, would fix the rate. If, however, on a given day the price has varied, being raised, lowered, and raised during the day, the rate for the day would be an average of the rates, which should be regarded as the going rate for that day. If, on a given day, no contracts for shipments had been made, then those of a preceding day would constitute the going rate for that day, and would continue until changed by an actual shipping contract made at a different rate. If mere offers by shippers, or demand of carriers, could establish the rate, then there would be no certainty in the fulfillment of that large class of contracts made for freight at *going rates*. Shippers would have it in their power to reduce freight at their pleasure, and carriers could increase them as might best subserve their interests.

The only safe, and the true rule is, that *rates of freight* are fixed and established by actual contracts in the market, and can only be changed by contract in good faith, made in the port for like services. The evidence in this case shows very satisfactorily that no contract had been made in this port before the refusal of the defendant to carry the coal for libellants, for any higher price than $2.25 in gold, and that the defendant in fact made the first contract after such refusal at the new rate of $2.50 per ton. This contract then changed the rate to $2.50, and the libellants had to conform to such increase in their contract with the Moss. The defendant, therefore, in refusing to carry the coal for the libellants at $2.25 in gold, per ton, as the contract bound the defendant to do, violated the contract of shipment, and for which the libellants are entitled to recover.

Another question is made on the hearing, which is not distinctly made in the answer of the defendant, and which it is claimed, prevents the libellants from a recovery in the case. The evidence shows that the libellants had sold the coal, to be carried on the vessel to a firm at Toronto, by the name of Conyer & Co., the freight to be paid by the consignee on its receipt. It also shows that the contract with Conyer & Co. was that they should receive the coal chargeable with a freight of only $2.25 in gold per ton. It is also shown that the consignees paid the $2.50 in gold per ton freight for the coal shipped on the Moss, on its receipt — that afterwards, and after this suit was commenced, the libellants settled with Conyer & Co., and paid them the difference in the freight so paid by the consignees. On this state of facts, it is claimed the libellants had no right in these proceedings against the defendant, having no interest in the contract and sustaining no damages.

The answer to this claim is, that by this contract the coal sold only being chargeable with $2.25 per ton, to be paid by the consignee, any excess paid over that sum was necessarily a loss to that extent on the value of libellants' coal and the price they were to receive for it, and therefore a damage to them in the amount their consignees were then compelled to pay.

Decree for the libellants for $123.91.

MIX, NOBLE & WHITE, for libellants.

H. D. GOULDEN, for defendant.

U. S. DISTRICT COURT OF MASS.

IN RE WHITNEY ET AL.

BANKRUPTCY—WHEN DISCHARGE OF BANKRUPT WILL BE REFUSED BY REASON OF OPPOSITION OF CREDITOR BEING BOUGHT OFF, ETC.

LOWELL, J.—The third specification of objection to the discharge of the bankrupts is, that they, or some person in their behalf, procured the assent of Reuben G. Morse, a creditor, to their discharge, by the payment of money. The evidence tended to show that the brother of one of the bankrupts bought the claim of Morse a considerable time after it had been proved against the estate; that the name of Morse is signed to the assent after four others, and before the sixth and last. It appeared that the purchase of the debt was negotiated like any other purchase, Morse asking three hundred dollars and obtaining only two hun dred Nothing was said between the parties about discharge, so far as the witnesses recollected, and it was not proved when the assent was given. The brother testified that he bought the debt for the chance of a dividend, that he had no communication with the bankrupts before buying, and that afterwards his brother told him he did not want to hear anything about it, lest fraud should be charged. I am satisfied, from the clear weight of the evidence, that no one of ordinary business capacity could have bought this debt with any expectation of a dividend exceeding two hundred dollars; for this, among other reasons, that he could probably have bought the whole assets for that price instead of a rather small fraction thereof. Upon the whole, I feel justified in believing, though against the positive testimony of the purchaser, that he must have had some other end to attain than the receipt of a dividend; and none can be thought of but that which was attained.

By the English law, when the certificate of discharge required the assent of creditors, it was held to have been obtained by fraud, if any one, even without the knowledge of the bankrupt, paid money to induce a creditor to sign it: Robson *v.* Calze, Doug., 227; Holland *v.* Palmer, 1 Bos. and P. 95. Lord Eldon regretted that the law had gone to such a length as to make void a certificate obtained by inducements offered by a friend or enemy without any priorty on the part of the bankrupt, and when, as he said, the bankrupt, perhaps, would have abhorred such means of procuring it: Exp. Butt, 10 Vol., 360; Exp. Hall, 17 Vol., 62. And he is said to have permitted a bankrupt in one case to apply for his discharge anew. Exp. Harrison, 2 Buck, 247 *n*.

Our statute speaks of a consideration given "in behalf" of the bankrupt, and was perhaps intended to vary the old rule to some extent; I have held that where the evidence was clear and undisputed that the opposition of a creditor had been bought off by one who was a surety of the bankrupt on certain bonds in court which it was for the interest of the surety to have discharged, and the surety acted wholely on his own account and without consultation with or care for the bankrupt, the discharge could not be vacated for that cause; the payment not having been one in behalf of the bankrupt in the sense of the law. That creditor had signed no assent.

But, I observed in that case, that different considerations might arise when a signature of a creditor had been obtained by money and placed upon the paper in such a way that it might have influenced other creditors to sign. This has been always held to be, in itself, a fraud on creditors, independently of any clause in a statute, and without regard to who has made the payment. Jackson *v.* Lomas, 4 T. R., 166; Leicester *v.* Rose, 4 East, 372; Dunglish *v.* Tenant, L. R. 2, Q. B., 49; Phillips *v.* Dicus, 15 East, 248. There is, besides, this circumstance in the present case: that the payment was made by a friend, with no conceivable motive but to benefit the bankrupt. In such a state of things it would be unsafe not to have the presumption, a very strong one, I will not say conclusive, that such a payment is made in the debtor's "behalf." In many of the decided cases it has appeared that the consideration has moved from a friend or relative of the debtor, and it would be very easy, of course, to conceal the motive. If it were clearly proved, as in the case already referred to, that a distinct and intelligible motive had influenced the action of the third person, and that the debtor was ignorant of the action until after it had been committed, I am still of opinion that the certificate ought not to be refused, unless other creditors may have been misled. I do not find that the debtors have made out such an exceptional case. I am obliged to say debtors, because the paper was a joint one, and though the claim was bought by the brother of only one of them, it operates to the advantage of both, and must be presumed to have been done in behalf of both.

Discharge refused.

R. M. MORSE, JR., for the opposing creditors.

N. B. BRYANT for the bankrupts.

SUPREME COURT OF ILLINOIS.

OPINION FILED JAN. 21, 1876.

THE COUNCIL OF THE VILLAGE OF GLENCOE
v.
THE PEOPLE EX REL., JOHN A. OWEN.

Error to Cook.

MANDAMUS TO COMPEL COUNCIL TO CALL AN ELECTION—WHO ARE PROPER PARTIES—SERVICE OF SUMMONS BY SPECIAL DEPUTY.

1. SERVICE BY SPECIAL DEPUTY.—That the service of summons may be by special deputy, and that in making the return of service it is not necessary for such special deputy to use the name of the sheriff. It is otherwise when the return is made by a deputy sheriff.

2. SERVICE ON A MUNICIPAL COUNCIL.—That service of summons in a mandamus case need not be on each member of a municipal council; that the peremptory writ, however, is governed by different principles, and should be served upon those composing the council at the time of the service.

3. MUST CALL THE ELECTION WITHIN A REASONABLE TIME.—That eight months postponement of a day for holding an election which it was the duty of the council to call, is an unreasonable postponement, though there was a discretion to be exercised by the counsel as to the day. That any postponement not authorized by some apparent public necessity would be unjustifiable.

4. MANDAMUS THE REMEDY.—That mandamus is the proper remedy in this case.

5. WHO MAY PROSECUTE.—That the prosecution was properly carried on by the relator.—[ED. LEGAL NEWS.]

Opinion by SCHOLFIELD, J.

This appeal is prosecuted to reverse a judgment of the court below awarding a peremptory *mandamus* against "The Council of the Village of Glencoe." Several errors are assigned which we shall proceed to pass on in the order of their presentation by the counsel for the respondents.

There was no appearance by the respondent before judgment was rendered, and it is insisted the respondent was not properly brought before the court.

"The Village of Glencoe" was incorporated by an act of the legislature, approved March 29, 1869, by section one, article two, whereof it is enacted "the municipal government of said village shall be vested in a council, consisting of a president and five councilmen, who shall be elected," etc. The summons runs to "The Council of the Village of Glencoe." It is endorsed as follows: "I hereby depute and appoint J. W. P. Hovey special deputy to serve this writ, this 9th day of October, 1874."

"T. M. BRADLEY, Sheriff."

State of Illinois, } ss.
Cook County, }

J. W. P. Hovey, being duly sworn, saith that he is the special deputy above named, and that he served the within writ on H. B. Wilmarth, President of the Council of the Village of Glencoe, by reading the same to him, and delivering him a copy thereof on October 9, 1874. J. W. P. HOVEY.

Subscribed and sworn to before me this 10th day of October, 1874. Signed, John A. Owens, Notary Public, and his notarial seal is also affixed.

The specific objections made are,

1st. The return should have been in the name of the sheriff. 2nd. The writ should have been against "The president and councilmen of the village of Glencoe," and it should have been personally served on each of them.

1st. If the service had been by a general deputy it admits of no controversy; the return should have been in the name of the sheriff. In such case, the act is in presumption of law, the act of the sheriff and the mere return of the service in his name is ordinarily conclusive. This was the English law (1st Sharswood's Blackstone, pp. 344-5 and notes) and it is so provided by our statute. (R. S. 1874. chap. 125, p. 990, § 12.) But the appointment of a special deputy to make service in a single case is authorized by other provisions of the statute, having, as we conceive, no dependence upon or connection with those relating to the appointment and duties of general deputies. It must be conceded that it is competent for the legislature to prescribe how and by whom writs shall be served, and what shall be accepted as evidence that they have been served, for we think there can be found no constitutional provision which prohibits the legislature to authorize personal service of process to be made otherwise than by or in the name of the sheriff.

The tenth section of the statute before referred to, provides, "A sheriff may appoint a special deputy to serve any summons issued out of a court of record by indorsement thereon substantially as follows: 'I hereby appoint —— my special deputy to serve the within writ,' which shall be dated and signed by the sheriff." The next section, the eleventh, provides: "Such special deputy shall make return in the time and manner of serving such writ under his oath, and for making a false return he shall be guilty of perjury, etc." Thus, it will be observed, instead of the requirement being as in the twelfth section, where it is required that the general deputy shall act in the name of the sheriff, that is omitted, and it is only required the special deputy shall make return "*under his oath*," and this under the pains and penalties of perjury. This difference in phraseology we regard as intended to authorize the return to be made as it was in this instance, the vital requirement being that it shall be *under he oath of the special deputy*. It sufficiently appears by the appointment endorsed on the writ, and the oath of the special deputy, in what capacity he acted, and the mere form of the return cannot, under these circumstances, be held to release the sheriff from liability for his act.

We think the return, although it might have been more formal to have used the name of the sheriff, is sufficient under the statute.

2nd. The duty sought to be enforced is claimed to be imposed upon the "Council of the Village of Glencoe." No other branch of the municipality has anything to do with it. The writ was, therefore, properly directed, The People ex rel *v.* The Mayor, etc., of Bloomington, 63 Ill., 208.

The object of the writ is to coerce the performance of a duty which is claimed to be obligatory on the council as a body, without regard to the individuals who compose that body. There might, therefore, be an entire change in the members composing the council, without in any wise affecting the proceeding. The duty sought to be enforced, although to be discharged by one branch of the corporate body, is nevertheless a corporate duty, and the proceeding might, with equal propriety, have been against the corporation—the ultimate result being precisely the same. See Dillon on Municipal Corps., § 701. We are of opinion, therefore, that service upon the president which is authorized by § 7, R. S. 1874, P. 775, in suits against villages, is sufficient. The peremptory writ, however, is governed by different principles and should be served upon those composing the council at the time of the service.

The next question to which our attention is invited, is, does the petition show sufficient grounds, conceding, as we must, its allegations to be true for issuing the peremptory writ?

The allegations material to the questions are, the village of Glencoe is incorporated under a special charter; that on the 16th day of July, 1874, a petition signed by thirty voters of the village, among whom was the relator, was presented to the council of the village (the president and trustees of said village, in whom all legislative authority is vested, being designated in the village charter as the "Council of Glencoe"), which council was then in session, requesting the council to submit the question whether said village will be organized as a village under the act of the legislature of this State, in force July 1st, 1872, "entitled an act to provide for the incorporation of cities and villages," to the decision of the legal voters of said village; that at the same time a motion was made by a member of the council that the question be submitted to the legal voters of the village at an election to be called for that purpose on the 4th day of August, 1874, which vote was laid over by a vote of the council until the next meeting thereof; that at the next meeting of the council no action was had on the petition; that at a meeting of the council held on the 10th day of August, 1874, motion was made that the election prayed by the petition be held on the first Tuesday of October, 1874, another member of the council moved to amend this motion by substituting the first Tuesday of April, 1875, for the first Tuesday of October, 1874, which was adopted; and the council then ordered the election prayed for to be held on the first

Tuesday of April, A. D. 1875, but did not designate any place for holding the election or elect any judges therefor, nor did they cause any notice to be given of the time and place of holding such election, and they have taken no other action in regard to such election.

It is alleged that the designation of the first Tuesday in April, 1875, is an unreasonable postponement of the time of holding the election prayed for; that it is the day designated by the present village charter for holding the annual election for village officers; that the designation of such time was made with the purpose and intention of unlawfully postponing and defeating the will of the voters of the village upon the question of reorganization, and it is stated as the opinion of the relator that it is the intention of a majority of the council to defeat said election by a failure to discharge the duties enjoined by the law.

It is argued by the respondent, the fixing of the time at which the election shall be held is a matter of discretion, in which the council cannot be interfered with by the courts.

By section one, article eleven of the statute relating to "Cities, Villages and Towns," R. S., 1874, p. 242, it is enacted: "Any town in this State, incorporated either under any general law for the incorporation of towns and acts amendatory thereof, or under any special act for the incorporation of any town or village, may become organized as a village under this act and in the manner following: Whenever any thirty voters in such town shall petition, the president and trustees thereof to submit the question whether such town will become organized as a village under this act to the decision of the legal voters thereof; it shall be the duty of such president and trustees to submit the same accordingly, and to fix a time and place within such town for holding such election and to appoint the judges to hold such election, and to give notice of the time, place and purpose of such election, by causing at least five notices thereof to be posted in public places in such town, for at least fifteen days prior to holding such election.

It is obvious that council had no discretion when the proper petition was presented, whether the prayer of the petition should be granted or not. The petition being in conformity with the statute, it was the plain duty of the council to act upon it at the earliest convenient moment, fix the time and place of holding the election, select the judges therefor, and give the required notice thereof. But inasmuch as no time is designated by the statute when the election shall be held, there was some discretion necessarily in the council in this regard. The implication of law, however, is that the time fixed should be within a reasonable period, in view of all the circumstances. Precisely what would be a reasonable time might, in many instances, be of extremely difficult solution; instances of what would be an unreasonable period can more readily be imagined which will serve the present purpose. For illustration: Had the election been postponed for ten years, or even five years, it would need no argument to show that it would amount practically to a denial of the right guaranteed to the petitioners. No one would pretend the discretion vested in the council could justify this. So it would seem to be equally clear that any postponement not authorized by some apparent public necessity would be unjustifiable. The discretion vested in the council can not be exercised arbitrarily for the gratification of feelings of malevolence or for the attainment of merely personal and selfish ends. It must be exercised for the public good, and should be controlled by judgment and not by passion or prejudice. When a discretion is abused and made to work injustice, it is admissible that it shall be controlled by mandamus. Tapping on Mandamus (Am. ed.), 66.

The change desired to be effected in the municipal government of the village through an election, was such as materially affected every citizen and tax-payer of the village. The petition was based on what were supposed sufficient reasons, having reference to the then existing state of affairs. If reform, to be brought about through this means, was needed, and desired by a majority of the voters of the village, it was a wrong and an outrage that they should be compelled to submit to the evils they labored under for another year, when the change might reasonably be effected within a month. If there were leeches in the treasury, a vicious revenue system, or imperfect police regulations, in the opinion of a majority of the voters, to be gotten rid of only through change in the organic law, they were entitled to have the change made as soon as it was practicable, and every day they were forced to submit to the continuance of the evils beyond that period, was so much arbitrary oppression by the council.

We can imagine no public necessity justifying the postponement of the election from the 16th day of July, 1874, to the first Tuesday of April, 1875. It has every appearance of an attempt on the part of those filling the council to perpetuate their own power to the utmost possible period, notwithstanding and in defiance of the wishes of the people. It is not admissible that this conduct shall be excused by the respondents assuming that a majority of the electors did not concur with the thirty petitioners, and therefore the election would have involved the village in useless expense.

That was the question to be settled by the election and it could in no other way be settled. The law gave the thirty electors the right to have the election, and to have it within a reasonable time, and its unnecessary postponement was in violation of that right.

The allegation of the petition, moreover, that this postponement was to defeat the will of the electors is by the default to be taken as true. Thus it is conceded the discretion in the council was abused and perverted to the attainment of an unjustifiable end.

If this postponement may be excused, it must follow, the council may, in the exercise of its discretion, indefinitely postpone the calling of an election, between which and an absolute refusal to call the election, the distinction is only in form and not in substance.

We have no hesitancy in saying the case is one in which mandamus properly lies. The only remaining objection is that the prosecution is carried on by a private citizen and not by a public prosecutor. The relator shows that he is a resident voter and tax-payer of the village.

It was said, in the County of Pike *v.* The State, 11 Ill., 207: "The question, who shall be the relator in an application for a mandamus, depends upon the object to be attained by the writ * * * * Where the object is the enforcement of a public right, the people are regarded as the real party and the relator need not show that he has any legal interest in the result. It is enough that he is interested, as a citizen, in having the laws executed, and the right in question enforced. See, also, City of Ottawa *v.* The People, 48 Ills., 235; Hall et al *v.* The People, 57, Id., 310.

These cases hold a different rule from that announced by the cases referred to by the respondent, but are conclusive here. The public prosecutor might undoubtedly have instituted this prosecution, but his failure to do so is no reason why the citizens, tax-payers, and voters of the village shall be denied the right to have the council perform its duty. The remarks in The People ex rel Stine *v.* Supervisors, 47 Ill., 259, referred to by the counsel for respondent, are not pertinent. They had reference simply to a contract in which the contracting party was asking no aid of the court and had no allusion to the case of a failure to perform a public duty.

We are of opinion there is no error in the record and the judgment must, therefore be affirmed.

Affirmed.

CHARLES J. BEATTIE and MORTON CLUVER for plaintiff in error.

JOHN A. OWEN for the people.

SUPREME COURT OF WISCONSIN.

OPINION FEB. 1876.

IN THE MATTER OF THE APPLICATION OF LAVINIA GOODELL TO BE ADMITTED TO THE BAR.

HELD, THAT A WOMAN CANNOT BE ADMITTED TO THE BAR IN WISCONSIN.

Opinion by RYAN, J.

In courts proceeding according to the course of the common law, a bar is almost as essential as a bench. And a good bar may be said to be a necessity of a good court. This is not always understood, perhaps not fully, by the bar itself. On the bench, the lesson is soon learned that the facility and accuracy of judicial labor are largely dependent on the learning and ability of the bar. And it well becomes every court to be careful of its bar and jealous of the rule of admission to it, with the view of fostering in it the highest order of professional excellence. The constitution makes no express provision for the bar. But it establishes courts amongst which it distributes all the jurisdiction of all the courts of Westminster Hall, in equity and at common law. Putnam *v.* Sweet, 2 Pew, 301. And it rests in the courts all the judicial power of the State. The constitutional establishment of such courts appears to carry with it the power to establish a bar to practice in them. An admission to the bar appears to be a judicial power. It may therefore become a very grave question for adjudication here, whether the constitution does not intrust the rule of admission to the bar, as well as of expulsion from it, exclusively to the discretion of the courts. The legislature has, from time to time, assumed power to prescribe rules for admission of attorneys to practice. When these have seemed reasonable and just, it has, generally, we think, been the pleasure of the courts to act upon such statutes, in deference to the wishes of a co-ordinate branch of the Government, without considering the question of power. We do not understand that the Circuit Courts, generally, yielded to the unwise and unseemly Act of 1849, which assumed to force upon the courts, as attorneys, any persons of good moral character, however unlearned or even illiterate; however disqualified by nature, education or habit, for the important trusts of the profession. We learn from the clerk of this court that no application for admission under that statute was ever made here. The good sense of the Legislature has long since led to its repeal. And we have too much reliance on the judgment of the Legislature to apprehend another such attempt to degrade the courts. The State suffers essentially by every such assault of one branch of the Government upon another, and it is the duty of all the co-ordinate branches scrupulously to avoid even all seeming of such. If, unfortunately, such an attack upon the dignity of the courts should again be made, it will be time for them to inquire whether the rule of admission be within the legislative or the judicial power. But we will not anticipate such an unwise and unbecoming interference in what so peculiarly concerns the courts, whether the power to make it exists or not. In the meantime, it is a pleasure to defer to all reasonable statutes on the subject. And we will decide this motion on the present statutes, without passing on their binding force.

This is the first application for admission of a female to the bar of this court. And it is just matter for congratulation that it is made in favor of a lady, whose character raises no personal objection—something, perhaps, not always to be looked for in women who forsake the ways of their sex for the ways of ours.

The statute provides for admission of attorneys in a Circuit Court, upon examination to the satisfaction of the judge, and for the right of persons so admitted to practice in all courts here, except this; but, that to entitle any one to practice in this court, he shall be licensed by order of this court. Taylor's Statutes, Chapter 119, Secs. 31, 32, 33. While these sections give a rule to the Circuit Courts, they avoid giving any to this court—leaving admission here, as i ought to be, in the discretion of the court. This is, perhaps, a sufficient answer to the present application, which is not addressed to our discretion, but proceeds on assumed right, founded on admission in a Circuit Court. But the novel positions on which the motion was pressed appear to call for a broader answer.

The language of the statute, of itself, confessedly applies to males only. But, it is insisted, that the rule of construction found in Sub. 2, Sec. 1, Chapter 5, R. S., necessarily extends the terms of the statutes to females. The rule is, that words in the singular number may be construed plural, and in the plural, singular; and that words of the masculine gender may be applied to females; unless, in either case, such construction would be inconsistent with the manifest intention of the legislature.

This was pressed upon us, as if it were a new rule of construction, of peculiar application to our statutes. We do not so understand it. It appears to be but a particular application of the general rule thus stated by TYNDALL, C. J.: "The only rule for the construction of Acts of Parliament, is, that they should be construed according to the intent of the Parliament which passed the Act." And it is not new or peculiar here. Potter's Dwarris, 111. The last clause of the rule, relating to sex, seems to be almost as old as Magna Charta. Coke, 2 Inst, 45. We apprehend that, unless in the construction of penal statutes, it has been little questioned since the much considered case of King *v.* Wiseman, Fortescue, 91. The rule is permissive only as an aid in giving effect to the true intent of the legislature. Even of a statutory rule, positive in terms, Lord Demnand said: "It is not to be taken as substituting one set of words for another, nor as strictly defining what the meaning of a word must be under all circumstances. We rather think that it merely declares what persons may be included within a term, when the circumstances require that they should." Queen *v.* Justice, A. & E. 7, 480. So *a fortiori* of the permissive rule here. And the argument for this motion is simply this, that the application of this permissive rule of construction to a provision applicable in terms to males only, has effect, without other sign of legislative intent, do admit females to the bar from which the common law has excluded them ever since courts have administered the common law. This is sufficiently startling. But the argument cannot stop here. Its logic goes far beyond the bar. The same peremptory rule of construction would reach all or nearly all the functions of the State government, would obliterate almost all distinction of sex in one statutory *corpus juris*, and make females elligible to almost all offices under our statutes, municipal and State, executive, legislative and judicial, except so far as the Constitution may interpose a verile qualification. Indeed the argument appears to overrule even this exception. For we were referred to a case in Iowa, which unfortunately we do not find in the reports of that State, holding a woman not excluded by the statutory description of "any white male person." If we should follow that authority in ignoring the distinction of sex, we do not perceive why it should not emasculate the Constitution itself, and include females in the constitutional right of male suffrage and male qualification. Such a rule would be one of judicial resolution, and not a judicial construction. There s no sign nor symptom in our statute law of any legislative imagination of such a radical change in the economy of the State government. There are many the other way: an irresistible presumption that the legislature never contemplated such confusion of functions between the sexes. The application of the permissive rule of construction here would not be in aid of the legislative intention, but in open defiance of it. We cannot stultify the court by holding that the legislature intended to bring about, *pier ambages*, a sweeping revolution of social order, by adopting a very innocent rule of statutory construction.

Some attempt was made to give plausibility to the particular consruction urged upon us, founded on Chapter 117 of 1867, and Chapter 79 of 1870. It was represented that the former admits women to every department of the University, excepting the military only, and so necesarily including the law department; that the latter directs admission to the bar of the graduates of the law department; that the legislature had thus provided for the admission of female graduates of the law schools, nd ought therefore to be understood as intending the admission of women under the general statute. If the legislature had so provided for the admission of female graduates, we do not perceive how that could aid the construction of the general statute of this lady, who does not appear to be a graduate. But, unfortunately for the position, the statutes were not stated with the fair accuracy which becomes counsel, and do not support it. The act of 1867 is an amendment of Sec. 4 of the Act of 1866, reorganizing the University. The section of 1866 provided, without qualification, that "the University in all its departments and colleges shall be open alike to male and female students." The section of 1867 substitutes the provision that "the University shall be open to female as well as male students, under such regulations and restrictions as the

(*Continued upon page* 199.)

CHICAGO LEGAL NEWS

Lex vincit.

MYRA BRADWELL, Editor.

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WE call attention to the following opinions, reported at length in this issue:

COLLECTION OF A CLAIM AFTER ACT OF BANKRUPTCY — ATTORNEY EMPLOYED BY COLLECTING AGENCY.—The opinion of the United States Supreme Court, by HUNT, J., where a creditor, residing in the east, gave a claim against a person residing in the west, to a collecting agency for the purpose of collection, and the collecting agency employed an attorney to collect it, who procured a confession of judgment on such claim from such debtor, well knowing at the time he was insolvent, and collected the money on such judgment; *held*, that the attorney who made the collection, was the agent of the collecting agency, and not of the creditor, and that the knowledge of the financial condition of the debtor which the attorney had, was not the knowledge of the creditor.

TELEGRAPH—CONTRACT.—The opinion of the Supreme Court of the United States, by MILLER, J., construing a contract for the running of a telegraph line by a railroad company.

MANDAMUS—TO COMPEL COUNCIL TO CALL AN ELECTION—PARTIES—SERVICE BY SPECIAL DEPUTY.—The opinion of the Supreme court of this State by SCHOLFIELD, J., holding that mandamus is the proper remedy to compel a council to call an election; that eight months' postponement of a day for holding an election, which it was the duty of the council to call, is an unreasonable postponement, though there was a discretion to be exercised by the council as to the day; that the prosecution was properly carried on by the prosecutor, a private individual that a special deputy in making return on a summons need not make use of the sheriff's name. It is evident from the remarks of the learned judge in delivering the opinion, that he is in favor of the people ruling, and against all combinations of officers for the purpose of preventing the people from legally expressing their wishes at the polls. This opinion has the right ring in it.

WE are indebted to John A. Owen the relator for a copy of this opinion.

A WOMAN CANNOT BE ADMITTED TO THE BAR IN WISCONSIN.—The opinion of the Supreme Court of Wisconsin, by RYAN, C.J., refusing the application of Miss LAVINIA GOODELL to be admitted to the bar of that State, and holding that a woman cannot be admitted to the bar in Wisconsin. The learned Chief Justice, in delivering the opinion, uses very strong language in giving his own personal views. We call the especial attention of our readers to this opinion, hoping they will read it with care, believing that it will not only aid in obtaining legislation which will allow women as well as men to practice law, but hasten the day when the right of suffrage shall be extended to women in Wisconsin. In the meantime, Miss Goodell must earn her living as best she can at some other calling, or leave the State of Wisconsin and go to some State like Illinois, where women are allowed to practice law upon equal terms with men.

ASSIGNEE IN BANKRUPTCY — RECEIVER OF STATE COURT—CONTEST FOR POSSESSION OF PROPERTY.—The opinion of the Circuit Court of this county, by WILLIAMS, J., holding, where a Receiver is properly appointed by a State court, and is in the possession of the assets, and subsequently a petition in bankruptcy is filed, and an assignee is appointed who applies to the State Court for the possession of the assets, that the possession of the Receiver will not be disturbed. The main question involved in this case is one of very general interest. Contests between assignees in bankruptcy and receivers appointed by State courts are of constant occurrence all over the Union. The authority of the State courts has not in all instances been respected. It would seem, from the recent opinions of the Supreme Court of the United States, that the jurisdiction of the Bankrupt Court in this class of cases, is not to be regarded as exclusive. In the consideration of cases involving a conflict of jurisdiction between the State and Federal courts, the greatest wisdom and moderation should be exercised by the judges of both tribunals.

WAGES AS THE SUBJECT OF GARNISHEEMENT.—The opinion of the Supreme Court of the State by SCOTT, C. J., construing the 14th section of chapter 62 of the revised Statutes, relating to the liability of a defendant being the head of a family to have his wages garnished, and holding that such a defendant may take his wages as fast as they become due, if the amount that shall become due at any one time shall not exceed twenty-five dollars, and that the statute has no reference whatever to wages subsequent to the service of the writ. The opinions of the bar in the construction of this section of the act have been conflicting. Frequently in practice the return day of the writ has been put off as far as possible, and even after that the hearing of the garnishee proceeding has been continued so as to reach wages acquired after the services of the writ. We have known some courts to construe the law so as to allow this practice. We are glad that the Supreme Court has settled this question in accordance with the humane spirit which prompted the passage of the act, and in favor of the poor laborer and his family.

WHAT IS A GOOD AFFIDAVIT AND JURAT?—The opinion of the Supreme Court of this State, by Walker J., holding that where the return of a special deputy sheriff on a summons, did not in the body contain the name of such deputy, and the jurat of the officer to such return was "subscribed and sworn to," etc., without giving the name of the person swearing to the same, that the return and jurat were insufficient; as not showing who made the affidavit. This opinion must be considered in relation to the facts in the case before the court; that is, that the name of the party making the return did not appear in either the return or jurat.

There is no doubt where the name of the party making the affidavit appears in the body of the affidavit, and the jurat of the officer is "subscribed and sworn to before me," etc., the court would hold this to be good. This is the usual practice in all the States and in the United States Courts, and there is nothing in conflict with it in this opinion. We make these remarks from the fact that some have supposed it went to that extent.

APPOINTMENT OF MR. DANA.—The appointment of Richard H. Dana, Jr., of Boston, to be Minister to England in the place of General Schenck, will meet with the approval of the people. He is one of the ablest and most learned lawyers of the nation, as well as one of its finest writers. He is a gentleman above reproach; a man who will honor the office and not the office the man. We wish the government had more such representatives abroad.

JUDGE TAFT'S APPOINTMENT.—Judge Taft, of Ohio, who has been appointed Secretary of War, is an excellent lawyer, an honest man, and has been for many years an honored and respected Judge, but we are not aware that he has had any military experience. A man who has had no military experience should not be appointed to the position of Secretary of War; and a man who has had no judicial experience should not be appointed a judge because he happens to be a great general. General Sherman is an able man and a great and brave general, one to whom the country owes much it can never repay, but who would think of appointing him Chief Justice of the United States Supreme Court? The American people, however, may rest assured that Judge Taft will not be a party to any corruption, either in or out of office.

Recent Publications.

REPORTS OF CASES ARGUED AND DETERMINED IN THE SUPREME COURT OF THE STATE OF WISCONSIN, WITH TABLES OF THE CASES, AND PRINCIPAL MATTERS. Prepared and edited for the Reporter by Edwin E. Bryant, O. M. Conover, Official Reporter. Volume XXXVII. Containing cases determined at the January Term, 1875. Chicago: Callaghan & Company, Law Publishers. 1876.

The practice of padding reports has become altogether too common. This is not a padded volume. It contains 746 pages, which is much above the average. It seems to have been the object of the publishers to get as many cases in a volume as possible, consistent with good taste. Mr. Conover very properly acknowledges the aid he has received from Mr. Bryant, in the preparation of the present volume, and says that by the liberality of the publishers, and with the full approval of the court, he has been able to make the arrangement which secures the early appearance of the present volume under such favorable auspices, while his own labor has been mainly directed to the preparation of Volume XXXVIII.; that the printing of that volume will be commenced before the appearance of the volume now on our table, and that it is expected to contain all the cases determined by the court during the year 1875. The proceedings of the Supreme Court upon the death of Judge ANDREW G. MILLER, are given in full.

CASES ARGUED AND DETERMINED IN THE CIRCUIT AND DISTRICT COURTS OF THE UNITED STATES, for the Seventh Judicial Circuit. By Josiah H. Bissell, of the Chicago Bar, Official Reporter. Volume V. 1851–1874. Chicago: Callaghan & Company. 1876.

This volume is in the usual style of Mr. Bissell's Reports. The important questions decided in this circuit, the ability of the judges rendering the opinions, and the skillful manner in which they are reported, make this one of the most useful series of United States Circuit Court Reports.

CIRCUIT COURT OF COOK CO., ILL.

OPINION, MARCH 2, 1876.

J. C. MYER ET AL. v. CRYSTAL LAKE PICKLING AND PRESERVING WORKS.

CONFLICT BETWEEN AN ASSIGNEE IN BANKRUPTCY AND A RECEIVER APPOINTED BY THE STATE COURT FOR THE POSSESSION OF THE ESTATE OF BANKRUPT CORPORATION.

A court of equity will appoint a Receiver of a corporation, where the bill alleges gross frauds by its officers, by which the property is greatly endangered.

Where a receiver is properly appointed by a State Court, and is in possession of the assets, and subsequently a petition in bankruptcy is filed, and an assignee appointed who applies to the State Court for the possession of the assets, *held*, that the possession of the receiver will not be disturbed.

Opinion by WILLIAMS, J.

On the 30th of December last a bill was filed in this court by the complainants, stockholders in the Crystal Lake Pickling and Preserving Works, alleging the commission of certain fraudulent acts upon the part of the corporation and its officers. Among these alleged frauds were the assumption by the corporation of the private debts of its president, to the amount of $160,000, and the conveyance of all the real estate of the corporation to secure said indebtedness; and also, the issue of certain fraudulent judgment notes by the corporation, upon which judgments, it was alleged, were then about being entered. The bill prayed for an injunction and for a receiver. It set forth acts of gross fraud, and presented a case of great exigency. If the alleged frauds were allowed to be consummated, the whole property of the corporation might be put beyond the control of its creditors and stockholders, by the fraudulent act of its officers. The facts stated in the bill present a case for the interference of a court of equity, independent of any existing statutes.

The common law powers of a court of chancery are sufficient to grant to complainants the relief which they seek. Their bill is filed not only in their own behalf, but in behalf of all other stockholders, and of all creditors who may desire to avail themselves of it. The bill is filed to prevent the execution of a great fraud, which, if it was consummated, would injure complainants, but which would injure every other stockholder of the corporation, and every creditor of the same, as well as the complainants. If other stockholders or creditors refused or hesitated to take action to prevent the consummation of these contemplated frauds, it was not only the right but the duty of complainants to ask the interference of a court of equity, even though they personally held but a very small proportion of the stock as compared with the whole issue. Their conduct, instead of subjecting them to animadversion, is deserving of commendation, more especially as their act in filing their bill enures to the benefit of every other innocent and interested party who might be injured by the contemplated fraud.

Upon the filing of the bill a motion was made by complainants for a receiver before my brother Farwell, and the order then entered recites that the "case coming on to be heard upon the bill filed and upon evidence and argument of counsel, both parties, complainant as well as defendant, being represented by counsel, the court doth order and adjudge and decree that one John N. Cannon be, and he hereby is, appointed receiver," etc. It appears also from the statement of counsel, that Judge Farwell sent for Mr. Dow, who had been theretofore the legal adviser of the stockholders, and he appeared in court upon the argument of said motion, and by the consent of all the parties then in court and their respective solicitors, including Mr. Dow, the propriety and necessity of the appointment of a receiver was admitted.

All this occurred upon the 30th of December last. Subsequent orders have been entered in this court in the present case, and the receiver appointed by the court filed his bond in the penalty of $75,000, and entered upon the discharge of his duties, taking possession of and exercising control over the property of the corporation.

On the first of February last, more than a month after the receiver had been appointed, a motion was entered in this court by and upon behalf of some of the creditors, asking this court to vacate all its orders, discharge its receiver, and remit the property to the custody of the assignee in bankruptcy.

At the time when the receiver was ap-

pointed, no proceedings in bankruptcy had been commenced. I am not aware that any were then in contemplation. The assignee in bankruptcy has been only recently appointed. When the bankrupt petition was filed, this court, through its receiver, had reduced the assets of the corporation to its possession and was administering them for the benefit of all parties in interest. Its possession was for the benefit of the stockholders who were not named in the bill, and for the benefit of the creditors who were not named therein, as well as of the three complainants who were named. This court can do as complete justice between all the parties interested in the property as can the bankrupt court and the assignee in bankruptcy can be made a party and protect any interest he may have in the property in the receiver's hand. The motion now made is based upon two grounds.

First. That this court had no right to appoint a receiver at the time such appointment was made, and

Second. That if the receiver was rightfully appointed, the U. S. District Court, by virtue of the provisions of the bankrupt act, is entitled to the possession of the bankrupt estate, even as against the receiver appointed by this court prior to the institution of any proceedings in bankruptcy.

As to the first ground of the motion, it may be said that this court under the allegations of the bill had a case presented to it, which entitled it to proceed to the appointment of a receiver at common law independent of any provision of the statute, and that it had a right, also, to proceed under section 25 of the statute, relating to corporations. Stat. of 1874, page 290. It is no answer to this position that other defendants should have been made to the bill. The principal party interested in preventing the appointment of a receiver, was a party to the bill, and was present in court consenting to such appointment. The corporation was there and then represented by its attorney, and some, if not all of the stockholders were also represented by other legal counsel.

The case was entirely unlike that of Baker *v.* Backus, (32 Ill., 79,) in the allegations of the bill and in the circumstances attending the appointment of the receiver. In the case at bar, the court had jurisdiction of the corporation and of the property and the acts and omissions complained of were at most only irregularities, which, upon proper application could be remedied by this court.

As to the position that the bankrupt act takes the property out of the State Court and vests in it the possession of the assignee in bankruptcy; it cannot be sustained by the language of the bankrupt act, nor by any decision of any State Court, nor of the Supreme Court of the United States.

It is true that there have been some decisions of the United States District Courts that have asserted the right of such Courts, upon the appointment of an assignee in bankruptcy, to take property the possession of which had been rightfully acquired by the State Courts prior to the institution of proceedings in bankruptcy, out of the hands of the Receiver of the State Courts and deliver it over to the assignee in bankruptcy. But these decisions have been upon the ground that the Receiver of the State Court had been appointed in a proceeding under a State insolvent law, which law had been superceded by the Bankrupt Act. Such decisions are not supported by any elementary treatise, by the decisions of State Courts, nor of the U. S. Supreme Court. But even if they were, they could not govern this case. The present bill is not filed under any State insolvent law. As I have before said, it could be supported if there was no statutory provision applicable to the case. If the bill was brought under the statute, that statute is very far from being an insolvent law. It has very few, if any, of the elements of such a law.

With the exception of decisions of the United States District Courts, I have upon the argument been cited by counsel to no authority, nor has my research been able to produce one, which supports the position assumed by the counsel who have filed the motion. All the authorities I have examined (with the exceptions above named) support the contrary doctrine.

Bump, on bankrptcy, lays down the rule thus: "So, also, where a receiver, appointed by another court before the commencement of proceedings in bankruptcy, has taken possession of the property which belonged to the bankrupt, and the jurisdiction of such court over the subject-matter of the suit therein, and over the parties thereto when it was instituted and a receiver was appointed, and its jurisdiction to appoint such receiver are in no manner impeached or questioned, the courts of bankruptcy cannot compel the receiver to give up the possession of such property, without its being shown that such possession of the property by such court is void or invalid by reason of the provisions of the bankrupt law.

"When property is lawfully placed in the custody of a receiver by the court which appoints him, it is in the custody and under the protection and control of such court for the time being, and no other court has the right to interfere with such possession, unless it be some court which has a direct supervisory control over the court whose process has first taken possession, or some superior jurisdiction in the premises. Under such circumstances, the courts of bankruptcy have neither such superior jurisdiction nor such supervisory control, as to authorize them to take the property from the possession of such court, or to enjoin the receiver from further interfering with it." Bump on Bankruptcy, p. 203. See also Bump on Bankruptcy, pages 305, 306.

Mr. High, in his late work upon Receivers (which is entitled, by reason of its accuracy of statement and careful quotation of authorities, to confidence) says: "The doctrine under consideration has been frequently applied in cases where proceedings in bankruptcy have been instituted against a defendant debtor in the United States, subsequent to the appointment of a receiver over the debtor's effects in a State tribunal, and in such cases the State Courts have uniformly insisted on maintaining their jurisdiction and disposing of the assets. Thus, where a receiver was appointed upon a judgment creditor's bill, in the State Court, and the appointment was completed and the debtor's property vested in the receiver, but the debtor filed his petition in bankruptcy subsequent to the filing of the creditor's bill, and was adjudicated a bankrupt subsequent to the appointment of the receiver, it was held that the assignee in bankruptcy took only such interest as the debtor had when the assignee was appointed, and, therefore, took the debtors' property, subject to the lien acquired by the creditor's suit, and the receiver was, therefore, directed to pay the funds realized from the property to the plaintiff in the creditor's suit rather than to the assignee in bankruptcy * * * * And without passing upon the right of the judgment creditor in a State Court, to ultimately maintain his lien upon the debtor's property as against the assignee subsequently appointed in bankruptcy, it was held that the defendants should transfer their property to the receiver, notwithstanding the filing of the petition in bankruptcy, and when the State Court has been the first to acquire control over the subject-matter, and has appointed its receiver, who has taken charge of the property in controversy, the receiver subsequently appointed by the U. S. Court, may be punished for contempt if he interfere with the receiver previously appointed by the State Court. The Federal Courts have generally recognized the doctrine under discussion, and have almost uniformly conceded the jurisdiction of the State tribunal, where the latter has first acquired control over the subject-matter and the parties, and where the receiver of the State Court has first acquired possession of the assets, even when the conflict of jurisdiction has been presented to the U. S. Court in the cause of a proceeding in bankruptcy there. And the undoubted weight of authority in the Federal Court supports the proposition, that where the State Courts have properly acquired control over the subject-matter and have appointed receivers, who are in possession of the property or fund at the time of instituting proceedings in bankruptcy, the U. S. Courts will not interfere with the jurisdiction already acquired by the State Court, but will respect the title of their receivers and their right to maintain the control of the property, at least until it is impeached for some cause for which it is impeachable under the bankrupt act.

The jurisdiction of the State Court having properly attached, and its right to appoint receivers not being questioned, the property of defendants is regarded as lawfully in possession of that court, and the federal court has no such superior jurisdiction or supervisory power over the State tribunal as will warrant it in taking the property out of the receiver's possession or enjoining them from its management. The bankrupt court will not, therefore, upon the petition of the assignee in bankruptcy, direct its marshall to take the assets out of the hands of the receiver, and it may enjoin the bankrupt from interfering with the property in the possession of the receiver." * * * And the fact that defendants in such suit, as receivers of the State court, assert a prior jurisdiction acquired by that tribunal, and claim thereupon the power of the State court to administer it, constitute no ground for the interference of the U. S. court by appointing a receiver *in limine*, especially when it is not shown that the property is in peril of waste or loss in the custody of the State court, or that the receivers are violating their duty, or that they are irresponsible or threaten the removal of the property. And an action cannot be maintained in the U. S. court in behalf of an assignee in bankruptcy, to compel a receiver appointed in the State court, in a creditor's suit, before the proceedings in bankruptcy, to deliver up the property to the assignee. High on Receivers, Secs. 51 and 52. See also Peck et al. *v.* Inness et al., 7 How. U. S. Rep., 624; 39 How. Prac. Rep., 363; 3 McLean, 494; 1 Bank. Rep., 195; 1 Bank. Rep., 204; 6 Blatchford, 156.

The last case was a suit by the assignee of the bankrupt against the receiver to obtain possession of the assets of the estate, and an injunction had been granted against the receiver to prevent the disposition of the assets. Justice Nelson dissolved the injunction, upon motion, saying, among other things, that "the question involving the right to this property is in the State conrt, where it belongs, and the decision of that court willl be conclusive upon the right." 2 N. Y. Supreme Court Rep., 568.

In the case of Eyster *v.* Goff, 8 Legal News, 177:

"The Supreme Court of the United States was called upon to decide the question as to the jurisdiction of the State Court, where the exclusive jurisdiction of the Federal court in a bankruptcy proceeding was insisted upon, against the right of the State Court to proceed, and in deciding the question says: 'The opinion seems to have been quite prevalent in many quarters at one time, that the moment a man is declared bankrupt, the district court which has so adjudged draws to itself by that act not only all control of the bankrupt's property and credits, but that no one can litigate with the assignee contested rights in any other court, except in so far as the circuit courts have concurrent jurisdiction; and that other courts can proceed no further, in suits of which they had at that time full cognizance, and it was a prevalent practice to bring any person who contested with the assignee any matter growing out of disputed rights of property or of contracts into the bankrupt court by the service of a rule to show cause, and to dispose of their rights in a summary way. This court has steadily set its face against this view.

The debtor of a bankrupt, or the man who contests the right to real or personal property with him, loses none of those rights by the bankruptcy of his adversary.

The same courts remain open to him in such contests, and the statute has not divested those courts of jurisdiction in such actions. If it has, for a certain class of actions, conferred a jurisdiction for the benefit of the assignee in the circuit and district courts of the United States, it is concurrent with and does not divest that of the State courts.

These propositions are supported by the following cases decided in this court. Smith *v.* Mason, 14 Wall., 419; Marshall *v.* Knox, 16 Wall., 501; Mays *v.* Fritton, 20 Wall., 414; Doe *v.* Childrers, 21 Wall., 642. See, also, Bishop *v.* Johnson, — Woolworth, 324."

In view of these decisions, I do not care to comment upon section 5123 of the bankrupt law, which it is claimed, upon the part of complainants, is conclusive against the right of the parties who are pressing the present motion to the relief which they ask.

If these authorities correctly state the law, this court having obtained complete control of the property through its receiver before any proceedings in bankruptcy were instituted, having jurisdiction of the persons of the litigants and the subject-matter of the litigation, and being possessed of as complete facilities for protecting the interests of all parties as the bankrupt court, it ought not, without the consent of all the parties to the record, to abdicate a jurisdiction so universally acknowledged, that it may almost be said to be unquestioned. The right to retain the jurisdiction of the cause and of the property is not so much that of the court as of the parties litigant who have invoked its aid. Another tribunal might have afforded them equal facilities for the redress of their alleged grievances, but it was their right to choose their own forum, and having chosen it, this court ought not now to relegate them to that tribunal which they have and do decline voluntarily to enter.

The right to choose his own forum is as much the legal right of a plaintiff or complainant, as his right of redress after he has entered it, provided, under the pleadings and proofs, he shows himself entitled to such redress. If the complainants are rightfully here, they cannot, except upon their own consent, be sent to any other court, however willing his court might be to relieve itself of the litigation.

The motion to set aside the orders entered in this case, discharge the receiver, dismiss the suit and transfer the property now in the receiver's hands to the assignee in bankruptcy, is denied.

McDAID & WILSON, sol's. for the assignee and a number of the stockholders; KRETZINGER & VEEDER, sol's. for the complainants and Receiver; E. B. SHERMAN, sol. for the part of the stockholders and creditors.

N. P. KINSLEY, sol. for the corporation.

ILLINOIS SUPREME COURT.

ABSTRACT OF OPINIONS FILED AT OTTAWA IN 1876.

J. H. Stevison et al. *v.* John Earnest.—Appeal from Knox.—Opinion by SCHOLFIELD, J.

Joseph Kroer *v.* The People, etc.—Error to Stephenson.—Opinion by SCHOLFIELD, J.

SUNDAY NIGHT DEFINED—FINES ON SEPARATE COUNTS—COMPETENCY OF JUROR—CONSTRUCTION OF LIQUOR LAW.

STATEMENT.—Indictment for selling liquors on the Sabbath day, and night; one count charging as to the day, the other as to the night. Fine of $75 under each count. *Held*,

1. That the period of darkness between midnight preceding and dawn of the Sabbath falls within the statute as to keeping tippling-house open on Sabbath night.

2. To assess separate fines under different counts in the same indictments, in prosecutions, is a correct practice.

3. It is no disqualification for a juror to have an abhorrence of the liquor traffic, in such prosecutions. The defendant has no right to demand a jury that shall approve his business. It is enough that a juror has formed no opinion as to the guilt of the person arraigned, and entertains no personal prejudice against him.

4. To constitute an offence under the statute, it is not needful that the saloon be kept open to the same extent as on week days, but only that some entrance, open or hidden, be available, and persons are allowed to enter for tippling purposes. Perhaps, however, it would be going too far to say that if one person only has such access, it is in violation of the statute.

Henry L. Gunnell et al. *v.* R. H. Cockerell.—Re-hearing. Appeal from Superior Court of Cook.

DELIVERY OF DEED.

Held, That no particular form or ceremony is necessary to constitute a delivery of a deed. It may be by acts without words, or words without acts; or by both. Anything clearly manifesting the intention of the parties that the deed shall at once become operative—that the grantor shall not control the property, but that the grantee shall have possession, will constitute a sufficient delivery.

(*Continued from page* ~~192~~ 194.)

Board of Regents may deem proper." In both statutes the section provides that all able-bodied male students shall receive military instruction, and makes no other reference to a military department. And the argument that the admission of females under the statute of 1867 to all departments except the military, necessarily contemplated their admission to the law department, falls to the ground, because the statute neither mentions all departments nor excepts the military—if there be a military department. The inaccuracy is the more striking from the fact that the section of 1866 does expressly include all departments and colleges, and the amendment of 1867 evidently *ex industrio* omits them. The change of an absolute right of admission to all departments and colleges of the University in 1866, to admission to the University under discretionary regulations and restrictions of the regents in 1867, is very significant; the more so that it is the only amendment made. It seems likely that the legislature came to regard the absolute and indiscriminate right of 1866 as dangerously broad, and to consider it necessary to make the right subordinate to the judgment of the regents. And if the law school had then been established by statute, it would be very doubtful whether the admission of females to it would be sanctioned by the act of 1867. But there was no such statute; and the law school was in fact established, not by statute, but—as we learn—by the authorities of the University sometime in 1868, after the enactment of the section in both forms. The first class of students, all males, graduated in 1869, without color of right to practice. Hence the statute of 1870 to give the right, presumably passed without thought of the admission of females to the bar. And the general argument for this motion takes nothing by these statutes. So we find no statutory authority for the admission of females to the bar of any court of this State. And, with all the respect and sympathy for this lady which all men owe to all good women, we cannot regret that we do not. We cannot but think the common law wise in excluding women from the profession of the law. The profession enters largely into the well-being of society, and to be honorably filled and safely to society exacts the devotion of life. The law of nature destines and qualifies the female sex for the bearing and nurture of the children of our race, and for the custody of the homes of the world, and their maintenance in love and honor. And all life-long calling of women, inconsistent with these radical and social duties of their sex, as is the profession of the law, are departures from the order of nature; and when voluntary, treason against it. The cruel chances of life sometimes baffle both sexes, and may leave women free from the peculiar duties of their sex. These may need employment, and should be welcomed to any not derogatory to their sex and its proprieties, or inconsistent with the good order of society. But it is public policy to provide for the sex, not for its superfluous members; and not to tempt women from the proper duties of their sex by opening to them duties peculiar to ours. There are many employments in life not unfit for female character. The profession of the law is surely not one of these. The peculiar qualities of womanhood, its gentle graces, its quick sensibility, its tender susceptibility, its purity, its delicacy, its emotional impulses, its subordination of hard reason to sympathetic feeling, are surely not qualifications for forensic strife. Nature has tempered woman as little for the judicial conflicts of the court-room as for the physical conflicts of the battle-field. Womanhood is modeled for gentler and better things. And it is not the saints of the world who chiefly give employment to our profession. It has essentially and habitually to do with all that is selfish and extortionate, knavish and criminal, coarse and brutal, repulsive and obscene, in human life. It would be revolting to all female sense of innocence and sanctity of their sex, shocking to man's reverence for womanhood and faith in woman, on which hinge all the better affections and humanities of life, that woman should be permitted to mix professionally in all the nastiness of the world which finds its way into courts of justice; all the unclean issues, all the collateral questions, of sodomy, incest, rape, seduction, fornication, adultery, pregnancy, bastardy, legitimacy, prostitution, lascivious cohabitation, abortion, infanticide, obscene publication, libel and slander of sex, impotence, divorce—all the nameless catalogue of indecencies, *la chronique scandaleuse* of all the vices and all the infirmities of all society—with which the profession has to deal, and which go towards filling judicial reports which must be read for accurate knowledge of the law. This is bad enough for men. We hold in too high reverence the sex without which, as is truly and beautifully written, *le commencement de la vie est sans secours, le milieu sans plaisir, et ve fie sans consolation*, voluntarily to commit it to such studies and such occupations. *Non lati auxilio, nec defensoribus estis*, should judicial contests be upheld. Reverence for all womanhood would suffer in the public spectacle of woman so interested and so engaged. This motion gives appropriate evidence of this truth. No modest woman could read without pain and self-abasement—no woman could so overcome the instincts of sex, as publicly to discuss the case which we had occasion to cite *supra*, King *v.* Wiseman. And when counsel was arguing for this lady that the word "person," in section 32, chapter 119, necessarily includes females, her presence made it impossible to suggest to him a *reductio ad absurdum* of his position, that the same construction of the same word in sec. 1, chap. 37, would subject woman to prosecution for the paternity of a bastard, and in sec. 39–40, chap. 164, to prosecution for rape. Discussions are habitually necessary in courts of justice, which are unfit for female ears. The habitual presence of women at these would tend to relax the public sense of decency and propriety. If, as counsel threatened, these things are to come, we will take no voluntary part in bringing them about.

The motion is denied.

SUPREME COURT OF ILLINOIS.

OPINION FILED JAN. 21, 1876.

ALBERT BLISS *v.* JOHN SMITH.

Appeal from Stephenson.

THE RIGHT TO GARNISHEE THE WAGES OF A DEFENDANT, BEING THE HEAD OF A FAMILY, ETC.

Where the wages of a defendant are garnisheed, judgment is only to go for the balance exceeding twenty-five dollars in the hands of the garnishee at the time the writ was served.

2. That the laborer may take up his wages as often as they become due, if the amount that shall become due at any one time shall not exceed twenty-five dollars.—[ED. LEGAL NEWS]

Through the kindnes of JOHN A. OWEN, of the Chicago bar, we have received the following opinion:

SCOTT, C. J.—The decision in this case turns partly on the construction of that section of the statute which provides, "the wages and services of a defendant, being the head of a family and residing with the same, to an amount not exceeding twenty-five dollars, shall be exempt from garnishment. In case the wages or services of such defendant in the hands of the garnishee shall exceed twenty-five dollars judgment shall be given only for the balance above that amount." R. S. 1874, chap. 62, sec. 14.

At the date of the service of the garnishee summons in this case, defendant was indebted to the judgment debtor in the sum of eight dollars for four days' labor previously performed. No question is made that the judgment debtor was at the time the head of a family, residing with them. Hence it follows, under the statute cited, that amount was clearly exempt from garnishment.

The only question in the case is, as to the wages subsequently earned by the judgment debtor in the services of the defendant during the period intervening the service of the garnishee process, and the filing of the interrogatories and answer herein.

The theory of the garnishing creditor is, that the process will hold all the judgment debtor has earned in the service of defendant up to the date of filing his answer, deducting but one time twenty-five dollars, the amount exempt by statute. The construction contended for is as harsh and uncharitable as it is unwarranted. There is no authority in reason or practice, for saying the statute has any reference whatever to wages subsequently earned by the judgment debtor. The language of the statute is, "in case the wages or services of such defendant in the hands of a garnishee shall exceed twenty-five dollars, judgment shall be given only for the balance above that amount." When in the hands of the garnishee? Obviously at the date of the garnishee summons. The judgment is only to go for the balance, exceeding twenty-five dollars, in the hands of the garnishee at that time. The statute has not provided, the judgment shall be for any sum the judgment debtor may subsequently earn in the service of defendant, and we have neither the right nor inclination by judicial construction, to extend its provisions so as to enable the garnisheeing creditor to reach any wages the judgment debtor may thereafter earn. The statute was enacted for a humane purpose, for the benefit of the debtor's family as well as himself, and should receive a fair and liberal construction, that it may effectuate the beneficent object the legislature had in view. Any other construction than the one we have indicated would render the statute nugatory.

But, aside from this view of the law, the case was heard in the court below on the answer of defendant, and as the case comes before us, we do not see how there could be any recovery.

It is set forth in the answer, that on the 18th day of July following the service of the garnishee summons, defendant was indebted to the judgment debtor, including the eight dollars earned before service, in the sum of twelve dollars for one week's labor, which he then paid to him. At the end of the next following week, he was indebted to him in the further sum of twelve dollars, which he in like manner paid. These two amounts being under twenty-five dollars, were, of course, under the statute, exempt from garnishment, and defendant could rightfully pay the same to the judgment debtor.

The last payment was in full of all wages earned up to the 25th of July. On the 27th day of July the judgment debtor commenced working for defendant as a laborer, and continued in his employ up to the date of filing his answer, at and for the wages of two dollars for each working day; that on each Saturday after the 27th of July, defendant had a complete settlement with the judgment debtor, and if anything was found to be due to him, paid in full; that the business of defendant during that period was delivering ice to the inhabitants of Freeport and vicinity, and that he employed the judgment debtor to assist him in delivering ice and in collecting the price. The answer further discloses that frequently between the 27th of July and the date of filing the answer, on the occasions of the Saturday settlement, the judgment debtor was found to be indebted to defendant on account of collections made by him from customers for ice delivered to them. Defendant further says in his answer, he has no means of knowing what amount of money he had paid the judgment debtor for his services from the 27th of July, but avers that at no time from that date to the filing of his answer, was he indebted to the judgment debtor in a sum exceeding twelve dollars; and that ever since the service of the summons the judgment debtor has been the head of a family, residing with them, and has claimed his wages as exempt from garnishment.

The answer is not contested, and must therefore be taken as true. Before any judgment can be rendered in such case, it must appear from the answer that the garnishee is liable. It does not appear from the answer that any sum was ever due from the garnishee defendant to the judgment debtor from the 27th of July to the filing of the answer. The judgment debtor, during all that time was collecting money for the garnishee, and frequently at the weekly settlements he was found to be indebted to the garnishee. The answer does not admit that any certain amount was due the judgment debtor, and it therefore affords no data by which a judgment for any particular sum could have been rendered.

But the decision may be placed on broader and more reasonable grounds. If any thing was found due to the judgment debtor at the Saturday settlements, if the amount was less than twenty-five dollars, the garnishee had the clear right under the statute to pay it over to him for the support of his family, for whose benefit as well as his own the act was passed. Had the judgment debtor quit the service of the garnishee before his wages amounted to twenty-five dollars, it will be conceded the same would be exempt from garnishment. The construction contended for would compel the judgment debtor to quit the service of his employer as soon as his wages should reach twenty-five dollars, and seek employment elsewhere to maintain his family. We are unwilling to give any such narrow and illiberal construction to the statute. The laborer may take up his wages as fast as the same become due, if the amount that shall become due at any one time shall not exceed twenty-five dollars. This construction of the statute is warranted by the enlightened spirit that prompted its enactment, and we have no inclination to so construe it as to defeat the beneficent design.

It is perhaps proper to say, that in giving this construction to the statute, it has no application except to the 14th section cited.

The judgment will be affirmed.

SUPREME COURT OF ILLINOIS.

ABSTRACT OF OPINIONS FILED AT OTTAWA IN 1876.

O. O. & F. V. R. R. *v.* Jacob P. Black.—Re-hearing.—Opinion by WALKER, J.

PAYMENT OF R. R. SUBSCRIPTIONS—CONTROL OF EQUITY AS TO TRANSFERS OF ROAD.

STATEMENT.—Suit on subscription to aid in building railroad. Defense, failure of consideration in the sale of the road by the company to another company, so as to destroy the value of the shares. *Held*,

1. That, where such sale is provided for by the charter, all subscriptions are to be held as having reference to this power under the charter; where there is no power conferred by the charter to sell or lease, this can only be done by a legislative act, empowering the company to do so; and, in the absence of this, the transaction of a sale or lease is merely an unlawful attempt to do what cannot be done, and affords no ground of resistance to the payment of subscriptions

2. In such case, the subscribers paying their subscriptions can invoke the aid of a court of equity, to compel the proper use of the franchises of the company. And the lessees will only be regarded as the servants of the company; which will be held to a strict discharge of the responsibilities existing toward subscribers and the public.

Wm. E. Furness et al. *v.* Elizabeth McGovern.—Error to Superior Court of Cook.—Opinion by SCOTT, C. J.

STATEMENT.—Suit brought for commissions for negotiating a loan of money, to be secured by a lien on the separate property of appellee, a married woman. She, it was alleged, had declined to take the money when the loan was effected. Bill brought to subject her separate property to the payment of the commissions claimed. *Held*,

1. That the remedy, if any, was at law, and not in equity. A general engagement, or simple contract, creates no such charge on the separate property of a married woman as can be enforced in equity. To this end, there must be a positive intention to make a debt, or claim, on the separate property manifested by writing, or otherwise, before equity will assume jurisdiction.

John Conley *v.* The People.—Error to Criminal Court of Cook.—Opinion by SCOTT, C. J.

CONTINUANCE IN CRIMINAL CASE.

Held, That where one is arrested but a short time before court, and speedily brought to trial, without opportunity to consult counsel, and prepare a defense and makes affidavit for continuance, in usual form, he is entitled to continuance, especially on the first application.

F. A. Bragg *v.* The People.—Appeal from Cook.—Opinion by SCHOLFIELD, J.

EXEMPTION FROM JURY SERVICE—CONSTITUTIONAL LIMITATION.

STATEMENT.—Appellant claimed, by contract with the State on the ground of his services as a member of the fire department in Chicago, a perpetual exemption from serving on juries. *Held*,

That this is no subject of contract; and that, under the constitution, the matter of exemption from serving on

juries must be solely under the control of the legislative power; which can, at any time, withdraw such privilege.

RECORD EVIDENCE—DEFAULT IN REPLEVIN —TITLE—BURDEN OF PROOF.

STATEMENT.—Suit on replevin bond, commenced in Peoria county and changed to Knox. The bond had been given in a replevin suit begun in Peoria, changed to Woodford, and then again to Marshall, where it was dismissed.

The pleas in the suit on the bond, were, (1) *non est factum*, (2) *nul tiel record*, as to the record in the replevin suit set out in the declaration, (3) that the merits of the case were not tried in the replevin suit, but that it was dismissed for failure to give security for costs; and (4) that, at the time of the commencement of the suit, the property and right of possession of the goods were in the defendant, Stevison.

On the trial, the plaintiffs read in evidence, against objection, the original affidavit, declaration, writ, endorsement thereon, transcript of Peoria Circuit court on change of venue to Woodford county, transcript of Woodford Circuit court on change of venue to Marshall county, together with the file marks on the several papers in the replevin suit, and a certified transcript of the proceedings and judgment in the cause in Marshall circuit court. Also, parol evidence was given identifying the several papers. It was objected that these loose papers could not be regarded as any part of the record, but only the material from which the record was to be made up; and that, the records being in a different court from that in which the trial was had, evidence of them could only be given by transcript certified as the statute requires. *Held*,

1. That our practice is different from the common law practice in this particular; so that the papers of a cause, when filed, become a part of the record as fully as if copied in the record book of the court. And transcripts of the records are made by espying the files and the orders of court as entered of record by the clerk. And the clerk is even prohibited by the statute from making a complete record in a case, unless directed so to do by the court, or one of the parties.

2. Although the rule is that a record itself is produced in evidence only when the cause is in the same court, or when it is the subject of proceedings in a superior court, yet this rule has reference to the ability of the court to compel the production of the record, and not to the sufficiency of the record as evidence, when actually produced. And although it is contemplated that the records be permanently kept in the court where they originate, yet, even if illegally obtained, they are not to be rejected for this reason when offered in evidence in another court. The preservation of records is one thing, and what they prove quite a different thing. The facts proved are the same whether originals or copies are used.

3. When an instrument in writing, or a record, is not the foundation of an action, a variance is not material, unless the discrepancy is so great as to amount to a strong probability that it cannot be the instrument or record declared on.

4. Where one suffers a suit in replevin to be dismissed, he loses all right to contest the plaintiff's claim to the property, except that saved to him by the statute, namely, to plead and prove his title to the property in mitigation of damages.

5. And in this the burden is on him. And when he proves title thus, to a *prima facie* degree, the plaintiff may rebut by showing that the title was obtained for the purpose of hindering, delaying or defrauding creditors.

SUPREME COURT OF ILLINOIS.

OPINION FILED JAN. 30, 1875.

JOHN HOCK HOCHLANDER *v.* EVA HOCHLANDER.

Error to Cook.

WHAT IS A GOOD AFFIDAVIT AND JURAT— VOID SUMMONS RETURN DAY.

1. AFFIDAVIT—JURAT.—Where the return of a special deputy sheriff on a summons did not in the body contain the name of such deputy and the jurat of the office to such return was "subscribed and sworn to, etc.," without giving the name of the person swearing to the same, *held* that the return and jurat were insufficient, as not showing who made the affidavit.

2. RETURN DAY OF SUMMONS.—*Held*, that a summons returnable at a term beyond that next succeeding its date is void.—[ED. LEGAL NEWS.]

WALKER, CH. J.—This was a proceeding in the court below to obtain a divorce, and the service was made by a special deputy. He made the following return:

"Served by reading to and leaving a copy with the within named John Hochlander, this 8th day of May, 1872."

The return is properly signed, and under it is the following jurat:

"Subscribed and sworn to before me this 11th day of May, 1872. Norman T. Gassette, Clerk."

This is loose, indefinite and uncertain. It nowhere appears to what the person, whoever he may have been, did subscribe and swear. It does not state that the deputy subscribed the return or swore to it. It fails to state who swore to it, or, for that matter, to anything else. It should have appeared to be a compliance with the statute, that the deputy took an oath stating that he made the service as stated in the return by him, or that the return was true, or that he made it at the time and in the manner stated in the return. Again, the return is indefinite and uncertain. He does not state what he read, or of what he served a copy, nor does he state the copy, whatever it may have been, was true and correct. Such incompetency or disregard of duty is inexcusable. For such a want of accuracy and compliance with the substantial requirements of the law seems to imply a want of responsibility on the part of its officers that renders the rights of parties very insecure. And it is strange to us that an attorney would ask a default on such a return. A moment's examination would have shown him the character of the return and the insufficiency of the writ. In a case of this character, of all others, we would expect care and vigilance to see that the court at least had jurisdiction. This is a duty devolving on courts and attorneys that should not be omitted.

It is next urged that the summons was utterly void. It was dated on the 8th day of May, 1872, and was returnable to the third Monday of the next May, more than a year from that date, whilst the May term for that year commenced twelve days after that date, and to that term it should have been and legally could only be returnable. As it was, there were several terms of court after its issue and before the return day named in the writ. The statute expressly requires all writs to be made returnable to the next term of court occurring after the date of the writ, and we are aware of no authority whatever to make a writ returnable to a subsequent term to that next succeeding its date. And this court has repeatedly held that where more than a term comes between the *teste* and return day of a summons, that such a writ is void and confers no jurisdiction upon the court. See Calhoun *v.* Webster, 2 Scam., 221; Hildreth *v.* Hough, 20 Ill., 331 Elie *v.* Wait, 28 Ill., 70, and Miller *v.* Handy, 40 Ill., 448. The writ in this case, according to the rule announced in the cases referred to, was void, and being void the court failed to acquire jurisdiction, and having no jurisdiction of the defendant, the decree of the court was equally void with the writ. The court had no power to act, and every step that was taken was without foundation. Had the clerk been reasonably circumspect, or had the attorney taking the default have but spent a moment's time in examining the writ, all of the consequences flowing from a reversal in this case would have been avoided, and the rights of innocent parties would not have been placed in jeopardy.

But for the errors in the record which have been indicated, without noticing others, the decree of the court below is reversed and the cause remanded.

Reversed and remanded.

JUDGE BROWN, of Detroit, is a gentleman of fine legal culture, pleasing in his manners and very popular with the profession. He has recently been holding court in Memphis. The *Appeal*, of that city, in referring to his judicial labors there, says:

Hon. Henry B. Brown, judge of the United States district court for the eastern district of Michigan, closes the Federal courts of this city to-day, and departs for his home by way of New Orleans. He came here an entire stranger to our citizens, but leaves us with expressions of most sincere regret on the part of all who have had business in his court. The universal testimony of our lawyers is that he is a judge of rare capacity for his place, possessing not only learning as a lawyer, but an administrative ability which enables him to dispatch business with rapidity and satisfaction. He has only recently been elevated to the bench, and although a young man, well deserves the distinguished honor conferred by his appointment. We hope he will be sent to us again on special service. He will always find a welcome among the many friends he has made during his brief sojourn in our city, as will his estimable wife, whose departure is not less regretted than his own.

UNITED STATES SUPREME COURT.

PROCEEDINGS OF.

Wednesday, March 1, 1876.

On motion of O. H. Browning, John J. Robinson, of Canal Dover, Ohio, was admitted.

No. 702. (Assigned.) Isaac Taylor, Collector of Peoria Company et al. v. James F. Secor and William Tracy. The argument of this cause was continued by R. G. Ingersoll for appellees, and concluded by James K. Edsall for appellants.

No. 704. (Assigned.) Herman Lieb and Henry B. Miller, Collector of Cook county, et al. v. Henry P. Kidder and Daniel O. Stone. This cause was argued by Lyman Trumbull, of Chicago, and James K. Edsall, Attorney General of Illinois, for appellants, and by Wirt Dexter, of Chicago, and O. H. Browning for appellees.

No. 297. The steamship Mantanzas, etc., v. Manheim Berwin. On motion of Reginald Fendall in behalf of counsel, dismissed, each party to pay their own costs.

Adjourned until Wednesday, the 15th of March, at 12 o'clock.

THE 77TH ILLINOIS REPORTS.—We have received from Hon. Norman L. Freeman the advance sheets of the 77th volume of Illinois Reports. It contains cases of the January Term, 1875. We should publish head notes from this volume, were it not that we have already printed an abstract of the opinions of that term. The 77th will soon make its appearance.

JUDGMENT NOTES.—We have just printed a short judgment note on paper not larger than an ordinary promissory note. We have them in sheets, and in books of one hundred, which we sell for 75 cents, and in books of fifty, for 50 cents.

PIRIE'S CELEBRATED PAPER.—We have just received a large quantity of Pirie's celebrated linen paper, from Scotland. We will furnish 1,000 letter heads, printed on this paper, for $9.00, or 500 for $5.50. A sample will be furnished upon application.

CHICAGO LEGAL NEWS.

SATURDAY, MARCH 18, 1876.

The Courts.

UNITED STATES SUPREME COURT.

OPINION DELIVERED FEB. 14, 1876.

No. 133.—CHARLES C. SMELTZER, plaintiff in error, *v.* MILES WHITE.

In Error to the Circuit Court of the United States for the District of Iowa.

GUARANTIES OF THE GENUINENESS AND REGULARITY OF ISSUE OF COUNTY WARRANTS—WANT OF SEAL—BREACH OF WARRANTY—DAMAGES.

This was a suit founded on express guaranties of the genuineness and regularity of the issue of county warrants. The plaintiff had sued the county and been defeated, for the general reasons that the seal of the county had not been attached to the warrants, and that under the laws of Iowa, as held by the court, the warrants were invalid without the impress of the county seal. The present suit is brought against the guarantor. *Held:*

1. That the guaranties covered the defect of the want of the county seal upon the warrants, and that as they did not bear the impress of the county seal, the guaranty was broken, and the defendant was liable.

2. GENUINENESS OF WARRANTS.—That the genuineness and regularity of issue of county warrants can exist only in cases when the warrants are sealed with the county seal.

3. BREACH OF WARRANTY—RETURN OF PROPERTY.—That in the case of the breach of warranty the person to whom the warranty has been given may sue without a return of the goods. He is not obliged to rescind the sale. The plaintiff was not bound to return the unsealed warrants before he could bring this suit. They were of no value.—[ED. LEGAL NEWS.]

Mr. Justice STRONG delivered the opinon of the court.

All the assignments of error, but one, are founded upon exceptions taken to the charge of the circuit judge. They are numerous, and many of them do not conform to the rules of this court or to the exceptions which were actually taken. Without examining them separately, we shall consider the legal questions they present, so far as they have any bearing upon the case.

The suit was founded upon express guaranties of the genuineness and regularity of issue of county warrants; guaranties which the plaintiff alleged had been broken. He had sued the county to recover the amount of the warrants, and had been defeated, for the general reasons that the seal of the county had not been attached to the warrants, and that under the laws of Iowa, as held by the court, the warrants were invalid unless they bore the impress of the county seal. In the present suit against the guarantor, the circuit judge instructed the jury that the guarantees covered the defect of the want of the county seal upon the warrants, and that inasmuch as they did not bear the seal, (the fact having been decided in the suit against the county,) the guaranty was broken, and the defendant was liable. To this instruction several objections are now urged. It is said, first, that the warrants were genuine and regularly issued, even though they did not bear the impress of the county seal; that the statutes of the State did not require that county warrants should be sealed with the county seal. This, we think, is clearly a mistake. Prior to 1860, the county judge had the management of the business of the county, with the usual powers and jurisdiction of county commissioners, and the county funds could be paid out by the treasurer only upon warrants issued by him. (Rev Stat. of Iowa, 241, 243, 360.) It was made his duty "to audit all claims against the county; to draw and seal with the county seal all warrants on the treasurer for money to be paid out of the county treasury."—(Code, 106.) The treasurer was authorized to pay only warrants thus drawn and sealed. The language of the statute was, and it still is, "the treasurer shall disburse the same (the county money) on warrants drawn and signed by the county judge, and sealed with the county seal, and not otherwise." In 1860 the powers and duties of the county judge in this respect were transferred to a county board of supervisors, (Act of March 22, 1860, Rev., sec. 312, *et seq.*,) and the clerk of the district court was constituted their clerk, and required to sign all orders issued by the board. Now, as the treasurer can pay no orders or warrants unless they are sealed with the county seal, and as all warrants were required to be sealed by the county judge, until 1860, when the board of supervisors was charged with his duties, (except that their warrants are required to be signed by their clerk,) it is very evident that no warrant is a genuine county warrant which is unsealed with the county seal. The statute expressly requires the board of supervisors, in all cases where the powers conferred by the act upon the board had been before exercised by the county judges, to conduct their proceedings under said powers in the same way and manner as had been provided by law in such cases for the proceedings of the county judge.—(Rev, sec. 325.) It is too clear, therefore, for debate, that the genuineness and regularity of issue of county warrants can exist only in cases when the warrants are sealed with the county seal. And so it has been decided by the Supreme Court of Iowa substantially, both in Prescott *v.* Gouser, 34 Iowa, 178, and in Springer *v.* The County of Clay, 35 Iowa, 243. It is next contended that the circuit court mistook the extent of the guaranty. The contention is that a guaranty that the warrants were "genuine and regularly issued," meant only that they were not forgeries, that they were not issued without consideration, and that they were ordered by the proper officers. To this we cannot assent. It is true, even of a technical guaranty, that its words are to be construed as strongly against the guarantor as the sense will admit.—(Drummond *v.* Prestman, 12 Wheaton, 515.) Such, also, is the English rule.—(Wood *v.* Prestner, Law Rep., 2 Ex, 67; Mason *v.* Pritchard, 12 East., 227.) So it has been held that in construing a guaranty, it is proper to look at the surrounding circumstances in order to discover the subject-matter the parties had in view, and thus to ascertain the scope and object of the guaranty.—(Sheffield *v.* Meadows, L. R., 4 C. P, 595.) Now, if this principle be applied to the present case, it is easy to see what the parties intended. The plaintiff was a citizen of Maryland. He purchased the alleged warrants from the defendant, a citizen of Iowa. He may be presumed to have had no actual knowledge of what constituted genuineness and regularity of Issue of Iowa county warrants. What was necessary for him to be assured of was that the instruments he proposed to purchase were valid and legal claims against the county; claims which might be enforced by law. In view of this, the construction contended for by the defendant is utterly inadmissible. And even without this, the language of the guaranties admits of no other construction than that which the court below gave to it. Under the law of the State, there could be no genuine county warrants regularly issued, imposing a liability upon the county, which were not duly sealed. The treasurer was bound to pay those only that were genuine and issued according to the requirements of the law.

Again, it is urged on behalf of the defendant that the plaintiff was bound to know, or must be presumed to have known, that the law required county warrants to be sealed with the county seal, and that, as the defect was apparent on the face of the instruments sold and guarantied, the guaranties must be construed as not covering a patent defect. It is said it cannot be admitted the defendant intended to guaranty any thing more than the existence of facts of which the guarantee had no knowledge. To this it may be answered that the absence of a proper seal upon the instruments guaranteed was not a patent defect equally within the knowledge of the plaintiff and defendant. Whether the instruments required a seal or not, and what the seal should be in order to constitute them genuine county warrants, regularly issued, depended upon the statute laws of Iowa, of which, it may be presumed, the plaintiff had no actual knowledge, and that for this reason he desired a warranty. Having exacted one, it is a necessary deduction from it that it was taken as a protection against his own ignorance of Iowa law. It was well said on the argument that the only warranty that would protect him against loss, in case it should turn out that the county officers neglected to comply with the law prescribing the mode in which county warrants should be executed and issued, would be a warranty coextensive with the defences to which such instruments were subject in suits against the counties, founded upon non-compliance with the State law on the part of the county officers. We can have no doubt that the true meaning of the guarantees is that the guarantor undertook that the paper was not subject to any defence in suits against the county founded upon any want of legal form, either in the signatures or seals, and we think the absence of the proper seal was a breach of the warranty, rendering the defendant liable for the loss which the plaintiff sustained thereby.

It is next urged by the defendant that the circuit court erred in holding him estopped by the judgments rendered in the plaintiff's suits against the county. This assignment rests upon a mistake of fact. The court did not so rule. And had such ruling been made it would have been harmless. The warrants were in evidence, and they exhibited the fact, not contradicted, that they were not sealed as the law required They were, therefore, not genuine county warrants regularly issued, and it was the duty of the court so to declare them. The defendant's contract was broken as soon as it was made, and the plaintiff was entitled to a verdict, no matter whether the judgments in the suits against the county were conclusive or not. It would, therefore, be idle to discuss the question whether the court below would have fallen into error had the jury been instructed that the former judgments were conclusive. The question is impertinent to this case. We may, however, simply refer to some decisions which tend strongly to show that those judgments were in law conclusive upon the defendant, especially as he had seasonable notice of the defences set up by the county in the plaintiff's suit on the warrants, and was required to assist in the prosecution of the claims.—(Carpenter *v.* Pier, 30 Vt., 81; Lovejoy *v.* Murray, 3 Wall., 18; Walker *v.* Ferrin, 4 Vt., 529; Chicago *v.* Robbins, 4 Wall., 658; Clarke *v.* Carrington, 7 Cranch, 322; Drummond *v.* Preston, 12 Wheat., 515.)

The fifth assignment is that the court erred in overruling the defendant's offer to show that the warrants were regularly issued for legal claims against the county. The offer, we think, was correctly overruled. The evidence proposed had no relevancy to the issue in the case. That the warrants were issued for debts due by the county was of no importance if they were not genuine, and in the form that the law required, to enable the holder to set them up as legitimate claims against the county, What availed it to the plaintiff that the county owed the sums of money mentioned in the warrants if the warrants were nullities? His only means of recovering the money was through the warrants.

The instruction given respecting the measure of damages is not open to any just exception. It was as follows: "The amount which the plaintiff paid the defendant for the warrants is prima facie evidence of their value at the time, and there is also the evidence of the defendant that they were sold by him to the plaintiff for their market value, based on the assumption that they were valid, and there is no other or different evidence on the subject of value. I therefore instruct you the plaintiff is entitled to recover * * * the amount of the consideration which he paid and the defendant received therefor, (for the warrants,) with six per cent. interest per annum on such amount." No other rule for the measure of damages could have been given to the jury.—(See Eaton *v.* Mellus, 7 Gray, 573.)

It is contended, however, that the court erred in refusing to charge as requested, that there could be no recovery without a return of the warrants, and in charging as follows: "It is not necessary thus to recover that the plaintiff should, before suit was brought, have tendered back the warrants mentioned in said written guaranties. It is enough that they are in court at the trial, and the court can order them to be retained, and on payment of the judgment rendered herein to be delivered to the defendant."

This instruction was in strict accordance with all the well considered decisions. In case of a breach of warranty, the person to whom the warranty has been given may sue without a return of the goods. He is not obliged to rescind the sale. Thus the law is stated by Kent, 4 Com., 486. In Man. Co. *v.* Gardner, 10 Cush., 83, the Supreme court of Massachusetts ruled that a vendee may sue for a breach of warranty, without returning the goods. And such is the rule in England.—(Fielder *v.* Starkin, 1 Hen. Blackstone, 17; Pateshall *v.* Tranter, 3 Ad. & Ellis, 103.) It is true that when a vendee seeks to rescind the contract of sale he must return the property or tender it, but when he relies upon an express warranty and sues upon it, he may recover the damages sustained by its breach without returning or tendering the property. This we understand to be the universal rule. There is, then, no just ground of complaint that the circuit judge charged as he did upon this subject, and much less that he added it was enough that the warrants were in court and could be impounded for delivery to the defendant. If any one could complain of this last declaration, it was the plaintiff and not the defendant.

What we have said sufficiently disposes of all the assignments of error, except the eleventh and twelfth. The eleventh is to the refusal of the court to charge as requested by the defendant's third prayer, which was that "if the jury should find from the evidence that the warrants were regularly issued by order of the several boards of supervisors directing the same, for a valid and subsisting indebtedness by said counties respectively, for the several amounts thereof, and that the plaintiff has not at any time offered to return them, he could only recover the difference between their value without the county seal, and their value with said seal at the time of the several sales, and interest." The fourth instruction asked for, but refused, was "that the several assignments of the warrants carried with them the right to sue and recover the several demands for which they were issued; that if the plaintiff has retained the warrants, without any offer to return them, until the right of action upon the original indebtedness is barred by the statute of limitations, and the right of the holder to affix the county seal to the warrant is also barred by the statute, the jury should find for the defendants."

Of these it may be remarked, in addition to what we have said of the supposed obligation of the plaintiff to return the warrants before bringing his suit on the warranties that there was no evidence whatever that the unsealed warrants had any value. The fair presumption is that they had none, since they were not drawn as the law required, and since the the county treasurer had no authority to pay them. It would, therefore, have been error had the court submitted to the jury to find that they had a value, and to deduct it from what their value would have been, had they been genuine warrants regularly issued.

The plaintiff, as we have seen, was a citizen of Maryland. Buying, as he supposed, Iowa County warrants, and ignorant of their necessary form, he took from the seller an engagement that the subjects of his purchase were such warrants, genuine and regularly issued. He had a right to rest upon that engagement. It was not his duty to inquire farther. Assuming that it was possible when he took the warrants to procure the impress of the county seal upon them, he was under no obligation to procure it. And there is no evidence that he discovered the instruments were not what the defendant warranted them to be until May 14, 1870, when in his suit against the counties they were adjudged void. Then it was too late to obtain, if they ever could have been obtained, regular warrants, or to obtain the impress of the county seal upon those he held. The right to require the affixing of the seal ceased, under the statutes of Iowa, at the expiration of three years from the issue of the warrants. That period had expired before 1870. The right of action on the original claims against the counties was barred at the end of five years from the time it accrued, and all the warrants were dated more than five years before they were adjudged void. The right of action on the original claims against the counties, even if it did pass to the plaintiff by the assignments of the unsealed warrants, was gone, therefore, when he discovered that the defendant's guaranty was broken, and consequently the defendant suffered no loss by not being remitted to the possession of the warrants then, or subsequently. Before that time there can be no pretence that the plaintiff

should have returned them. From this it follows very plainly that the third and fourth requests to the circuit court could not have been properly granted.

The judgment is affirmed.

UNITED STATES SUPREME COURT.

OPINION DELIVERED FEB. 14, 1876.

No. 132.—THE ÆTNA LIFE INSURANCE COMPANY OF HARTFORD, plaintiff in error,
v.
DAVID FRANCE and LUCETTA F. FRANCE, his wife, TO USE OF SAMUEL B. SELVAGE.

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

STATEMENTS IN APPLICATION FOR INSURANCE.

1. That the applicant, when she asked for a policy of insurance, expressly agreed that the answers made by Chew to the questions put to him should be true, and that if any of them were false the policy issued to her should be void. She expressly declared again that the answers made by him were true; that they formed the basis of the contract of insurance, and that any untrue answer should render the policy void.

2. That the question of the materialty of the answer did not arise; that the parties had determined and agreed that it was material; that the agreement was conclusive on that point, and that the only questions for the jury were, first, was the representation made; second, was it false.—[ED. LEGAL NEWS.]

Mr. JUSTICE HUNT delivered the opinion of the Court.

The action was assumpsit, to recover $10,000, the amount of a policy insured upon the life of Andrew J. Chew in July, 1865. The issuing of the policy, the death of Chew, and the service of the necessary proofs of his death are not seriously disputed.

The policy contained the following clause:

"And it is also understood and agreed to be the true intent and meaning hereof, that if the proposals, answers, and declarations made by said Andrew J. Chew, and bearing date the 12th day of July, 1865, and which are hereby made part and parcel of this policy as fully as if herein recited, and upon the faith of which this agreement is made, shall be found in any respect false or fraudulent, then and in such case this policy shall be null and void."

The issuing of the policy was preceded by a proposal for insurance, which contained a number of questions propounded to Chew by the company, with the answers made by him.

In relation to such questions and answers the policy contained this clause:

"It is hereby declared that the above are correct and true answers to the foregoing questions, and it is understood and agreed by the undersigned that the above statements shall form the basis of the contract for insurance, and also that any untrue or fraudulent answers, any suppression of facts in regard to the party's health, or neglect to pay the premium on or before the day it becomes due, shall render the policy null and void, and forfeit all payments made thereon."

Among others were the following questions and answers, viz:

Question 4. Place and date of birth of the party whose life is to be insured?

Answer 4. Born in 1835, interlined (Oct. 28th,) Gloster Co., N. Jersey.

Question 5. Age next birthday?

Answer 5. 30 years.

Question 11. Has the party ever had any of the following diseases? If so, how long, and to what extent? Palsy, dropsy, palpitation, spitting of blood, epilepsy, yellow fever, consumption, rupture, apoplexy, asthma, convulsions, paralysis, bronchitis, disease of the heart, disease of the lungs, insanity, gout, fistula, affection of the brain, fits.

Answer 11. None.

Evidence upon both sides was given as to the age of Chew, tending to show that he was 37 years old, or at least 35 years old when he signed the application, and upon the question of his having suffered from a rupture. Before the case was submitted to the jury a number of requests to charge were made to the judge, which will be referred to presently.

In its main features this case bears a close resemblance to that of Jeffries *v.* The Economical Ins. Co., decided at the last term of this court.—(22 Wall., 47.) In tthat case, as in this, it was insisted tha the falsity of a statement made in the application did not vitia e the policy issued upon it, unless the statement so made was material to the risk assumed. The opinion then delivered contains the following language in answer to that claim:

"The proposition at the foundation of this point is this: that the statements and declaration made in the policy shall be true.

"This stipulation is not expressed to be made as to important or material statements only, or to those supposed to be material, but as to all statements. The statements need not come up to the degree of warranties. They may not be representations even, if this term conveys an idea of an affirmation having any technical character. Statements and declarations is the expression—what the applicant states and what the applicant declares. Nothing can be more simple. If he makes any statement in the application, it must be true. If he makes any declaration in the application, it must be true. A faithful performance of this agreement is made an express condition *to the existence* of a liability on the part of the company."

This decision is so recent and so precise in its application that it is not necessary to go back of it. It is only necessary to reiterate that all the statements contained in the proposal must be true; that the materiality of such statements is removed from the consideration of a court or jury by the agreement of the parties that such statements are absolutely true, and that if untrue in any respect the policy shall be void.

The judge was requested to charge—

Fifthly. If the jury believe that the answers to questions Nos. 4 and 5 in the application for insurance, as to the date of birth and age next birthday of said Andrew J. Chew, were false and untrue, the policy issued upon the application is void, and their verdict must be for the defendants.

In response to this request the judge said: "If the jury believe that the answer to the questions numbered four and five were materially untrue, as to the age of the said Andrew J. Chew, the policy is void, and the verdict must be for the defendants." The defendants were entitled to the charge they requested, without the addition made by the judge of the word "materially." The judge, however, proceeded to say: "And if he was 37 or even 35 years old, the difference was not immaterial. I give the fifth instruction as requested."

The process of reasoning by which the learned judge reached his conclusion on this point we have held to be erroneous, viz., that to make the representation important it must be material to the risk assumed; that the representation that he was but 30 years old, when he was 37 or even 35, was material to the risk; and if the jury believed that he was of the greater age mentioned their verdict must be for the defendants, and, therefore, he charged as requested. The charge should have been, that as Chew had represented himself to be but thirty years of age, if the jury found him then to be 35 years old the false statement would avoid the policy, and they must find for the defendants, resting his direction upon the falsity alone of the statement.

Still we do not see that the defendants can ask relief for this reason. The charge was right and could not be misunderstood by the jury. The allegation of the defendants was that Chew had misrepresented his age in the manner stated, and, therefore, the policy should be adjudged void. The judge charged that if he had so misrepresented, the policy was void, and the verdict must be for the defendants. We think no valid exception can be taken to this charge.

Upon the subject of the disease of rupture, or of having been ruptured, the record gives this statement, viz: The defendants requested the court to charge the jury—

6. If the jury believe that the answer to question No. 11 in the application for insurance, whether said Andrew J. Chew ever had any of the diseases therein specified, &c., was false and untrue as to any one of said diseases, the policy issued upon the application is void, and their verdict must be for the defendants.

7. If at the time of the application for insurance was made and the policy issued, Andrew J. Chew was or had been ruptured, he was bound, in answer to question No. 11, to state the fact and also how long, and to what extent; and if the jury believe that at the time mentioned he was or had been ruptured, his answer "None" to said question No. 11 was untrue and false, and their verdict must be for the defendants.

The judge declined thus to charge, but said: "If you believe that Andrew J. Chew was ruptured at the time, or at any such previous period that the rupture may have been material to any question of the soundness of his health when his life was insured; or if, at that time, or within any such prior period, he wore a truss in order that he might repress hernial extrusion, your verdict should, in either case, be for the defendants. But, though he was ruptured in 1846 and 1854, and although the rupture accidentally recurred in a worse form in 1870, from an extraordinary exertion of strength in lifting a heavy weight, yet, if you find that from 1855, or thereabouts, until after the last insurance in 1865, he had no such disease, and was, in all this interval, in the habit of working and using bodily exercise, and occasionally dancing, bathing and traveling, and could walk long distances without being fatigued, and either did not wear a truss, or wore it only from continuance of early habit; that his health was not impaired or affected by the former rupture; that it would not, if mentioned, have increased the risk or the premium, and that there was, in this respect, no falsehood or willful suppression, I cannot give the instruction seventhly requested in the absolute form in which it is expressed."

This charge was erroneous. It left to the decision of the jury, and under circumstances of much embarrassment, a question which the parties had themselves determined. An ordinary jury of twelve men, without the aid of experts, are poorly qualified to determine a question of medical science. To submit to a jury the question, conceding the fact that Chew was ruptured in the year 1846, and again in the year 1854, and again in a worse form in the year 1870, whether during an intermediate period from 1855 to 1865 he had no disease of rupture, and that the jury might decide that, because he walked and worked and danced and bathed without fatigue, and either did not wear a truss or wore it only from continuance of early habit, that his health was not impaired, is to impose a great strain upon the powers of a jury. In the ordinary course of things persons not skilled in medical science could not know what caused a rupture, whether at any particular time the disease was conquered, because its appearance was not then present, or whether it was suspended to reappear sooner or later. Hernia or rupture appears in infants of but a few days old, in youth, maturity, and extreme old age. It manifests itself in the abdomen, the groin, the scrotum, the naval, and the thigh. It is external, or may be internal only.—(Laurence on Rupture, pp. 4, 10.) The author quoted says that this "complaint affects indiscriminately persons of both sexes of every age, condition, and mode of life." "It is true (he says) that a hernia, if properly managed, is not immediately dangerous to the patient, does not effect his health or materially diminish his enjoyments, but it is a source of constant danger, since violent exercise or sudden exertion may bring it from a perfectly innocent state into a condition which frequently proves fatal. * * * The treatment of rupture (he adds) demands from all these circumstances as great a combination of anatomical skill, with experience and judgment, as that of any disorders in surgery."—(p. 2, 3.)

These facts illustrate the gravity of the error committed on the trial of the cause.

The facts and circumstances stated should not have been given to the jury for their judgment. The parties had themselves adjudged and agreed what should be the result if certain facts existed. It was for the jury to determine whether the facts existed, and according as they determined upon that point the one or the other result must necessarily follow. Thus the applicant, when she asked for a policy of insurance, expressly agreed that the answers made by Chew to the questions put to him should be true, and that if any of them were false the policy issued to her should be void. She expressly declared, again, that the answers made by him were true, that they formed the basis of the contract of insurance, and that any untrue answer should render the policy void.

It was alleged by the defendants that when Chew was asked whether he "had ever had any of the following diseases," among which was "rupture," and to which he answered "none," that such answer was untrue.

We decided in the case of Jeffries *v.* The Economical Ins. Co., (supra,) that the question of the materiality of the answer did not arise, that the parties had determined and agreed that it was material, that their agreement was conclusive on that point, and that the only questions for the jury were—first, was the representation made; second, was it false. This principle was precisely embraced within the requests six and seven made in this case, and the judge erred in not charging as therein requested.

New trial granted.

WE are under obligations to CHARLES H. BILL, Deputy Clerk, for the following opinion:

U. S. CIRCUIT COURT, N. D. OHIO.

ANNA M. BUELL *v.* THE CONNECTICUT MUTUAL LIFE INS. CO.

Hearing on Demurrer to Second Defense.

STATEMENTS IN APPLICATION FOR INSURANCE—WHAT ARE WARRANTIES—WHAT ARE REPRESENTATIONS.

1. That statements in the application for insurance in the declaration, or answers to the questions are either warranties or representations. If warranties, then materiality, or want of materiality as to the risk, has nothing to do with the contract. The only question is, were they untrue, and if so, the policy is void. But if representations, then to avoid the policy, they must be substantially and materially untrue, or made for the purpose of fraud.

WHAT ARE WARRANTIES—WHAT REPRESENTATIONS.—That where the answers in this class of applications are responsive to direct questions asked by the insurance company, they are to be regarded as warranties, and where they are not so responsive, but volunteered without being called for, they should be construed to be mere representations.—[ED. LEGAL NEWS.]

WELKER, J.—This suit is founded upon a policy of insurance upon the life of Jeptha C. Buell, for the benefit of his wife, the plaintiff.

The defendant, as a second defense to the action, sets up in its answer that in the declaration made at the time of the application for insurance, among other things, the plaintiff says: "And I do hereby agree that the answers given to the following questions and the accompanying statements, and this declaration shall be the basis and form a part of the contract or policy between me and said company; and if the same be not in all respects true and correctly stated, the said policy shall be void." That among the questions in said declaration above referred to, was the following question: "Has father, mother, brother or sister of the party died, or been afflicted with consumption, or any disease of the lungs, or insanity? If so, state full particulars of each case." That the answer to the above question given by the plaintiff was as follows: "No. Father died from exposure in water; age 58. Mother living; age about 50." That the policy issued upon said declaration and questions and answers, and sued upon, contains the following condition, to wit: "And it is also understood and agreed to be the true intent and meaning hereof, that if the proposals, answers and declaration made by said Anna M. Buell, and bearing date the 19th day of March, 1866, and which are hereby made part and parcel of this policy as fully as if herein recited, and upon the faith of which this agreement is made, shall be found in any respect untrue, then, in such case this policy shall be null and void." The defendant avers that the said answer above stated was not in all respects true and correctly stated, but was incorrect and untrue in this, the father of said Jeptha C. did not die at the age of 58, but he died before he was of the age of thirty years: Wherefore the defendant says said policy was and is void and of no effect, and said plaintiff not entitled to recover any amount against the defendant.

To this answer the plaintiff files her demurrer, alleging as reason therefor, that all of said statements and allegations are redundant and irrelevant, and constitute no defense to the plaintiff's action. The demurrer admits that the answer to the question as stated in respect to the age of the father at the time of his death, was untrue and incorrect. That being the fact, does it constitute a defense to this action?

Statements in the application for insurance in the declaration, or answers to the questions are either *warranties* or *representations*. If *warranties* then materialty, or want of materialty as to the

risk has nothing to do with the contract. The only question is were they untrue, and if so the policy is void. But if *representations*, then to avoid the policy, they must be *substantially* and *materially* untrue, or made for purpose of fraud.

In 2 O. S. R., 464, the Supreme Court of Ohio says: "The distinction between a warranty and a representation is easily comprehended; the difficulty only arises in its application to particular cases." "An express warranty is a stipulation in writing on the face of the policy, on the *literal* truth or *fulfillment* of which the validity of the entire contract depends." "It may be contained in another paper, if distinctly referred to in it and expressly made a part of the contract between the parties." A representation is defined to be "A verbal or written statement made by the assured to the underwriter *before the subscription of the policy*, as to the existence of some fact or state of fact tending to induce the underwriter more readily to assume the risk by diminishing the estimate he would otherwise have formed of it."

In the case of Campbell *v.* N. E. Ins. Co., 98 Mass., 381, in defining what is a warranty and what is merely a representation, the court says: "When statements or engagements on the part of the insured are inserted, or referred to in the policy itself, it often becomes difficult to determine to which class they belong. If they appear on the face of the policy, they do not necessarily become warranties. Their character will depend upon the form of the expression used, the apparent purpose of the insertion, and sometimes upon the connection or relation to the other parts of the instrument."

Upon this subject our Supreme Court in 2 O. S. R., says: "But it is by no means * * clear that what is in its nature preliminary, and designed for the information of the underwriter, will so change its character as not to be satisfied by a substantial compliance; from the fact that it is, by appropriate words in the policy made a part of it."

But I am referred to the case of *Jeffries, Administrator of Renedy, deceased,* v. *Economical Mutual Life Ins. Co.*, 5 *Ins. Law, I,* 386, recently decided by the Supreme Court of the United States as decisive of the question made upon this demurrer. In that case there were two questions asked the insured: 1st. Whether he was married or single? The answer to which was that he was single. 2d Had any application been made to any other company, and if so, when? The answer to which was "no." The answers to both questions were alleged to be untrue. The Court held that the answers to these questions constituted a part of the contract, and if untrue, whether they were material to the risk or not, would avoid the policy. The court did not seem to put this upon the ground alone that the answers constituted warranties, but that they formed a part of the contract and were expressly made so by the parties, and the court would not inquire as to materiality, because the parties had themselves deemed them material. How did they become material? It will be observed that both of these answers were direct responses to the questions, and that by the direct form of the questions the answers necessarily become a part of the contract. How is it in that respect in the case before us?

The falsity complained of in the answer consists only in reference to the age at which the father died. This certainly was not inquired of in the question, unless we are to find it in that part of it which reads, "If so, state full particulars of each case." This part of the question was evidently intended to reach simply the particulars of the death, or affliction of the near relatives, to ascertain the character and nature of the disease—its extent, whether produced from recent causes or hereditary in the family, in order to determine whether Buell was a proper subject to insure. It is exceedingly doubtful whether the question is really definite enough to require the answer to state whether the father was dead at all, if he did not die of consumption, or disease of the lungs, or insanity. I think the question fairly means, not whether the father, etc., had died of *any disease*, or *from any cause*, but whether he had died of, or been afflicted with consumption, or any disease of the lungs, or insanity. This being the fair import of the question, "No" was a complete answer to it, and the remainder of the answer was uncalled for and not responsive to the question. But suppose that be so, defendant claims that it is nevertheless an answer of some sort, and therefore an important part of the contract. The reply to that is, that the declaration which relates to the answers to questions to be made by plaintiff, and which it was agreed should be made part of the contract, must be construed to, and does mean, such answers as are responsive to the questions and such as may be called for by the defendant; and that it does not cover such answers as may be volunteered and irrelevant, and that amount to mere representations.

In the light of the cases in 98 Mass, and 2 O. S. R., I may be allowed to say that not all the statements in the application or writing are to be regarded as warranties, but some may be regarded as mere representations. I do not think the case of Jeffries *vs.* Economical Insurance Company is at all at variance with this construction. In that case the questions directly called for the answers, and the asking and the answers constituted the mutual agreement of the parties. In this case the age of the father was not called for, and is only voluntarily given by the plaintiff, and the mutual agreement cannot arise as it did in that case so as to say the parties themselves settled the question of materiality.

I believe the true rule in relation to the question of what amounts to a *warranty*, or what amount only to *representation*, in the answers to questions in this class of applications, is: Where the answers are responsive to direct questions asked by the insurance company, they are to be regarded as warranties, and where they are not so responsive, but volunteered without being called for, they should be construed to be mere representations. The part of the answer in question in this case in reference to the age of the father at death, being a mere representation, does not constitute a defense unless it appears to have been material as well as false.

The demurrer is therefore sustained.

R. P. and H. C. Ranney for Demurrer, Bishop & Adams *contra.*

We are under obligations to Frank Crosby, of the McHenry bar, for the following opinion:

SUPREME COURT OF ILLINOIS.

Frame *v.* Badger.

Appeal from McHenry.

REPLEVIN—INSTRUCTIONS—FRAUD.

1. That the arrangement for working the farm does not appear from the evidence to have been made for the purpose of hindering or delaying creditors.

2. Unfair Instructions.—That it is unfair to select isolated portions of the evidence and give it prominence by calling the attention of the jury especially to it; such a practice is improper; that the judge invades the province of the jury when he undertakes to inform them that one part of the evidence is superior to another, or if they believe one part of the evidence they should discard another.

3. Judge Expressing Opinion.—That the judge should always abstain from in any manner indicating an opinion as to the weight of evidence, unless it is of that character which the law deems conclusive.—[Ed. Legal News.]

Walker, J.—Appellant sued appellee in the Circuit Court of McHenry county in an action of replevin for the recovery of a quantity of wheat, oats and corn. The writ was executed and the property delivered to plaintiff. Before a trial was had it was stipulated and agreed that the trial should be had as though all proper pleas in a replevin suit were filed with replications thereto and issues in fact joined. A trial was had before the court and a jury, resulting in a verdict in favor of defendant. A motion for a new trial was entered, but was overruled by the court and judgment was rendered on the verdict and the plaintiff appeals to this court.

It appeared on the trial that appellant had charge of and controlled a farm in McHenry county which belonged to his brother, who was a non-resident of the State. He had with him an arrangement that he was to cultivate it and pay his brother what he considered a fair consideration for the use of the farm. Appellant had occupied the place on these terms for five or six years, and a final settlement was made by them in the spring of 1874 for the use of the farm for the years 1871 and 1872. Appellant, under the arrangement, was to pay his brother in cash, and not in a portion of the grain raised on the farm.

During the years 1870 and 1871 appellant had leased a portion of the farm to Leonard Frame for a third of the grain and hay he should raise on that portion he finding everything necessary to the cultivation and harvesting the crops. But being unable to support his family, owing to the sickness of his wife in the autumn of 1871, it was agreed that Leonard should work the ensuing year for appellant on another farm, appellant to furnish his family with necessaries and to pay him as much more as he could afford, depending upon the result of the crops, as we infer. But owing to the sickness of his wife, Leonard was unable to remove to the other place, but remained on the farm of appellant's brother and cultivated it as he had previously done. Appellant, in pursuance of the agreement, purchased and furnished goods, groceries, etc., for the use of Leonard's family, to the amount of $311. It also appears that Leonard was a distant relative of appellant.

In the autumn of 1872, Sherwood and Austin having recovered a judgment in the Circuit Court against Leonard for something more than two hundred dollars, sued out an execution, placed it in the hands of the sheriff and had it levied on the property in dispute, and for the recovery of which appellant brought this suit. There is no dispute that the grain was raised by Leonard on the farm of the brother of appellant.

It also appears that in the summer of 1872, E. A. Murphy & Co. caused an execution to be levied on this and other property, on which one Delafield held a chattel mortgage, as the property of Leonard. Appellant and Delafield commenced replevin before a justice of the peace, where, on a trial, the case was decided in favor of the constable, and an appeal was prosecuted to the Circuit Court; but before a trial was had, Leonard turned out property not subject to execution to appellant and Delafield, nearly sufficient to satisfy both debts, and the replevin suit was compromised, and E. A. Murphy & Co. was paid their debt, and the property was released from the levy, and the replevin suit dismissed.

It also appears that in the summer of 1872, appellant had a conversation with E. A. Murphy, in which he says that appellant told him that Leonard Frame's crops were good, and that he thought he would be able to pay a part of his debts the next fall. That on the next day appellant came to him and said he had forgotten to tell him on the day before, that Leonard was working for him that year. On cross-examination, this witness said he would not be positive whether appellant "said Leonard's crops were good, or that Leonard had raised good crops;" that he wonld not be positive as to whether appellant "said he had forgotten to tell me whether Leonard was working for him, or that he felt it his duty to come and tell me the way the thing stood."

Appellant, on being recalled, testified that he told Murphy that Leonard had raised good crops that year, and that when he saw Murphy the next day, he said to him he thought it was his duty to tell him how the matter stood, and that Leonard was working for him, and had been during the year.

The controversy arises on this evidence as to the ownership of the property. Appellant claims that as he hired Leonard to cultivate the grain, that the title is in him. On the other hand, appellee contends that the arrangement was designed and carried out for the purpose of defrauding, hindering and delaying creditors of Leonard in the collection of their debts, and this seems to have been the theory of the defense on the trial below.

It is urged, as a ground of reversal, that the court below erred in giving the first and third of appellee's instructions. This is the first instruction:

"1st. In this case the court instructs the jury as a matter of law, that the burden of proof is upon the plaintiff to show from the evidence in the case, that at the time of suing out this writ of replevin he was the owner of the property in question. And if the evidence in the case, or from the lack of evidence, he has failed to show he was such owner, or if the evidence on that question is equally balanced, then the jury should find for the defendant; and it is not enough that the jury may believe from the evidence, that the property in question, at the time of its replevy, belonged to the brother of the plaintiff, who lives in Virginia."

We, after a careful examination of the entire record, fail to find any evidence on which to base the last clause of this instruction. Appellant testified, and he is uncontradicted, that he had the control of the place, and was to pay his brother what appellant considered a fair share of its products. And he had sold one-third of the grain raised on the place and paid the proceeds to his brother. This was virtually and in effect a leasing of the place, and as lessee, appellant was the owner of the grain he raised, and Leonard Frame was his tenant during the time he occupied the property, prior to 1872. Hence, there was no grounds for leaving the question to the jury whether the grain belonged to Charles Frame. It was calculated to mislead the jury, and should have been stricken out of the instructions before it was given.

The third instruction is this:

"3d. If the jury believe from the evidence that in the summer of 1872 the plaintiff Norman Frame told E. A. Murphy, a creditor of Leonard Frame, that he (Leonard) was doing well on the place, and that he thought in the fall when he came to harvest his crops he would have enough and be able to pay all his debts, this is a circumstance, and to be taken into account by the jury as tending to show that the arrangement between said Norman Frame and Leonard Frame as to the property in question was fraudulent as to the creditors of said Leonard Frame. And if from all the facts and circumstances proven in the case, the jury find that such arrangement about said property was made and entered into by them (Norman and Leonard Frame) with the intent and view on their part to hinder or delay the creditors of said Leonard Frame in the collection of their debts, then they should find for the defendant."

This instruction is unfair to appellant. In the first place, it misrecites the evidence. It states that if the jury believe that Appellant, in the summer of 1872, said to Murphy, a creditor of Leonard Frame, that he was doing well on the place, and that he thought in the Fall, when he came to harvest his crops, he would be able to pay all of his debts, that it would be a circumstance indicating fraud. From this record there is not the slightest pretence for saying that appellant gave it as his opinion that Leonard would be able to pay all of his debts in the Fall. Either the bill of exceptions does not fairly represent the evidence, or the court below has fallen into an error in regard to what the evidence was, when this instrnction was when he gave it. The instruction implied that the judge trying the case understood the evidence as recited in the instruction, and we presume the jury so inferred and acted.

Again, when the evidence is slight or is highly contradictory, it is unfair to select isolated portions of the evidence and give it prominence by calling the attention of the jury especially to it. Such a practice is improper, as this Court has frequently held, and it should not be indulged in by the Circuit Court. All evidence properly admitted on the trial is only received because it is supposed to tend to prove the issue, and it is the duty of the jury to weigh and consider all that is thus admitted on the trial. And the judge invades the province of the jury when he undertakes to inform them that one part of the evidence is superior to another. Or that if they believe one part of the evidence they should discard another. Or generally, if they believe a particular item of evidence they should find for one or the other of the parties to the suit. The court should always instruct that if the facts averred in the issue are proven reciting them, then they should find for the party in whose favor they shall find the facts. Or if either party holding an affirmative fails to prove the affirmative facts, the jury may be told that if they so find, they should find against him. But the judge should always abstain from in any manner indicating an opinion as to the weight of evidence, unless it is of that character which the law deems conclusive.

Again, the theory of the first part of the instruction is wrong. We fail to see how the expression of the opinion by appellant that Leonard Frame would

be able to pay all of his debts, or any part of them, to a creditor of Leonard's or to any other person, by a given time, tends, in the slightest degree, to prove that they had entered into a fraudulent arrangement to cheat or wrong Leonard's creditors. At most it was but the expression of an opinion as to the happening of a future event. It did not mislead, or, so far as we can see, did it tend to mislead creditors. And it was not given on the faith of the statement, nor did it imply the crops were admitted to belong to Leonard so as to estop appellant, or tend to prove that appellant was falsely claiming the property. For aught that appears in the evidence, appellant may have had sufficient reason for believing that Leonard would be able to pay something on the debts the next fall. But, be that as it may, we fail to see how the expression of the opinion tended to prove fraud. It must have been this instruction which misled the jury and controlled their verdict, as we are of the opinion that it is not warranted by the evidence. And the judgment of the court below is reversed and the cause remanded.

Judgment reversed.

FRANK CROSBY and B. N. SMITH for appellant.

WE have received from JAMES L. HIGH, of the Chicago bar, the following opinion:

SUPREME COURT OF ILLINOIS.

OPINION FILED FEB., 1876.

STRAUS ET AL. *v.* MINZESHEIMER.

PERSONAL PROPERTY—SALE—VENDOR AND VENDEE—DELIVERY—WHEN GOODS TO BE COUNTED—ESTOPPEL.

1. DELIVERY.—Where the vendor of personal property, such as cigars, has done all in his power to complete its delivery to vendee, and thereafter exercises no control over and asserts no possession in the property, everything having been done as between the parties themselves to vest the title, the jury is warranted in finding that there was a delivery of the property and a change of possession, as against attaching creditors of vendor, even though there was no actual removal of the property before its attachment.

2. PROVINCE OF JURY.—Where there is evidence tending to show a delivery, and change of possession of personal property, it is for the jury to determine from the evidence whether a delivery and change of possession actually occurred.

3. CIGARS NEED NOT BE COUNTED, BOXED OR STAMPED.—Where vendee purchases *all* the cigars at a factory, it is not necessary that they should be counted before the title vests, no separation from stock on hand being required; nor is it necessary that the cigars be boxed or stamped where they have been paid for and the parties have done all in their power to pass the title.

4. CIGARS—STAMPING.—The relative rights of vendors and purchasers of cigars are not affected by the Act of Congress of July 20, 1868, requiring the boxing and stamping of cigars before sale, so as to invalidate, as between themselves, their contract of sale for a supposed violation of the Act.

5. INSTRUCTIONS TO JURY.—A court is justified in refusing an instruction to the jury, when there is not sufficient evidence to make the instruction applicable to the facts, or when it assumes a disputed fact which the jury should be left free to determine.

6. ESTOPPEL.—A purchaser whose property has been attached in his absence for a debt against a third person, is not estopped from maintaining an action of trespass therefor, merely because he did not immediately warn the sheriff, but when he has notified him of his title a few days afterward, and when his conduct has not deceived any one as to the ownership of the property.

Opinion by SHELDON, J.

This was a suit in trespass brought by appellee, Minzesheimer, against appellants, to recover damages for the taking of 10,700 cigars to which Minzesheimer claimed title under a purchase from one Regina Blumenthal, the cigars having been levied upon and sold by appellant Ayars, a deputy sheriff, under a writ of attachment in favor of appellants, Straus and Sawyer, against Regina Blumenthal, and one Schloss, her partner. The record shows the following facts:

In 1872 Minzesheimer was in partnership with J. W. Schloss and Regina Blumenthal in the cigar business in Chicago, under the firm name of F. Minzesheimer & Co. This firm dissolved October 16, 1872, and the business was continued by J. W. Schloss and Regina Blumenthal, under the name of J. W. Schloss & Co. The new firm became indebted to Strauss & Co. in the sum of about $800. Regina Blumenthal lived in New York, and the business was conducted by Schloss in Chicago. Julius Blumenthal, husband of Regina, came to Chicago acting under a power of attorney from his wife, and dissolved the firm, Blumenthal taking the assets and agreeing to pay the firm debts. Blumenthal took charge of the firm assets, including cigars, tobacco, and fixtures at store, No. 39 South Canal Street, and the cigars in controversy, at factory, No. 39 Waller Street. Blumenthal was to take charge of the cigars as soon as they could be packed and ready to be stamped. Before they were packed or stamped, and on the 2d of January, 1873, Minzesheimer claims to have bought the cigars of Blumenthal. The alleged sale was made at 283 West Lake Street, a mile and a half from the cigars at 39 Waller Street. Minzesheimer had never seen the cigars; he paid $428 for them, and received a written memorandum of the sale. Blumenthal was to deliver them Januarv 4, 1873. He was a brother-in-law of Minzesheimer. On the morning of the fourth of January, Minzesheimer, who was to pay for the stamps, purchased them and went with his son and Blumenthal to the factory with two wagons. Blumenthal pointed to the cigars, gave Minzesheimer several boxes, saying: "Here are your cigars." Minzesheimer looked them over, and they began stamping. Schloss' foreman, in charge of the place, then offered to stamp them with the aid of a boy, and to have them completed by 4 o'clock, which was assented to, and Minzesheimer and Blumenthal then left. About 4 o'clock of the afternoon Minzesheimer and Blumenthal came back, but in the meantime the levy had been made under the attachment writ in favor of appellants Straus and Sawyer, against Schloss & Co. Verdict and judgment were for the plaintiff, and defendants appealed.

It is assigned for error that the verdict is unsupported by the evidence, and that the Court erred in giving and refusing instructions. It is claimed that the alleged sale of the cigars to Minzesheimer was invalid, as being fraudulent as against creditors. We are entirely satisfied with the correctness of the finding of the jury in this respect. We do not see how they could, under the evidence, have found otherwise. The sale is further claimed to be invalid, because there was no delivery of the cigars to Minzesheimer, and no change of possession.

This is the chief point of controversy. We think it may be inferred from the evidence, that 39 Waller street was the place where the firm of J. W. Schloss & Co. manufactured its cigars; that every thing there belonged to that firm, although the license was taken in the name of J. W. Schloss; and that there was nothing at Waller street but these cigars, more than half of which were boxed. On January 4, 1873, Blumenthal having previously sold the cigars to Minzesheimer, and received the pay, took Minzesheimer to the factory, at 39 Waller street, showed him the cigars, saying: "Here are your cigars," and handing to him several boxes of them. Blumenthal paid the employees at the factory; Schloss gave him an order for the revenue stamps, which was necessary, because of the license being in the name of Schloss individually. Minzesheimer paid for and obtained the requisite stamps, and commenced the work of stamping the cigars. The foreman suggested that, as it would take some time to complete the stamping, he, with the boy there, would attend to it, and have them ready on Minzesheimer's return in the afternoon. Minzesheimer gave the foreman a dollar to purchase some bay rum, with which to flavor the cigars. During Minzesheimer's absence, the cigars were attached. Both Schloss and Blumenthal had done all they could do to complete the delivery of the property to Minzesheimer. The evidence fails to show, that after the alleged delivery to Minzesheimer, they exercised any control over the cigars, or were in possession thereof. Minzesheimer had commenced to stamp the cigars, and left an agent to complete the same. He would seem to have been the ostensible, as well as real person, in possession.

True, the cigars had not been actually removed, but this could not have been done before stamping, without violating the revenue law. Everything had been done, so far as respected the rights of the parties as between themselves, and their power to do so, to vest the complete title in, and to perfect the delivery to Minzesheimer. The stamping required before removal, concerned alone the United States government, and that Minzesheimer undertook to do.

We think, from such facts, it is not to be asserted that the jury were not warranted in finding that there was a delivery of the cigars to the vendee, and a change of possession.

The objection taken to the instructions given for the plaintiff is, that they assume that the question of delivery is solely a question of fact for the jury, whereas, it is a mixed question of law and fact, and that whereas in this case, the facts show no immediate, continuous, or exclusive change of possession, the court should have instructed the jury that the title had not passed as to creditors. But this is on, what we regard, as a mistaken assumption. We find that there was evidence tending to show a delivery and change of possession. In such case it is for the jury to determine from the evidence, whether they occurred or not.

It is objected that there was error in refusing these three instructions, asked by defendant;

I. The jury are instructed that, under the revenue laws of the United States, Blumenthal could not lawfully sell, nor could the plaintiff lawfully buy the cigars in question, until they were properly boxed and stamped with the United States revenue stamps as provided by law, and that any sale or attempt to sell the cigars until so boxed and stamped rendered the cigars liable to forfeiture to the United States, and the parties liable to a fine of not less than $100, nor more than $1,000, and to imprisonment not less than six months nor more than two years.

II. If the jury find from the evidence that the alleged sale of the cigars by Blumenthal to plaintiff was made with a view to defraud or hinder the creditors of J. W. Schloss & Co., and that the plaintiff knew or had reasonable cause to know of such intention, then the plaintiff, as against such creditors, could acquire no title to the cigars, even had he obtained possession and control thereof, and the defendants were justified in taking the same under the proceedings in attachment.

III. The fact that the cigars in question at the time of the sheriff's levy, were found at the factory of J. W. Schloss, one of the defendants in the attachment, and under his control, affords a strong presumption against their ownership by plaintiff, which presumption must be overcome by satisfactory evidence that the title and possession had passed to plaintiff by a *bona fide* sale, before the levy of the attachment, in order to entitle plaintiff to a recovery in this action.

The first instruction we regard as inapplicable here. It was drawn in view of the act of Congress of July 20, 1868, which provides for a forfeiture to the United States of all cigars which shall be sold or offered for sale, not properly boxed and stamped, and imposes a penalty therefor. It was not here contemplated that the cigars should be sold without being boxed and stamped, but it was a provision of the contract that they should be stamped. It was the intent that they should be stamped before removal, and Minzesheimer was in the course of stamping them preparatory to their removal, when they were attached. Under such circumstances, we cannot think that the relative rights of the parties are to be affected by this act of congress, so as to invalidate, as between themselves, their contract of sale for a supposed violation of the act.

As regards the second refused instruction, without entering upon any discussion of its correctness, abstractly considered, we find it sufficient to say that, in our opinion, the court was justified in its refusal to give it, on the ground, if no other, of the want of evidence upon which to base the instruction. From an examination of the testimony, we fail to discover enough of evidence that the sale was made with a view to hinder or defraud creditors, and still less that the purchaser knew of any such intention, to fairly raise a question in those respects, and make the instruction applicable to the facts.

It was enough to condemn the third refused instruction, that it assumed the fact that the cigars were found under the control of J. W. Schloss. That was a disputed fact, and the jury should have been left free to find upon it.

It is further urged, that the court erred in its modification of the following instruction, asked by the defendants:

III. It is a well-settled rule of law that in sales of personal property, when anything remains to be done to complete the contract, such as ascertaining quantity or delivering possession, the title does not pass until these things are done, and if the jury are satisfied from the evidence that the cigars in question were in such condition at the time of their alleged purchase by the plaintiff, that something material to the contract, such as *counting, boxing, stamping*, or delivery of possession remained undone, then, as against creditors, the title could not pass to plaintiff, and defendants are entitled to a verdict.

The words appearing in italics, viz: "counting, boxing, stamping, or," were stricken out by the court and the instruction then given.

Counting was not necessary. Minzesheimer had purchased *all* the cigars at the factory. The amount paid was based upon the number 10,700. There was no counting to be done. No separation from stock on hand. The boxing and stamping were not with a view to the interest of either of the parties under the contract of sale. They concerned the interest solely of the United States government. The stamps had already been purchased by Minzesheimer to be affixed, and the requirement of government virtually answered. The authorities as to when title to personal property passes on sale, where something remains to be done to the property, are not entirely harmonious. There are numerous most respectable authorities, which hold that a contract for the sale of specific goods, or of goods identified, where something remains to be done to the property, will pass the title to the property before the act be done, if such appears by the contract to have been the intention of the parties. In consonance with this class of authorities, this court held in Graff *v.* Fitch, 58 Ill. 374, and in Shelton *v.* Franklin, 68 Ill., 339, that the title to personal property would pass by a contract of sale, where such was the intention of the parties, although measuring or weighing was to be had at a subsequent time in order to ascertain the amount to be paid. The cigars here had been paid for; everything had been done which it was possible under the circumstances to do, to change the possession and make the title complete in the vendee; and there can be no doubt from the evidence that the parties intended an absolute transfer to make the sale complete and absolute, although the stamping of a portion of the cigars remaining to be afterward done for government purposes only. In view of the facts, we perceive no error in the modification of the instruction.

The point is made that Minzesheimer is, by his own conduct, estopped from a recovery. The conduct claimed as having such effect, is, that Minzesheimer on his return to the factory made no assertion of his title or ownership of the property, and did not even speak to the sheriff, whereas, he should have made assertion of his title and warned the sheriff of the consequences of taking his property.

But when Minzesheimer returned to the factory he found the sheriff had already attached the cigars. He did not by any conduct induce the sheriff to make the attachment, nor did he quietly stand by and acquiesce in the making of the levy. It had been made before in his absence. The cigars were attached on Saturday, the 4th; on Monday, the 6th, Minzesheimer tried to find the sheriff and failed in finding him every day for about a week, when he saw him and demanded the cigars. He also, at the same time, demanded them of Straus and Sawyer. We do not perceive that he assisted to deceive any one, or that he influenced any one by his acts to believe any other person owned the property except himself. We see no foundation for the claim of any estoppel.

The judgment will be affirmed.

Judgment affirmed.

J. L. HIGH, for appellants.

J. S. GRINNELL, for appellee.

WOMEN ATTORNEYS.—We clip the following from the Milwaukee *Sentinel* in relation to Chief Justice RYAN's opinion in the case of Miss Goodell:

Another young woman has been admitted to the bar in Chicago. Down there they haven't the same desire to preserve "the peculiar qualities of womanhood, its gentle graces, its tender susceptibility, its delicacy, its emotional impulses," as Chief Justice Ryan has. They somehow have an idea that it is just as well for a woman to earn a comfortable living in the profession as in bending over a wash-tub.

CHICAGO LEGAL NEWS.

Lex vincit.

MYRA BRADWELL, Editor.

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We call attention to the following opinions, reported at length in this issue:

County Warrants—Guaranties of Genuineness—seal.—The opinion of the Supreme Court of the United States by Strong, J., in a case founded upon express guaranties of the genuineness and regularity of the issue of county warrants. The plaintiff has sued the county and been defeated, for the general reason that the seal of the county had not been attached to the warrants, and that under the laws of Iowa, as held by the court, the warrants were invalid without the impress of the county seal. The present suit was brought against the guarantor, and the court held that the guaranties covered the defect of the want of the county seal upon the warrants, and that as they did not bear the impress of the county seal, the guaranty was broken, and the defendant was liable. The court decides several interesting questions relating to suits brought on warranties.

Statements in Application for Insurance.—The opinion of the Supreme Court of the United States, by Hunt, J., holding in the case before the court that the question of the materiality of the answer made by the party whose life was to be insured, did not arise; that the parties had determined and agreed that it was material that the agreement was conclusive on that point, and that the only questions for the jury were: first, was the representation made; second, was it false. In this connection we would call attention to the opinion of Welker, J., upon the same question, published in this issue. We consider it the better opinion of the two.

Insurance—Statements on Application for.—The opinion of the United States Circuit Court for the Northern District of Ohio, by Welker, J., holding that statements in the application for insurance in the declaration or answers to the questions are either warranties or representations. If warranties, then materiality, or want of materiality as to the risk, has nothing to do with the contract, the only question is were they untrue, and if so the policy is void, but if representations, then to avoid the policy, they must be substantially and materially untrue or made for the purpose of fraud. The learned Judge states what are to be regarded as warranties and what as representations.

Fraud—Instructions.—The opinion of the Supreme Court of this State, by Walker, J., as to the province of a judge, in instructing the jury as to the weight of evidence. We have noticed in several recent cases, that the Judges of our Supreme Court have spoken very plainly of the practice of some Circuit Judges, assuming to tell the jury in their instructions what facts have been proven, and the weight they must give to them in making up their verdict. We are glad to see this, for it will have a tendency to break up this evil practice. Instructions should be short, clear, and relate only to the particular case on trial.

Sale—Delivery—When Goods to be Counted.—The opinion of the Supreme Court of this State, by Sheldon, J., as to what constitutes delivery of personal property where the goods sold are to be counted, and holding that the relative rights of vendors and purchasers of cigars are not affected by the act of Congress of July 20, 1868, requiring the boxing and stamping of cigars before sale, so as to invalidate, as between themselves this contract of sale for a supposed violation of the act.

Compromise Agreement.—The opinion of the Supreme Court of Illinois by Craig, J., construing an agreement signed by the creditors of an insolvent to take a certain percentage of their claims in full satisfaction, and stating to what claims it relates.

Agreement — Penalty — Liquidated Damages.—The opinion of the Supreme Court of Illinois, by Scholfield, J., holding where there are several covenants or stipulations in an agreement, the damages for the non-performance of some of them, which are readily ascertainable by a jury, and the damages for the non-performance of the others, are not measurable by any exact pecuniary standard, and a sum is named as damages, for a breach of any of the covenants or stipulations, such sum is held to be merely a penlaty.

The Dram Shop Act.—The opinion of the Supreme Court of this State by Breese, J., construing the act known as the "Dram Shop Act," stating to what cases it applies, and holding that it has no application to the giving away of liquors at a party's own private dwelling as an act of courtesy.

Recent Publications.

The N. Y. Weekly Digest of cases decided in the U. S. Supreme, Circuit, and District Courts, Appellate Courts of the several States, State and City Courts of New York and English Courts. Vol. 1, New York; McDivitt, Campbell & Co., Law Booksellers and publishers, 1876.

We have received from the publishers a neatly bound copy of the first volume, the contents of which is sufficiently expressed in its title page. The volume contains over 600 pages. It is issued regularly in weekly numbers.

A Key to Story's Equity Jurisprudence, containing over eight hundred questions, being an analysis classified by subjects and references, and an index. Designed for the use of universities, colleges and law schools, and for private use. By R. S. Guernsey, of the New York bar, New York: Diossy and Company, publishers, 1876.

The author says these pages are for the express purpose of aiding law students to study and clearly understand equity jurisprudence as a system complete within itself, and as founded upon logical and scientific principles. The arrangement is such that the chapters and questions comprise an outline and skeleton of the system of equity jurisprudence. We are satisfied from the examination we have been able to give this little volume, that if any student follows the method of study here recommended and laid down, that it will be a valuable aid to him in acquiring a knowledge of our equity system.

A Treatise on Questions of Law and Fact — Instructions to Juries, and Bills of Exceptions, By J. C. Wells, Counselor at Law, New York. James Cockcroft and Company. 1876. Price $7.50.

This work is printed from plates made at the Boston Stereotype Foundry, by what is known as the clay process. The paper is excellent. The volume contains seven hundred and fifty-two pages. It is divided into three parts. Part I. treats of Questions of Law and Fact. Part II., of The Law of Instructing and Charging juries. Part III., of Bills of Exception. The plan pursued by Mr. Wells is to give concisely in the text the principles announced by the courts in delivering opinions in cases involving questions within the scope of the work and to give the citations to authorities in the notes. Mr. Wells is a member of the Illinois bar and the author of a treatise upon the Statute of Limitations.

The Institutes of Justinian; with English Introduction, Tranlation and Notes. By Thomas Collett Sandars, M. A., Barrister at Law, late Fellow of Oriel College, Oxford. First American, from the fifth London edition, with an Introduction by Wm. G. Hammond, LL. D. Professor of Law in the Iowa State University. Chicago: Callaghan & Company. 1876.

The publishers have taken the most approved and recent English edition of the Institutes of Justinian and clothed it in an exceedingly elegant new dress, and introduce it to the American bar by an introduction written by Professor Hammond, which shows the author to have been a thorough and critical student of the Roman law. He gives a general account of the classification of Roman law, and of the relation between that classification and the arrangement of our own law, as represented in Blackstone, and says: To appreciate the Institutes, or the other works of the Roman jurists, they must learn to look upon them as the precursors of Blackstone, Kent and Story; as stages in the development of one great science, which, in spite of temporary aberrations and local diversities, has preserved its unity and has grown by continuous forces from the Twelve Tables to the codes and statute books, reports and treatises of the present day; that the recent civilians have fostered a belief in the radical diversity of the civil and common law, in methods, principles and sources. That this work must be undone before the study of Roman law can take firm root among us, or bear its legitimate fruit in a more careful and appreciative study of our own law. Of the merits of the Institutes it is unnecessary for us to speak, They should be read and studied by the law student with the same care as Black-Stone or Kent.

We have received, just as we go to press, too late for notice in this issue, the 68th volume of Illinois Reports.

RULES IN ADMIRALTY.

The following rules in Admiralty were entered by Judge Blodgett in the United States District Court for this district, on Monday, March 13, 1876:

Ordered,—That the following rules of Practice in Admiralty be entered:

1st. Upon the entry of default in admiralty cases, the case shall be referred to a commissioner to take proofs, and such commissioner shall notify the libellant to produce before him the evidence relied upon to support the cause of action set forth in the libel, within ten days, and the commissioner shall thereupon, with all convenient speed report and transmit to the court the proofs taken by or submitted to him, and his conclusion as to whether said proofs are sufficient to maintain said cause of action.

2d. In all admiralty causes where an answer is filed making an issue or issues of fact, either party may move for the reference of the case to a commissioner, to take proofs, and such commissioner shall proceed on reasonable notice to the parties to take the proofs offered in said case. The party having the affirmative of the issue shall take proofs first and within thirty days after such reference, unless, for cause shown, the time shall be extended. The other party shall then take and close proofs within thirty days unless the time shall be extended by the court for cause. And the party having the affirmative shall then have not to exceed twenty days to put in rebutting proofs.

On expiration of the time for taking proofs the commissioner shall, with all convenient dispatch, return said proofs with his report thereon to the court, and if no exception shall be taken to said report within ten days after the filing thereof, the same shall stand confirmed and a decree shall be entered in accordance with the recommendations of the commissioner. But if exceptions shall be taken, then the case shall stand for hearing upon said exceptions or the pleadings and proofs, and be heard before the court in such order as the court shall direct.

3d. That in all cases where property has been sold under a decree in Admiralty or upon the instance side of the court and the proceeds paid into court, notice shall be published by the Clerk in the same manner and time that notices of seizure under mesne process are published, stating, as nearly as may be, the amount of such proceeds and requiring all persons claiming the same, or in any way interested in the distribution thereof to file with or make known to the court within thirty days the nature and amount of such interest or claims, and at the expiration of the time limited by such notice a reference shall be had to a commissioner to examine and report the nature and amount of all claims filed and the respective priorities of said claimants or interveners. And no person shall be entitled to participate in said proceeds unless his claim or petition so to do shall be filed within the time fixed by said notice, unless by leave of court he shall, for cause shown, be allowed to intervene and make such claim after such lapse of time.

SUPREME COURT OF ILLINOIS.

Abstract of opinions filed at Ottawa in 1876.

C. R. I. & P. R. R. Co. *vs.* the City of Joliet.—Appeal from Will.—Opinion by Sheldon, J.

UNRESTRICTED DEDICATON TO PUBLIC USE.—USE OF R. R. PUBLIC USE.—DIRECTION OF PUBLIC USES.—EQUITABLE ESTOPPEL.—NUISANCES.—REGULATIONS OF RAILROADS BY MUNICIPALITY.

Statement.—In 1834, the town of Joliet was laid out in Cook county—a block of land on the plat being marked "Public Ground." In 1836 East Joliet was laid out; and also a block marked "Public Ground" was platted, adjoining the former. In 1836, Will county struck off from Cook, with county seat at Joliet; and the act directed the county buildings to be built on these "Public Grounds." In 1837, the town of Joliet was incorporated. In 1841, the incorporating act was repealed. In 1845, the name was changed to Joliet. In 1846 and 1847, the present court house was built. In 1847, the Rock Island and La Salle R. R. Co. was incorporated and authorized to build a railroad from Rock Island to the Illinois river. In 1851, extended to Chicago, via Ottawa and Joliet; and the name of the company changed to the Chicago and Rock Island Railroad Company; and the road was constructed to Chicago. In Joliet, by the public wish, the road was laid across the "Public Ground," within twenty feet of the court house; the right of way being granted by the board of supervisors of Will county, on conditions,—one of which conditions was that the company should enclose a portion of the public square with a fence corresponding with what might afterwards be erected by the county around the other portion. The first train passed July 4th, 1852,—the "public ground" being then altogether unfenced. In June, 1852, the city

was again incorporated; and the city government was organized in August. In January, 1853, the council, on request, granted privileges in regard to the erection of a depot—privileges available only by the road passing across the "public ground." In September, 1863, the county board called on the company for the building of their share of the fence, as previously provided for, and the company, accordingly, built the fence, at the cost of over $4,000. In 1866, the Chicago and Rock Island R. R. Co., consolidated with the Chicago, Rock Island and Pacific R. R. Co., of Iowa, and took the name of the latter. From 1854, the city levied taxes on the "public ground" against the county, and the county paid these taxes.

In 1872, the council declared the operation of the railroad on certain streets, and across the square, to be a public nuisance, and imposed penalties for its continuance. Two months afterwards, the city filed a bill for an injunction, and prevailed; whereon the company appealed, *Held.*

1. That the dedication of the square being only as "public ground," it was an unrestricted dedication to public use. In such case, the use is indefinite, and may vary, according to circumstances, in the discretion of those holding the public trust.

2. While a railroad company is a private corporation, yet the use of a railroad is a public use, and therefore may be provided for by the exercise of eminent domain.

3. There having been no municipal organization at the time the right of way was granted, the county board was the only representative power to direct the public use of the ground dedicated, and this was necessarily subject to the directing authority of the legislature. Even where a fee is in a municipal corporation for public use, the legislature can direct the use to railroad, or other purposes consistent with the design of a dedication of the ground.

4. The acts and acquiescence of the city, after the location, constituted an *estoppel in pais;* especially when taken in connection with the lapse of time.

5. A city cannot be permitted to allege annoyances in such case, in regard to the holding of courts, since this is exclusively a matter pertaining to the interests of the county.

6. The necessary inconveniences of operating a railroad through a city are not *per se* a nuisance; although the municipal corporation is at full liberty to provide safeguards against them.

7. A municipal corporation cannot declare anything a nuisance arbitrarily, or, in the absence of general laws of the state or the city, at the mere discretion of the local authority, and not even where it is authorized to declare and punish nuisances.

8. Where a prior ordinance provides, "that said railroad company shall be subject to all laws and ordinances that may hereafter be passed to regulate railroads in the city," this only means that the company shall be subject to all reasonable and legal regulations, and not that the company shall be held liable to abandon, take up, or remove its track, at the bidding of the council.

Henry Muller & wife *v.* John B. Inderreiden.—Error to Superior Court of Cook.—Opinion by BREESE, J.

VALUATION OF HOMESTEAD.

Held, That where a homestead is levied on, it belongs not to the court, but to the commissioners provided by the statute, to determine whether it is worth more than $1,000, or not.

G. B. Girard *v.* A. Gateau.—Appeal from Opinion by WALKER, J.

DISSOLUTION OF PARTNERSHIP BY EQUITY.

Held, That, while equity will not, on slight grounds, interfere to dissolve a partnership, on application of one of the partners, yet, where the personal relations of the partners become so hostile that a harmonious carrying on of the business is wholly impracticable, equity will thereon decree a dissolution.

97. Alfred Skinner, et al. *v.* P. D. Baker et al.—Opinion by CRAIG, J.

DEEDS—DELIVERY—ESCROW.

Held, That a deed takes effect only on delivery to the grantee, or his agent. And where it is delivered to a stranger, or third party, to be delivered to the grantee on performance of conditions, this is an *escrow*, and passes no title until the fulfilling of the conditions. If the performance fails, the deed may be returned to the grantor, and canceled.

Pratt Roberts et al. *v.* Levi Pierce.—Opinion by SCOTT, J.

TESTIMONY OF PARTIES—EXCEPTION.

Held, That the exception, in the evidence act of 1857, that where one sues as administrator, the opposite party cannot testify on his own behalf, does not extend to the case where the plaintiff, though administrator, needed not to describe himself as such, but might have maintained the suit in his own individual name.

Isaac P. Coats *v.* Alexander Cunningham.—Error to Superior Court of Chicago.—Opinion by SCHOLFIELD, J.

APPOINTMENT OF RECEIVERS.

Held, 1. That the appointment of a receiver by a court, is only interlocutory; and no writ of error will lie thereto.

2. The appointment of the receiver determines no rights; and does not, in any manner, affect titles to the property involved. The receiver is merely the officer of the court, and his holding is only the holding of the court for him from whom the possession is taken. He is appointed on behalf of all parties, and his appointment is not to oust any party of his right to the possession, but merely to retain it for the benefit of the party ultimately entitled; and when he is ascertained, the receiver will be considered as his receiver.

C. & P. R. R. Co. *v.* Frederick Kaehler et al.—Error to Superior Court of Chicago.—Opinion by BREESE, J.

SERVICE ON R. R. CO. AND RETURN.

Held, That, in a suit against a railroad company, a return is sufficient as follows, to wit: "Served the within named railroad company, by reading the same, and leaving a copy thereof to A. B., cashier of the said R. R. company, this 24th day of March, 1875; the president of said company conld not be found in my county, this 5th day of April, 1875;" and will be construed to mean that, on the day service was made on the cashier, the president could not be found in the county, the latter date being merely the date of the return, and not of the service.

Hollis Cummings et al. *v.* Allen B. Burleson et al.—Appeal from Carroll.—Opinion by CRAIG, J.

MORTGAGED HOMESTEAD.

Held, That where a mortgage on a homestead is foreclosed, the homestead right remaining, it is proper to set out the homestead in the mode prescribed by statute under executions at law. The silence of the statute as to the mode, is to be construed to indicate the will of the legislature that the mode prescribed in similar cases by the specific statute, should govern this proceeding also.

101.—A. G. Comsen *v.* Joseph F. Hixon et al. Error to Superior Court of Cook.—Opinion by BREESE, J.

SERVICE OF SCIRE FACIAS—MOTION TO SET ASIDE JUDGMENT.

Held, 1. That a *scire facias* is a summons, and therefore may be served by a special deputy, in the manner prescribed by law.

2. That a motion to set aside a judgment is too late after the term at which the judgment was entered.

1.—Jacob Frye et al *v.* Daniel A. Jones et al. Error to Superior Court of Cook.—Opinion by Sheldon, J.

WARRANT TO CONFESS JUDGMENT — CONSTRUCTION.

STATEMENT. — Thirteen promisory notes, for equal amounts, and of the same date, payable at monthly intervals, given. On each alternate note a printed warrant of attorney was filled out; and on the rest, this was left blank, and detached. Under this warrant, so attached to the alternate notes, confession of judgment was made on all—the warrant reciting that "we are now justly indebted," etc., and "may, from time to time, become further, or otherwise, indebted, upon bonds, promissory notes, etc., made, or to be made," etc., and authorized such debts made or to be made to be confessed. *Held*,

1. That the detaching of the warrant from some of the notes indicated the intention of the parties that the notes from which the warrant was detached should not be subject to the power of the warrant.

2. The authority to confess a judgment without process, must be clear and explicit, and must be strictly pursued.

106.—Eliza Nixon *v.* John Halley. Error to DeKalb. Opinion by CRAIG, J.

ESTOPPEL ON A MARRIED WOMAN AS TO CONTRACT RELATING TO SEPARATE PROPERTY —STATE COMITY.

Held, 1. Where a married woman has possession of property, holds herself out as the owner thereof, and, by such representation, induces one to labor upon it in repairs, she is estopped, in a subsequent suit for the price of the labor, from denying that she was the actual owner.

2. It seems, that if the property is situated in another state, the courts of this State will, by comity, regard the law in that State, and, if that law allows a married woman to contract in regard to her separate property, will enforce such contract, and, more especially, when a subsequent promise to pay is made in this State.

108. Union National Bank *v.* Oceana County Bank.—Appeal from Cook.—Opinion by SCOTT, J.

EFFECT OF A BANK CHECK AS TO FUNDS IN BANK—TRANSFER—COUNTERMAND.

Held, That where a depositor draws a check on his banker, having funds of his in an equal or greater sum than the amount of the check, it operates to transfer the sum to the payee, who may sue for and recover the amount from the bank; and a transfer of the check gives the right to each successive holder. After the check has passed into the hands of a *bona fide* holder, it is not in the power of the drawer to countermand the order of payment.

109. Ole Anderson *v.* H. P. Wood.—Appeal from Knox.—Opinion by BREESE, J.

LAYING OUT AND VACATING ROADS.

This case turns almost wholly on matters of fact. However,

Held, That applications for laying out a new road, and for vacating an old one, may be joined in the same petition, under the present road law.

Isaac Wilsan *v.* James McDowell.—Appeal from Livingston.—Opinion by WALKER, J.

IMPEACHING DEED—EVIDENCE—STATUTE OF FRAUDS.

Held, 1. That evidence to impeach a deed must be clear and convincing.

2. The statute of frauds will not allow a parol contract concerning lands to be set up for the purpose.

3. The court is not at liberty to make exceptions to the operation of any statute, on the ground of obviating individual hardship. And, as to the statute of frauds, it has already been relaxed to the full limit allowed by public policy.

James H. Clark, et al. *v.* School Directors, etc.—Appeal from Iroquois, Opinion by SHELDON, J.

DISCRETION OF SCHOOL DIRECTORS IN PURCHASING SCHOOL SUPPLIES.

STATEMENT.—Sale of stereoscopic views etc., to school directors, who gave this order:

"State of Illinois, } ss.
County of Iroquois. }

October 26, 1871.

Treasurer of township 27 north, range No. 14, in said county; on or before the 1st day of April, 1872, pay to Clark, Lake & Co., or bearer, the sum of fifty-three dollars, out of any money belonging to school district No. 1, in said township, for one school set of stereoscopic views, with scope, and Elements of Geography and History, with interest at the rate of six per cent., and ten per cent. on the amount after due."

(Signed)

This was refused by the treasurer, as void on its face. Suit brought; verdict for defendants, and appeal. *Held:*

1. That the discretion of school directors to purchase school supplies, is extremely limited under the statute.

2. Such purchases can only be made out of surplus money, left after all necessary school expenses are paid, whereas the order above is upon any funds, generally.

3. Directors are not authorized to purchase on time, or pay interest on such claim.

4. The plaintiffs have no remedy but to reclaim their property.

T. L. Miller *v.* Superior Machine Co.—Error to Superior Court of Cook.—Opinion by CRAIG, J.

SIGNATURE OF COMPANY AND SEAL—APPEAL FROM JUSTICE INSUFFICIENT BOND.

STATEMENT.—Suit by the Machine Company before a J. P. Verdict against it for costs. Appeal to Circuit Court. Default and judgment against defendant (plaintiff in error.)

The appeal bond was signed:

"Superior Machine Company,
by G. S. Stowe, Agt. [Seal.]"

Held, 1. That the court can not know, judicially, that a corporation or company has a seal other than a scrawl. In the absence of proof, the presumption is that the seal used was the proper and only seal of the company.

2. The insufficiency of an appeal bond does not justify an appellee to make default in following the case to a circuit court; since there he could obtain a rule for a sufficient bond.

American Express Co. *v.* R. Greenhalgh.—Appeal from Knox.—Opinion by WALKER, J.

LIABILITY OF PUBLIC CARRIERS FOR GOODS SHIPPED C. O. D.

STATEMENT.—Goods shipped to Greenhalgh, C. O. D. Consignee refused to receive them, but paid the express charges. Suit was brought by the consignors against the consignee, for the value of the goods. Pending the suit, the attorney for the consignee ordered the express company to return the goods. This was done, and the consignors received them. Afterward, verdict was rendered against the defendant, who then demanded the goods of the express company, and thereon brought suit in trover. It was contended that the judgment gave absolute title to the defendant. *Held*,

1. That, if so, the action could only lie against the consignors for the goods so returned by order of the defendants.

2. If the agent of the company even knew of the pendency of the suit, yet he would be justified by such order in reshipping to the consignors.

3. It is not the duty of a public carrier to seek the true owner of goods, nor unasked, or unwarned, to seek to protect the contingent future interests of a consignee.

4. Although, should the public carrier deliver goods to a third party, it would devolve upon such carrier to prove that the delivery was to the true owner. But that is not this case.

Isaac M. Kirkpatrick *v.* R. A. Howk.—Appeal from Warren.—Opinion by SHELDON, J.

A CREDITOR AND SURETY.—RELATION BETWEEN THEM AS TO PLEDGES OR SECURITIES OF THE PRINCIPAL IN THE CREDITOR'S HANDS—DECLARATIONS OF CO-OBLIGOR.

Held, 1. That in equity, a creditor who has the personal contract of his debtor, with a surety, and takes property of the debtor as a pledge, or security, is required to hold the property for the benefit of the surety, as well as himself; and if he parts with it without the knowledge or against the will of the surety, he will thereby lose his claim against the surety to the amount of the property so surrendered. And these rules of equity are enforced in courts of law.

2. A surety who pays the debt is entitled to be put in the place of the creditor, as to all the means and remedies of the creditor.

3. Where two names are embraced in a summons, but service is only on one, the one not served is not a party to the action, and his acts and declarations are incompetent as evidence against the other.

WE have received from JOHN LYLE KING, of the Chicago bar, the following opinion:

SUPREME COURT OF ILLINOIS.

OPINION FILED JAN. 21, 1876.

ABRAHAM LIPMAN *v.* ELIAS LOUITZ.

Appeal from Cook.

AN AGREEMENT BY CREDITORS OF AN INSOLVENT TO TAKE A CERTAIN PERCENTAGE IN FULL OF THEIR CLAIMS CONSTRUED—THE RIGHTS OF A CREDITOR, WHO, AFTER SIGNING THE SAME, HAD TO PAY A NOTE WHICH HE HAD ENDORSED FOR THE DEFENDANT.

CRAIG, J.—The principal ground relied

upon by appellant to secure a reversal of the judgment, is, that the circuit court erred in giving appellees seventh instruction which was as follows: "The jury are instructed that if they believe, from the evidence, that the agreement of compromise read in evidence was entered into by the plaintiff, and that at the time of such agreement being made and signed by him there was no false or fraudulent representations made by the defendant concerning the amount of his liabilities or assets; and even if the defendant carried out the agreement, cannot prevent the plaintiff, Lowitz, recovering all the money he was obliged to pay as endorser of the defendant's notes, after the said agreement was made, if any such money he did pay. So, if, at the time of the making of the said agreement, the notes of the defendant, Lipman, or any or either of them, were held by third parties, and the plaintiff was obliged to, and did, pay them by reason of his having endorsed them; and this payment was made by him, after said agreement was made, then, in that case, the plaintiff is entitled to recover all that he so paid on the said notes."

In the summer of 1871, the appellant being indebted to appellee in the sum of $6,000, gave him his four promissory notes, two for $1,500 each, one for $1,000, and one for $2,000.

The $1,500 note that matured on the 11th day of October, 1871, was endorsed and transferred, before it became due, to the German National Bank by appellee. In the month of December following, and while the German National Bank held as endorsee, the $1,500 note, appellant made a settlement with his creditors, and a composition agreement was executed, which agreement contains the following: "That we, the said several and respective creditors, shall and will accept, receive, and take, of and from the said Abraham Lipman, for each and every dollar that the said Abraham Lipman does owe and is indebted to us, the sum of twenty-five cents, in full discharge and satisfaction of the several debts and sums of money that the said Abraham Lipman does owe and stand indebted unto us."

This agreement was signed by appellee, and at the foot of his signature he noted down his claim against appellant at the sum of $4,500.

The German National Bank that held the $1,500 note, did not become a party to the agreement.

In the month of January, 1872, after the execution of the composition agreement, appellee paid the German National Bank the amount due upon the $1,500 note held by the Bank upon which he was endorser; the payment was made partly in cash, and in part by appellee's own paper. The position of appellant is that the legal effect of the composition agreement discharged him from any further liability to appellee on the $1,500 note.

It will be observed that the language used in the agreement is that the twenty-five cents on the dollar which appellant agreed to pay, was to be accepted in discharge and satisfaction of the several debts and sums of money that appellant was then owing to the parties who executed the agreement.

It does not in terms or by implication embrace causes of action or liabilities that might arise or be incurred in the future. We are aware of no authority that would sanction a construction of a contract of this character more comprehensive than a reasonable import of the language used would signify. And a composition agreement, like the one under consideration, should be limited in its effect to such matters as were within the contemplation and intention of the parties at the time of its execution. Butcher *v.* Butcher, 1 Bos. & Pull, 113.

When the contract was made, appellant was not indebted to appellee upon the note; it was held and owned by the bank, and whatever amount of money appellant owed upon it, was due and owing from him to the bank.

It is true, appellee had indorsed the note, and as indorser might have been compelled to pay the endorsee the amount of the note, but that was by no means certain; appellee's liability depended upon the insolvency of the maker, and perhaps the diligence which had been, or should be used by the bank to enforce payment of the maker, at all events when the composition agreement was made, the liability of appellee, as indorser, was not fixed, certain and definite.

This being the case at the time the agreement was executed, apelleee had no claim upon appellant on account of the $1,500 note.

If, in the future, appellee should be required to pay the bank the note, as endorser, then, and not until that event had occurred, would he have any subsisting claim or demand on account of the note, against appellant. The manner in which appellee signed the agreement, is enough, of itself, to establish the fact that it was not within the intent of the contracting parties to include the note in the agreement. If such had been the intention, appellee's claim would have been put down at $6,000. This, however, did not occur, but appellee's debt was stated upon the agreement, to be $4,500, thus leaving out the identical amount of the note which had been indorsed to the bank.

When, therefore, appellee, after the composition agreement had been made, was compelled, as endorser, to pay the note in question, a cause of action arose in his favor, not, perhaps, upon the note itself, but to recover so much money as he was required to pay, and this recovery could be had under the common counts of the declaration.

In Cuyler *v.* Cuyler, 2 John., 186, was a case where the plaintiff held a note against the defendant, which he indorsed to a third party, and while the note was so held, the plaintiff executed a contract to the defendant, the legal effect of which was to release the defendant from all demands then existing. Subsequently the plaintiff was required to pay the indorsed note, and it was held that the cause of action had arisen subsequently to the execution of the release, and was not affected by it, and that the action for money paid would lie.

See also Crawford *v.* Swearington, 15 Ohio, 264. Appellant has cited two authorities to sustain his position. The first is Parson on Contract, page 713, where the author says a "release, strictly speaking, can operate only on a present right, because one can only give what he has, and can only promise and give what he may have in future. Where one is now possessed of a distinct right which is to come into effect and operation hereafter, a release in words of the present may discharge the right."

This authority does not in any manner help appellant's position. Appellee had no distinct right, so far as the note held by the bank was concerned, at the time the release was given, and hence it could not operate upon it, as we have heretofore shown.

The case of Pierce *v.* Parker, 4 Met., 80, also cited, upon examination, will be found not to sustain appellant's position. The agreement upon which the decision in the case last cited was predicated, was much broader than the one in the case at bar. It embraced all "claims and demands, actions and causes of action," and it further appears from the opinion, which is an important element, that the parties, at the time the release was executed, had in view the claim which formed the subject matter of the litigation.

These two important elements clearly distinguish the case cited from the one under consideration.

We are, therefore, satisfied the instruction given is fully sustained by the authorities, and appellant's second instruction, which, in substance, presents an opposite view, was properly refused. It is also urged that the judgment cannot be sustained for the reason that the appellee had not paid in money the entire amount of the note held by the bank.

The proof upon this point is, that appellee had paid a portion of the note in cash, and gave his own paper for the balance and lifted the note.

It is immaterial, so far as this action is concerned, in what manner the note was paid, a payment in merchandise or by appellee's own paper, would be as effectual as a payment in cash.

As the record discloses no substantial error, the judgment will be affirmed.

Affirmed.

JNO. LYLE KING, for appellant,
STORY & KING, for appellee.

Through the courtesy of the law firm of HENRY & PENWELL, of Danville, we have received the following opinion:

SUPREME COURT OF ILLINOIS.

THOMAS B. TROWER ET AL. *v.* WILLIAM ELDER.

Agreed Case from Shelby.

AGREEMENT—PENALTY—LIQUIDATED DAMAGES.

That where there are several covenants or stipulations in an agreement, the damages for the non-performance of some of which are readily ascertainable by a jury, and the damages for the non-performance of the others are not measurable by any exact pecuniary standard, and a sum is named as damages for a breach of any of the covenants or stipulations, such sum is held to be merely a penalty.—[ED. LEGAL NEWS.]

Opinion by SCHOLFIELD, J.

It is not contested, if the clause in the argument providing for the forfeiture of three fold the amount paid as damages relates as well to the sale of the bank-safe and fixtures, as to the agreement not to engage in the banking business in the town of Sullivan, the sum named must be held to be a penalty to secure the performances of the entire contract, and not liquidated damages to be recovered for the breach of a single stipulation.

This is in accordance with the well established rule that where there are several covenants or stipulations in an agreement, the damages for the non-performance of some of which are readily ascertainable by a jury, and the damages for the non-performance of the others are not measurable by any exact pecuniary standard, and a sum is named as damages for a breach of any of the covenants or stipulations, such sum is held to be merely a penalty.

Astley *v.* Weldon, 2 Bosanquet & Puller, 346, 353; Davies *v.* Panton, 6 Barnwell & Cresswell, 216, 264; Crisdee *v.* Bolton, 6 Carrington & Payne, 240, 243; Walls, exr., *v* Shepherd, 2 Ala., 425; River *v* Ransom, 18 Barb., 51; Berry *v.* Wisdom, 3 Ohio St., 241; Lampman *v.* Cochrane, 16 N. Y., 275; Foley *v.* McKeegan, 4 Iowa, 1; Bayse *v.* Anderson, 28 Mo., 39; Higginson *v.* Weld, 14 Gray, 165; Nash *v.* Hermosilla, 9 Cal., 584; Hamilton *v.* Overton, 6 Blackford, 206; Dailey *v.* Litchfield, 10 Mich., 29; Carpenter *v.* Stockhart, 1 Ind., 434.

The language of the clause is: "And the said William Elder, party of the first part, on his non-compliance with the foregoing recited engagements forfeits three-fold the amount paid to him by the said T. B. Trower & Son, as damages to them for such non-compliance."

It is true, as argued by counsel, the recitals or preamble prefixed to an agreement do not of themselves alone have any obligatory force; but they may be referred to in the operative part of the instrument in such way as to show it was designed that they should form a part of it, and this we conclude to be the case in the present instance.

What are "the foregoing recited engagements" upon non-performance of which the forfeiture is to be incurred? The recitals immediately preceding, are: "That William Elder, party of the first part, hath this day sold all his business interest, influence and patronage in the banking business; and also his bank-safe, together with all the fixtures pertaining to the business of banking, in the town of Sullivan, Moultrie county, Illinois; and he also agrees, and hereby binds himself not to engage in the banking business in said town of Sullivan, Illinois; for which franchises, benefits and privileges, the said T. B. Trower & Son, parties of the second part, pay unto the said William Elder the sum of twelve hundred and fifty dollars."

The words "and also his bank safe, together with the fixtures," etc., show as plainly as words can, that these articles *were sold* in connection with the banking business interest, patronage, etc.; and the words, "he also agrees and binds himself not to engage in banking," etc., as clearly show that this understanding was a part of the same contract.

But it is argued the bank safe and fixtures were too trifling and insignificant to have any value affixed to them, and that they do not constitute any part of the consideration for which the twelve hundred and fifty dollars were paid.

The payment of the twelve hundred and fifty dollars manifestly could not have been solely in consideration of the undertaking to not engage in banking, since the language of the agreement is that it was for certain "franchises, benefits and privileges." What was intended by the use of these terms is apparent from the connection in which they occur.

As will be remembered, they immediately succeed the recital of the things sold and what is to be done by Elder. They are prefixed by the words "for which," thus showing that they were used as synonymous with that which was previously recited.

Although this may be an inapt description of tangible property, yet as the safe and fixtures were a part of that which was sold, by the agreement, it must have been intended they were included in it.

But again, if it be true that the safe and fixtures were of no value, why were they mentioned in the agreement? The language of the agreement itself forbids this supposition. It says they were *sold*.

If there was a sale, there must necessarily have been a price agreed upon in some form as to their value, and, whether it was much or little, whatever it was, it formed so much of the consideration for which the twelve hundred and fifty dollars were paid.

We can neither indulge in presumptions, nor judicially know that the safe and fixtures were not an important part of that consideration.

Entertaining these views, it follows the judgment must be affirmed.

Affirmed.

ANTHONY THORNTON, for appellants.
HENRY & PENWELL, for appellee.

SUPREME COURT OF ILLINOIS.

OPINION FILED JAN. 21, 1876.

ALBRECHT *v.* THE PEOPLE.

Error to Bureau.

CONSTRUCTION OF THE DRAM SHOP ACT—GIVING AWAY LIQUOR AT PRIVATE HOUSE OR AT A BREWERY—COURTESY.

1. THE DRAM SHOP ACT.—The court construes the act known as the Dram Shop Act, and states to what cases it applies.

2. GIVING AWAY LIQUOR—ACT OF COURTESY.—That this act was not designed to punish a person for giving away liquor to his friends or guests at his private residence. This is a mere courtesy which the law was not intended to reach.—[ED LEGAL NEWS.]

BREESE, J.—This was a prosecution by indictment, in the circuit court of Bureau county, against Jacob Albrecht for an alleged violation of chap. 43, title "Dram Shops," R. S., 1874, p. 438.

The title of the act in full, is, "An act to provide for the licensing of, and against the evils, arising from the sale of intoxicating liquors." The sixth section of this act, provides as follows: "Whoever by himself, or his agent or servant, shall sell or give intoxicating liquor to any minor, without the written order of his parent, guardian, or family physician, or to any person intoxicated, or who is in the habit of getting intoxicated, shall for such offense, be fined not less than ten dollars, nor more than one hundred dollars, and imprisonment in the county jail, not less than ten, nor more than thirty days.

The previous sections define: 1. Dram Shops. 2. Provides penalty for selling without license. 3. How license may be granted. 4. The form of the license—the rights under it and how revoked for violation of the provisions of the act, or by keeping a disorderly, or ill-governed house, or place of resort for idle or dissolute persons, or by allowing any illegal gaming in the dram shop, or in any house or place adjacent thereto. 5. Provides for taking bond of the dram seller, and how suit may be brought thereon. This statute is highly penal in its provisions, and is emphatically a penal statute, and according to well recognized canons, must be construed, strictly keeping in view, the great central object the legislature had in view on its enactment, and the evils to be prevented.

The title of the act, in the revision of 1874, is "Dram Shops," and every section is leveled against them, with a view, not to their suppression, for they are licensed to sell intoxicating liquors, and pay large sums of money into the town or county treasury for the privilege. The provisions of the act are aimed at such. What, then, under this view of the statute, should be the construction to be put on the sixth section. Can it be, should it be, other than this: that, whoever keeping a dram shop, shall, &c. The

leading facts in this case are, that the defendant was the owner and operator of a brewery, selling the manufacture by the keg or barrel, to any one who wished to purchase, and for the privilege he became liable to pay to the government of the United States, large sums of money demanded by the internal revenue laws, to be appropriated to the payment of our government debt. He kept no dram shop, nor did he sell his beverage by the small, to be drank on his premises.

One day, about the last of July or first of August, 1874, Charles Dewey, the person to whom it is alleged, defendant sold or gave, one or more glasses of beer, came to see appellant, who was then in bad health and nearly blind, lying on a lounge in his house, apart from his brewery, for the purpose of getting a renewal of a lease of some of the lots at Ohio Station, on which he had erected a hay-press. He was accompanied by Mr. Kyle, an attorney-at-law, who was wanted by Dewey to draw the papers. When Dewey and Kyle reached the house and found defendant in this condition, they also found Andrew Ross there, and Samuel Connor, the principal witness for the prosecution. Ross' business there, he being a preacher, was to aid Connor in purchasing some lots of defendant, and to see about the two lots on which Dawey had his hay-press, for the purpose of building a mill upon them. Ross had talked about this with defendant when Kyle and Dewey came in. Dewey wanted to buy the lots, as it would be expensive to move his press, which had cost him eighteen hundred dollars. Ross in his testimony says he supposes Dewey thought he was trying to get these lots, and he got mad, and talked pretty loud, and was "a little boozy."

Connor on his cross examination, says he wanted to buy some lots; Kyle and Dewey came in, and went off together; Dewey was considerably excited; he thought he would lose considerable in moving his press, and was much excited at Ross. In his direct examination, he says: Dewey seemed a little tight, was intoxicated, called for beer twice—some person went into another room and brought it out, and set the beer and glasses on the table, and all were invited to partake. Ross being a preacher, of course declined, never having drank anything intoxicating, and was never drunk. The opposing testimony of Kyle, Dewey and defendant shows quite conclusively Dewey was not intoxicated. The beer was sent for to the brewery, and proffered by defendant to his visitors, as an act of hospitality to neighbors and friends. Surely it was not such an act as this, the statute in question was intended to punish by imprisonment in the county jail. It has nothing of the nature of a dram shop about it, and was but a mere courtesy, which this law was not designed to reach.

If one invites his friends to dine with him, and generous wine which cheers the heart is passed upon the party, one of whom happened to be excited with wine when he came there, is the host to be incarcerated for giving to this most bibulous guest an additional glass.

We do not think the statute should bear such a construction. The culture of the grape is recommended by the moralist and the economist, and the expression of its juices into wine.

Would it be held an offense, punishable by fine and imprisonment, should the vinter from his wine-press fill a flagon and serve it to his guests in his own house, at his table?

Where is the difference in a brewer presenting a tankard under similar circumstances? We can not believe this law was designed to punish such acts. The testimony, we think, is quite sufficient to show that Dewey, though highly excited at what he believed to be the interference of Ross to get these lots, was not intoxicated. He denies positively, he had drank through the day and before dinner, but three or four glasses of beer, and that he was not intoxicated in the slightest degree. There is not the slightest proof, Dewey was in the habit of getting intoxicated.

A jury was waived in this case, and we think the finding of the court was against the clear preponderance of the evidence; and the case made was not as contemplated by the sixth section of chap. 43, title "Dram Shops."

The judgment must be reversed.

SUPREME COURT OF ILLINOIS.

ABSTRACT OF OPINIONS FILED AT OTTAWA IN 1876.

13.—Stephen S. Phelps et al. *v.* John F. Curts et al.—Opinion by SHELDON, J.

FRAUDULENT CONVEYANCES — BONA FIDE LIEN THEREUNDER—PERSONAL DECREES IN RELATION THERETO—EFFECT OF BANKRUPTCY THEREON.

STATEMENT.—Creditors bill to subject real estate to the payment of judgments; which real estate had been conveyed under the mere forms of a sale by S. S. Phelps to Wm. Phelps, when Phelps and company were about to fail for $174,000. After the transfers, Wm. Phelps purchased from Myron Phelps certain notes due from Phelps & Co., for many years before the failure; the notes having been given *bona fide* for loans of money; Wm. representing that he wished the notes to turn in as part payment for real estate which he designed purchasing from Phelps & Co., and giving his own note for the transferred notes. To secure the payment of this note, Wm. transferred, as security though under the form of an absolute conveyance, some of the lands so conveyed by S. S. to him (Wm.), to be released by Myron as he (Wm.) could find purchasers for portions of it; which was done accordingly, at different times. Myron, it appears, knew nothing of the transaction between S. S. and Wm. The decree set aside the conveyance absolutely between Wm. and Myron, as well as the former conveyances. *Held*,

1. That, even where there is no intentional fraud in voluntary conveyances, and whatever the motives of the parties may be, even if it be designed thus to make a better provision for the payment of creditors, such conveyances will be adjudged fraudulent as against creditors. A debtor in failing circumstances, is only allowed to place his property beyond the reach of his creditors by making a general assignment of it, when he does so for their benefit by devoting it unreservedly to the payment of his debts, and not with a view to his advantage in delaying until a favorable time the appropriation of the property for such purpose.

2. But as to Myron, the decree should have preserved his *bona fide* lien for the payment of his actual claim in preference. The rule is well settled in equity that when a security or conveyance is set aside as constructively fraudulent, it may be upheld in favor of one not guilty of actual fraud, to the extent of the actual consideration, to be vacated only as to the excess.

3. The decree was erroneous, likewise, in being personal against Myron, for which there was no basis in the transaction between the parties. Any debts of S. S. Phelps, or of S. S. Phelps & Co., which Wm. Phelps may have paid previously to the filing of the creditors' bill, should have been deducted from whatever proceeds he may have received from the fraudulently conveyed property; and in rendering any personal decree against him on account of such proceeds, it should only be for the balance after such deduction.

Pending the creditors' suit, which was in court since Sep., 1862, a cross-bill was filed in 1872, setting up that since the filing of the answers, S. S. Phelps had been adjudged a bankrupt, namely in 1868; and the assignee had fulfilled the duties of his appointment, and been discharged. On demurrer, this cross-bill was dismissed. *Held*,

4. That the cross-bill contained nothing to bar complainants right to relief, because the fraudulent conveyances were not void, but voidable only, by creditors; so that the property embraced therein did not vest absolutely in the assignee in bankruptcy, as a portion of the bankrupt's estate. All he had was an option, to impeach and avoid the conveyances or not, and he had not done so.

The discharge might debar other creditors from claims with regard to it, by reason of the discharge of their demands, but could not operate to deprive the complainants of the priority of lien acquired by filing their bill. Decree reversed in part.

20.—Garden City Ins. Co. *v.* P. Stayart.—Error to Superior Court of Cook.—Opinion by BREESE, J.

PRESUMPTION AS TO THE FILING OF PAPERS IN COURT.

STATEMENT. — Judgment by default against plaintiff in error, without a declaration actually filed. Afterwards, on application, the court ordered a declaration filed *nunc pro tunc*, on the affidavit of the attorney's student that he handed the declaration to the clerk to be filed, and an affidavit of the attorney that he had handed a declaration to the student for that purpose; opposed by an affidavit of defendant's attorney that twice he had examined the files after the time, and at neither time was there a declaration on file. *Held*,

That the presumption is that the clerk did his duty, and that where no file mark appears, a paper was not filed. And the two affidavits of the plaintiff were overborne by the affidavit of the defendant's attorney, so that the court erred in refusing to set aside the default, and in allowing the declaration to be filed *nunc pro tunc*.

Wm. C. Snyder, Assignee, etc., *v.* Robert Newlin et al.—Error to Whiteside.—Opinion by BREESE, J.

PRACTICE IN SUPREME COURT.

STATEMENT.—Foreclosure suit against unknown heirs of Newlin. These unknown heirs brought error alleging that default was taken against them, without proof of Newlin's death, and without affidavit of the existence of unknown heirs. The record failed to show that these unknown heirs were minors when bill was filed. In the Supreme Court, an attempt was made to supply this defect, by affidavit; but the court *Held*,

That such affidavit could not be received, the court being obliged to govern itself by the record alone.

Joseph Morley *v.* The Town of Metamora.—Appeal from Woodford.—Opinion by SCOTT, J.

LIABILITY OF OFFICIAL SURETIES.

Held, That where a supervisor, having in his hands money not paid over, but acknowledged, is afterwards re-elected and gives another bond with new sureties, and afterwards makes default in paying over the money on demand, the sureties on the second bond are liable, since they are to be presumed to know what is matter of public record, and that the supervisor had money in his hands; and further, the non-payment of the money, accruing after the second bond is executed, is to be regarded as the breach of the second bond.

WHEREAS, DAWSON KERR, JR., (THEN OF THE Village of Evanston, county of Cook and State of Illinois,) did, on the seventeenth (17th) day of September, A. D. 1874, by his deed of trust, duly executed and delivered, and recorded in the recorder's office of Cook county, Illinois, in book 420 of records, at page 328, did convey unto Lyman J. Gage, as trustee, the following described premises, to wit:

Lot seventeen (17), in block thirty-eight (38), of the original plat of the village of Evanston, Cook county, in the State of Illinois, to secure one (1) certain promissory note bearing even date therewith and payable to the order of himself five (5) years after date, in the sum of two thousand ($2,000) dollars, with interest at ten (10) per cent. per annum, payable annually, which promissory note was endorsed and delivered to Homer E. Wheeler, of Rockford, Winnebago county, Illinois, as part of the purchase money for the above described premises. Said note was by said Wheeler endorsed without recourse and is now the property of W. H. Tibbals, of Baileyville, Illinois.

And whereas, it is provided in and by said deed of trust that in case of default in the payment of said promissory note or the interest thereon, or any part thereof, according to the tenor and effect of said promissory note, or in case of the breach of any of the covenants or agreements in said deed of trust contained, the whole of said principal sum of said promissory note and the interest thereon to the time of payment may at once, at the option of the legal holder thereof, become due and payable and said premises sold in the same manner and with the same effect as if said indebtedness had matured, then, on the application of the legal holder of said note, it should or might be lawful for the said Lyman J. Gage, trustee (the undersigned), to sell and dispose of said premises, and all right, title, interest, benefit and equity of redemption of said Dawson Kerr, Jr., his heirs and assigns therein, at public auction, at the north door of the court house (corner of Adams and LaSalle streets) in the city of Chicago, in the State of Illinois, or on said premises, for the highest and best price the same will bring in cash, thirty (30) days' notice having been previously given by publication once in each week for four (4) successive weeks, in the Chicago Legal News or any newspaper at that time published in the city of Chicago, and to adjourn said sale from time to time as may be thought expedient, and to make, execute, and deliver to the purchaser or purchasers at such sale good and sufficient deed or deeds of conveyance for the premises sold, and out of the proceeds or avails of such sale to pay all costs of advertising and sale, commissions, attorneys' fees, and all expenses of this trust, then pay the principal and interest of said promissory note rendering the overplus, if any, to said party of the first part, his heirs or assigns. The principal and interest, it is claimed, will, up to the time of sale amount to the sum of twenty-three hundred eighteen 34-100 ($2,318.34) dollars.

And whereas, default has been made in the payment of the interest due on the seventeenth (17th) day of September, A. D. 1875, and the same still remains due and unpaid, and the legal holder of said promissory note has elected to declare and declared the principal sum due and payable, and made application to me, the undersigned trustee in said deed of trust named, to sell and dispose of the aforesaid lot seventeen (17), in block thirty-eight (38), under the provisions of said deed of trust.

Now, therefore, public notice is hereby given, that in pursuance of said deed of trust, and by virtue of the power and authority to me granted in and by the same, I, the undersigned trustee, will on Thursday, the twentieth (20th) day of April, A. D. 1876, at ten (10) o'clock A. M., at the west north door of the court house, (on the corner of Adams and LaSalle streets), in the city of Chicago, Illinois, sell and dispose of the premises described above, and all right, title, benefit and equity of redemption of the said Dawson Kerr, Jr., his heirs and assigns therein, at public auction for the highest and best price the same will bring in cash.

Dated Chicago, Illinois, March 17th, 1876.

26-29 LYMAN J. GAGE, Trustee.

ASSIGNEE'S NOTICE.—NORTHERN DISTRICT of Illinois, ss. At Chicago, in said district, on the 4th day of February, A. D. 1876.

The undersigned hereby gives notice of his appointment as assignee of James Duguid and James Crighton, of Chicago, in the county of Cook and State of Illinois, who have been adjudged bankrupts upon their own petition, by the District Court of the United States, in and for said District.

24-26 ROBERT E. JENKINS, Assignee.

CHICAGO LEGAL NEWS.

SATURDAY, MARCH 25, 1876.

The Courts.

UNITED STATES SUPREME COURT.

OCTOBER TERM, 1875.

Error to the Circuit Court of the United States for the Western District of Wisconsin.

DOW *v.* HUMBERT et al.

MEASURE OF DAMAGES AGAINST TOWN OFFICERS FOR REFUSING TO PLACE UPON THE TAX LIST THE AMOUNT OF JUDGMENTS, ETC.

The defendants, Supervisors of a town, failed to perform their duty in refusing to place upon the tax list the amount of judgments recovered by plaintiff against the town. *Held*, that plaintiff was entitled to recover only nominal damages, the taxable property still remaining subject to the judgment, and the right to relief still remaining.

Mr. Justice MILLER delivered the opinion of the court.

The defendants are sued by plaintiff for a failure to perform their duty as supervisors of the town of Waldwick, in the county of Iowa, Wisconsin, in refusing to place upon the tax list the amount of the judgments recovered by him against that town. By the statutes of Wisconsin, no execution can issue against towns on judgments rendered against them, but the amounts of such judgments are to be placed, by order of the supervisors, on the next tax list for the annual assessment and collection of taxes, and the amount so levied and collected is to be paid to the judgment creditor, and to no other purpose.

The declaration avers due notice served on the supervisors of these judgments, and demand that they be so placed on the tax list. The first judgment is described in the declaration as rendered in the circuit Court for the district of Wisconsin, on the 27th of October, 1870, for $708.90; and the notice to the supervisors, set out in the declaration, uses the same language. The other judgment is described as rendered in the circuit court for the western district of Wisconsin, June 10, 1871, for the sum of $1,531.56.

The answer of the defendants denies that there is any such judgment as that first described. And as to the second judgment, they say that after it was rendered the town of Waldwick was divided, and a part of it organized into the new town of Moscow; that thirty-seven per cent. of the judgment was collectable from that town, and that it was not the duty of the defendants to levy the whole judgment on the property of the citizens of Waldwick.

On these issues the parties went to trial before a jury. In support of the issue as to the existence of the first judgment, plaintiffs introduced a copy of a record of a judgment between the same parties, for the same amount, and of the same date, as that described in the declaration, in the circuit court for the eastern district of Wisconsin, to which defendants objected because it varied from the judgment described in the declaration, and in the notice given to defendants to place it on the tax list. The court sustained the objection, and this ruling is the ground of the first assignment of errors. The argument of counsel on this branch of the case rests mainly on the ground of the sufficiency of the notice to the supervisors. But the question before that is whether such a judgment was admissible under the pleadings as they stood. There had been for many years a circuit court for the district of Wisconsin. Shortly before this judgment was rendered, the district was divided into two districts, and the circuit courts were by the express language of the act of Congress called the circuit court for the eastern district, and the circuit court for the western district, respectively. There was no such court in existence at the date of the judgment offered, as the circuit court for the district of Wisconsin, and the defendants were justified in pleading *nul tiel* record to a declaration founded on a judgment of that date in that court. And on this issue as it stood when the record of a judgment in the circuit court for the eastern district was offered, it did not prove a judgment in the circuit court for the district of Wisconsin.

If plaintiff had asked leave to amend his declaration by inserting the word *eastern* before district in his first count, in describing his judgment, it would no doubt have been granted, and the question would then have arisen as to the sufficiency of notice to the supervisors, the notice containing the same mistake. But on the plea of *nul tiel* record of judgment of the circuit court for the district of Wisconsin, it is clear a judgment of the circuit court for the eastern district of Wisconsin is not evidence of such a judgment.

Plaintiff having introduced a record of his judgment for $1,531.56 in the western district of Wisconsin, and notice and demand as to that to the supervisors, the defendants were permitted, as the court said, solely in mitigation of damages, to offer the record of the division of the township and resolutions of the board, adopted after this suit was brought, directing the town clerk to place this latter judgment, with its interest, on the tax list in November, 1872, to which exceptions were taken, and this constitutes the ground of the second and third assignments of error. They will be considered in connection with the fourth and last assignment.

This being all the testimony, plaintiff requested the court to charge the jury that the plaintiff was entitled to recover of the defendants the amount of both these judgments, with intetest from their date; and this being refused, he asked the same instruction as to the second judgment, which was refused. Exceptions were taken to both these refusals, and to the following language in the charge which the court did deliver:

"The jury are instructed upon the whole evidence in the case that the plaintiff is entitled to recover nominal damages from the defendants by reason of their failure to direct the levy of the tax in question. The plaintiff is not entitled to recover any more, because he has not shown that he has suffered any injury from the neglect or omission of the defendants to cause the clerk to put the judgment on the next tax-roll of the town."

The whole case turns upon the soundness of this latter instruction, representing, as it does, the converse of that which the plaintiff asked and which was refused. And the single question presented is, whether these officers, by the mere failure to place on the tax list, when it was their duty to do so, the judgment recovered by plaintiff against the town, became thereby personally liable to the plaintiff for the whole amount of said judgment, without producing any other evidence of loss or damage growing out of such a failure.

It is not easy to see on what principle of justice the plaintiff can recover from defendats more than he has been injured by their misconduct.

If it were an action of trespass, there is much authority for saying that plaintiff would be limited to actual and compensatory damages, unless the act were accompanied with malice or other aggravating circumstances. How much more reasonable that, for a failure to perform an act of official duty, through mistake of what that duty is, plaintiff should be limited in his recovery to his actual loss, injury, or damage?

Indeed, where such is the almost universal rule for measuring damages before a jury, there must be some special reason for a departure from it.

In the case before us it must be presumed that the taxable property of Waldwick township remains to-day as it was when the levy should have been made. That a levy this year would as surely produce the money as if it had been made last year. The debt is not lost. The right to recover remains. The property is liable to its satisfaction, and the means of subjecting it to that use are still open to plaintiff. The only loss, then, is the delay, unless it may be the cost and expense of the unavailing effort to have the debt levied on the tax of the previous year; and this, if proved, could have been recovered under the instructions. For mere delay in paying a monied demand, the law has long recognized interest as the only damages to be recovered, and this interest is by law added to the assessment when placed on the tax list. If A, by the highest class of express contract, say a promissory note or bond, promise to pay B ten thousand dollars on a day fixed, and fail to do it, B can only recover interest for the delay, though he may have depended on that money to save his homestead from sacrifice, and has lost it by reason of that failure. So a man buying real estate may improve, adorn, and have it grow in his hand to a value ten times what he gave for it. But if he loses all this by a failure of his title, he can only recover of the warrantor the sum which he gave for the land. These are apparent hardships. But wisdom and experience have shown that the danger of holding persons liable for these remote consequences of the violation of their contracts is far more serious in its consequences than occasional failure of full compensation by the application of the rule of interest for delay, and of the purchase money in a suit on a warranty of title to lands.

"Damages," says Mr. Greenleaf, "are given as a compensation, recompense or satisfaction to the plaintiff for any injury actually received by him from the defendant. They should be precisely commensurate with the injury, neither more nor less, and this, whether it be to his person or estate." (2 Greenleaf's Evidence, sec. 253) And without entering into the question whether this rule excludes what are called exemplary damages, which are not claimed here, we think this definition of the principle on which damages are awarded in actions of law, a sound one.

The expense and cost of the vain effort to have the judgment placed on the tax-list; the loss of the debt, if it had been lost; any impairment of the efficiency of the tax levy, if such there had been; in short, any conceivable actual damage the court would have allowed if proved. But plaintiff, resting solely on his proposition that defendants by failing to make the levy had become his debtors for the amount of his judgment, asked for that and would accept no less.

Counsel for plaintiff relies mainly on the class of decisions in which sheriffs have been held liable for the entire judgment for failing to perform their duty when an execution has been placed in their hands. The decisions on this subject are not harmonious; for while it has been generally held that on a failure to arrest the defendant on a capias, or levy an execution on his property, or to allow him to escape when held a prisoner, the amount of the debt is the presumptive measure of damages, it has been held in many courts that this may be rebutted or the damages reduced by showing that the prisoner has been rearrested, or that there is sufficient property subject to levy to satisfy the debt, or other matter showing that plaintiff has not sustained damages to the amount of the judgment. This whole subject is fully discussed and the authorities collated in Sedgwick on Damages, pp. 506–525. Richardson *v.* Spence, 6 Ohio, 13. But without going into this disputed question, we are of opinion that those cases do not furnish the rule for the class to which this belongs.

The sheriff, under the law of England, was an officer of great dignity and power. He was also custodian of the jail in which all prisoners, whether for crimes or for debt, were kept. He had authority in all cases, when it was necessary, to call out the whole power of the county to assist him in the performance of his duty. The principle of the sheriff's liability here asserted originated, undoubtedly, in cases of suit for an escape. Imprisonment of the debtor was then the chief if not the only mode of enforcing satisfaction of a judgment for money. It was a very simple, a very speedy, and a very effectual mode. The debtor being arrested on a *capias*, which was his first notice of the action, was held a prisoner, unless he could give bail, until the action was tried. If he gave bail, and judgment went against him, his bail must pay the debt, or he could be re-arrested on a *capias ad satisfaciendum*, and if he had given no bail he was holden under this second writ until the money was paid. To permit him to escape was in effect to lose the debt, for his body had been taken in satisfaction of the judgment. Inasmuch as the object of keeping the defendant in prison was to compel the payment of the debt through his desire to be released, the plaintiff was entitled to have him in custody every hour until the debt was paid.

It is also to be considered that for every day's service in keeping the prisoner the sheriff was entitled to compensation by law at the hands of the creditor. (Williams *v.* Mostyn, 4 M. and W., 153; Williams *v.* Griffith, 3 Exch., 584; Wylie *v.* Bird, 4 Q. B., 566; 6 id., 468.)

With the means in the hands of the sheriff for safe keeping and re-arrest, with the escape of the debtor almost equivalent to a loss of the debt, and with compensation paid him by plaintiff for his service, it is not surprising that when he negligently or intentionally permitted an escape, he should be held liable for the whole debt.

How very different the duties of the class of officers to which defendants belong, and the circumstances under which their duties are performed. There is no profit in the office itself. It is undertaken mainly from a sense of public duty, and if there be any compensation at all, it is altogether disproportionate to the responsibility and trouble assumed. They are in no sense the agents of creditors, and receive no compensation from holders of judgments and other claims against the town, for the collection and payment of their debts. There are no prisons under their control, no prisoners committed to their custody, no *posse comitatus* to be brought to their aid. But without reward, and without special process of a court to back them, they are expected to levy taxes on the reluctant community at whose hand they hold office. To hold that these humble but necessary public duties can only be undertaken at the hazard of personal liability for every judgment which they fail to levy and collect, whether through mistake, ignorance, inadvertance or accident, as a sheriff is for an escape, without any proof that the judgment creditor has lost his debt, or that its value is in any manner impaired, is a doctrine too harsh to be enforced in any court where imprisonment for debt has been abolished.

The case of The King, at relation Parbury, *v.* The Bank of England, Dougl., 524, is cited as sustaining the plaintiff in error. It was an application for a mandamus to compel the governor and company of the Bank of England to transfer stock of the bank. The writ was denied on several grounds, among which, as a suggestion, Lord Mansfield said that "where an action will lie for complete satisfaction, (as in that case,) equivalent to a specific relief, and the right of the party applying is not clear, the court will not interpose the extraordinary remedy of a mandamus." He then shows that the right of the party in that case to have the transfer made was not clear. As this was not an action against the officers of the bank for damages, the remark that there was other relief is only incidental, and the point as to the measure of damages was not in issue.

A note to the principal case shows that an action of assumpsit was afterward brought and compromised before final judgment. But on the whole case there is no discussion of the measure of damages; and that question remained undecided. The case of Clark *v.* Miller, 54 N. Y., 528, decided very recently in the Commission of Appeals, appears to be more in point. It was an action against the supervisor of the town of Southport, Chemung county, for refusing to present to the board of supervisors of the county plaintiff's claim for damages as reassessed for laying out a road through his land.

The court, without much discussion of the principle, holds the defendant liable for the full amount of the re-assessment, on the authority of the Commercial Bank of Buffalo *v.* Kortright, 22 Wend., 348.

That case was decided in the Court of Errors in 1839. It was an action for refusing to make a transfer of stock of the bank. The chancellor (Walworth) was of opinion that the extent of the damages was the depreciation of the stock, and not its full value; and bf this opinion were four senators.

In the case of The People *v.* The Supervisors of Rickmond. 28 N. Y., 112, also before the court in 20 N. Y., 252, the relator had sued out a writ of mandamus requiring the supervisors to audit his claim for damages assessed for land taken as a highway. The supervisors made a return to the writ, which, proving false, the supreme court rendered a judgment against them personally for the claim of $200, and for $84 damages for delay. The court of appeals said that, as the return of the supervisors was false, and the relator had been kept out of the

money to which he was entitled from the town, the supervisors may be properly made liable in damages to the extent of the interest upon the $200, to wit, $84, and they affirm the judgment as to the $84, and reverse it as to the $200, for which they order a peremptory writ of mandamus.

This answer accords precisely with our views, and we think it of equal authority with Clark *v.* Miller, above cited in 54 New York.

We are of opinion that, in the absence of any proof of actual damages in this case, the defendants were liable to nominal damages and to costs, and no more.

If we are correct in this, the evidence of the division of the township, and that the supervisors had actually placed the judgment of plaintiff in the tax list of the next year, were properly received in mitigation—at all events did him no harm, as he had proved no actual loss or injury.

The judgment of the circuit court is affirmed.

Mr. Justice CLIFFORD dissenting. I dissent from the opinion and judgment of the circuit court in this case, because the instruction given by the circuit court to the jury was erroneous. Plaintiffs were entitled at least to the actual damages sustained by them in view of the whole evidence. Unless the plaintiffs in such a case may recover something more than nominal damages, the debt becomes valueless, as the same conduct by the supervisors may be repeatsd indefinitely, and the rule necessarily leads to practical repudiation.

U. S. CIRCUIT COURT, S. D. ILLINOIS.

OPINION, MARCH, 1876.

THOMAS A. SCOTT et al., Trustees, etc., *v.* THE CLINTON AND SPRINGFIELD R. R. CO.

REMOVAL OF CAUSE FROM STATE TO FEDERAL COURT—AFTER APPOINTMENT OF RECEIVER IN ONE OF THE SUITS.

REMOVAL—TWO CASES.—That when the court is considering a question of jurisdiction, and whether or not the parties in an independent suit, seeking different relief from that of another suit, can be prevented from exercising an undoubted right under the act of Congress, the court can look to the real status of the two cases to determine whether this is an insuperable obstacle to the removal of the cause. A receiver had been appointed in the other case. That receiver had been removed because the court deemed the trustees the proper custodians, under the circumstances, of the property. It seems to have been conceded that the other case was not one where a receiver should have been appointed. It may be regarded, therefore, only a possession of the trustees, so far as the court was concerned, for the purpose of exercising a certain control over, the property, so as to protect the rights of all parties. In this case the rights of the plaintiffs are paramount. This is a distinct and separate controversy, with which the other case has nothing to do.

2. EFFECT OF ORDER.—That the effect of the order of the State Court, so far as it can have any upon the right of removal, is just as strong, and places just as effectually the property in the possession of the trustees in this case as it does in the other case.

3. PERSONAL PROPERTY—MORTGAGE ON ROLLING STOCK.—That the provision in the Constitution of 1870, which declares that the rolling stock, etc., of railroads shall be personal property, does not change the rule of equity which the U. S. Supreme Court declared in Coe v. Pennock, reported in 23rd Howard, to the effect that whenever a mortgage is made by a railroad company to secure bonds and the mortgage, declares that it shall include all present and after acquired property as soon as the property is acquired, the mortgage operates upon it.

4. WHEN APPLICATION FOR REMOVAL MUST BE MADE.—The court construes the 3rd Sec. of the act which declares that a party seeking a removal from the State to the Federal Court shall make and file a petition in the State Court, before or at the term at which said cause would be first tried, and before the trial thereof.—[ED. LEGAL NEWS.]

This cause, originally instituted in the Circuit Court of McLean county, Illinois, was removed to the Circuit of the United States for the Southern district of Illinois, in December last, under the act of Congress of March 3d, 1875, and a motion having been made by Henry Crawford, on behalf of the respondents, to strike the record from the files, and TREAT, J., having intimated a desire to have the opinion of DRUMMOND, J. upon the question, the motion was argued before DRUMMOND, J., February 14, 1876, by Mr. Crawford for the motion, and R. Biddle Roberts, of Chicago, for the trustees, *contra.*

DRUMMOND, J., having intimated an opinion, and TREAT, J., concurring, an order was entered at Springfield on the 15th, taking jurisdiction of the case, and requiring the defendants to answer.

Subsequently Mr. Weldon, of Bloomington, made an application to the court, praying them to rescind the order taking jurisdiction of the case, and the court allowed the same to be heard, and on March 8th, 1876, it was argued by Mr. Weldon in support of the motion, and by Mr. Roberts, of Chicago, and Mr. Williams, Bloomington, *contra.* The following is the opinion of the Court:

DRUMMOND, J.—This was a suit originally brought in the Circuit Court of McLean county, and which has been removed from that court to this court under the act of Congress of March 3d, 1875.

At the time the appplication was made to the State Court for the removal of the cause, there was also pending in the Circuit Court of McLean county a bill filed by Kelly for himself and others as stockholders of the railroad company, against the company and the directors, in which the latter were charged with certain wrongful acts, to the injury of the stockholders, among which was one that the directors were interested in a company known as the Morgan Improvement Company, which had contracted to construct the railroad, upon which contract the directors had realized large profits, and it was claimed that these profits should enure to the benefit of the company. That case had gone to a decree, which was affirmed by the Supreme Court of the State, and all the questions in the case appear to have been settled except the taking of an account.

The plaintiffs in this suit are trustees and bondholders, under a certain deed of trust, given by the railroad company to secure bonds which had been issued for the construction of the railroad, and which it is not controverted were paramount to any claims which might exist on the part of plaintiffs in the Kelly case, upon the property of the road, or upon profits that might be realized upon any contract made by the directors, and which might enure to the company.

The State Court had appointed a receiver in the Kelly case, who, in August last, had been superseded by the appointment of two of the plaintiffs in this case, Scott and Jewett, as trustees, under the deed of trust, the receiver being required to deliver all the property, held by him as such, to them. The trustees were restrained from selling the property until the further order of the court; but were to receive and hold it, and operate the road, under the powers vested in them by the deed of trust, and they were to retain, use and operate the road until the further order of the court, or until discharged from their trust according to law.

At the same time an order precisely similar, was made by the State Court in this case, so that Scott and Jewett had possession of the road, and were operating it as trustees under the deed of trust (which authorized them in a certain contingency so to do), and in conformity with the order of the State Court.

This being the condition of the two cases, and a record of this case being filed in this court, a motion is made, the effect of which is to remand the cause to the State Court, first, for the reason that at the time the application was made for a removal, the order made in August in the Kelly case so operated upon the property that it was still in the custody of the State Court, in the hands of the trustees, as *quasi* receivers; and second, because the petition filed by the plaintiffs in this case for the removal of the case was not in apt time. No objection is made to the sufficiency of the petition, or of the bond given in the State Court, and there is no controversy but that the plaintiffs in this case and the defendants were citizens of different States, and so that the cause as to citizenship was removable.

As to the first objection:—the suit in the Kelly case was a controversy in relation to the property confessedly subordinate to any rights existing on the part of the trustees and bondholders, under the deed of trust, the plaintiffs in this case. The controversy existing in the Kelly case, was substantially settled when the application was made for removal in this case. That case did not claim to interfere with the rights of any of the bondholders, or of the trustees representing them. This, then, was a controversy at the time the application was made, *wholly* between citizens of different States. Did the order made in August by the State Court in the Kelly case, turning the property over to the trustees as custodians, to hold and operate the road under the deed of trust, prevent the removal of this cause? It is to be observed that order was in no respect different from that made in this case by the State Court; the property therefore was just as much in the possession and control of the trustees in this case as in the Kelly case, and when the case is removed to this court, if by law that can be done, it necessarily brings with it the order made by the State Court transferring the property to the trustees in this case, and the order certainly is just as binding and conclusive upon the rights of parties in this case, and the question is, whether the court cannot look into the real controversies existing in the two cases, for the purpose of determining whether or not the order made by the state Court in the Kelly case could prevent the removal of this case.

It is manifest that the order in both cases was made because the deed of trust authorized, under certain circumstances, the trustees to take possession of the property.

It is not disputed but that the circumstances authorizing such possession under the deed of trust, had occurred, and that, independent of the order of the court, the trustees had a right, according to the terms of the deed of trust, to take possession of the property.

The effect, then, of the order made in each case, was to put the trustees in possession under the deed of trust, and because there was a litigation pending, affecting the property in the two cases, to hold the trustees subject to some extent at least, under the control of the court. But it seems to me that when we are considering a question of jurisdiction, and whether or not these parties in an independent suit, seeking different relief, can be prevented from exercising an undoubted right under the act of Congress, we can look to the real status of the two cases to determine whether this is an insuperable obstacle to the removal of the cause.

A receiver had been appointed in the Kelly case. That receiver had been removed because, it is to be presumed, the court deemed the trustees the proper custodians, under the circumstances, of the property. In fact, it seems to be conceded that the Kelly case was not one where a receiver should have been appointed. It may be regarded, therefore, only a possession of the trustees, so far as the court was concerned, for the purpose of exercising a certain control over the property, so as to protect the rights of all parties. Now what rights have any of the parties in the Kelly case, as compared with the plaintiffs in this case?

In this case the rights are paramount. This is a distinct and separate controversy, with which the Kelly case has nothing to do. All the serious questions in that litigation have been settled by the opinion of the Supreme court of the state; they do not interfere with the controversy in this case, and as to the possession of the property, that is substantially under the authority of the deed of trust to which these plaintiffs are parties, and under which it is their duty to take possession and control, and operate the road in the interests of the bondholders, whom the trustees represent. And certainly, as already mentioned, the effect of the order of the State court, so far as it can have any upon the right of removal, is just as strong, and places just as effectually the property in the possession of the trustees in this case, as it does in the Kelly case.

A priority of equity and of right must give this court a paramount control over the property, where the case is removed, as we think it can be, from the State to the Federal court. It follows, therefore, that the control of the State court over the property in the Kelly case, as against the trustees in this case, and the parties and interests they represent, is little more than nominal, and if the trustees are called on by the State court, it would be sufficient to answer that they are subject to the terms of the deed of trust, and to the orders of this court in this case, at least to the extent and priorities of the interests the trustees represent.

It is said, however, that there is, or may be, a large amount of property not covered by the mortgage or deeds of trust, and therefore not subject to the claims of the bondholders represented in the mortgage.

There seems to be considerable misapprehension as to the effect of the provision in the constitution of 1870 of this state, which declares that the rolling stock and other movable property of railroads shall be personal property. I do not understand that this changes the rule of equity which the Supreme court of the United States declared in the case of Coe *v.* Pennock, reported in the 23d of Howard, to the effect that whenever a mortgage is made by a railroad company to secure bonds, and the mortgage declares that it shall include all present and after acquired property, as soon as the property is acquired, the mortgage operates upon it. In other words, it seizes the property or operates on it by way of estoppel as soon as it comes into existence, and is in possession of the mortgagor, and the mortgagees, under such circumstances, have a prior equity to the claims of creditors obtaining judgments and executions after the property is thus acquired, and placed in possession of the mortgagor. That was a case of locomotives and rolling stock which had been purchased by the mortgagor long after the mortgage was executed, and of which the mortgagor had acquired possession prior to the obtaining of judgments by the parties who sought to make them available for the payment of their debts.

That principle has been adhered to in a case in the first of Wallace, Dunham *v.* R. W. Co., and also in the case of the Galveston Railroad Company *v.* Cowdrie, in the 71st of Wallace, 459, and must be considered as the settled law of the Federal courts upon that subject, so that all property that was acquired in this case by the railroad company, the deeds of trust having expressly declared that it was given for all the property then in possession of the railroad, or thereafter to be acquired, was covered by the deed of trust, and the mortgagees have a superior equity as against all parties who, at the time that any after acquired property came into possession of the railroad company, had not an inchoate or perfect lien upon the same

The principles declared in the case of Coe *v.* Pennock and other cases referred to in the Supreme Court of the United States, directly apply in this case. I do not understand that it makes any difference whether the property is real or personal. It is true that we have, as a sort of necessity of the case, and yielding, to some extent, to the statute of this State, where supplies and materials have been furnished to a railroad, and the diligence required by the statute has been used by the creditors to enforce their claims within six months, allowed the payment of those claims, which, perhaps, is stretching the principle referred to as decided by the Supreme court, beyond its legitimate operation.

II. Then, as to the second objection, that the application was not made in time. The third section of the act of 1875 declares that a party seeking a removal from the State to the Federal court, shall make and file a petition in the suit in the State court, before or at the term at which said cause could be first tried, and before the trial thereof.

It is objected, that as more than a term elapsed from the time that this suit was pending in the State court, before the application was made, therefore it was too late; and the question arises as to the true construction of this part of the third section of the act of 1875.

When is the term at which the cause could be first tried, and when is it that it can be said to be before the trial thereof? Could this cause have been tried or heard before this application was made? We are required to say, upon the facts as they appear in the record, that this cause could have been tried at a term before the application was made. In a case which was recently decided by me, at Chicago, I hold that where a cause was pending in the State court, being a bill in chancery, and where an answer had been filed and an issue thereon, and where it appeared that the cause could have been tried, but that by consent of both parties it had been continued over the term, the application for removal came too late, for the cause was at issue and could have been heard, as it satisfactorily appeared, by the court, and therefore the action of the parties in postponing it, was neither an act of the law or of the court, and consequently the application came too late. But in this case, there was not only no issue when the application was made, but there was no answer filed by the parties. It does not appear that there had been any such negligence by those who made the application in this case, as to deprive them of the right which was clearly given by the act of 1875. The object of this provision of the law, was to prevent

parties from making an application after the term when the cause could have been tried.

Now, unless the party has been guilty, of some negligence, the cause cannot be heard until there is an issue; and in this case it was not competent, therefore, for the court to try the case, there being no issue before the court to try. And, therefore, I think that within the meaning of the law, a term had not elapsed during which the cause could have been heard. It is to be regretted, perhaps, that the language of the statute upon this subject is not more precise. It will be observed that is more especially applicable literally to the trial of a case at law at "the term at which said cause could be first tried:" and it is often a matter of extreme difficulty to determine what is the first term at which a chancery cause can be tried or heard. Whether the parties seeking a removal could be guilty of such laches as to prevent it, although an issue had not been made up, and the cause might not be ripe for hearing, it is not necessary now to decide. It is sufficient that it does not affirmatively appear in this case, upon inspection of the record, that such laches existed on the part of these plaintiffs. Neither is it necessary to decide whether it is competent for this court to hear evidence outside of the record. It is sufficient for us to decide the case as it exists before us. And we think that this is a controvesry between citizens of different states, and that the application was made for removal at or before the term at which the cause could be first heard, and that, therefore, it is properly removed to this court. The only object of a *certiorari*, upon which stress is sometimes laid, is to bring the record from the State into the Federal court.

The act of 1875 provides for the issue of that writ by the Federal court, in cases within the terms of the act, and gives the Federal court power to enforce the writ. But here the record itself of the State court is before us, and the issue of a *certiorari* would therefore be a useless act.

U. S. CIRCUIT COURT, S. D. ILLINOIS.

Before DRUMMOND and TREAT, JJ.

OPINION MARCH 11, 1876.

NEWARK SAVINGS INSTITUTE *v.* WM. PAUHORST ET AL.

LIABILITY OF OFFICER OF TOWN FOR NOT PLACING JUDGMEMT ON TAX LIST.

The court, citing the opinion of the Supreme Court of the United States in Dow v. Humbert et al., reported in this issue, that court has decided, in effect, where the supervisors of a town refuse to enter the amount of a judgment on the tax list of the town, that the measure of damages is not the amount of the claim. At the same time it is stated that if the plaintiff has sustained any special damages they can be recovered. The decision is, that nothing more than quasi nominal damages can be allowed. The court feels restricted by the decision of the U. S. Supreme Court and says, while it allows some damages they will not amount to much more than nominal damages, being five hundred dollars to the plaintiff and eighty-five dollars paid for notices.—[ED. LEGAL NEWS.]

DRUMMOND, J.

This is an action on the case by the plaintiff, against the defendants, to recover damages for the non-performance of a duty by the defendants, as supervisors of the county of Macoupin.

It seems that the plaintiff recovered two judgments in this court, against the county of Macoupin, amounting, altogether, to over one hundred thousand dollars, and writs of mandamus were issued, requiring the supervisors to levy a tax amounting to one per cent. of the assessed value of the property in the county, to pay these judgments. These writs of mandamus were issued respectively on the 24th of May, and the 28th of August, 1873. They were served upon the board of supervisors of the county, and the defendants all had notice of the fact that writs of mandamus had been issued, independent of the general obligation which the law imposed upon them to discharge the duty. The attention of the defendants was, therefore, in these writs, specially called to the duty incumbent upon them, to impose a tax to pay the judgments.

They willfully disregarded and disobeyed these orders of the court; in other words, violated a solemn obligation.

For this disobedience to the order of he court, and for the non-performance of the duty required by the law, this action was brought, and the only question is, what is the amount of damages that can be recovered in the case.

It may perhaps be said, although it might hardly to be considered as proved in the case, but still it has been argued somewhat upon that undisputed fact, that, for this disobedience to the orders of the court, the parties were fined, and the fine was paid. But it was not paid by themselves. They took the money of the county and paid the fine. And these fines were, it is understood, appropriated in part to the payment of costs.

A decision of the Supreme Court of the United States, not yet reported, Dow *v.* Humbert et al., has restricted us very much as to the *quantum* of damages which should be allowed in a case like this. That court has decided, in effect, that the measure of damages is not the amount of the claim. At the same time it is stated that if the plaintiff has sustained any special damages, they can be recovered.

Looking at the whole case, without going into the reasons which have influenced the conclusion, and regarding the decision above referred to, as allowing nothing more than *quasi* nominal damages, we have determined that we will give the plaintiff some compensation for the trouble to which it has been put in consequence of the non-performance of of a duty by the defendants, in the employment of counsel, and for the labor and expense, without defining it in any precise form or language.

In the case of Dow *v.* Humbert et al. a demand was made on the officers of the town to place upon the tax-list the judgments then in question which was necessary under the law of Wisconsin, before the judgments could be paid. That was not done. The Supreme Court thereupon assumed that it might have been in consequence of ignorance, inadvertance or mistake, on the part of the officers, although it does not exactly appear how, or under what circumstances that inference was drawn.

There certainly can be no such assumption here. In that case there were only allowed nominal damages, and which would not carry costs. Here the case is infinitely more aggravated. In fact, it is as much so as it possibly can be. It is a case where the defendants have set at defiance the orders of the court—orders they were bound to obey—a case in which they were as guilty of the violation of an imperative duty as men well can be. This court is a part of *the* institutions of their country, just as much as the circuit court of Macoupin county. They are just as much bound to obey its mandates as though it was a court of their own county. They have chosen deliberately, solemnly, to disregard them.

It is said, to be sure, that we have punished them and can punish them again. Part is true, but this is an action brought for the violation of a public duty, which has resulted, it is claimed, in pecuniary loss to the plaintiff. So that it is a case where we think we may go further than the Supreme court said they could go in the Wisconsin case. But at the same time we feel restricted, as I have said, by the rulings of the Supreme court, and, while we give some damages, after all, they will amount to not much more than nominal damages.

We will allow five hundred dollars to the plaintiff and eighty-five dollars for the payment of the money for notices.

The judgment of the court will be therefore for the plaintiff for the amount of $585 and costs.

The parties who were not present at the meeting of the board of supervisors, at which the act of disobedience occurred, as well as those who voted for the imposition of the tax, as directed by the writs, are, of course, not included in this judgment.

I ought, perhaps, to add that our view was, if we were left free by the Supreme court, that the plaintiff would at least be entitled to the interest upon the money which would have been collected, if the defendants had performed their duty.

The presumption is, the plaintiff could have had the use of the money, and, in one sense, might have compounded the interest. But we think we are not at liberty, under the decisions of the Supreme court. to allow it. That court seems to think that as the interest is still due and payable, and may be included with the principal, that is all which can be allowed.

We have also thought that there has not been, within the meaning of the Supreme court, any substantial "impairment" of the responsibility of the county. It is true, that the assessed value of the property of Macoupin county, was much less in 1875 than it was in 1873; but still it appears that the property is sufficient to enable the county to pay,—at any rate, the fund out of which these judgments are to be made, is sufficiently large to enable the plaintiff to avail itself of the laws to recover the amount.

It is true, that under the decisions of the Supreme court, these judgments against municipal corporatiors, where people do not choose to pay them, are not very potential. It has held that where the laws of a State declare that there can be no execution against the property of a municipal corporation, the Federal courts are without power to collect judgments by the imposition of taxes, although that may be the only resource. Rees *v.* Watertown, 19 Wall., 107.

And now it has been decided, substantially, that the officers of such corporations are not liable for more than nominal damages, if they refuse to perform the duty which the law imposes on them. The result is, judgments can be obtained in the courts against these municipalities, upon the bonds or coupons they have issued, and their obligations construed with the greatest rigor.

But *after* judgments, and when it is attempted to make their property available to satisfy them, then arises the real difficulty of the case, in the effort to overcome which, the old legal maxim, that there is no wrong without a remedy, seems sometimes to be reversed.

MR. PALMER & SON, for plaintiff.
MR. LYMAN TRUMBULL, for defendants.

Through the courtesy of JOSIAH H. BISSELL, Official Reporter of this District, we have received the following:

U. S. D. COURT, S. D. OF OHIO.

FEB., 1876.

THE UNITED STATES *v.* H. A. HAMILTON and L. A. LOGAN.

INDICTMENT FOR ATTEMPTING TO DEFRAUD THE GOVERNMENT OF ITS REVENUE, AND FOR COMMITTING AN OFFENSE AGAINST THE UNITED STATES.

Four of the counts in the indictment charged the defendants as conspiring with each other; the other three counts charged them with conspiring with other persons unknown. § 1036 of the Revised U. S. Statutes at Large, of 1874, is as follows: "Sec. 1036. On an indictment against several, if the jury cannot agree upon a verdict as to all, they may render a verdict as to those in regard to whom they do agree, on which a judgment shall be entered accordingly; and the cause as to the other defendants may be tried by another jury."

BATEMAN, RICHARDS & DYER for the United States.

BUTTERWORTH & VOGLER, T. YOUNG, and MOULTON & J. JOHNSON, for defendants.

SWING, J., charged the jury, that, in order to find either of the defendants guilty, under the four counts, charging them jointly, they must find, from the evidence, that they had conspired together; that, on these four counts, an acquittal of one was an acquitttal of both; but that under the other three counts, if they believed that the defendants had conspired with other persons to the government and the jury unknown, they might find the defendants guilty.

After remaining out for two days, the jury came into court and inquired, whether, if they believed from the evidence that one of the defendants was not guilty, and as to the other they were unable to agree, they could so return their verdict, upon which SWING, J., charged them, that under the three counts, charging them with conspiring with other persons, if they found from the evidence that one of the defendants had conspired, not with his co-defendant, but with other persons to the government and jury unknown, they might find a verdict of guilty as to him and not guilty as to his co-defendant; that under these three counts an acquittal of one was not an acquittal of both. If they were satisfied from the evidence that one of the defendants was not guilty, they might return a verdict of not guilty as to him; and if, as to the other defendant, they were unable to determine as to the fact of his conspiring with persons unknown, whether he was guilty, they might return as to him that they could not agree upon a verdict.

The jury found a verdict of not guilty as to Hamilton, and guilty as to Logan, in the three counts charging him with conspiring with other persons unknown.

SUPREME COURT OF TENNESSEE.

JACKSON, NOV. 27, 1875.

J. W. GOSLING *v.* T. S. GRIFFIN.

NEGOTIABLE PAPER—PAYMENT BY MAKER BEFORE MATURITY, BUT AFTER INDORSEMENT AND TRANSFER, NO DEFENSE TO ACTION BY HOLDER.

Payments of negotiable paper before it is due, and in the absence of such paper, are not made in due course of business, and the party so paying should be held to do so at his own risk. Therefore, the maker of negotiable paper is not discharged if, before the maturity of the paper, and after its transfer, even as collateral security, he makes payment to any person other than the real holder. And this is so although the maker may have no notice of such transfer at the time of making such payment.

The case of Vatterlien v. Howell, 5 Sneed, 441, reviewed at length and overruled.—[ED. COMMERCIAL AND LEGAL REPORTER.]

HOWELL E. JACKSON, Special J., delivered the opinion of the Court.

The material facts of this case necessary to be noticed in determining the legal questions presented by the record, are the following:

On the 9th day of January, 1871, the defendant, T. S. Griffin, executed and delivered to Pollard & Co., his negotiable promissory note for the sum of $598.00 payable thirty days after date, the consideration for said note being the proceeds of a buggy which Pollard & Co. had placed in said Griffin's hands for sale, and which he had sold, and used and appropriated the money. The payees in said note being indebted to the plaintiff Gosling in the sum of $554.25 evidenced by their acceptance, which matured 1st and 3d of January, 1871, and which had been placed in the hands of attorneys at Memphis for collection, on the 10th day of January, 1871, indorsed in blank the defendant's said note for $598 00 and delivered it to the plaintiff's attorney as *collateral* security for the *indorsers'* acceptance which said attorneys held for collection. Said attorneys, at the time of receiving defendant's note from said Pollard & Co., gave to the latter a receipt specifying that said note was received by them as collateral security for the payment of said Pollard & Co.'s acceptance for $554.25 due 1st and 3d of January, 1871. It appears that the defendant, after the date of this transfer, and before the maturity of his said note, delivered to Pollard & Co. several lots of flour and meal in payment and satisfaction of his note. This flour and meal to the amount of $613.00, was delivered on the 26th and 29th of January, 1871, without notice or knowledge on the part of defendant that this note had been previously indorsed and transferred by Pollard & Co. to the plaintiff. He accordingly refused to pay the note at its maturity and was sued thereon by the plaintiff in the First Circuit Court of Shelby county.

Amongst other pleas not necessary to be noticed, the defendants plead that said note was not transferred to the plaintiff in due course of trade, but was given to the plaintiff by the firm of Pollard & Co. as collateral security for a debt which the said Pollard & Co. owed the plaintiff, and further that the defendant paid said note to the firm of Pollard & Co. without notice from the plaintiff that he had the note assigned to him, and of this he put himself upon the country. By consent of parties a jury was waived and the case was tried by the court, and resulted in a finding "that though the note was assigned before maturity, it being received as collateral to secure a pre-existing debt, the defendant should have been notified of the assignment and the plaintiff cannot recover on the note, because defendant was not so notified (before paying the note to Pollard & Co.) The court thereupon gave judgment for the defendant, from which the plaintiff has appealed in error to this court.

In rendering judgment for the defendant upon the foregoing facts the court below followed the case of Vatterlien *v.* Howell et al. 5 Sneed 441, which presented the direct question here presented and is conclusive of the present case if it is to be adhered to as authority. In Vatterlien *v.* Howell the material facts were, that Howell & Co. on the 10th of March, 1856, executed to T. S. Brown & Co. their promissory note for $208,00 due at six months. On the 15th of May, 1856, Brown & Co., the payees, endorsed and delivered said note to Vatterlien as collateral security for the pay-

ment of a pre-existing debt due from them to him.

Vatterlien gave the makers no notice of this assignment of the note to him, and on the 30th of July, 1856, before the note matured, the makers paid the amount thereof to Brown & Co., the payees. When the note was due, Vatterlien sued the makers and it was held, that their payment to the payees, before maturity and after the assignment of the note, having been made without notice of the transfer, was a good defence against the suit of said Vatterlien. This decision seems to proceed upon the idea that an indorsee of negotiable paper, who receives it before maturity as collateral security for or in payment of an antecedent debt is bound to notify the makers of his being the holder, in order to protect himself against payments by the maker to the original holder or payee. That in the absence of such notice an indorsee must show himself to be a holder for value and in due course of trade in order not to be bound by the maker's payment to the original payee, although made before maturity, and after transfer of the note. We cannot assent to the correctness of this principle as applied to negotiable paper. It in effect places such paper upon precisely the same footing as open accounts, and, in our opinion, attaches a *condition* to the legal and complete transfer of negotiable instruments, which is supported neither upon principle nor authority. It was decided in Clodfelter *v.* Cox, 1 Sneed, 330, that the assignee of equitable rights and open accounts must give notice to the debtor or holder of the fund of the assignment in order to protect himself against subsequent payments by the debtor to the assignor. But in the subsequent cases of the "Mutual Protection Co. *v.* Hamilton, 5 Sneed, 277, and Sugg *v.* Powell, 1 Head, 221, it was held, that this doctrine as to notice had no application to the assignment of negotiable paper, or of instruments, which, though not negotiable by the Law Merchant, are made assignable by law, so as to pass the legal interest or title and permit the assignee to sue in his own name. The rule announced in these cases is irreconcilable with the position assumed in Vatterlein *v.* Howell. No authority is cited to sustain the proposition or conclusion of law laid down in Vatterlien *v.* Howell except the case of Van Wyck *v.* Norwell, 2 Humph., 192, which fails to support the decision. The contest in Van Wyck *v.* Norvell was between the true owners of the notes and a party holding them as collateral security. The former prevailed, upon principles well settled in our decisions. But Judge Green, who delivered that opinion, recognized the fact that a pre existing debt was a good consideration as between the holder and the individual from whom he received the paper, though it would not be sufficient to entitle him to hold against the true owner. The consideration on which Vatterlien received the transfer of the note from Brown & Co., being a good one as between themselves, and that transfer having vested him with the legal title to the note so as to dispense with the necessity of his giving notice of the assignment, the conclusion seems to be inevitable that a payment by the maker to the original payee, after such transfer and before maturity, should not be held good against the holder.

Again, the decision in Vatterlein *v.* Howell ignores the distinction that should manifestly be taken between the payment of a negotiable note made after its transfer, and such a payment before assignment. The latter is the proposition discussed by the judge delivering that opinion. He says: "The argument is, that if a party pay a negotiable paper (as this is) before maturity and fails to take it up, he does it at his peril, and if it is afterwards assigned before maturity, the assignee has the right to enfore its repayment." After correctly saying that this doctrine was too broadly stated, the opinion proceeds: "It is true that if a party pay a negotiable paper before due and fail to take it up, and it is afterwards and before maturity negotiated in due course of trade, the assignee being an innocent holder for a valuable consideration, would be entitled to enforce its payment. But it is equally true that if it is taken in payment of, or as security for, a pre-existing debt, it is not negotiated in due course of trade, and the holder would stand in no better situation than the payee, and would be subject to all defences which might be made against it in the hands of the payee." This was undoubtedly a correct statement of the law as applicable to the case of a payment of negotiable paper made before its transfer or assignment. But it did not follow from this principle, as the court concluded therefrom, that a payment made after such transfer or assignment would stand upon the same footing, and be equally available as a defence to an action by the holder.

The endorsement and delivery of negotiable paper as collateral security for pre-existing indebtedness is a transaction of daily occurrence in all commercial communities. It is a legitimate use of such paper, and if the person so receiving it does not become thereby a holder for value, and in due course of trade, according to the Law Merchant, so as to cut off all defences, he is certainly entitled to protection as against payments made or equities arising between the maker and endorser *after* the date of such transfer. The business of mercantile communities is to a great extent transacted through the medium of bills of exchange and promissory notes, and this free circulation of such paper is a matter of too much importance to be restricted by adhering to an adjudication not founded upon principle nor supported by authority. Our decisions have gone sufficiently far in holding that negotiable paper, transferred in payment of a pre-existing debt, or as collateral security, is subject to all equities or defences existing against the paper at the time of its transfer, and we are unwilling to extend the principles of these decisions so as to let in defences arising after such transfer. Every maker of negotiable paper knows as matter of law that it is transferable by endorsement, so as to pass the legal and complete title to the paper and the debt evidenced thereby, and it is his duty to pay to the holder upon production of the note.

Payments of negotiable paper before it is due, and in the absence of such paper, are not made in the due course of business, and the party so paying should be held to do so at his own risk. For when the title has passed by endorsement and delivery of such paper, the actual or legal holder alone has the right to receive the money due thereon, and the maker, in paying to the original payee after such transfer, in the absence of the paper, either before or after its maturity, must abide the consequence of making payment to a party not entitled to receive it. Our legislation, in providing indemnity for makers of lost negotiable paper when sued thereon, proceeds upon the principle that the actual legal holder thereof could lawfully compel a re-payment to himself.

We therefore hold that in the case of negotiable paper the maker is not discharged if, before the maturity of the paper and after its transfer even as collateral security he makes payment to any person other than the real holder. This conclusion is fortified by the rule applicable to over-due negotiable paper. When such paper is endorsed and transferred after maturity, the maker can avail himself only of such matter of defence as existed between himself and the promisee or endorser at the time of the actual endorsement and transfer of the note to the holder. This is so, both upon the principles of the Law Merchant and under the provisions of our statutes of set-off. It is founded upon the well settled rule that a note does not cease to be negotiable because it is over-due. The payee by his endorsement may still communicate a good title to the endorsee. Nor can the maker, when sued thereon, rely on matters of defence against the endorser which arose after such transfer, although he had no notice of the transfer, at time of acquiring his defense. The maker has no right to presume that such over due paper, which he has made negotiable and on which he agrees to be liable to the actual holder or endorser, remains in the hands of the original payee, and if he pays to the original promisee without regarding the production of the paper, he does it at his own risk.

This is the true distinction between the assignment of open accounts or equitable interest in a fund and the endorsement of a negotiable note. In the former case, notice of the assignment must be given the debtor to protect the assignee against future payments to the assignor; such assignee acquires only an equitable title, and in the absence of such notice the debtor may reasonably presume that the original creditor still holds or controls the claim, and may accordingly make payments to him in the ordinary course of business. But the endorsee of an over-due negotiable note acquires a full legal title with the sole and exclusive right to demand and receive payment thereof—his right being only subject to the equities and defences existing against the paper at the time of its transfer to him. No defences against the original payee acquired after the transfer, are available against him. Now, it is manifest that negotiable paper, taken as collateral security for pre-existing indebtedness, before maturity and before any equities or defences exist against it, must stand upon the same footing as the transfer of such over-due paper. The holder in neither case is considered a holder for value in due course of trade under the Law Merchant. Both are subject to all equities existing at the time of the transfer, but neither is subject to defences arising after such transfer.

The foregoing doctrines are, we think, supported both by principle and authority. See 20 N. Y. Rep., 138; 20 Pick, 545; 6 Metcalf, p. 7; Edwards on Bills and Notes, (marginal) pp. 537, 538.

Our conclusion is that the case of Vatterlien *v.* Howell, 5 Sneed, 441, was not correctly decided, and should not be adhered to as authority.

It follows from the principles already announced, that the defendant's payment to Pollard & Co., the original payees of the note sued on, made before its maturity but after the date of its endorsement and transfer to the plaintiff as collateral security, constitutes no valid defence to the plaintiff's suit upon said note, although the defendant may have had no notice of such transfer at the time of making such payment. It results, therefore, that the judgment of the Circuit court must be reversed, and that the plaintiff have judgment here upon the note with costs of suit.

SUPREME COURT OF INDIANA.

[From the Indianapolis Sentinel.]

RIGHTS OF MARRIED WOMEN—INTEREST OF WIDOW IN THE PROPERTY OF HER HUSBAND SOLD IN 1840 AT SHERIFF'S SALE, SHE NEVER IN ANY WAY CONSENTING TO THE CONVEYANCE.

4529. Charlotte Taylor *v.* Henry T. Sample et al., Tippecanoe C. C. Affirmed.

Biddle, C. J., delivering the opinion of the court. Statement of the case: The husband of the appellant was the owner in fee of the lands in controversy, which were sold by the sheriff upon execution in 1840. The wife did not join in the conveyance. The husband died in 1864. The question raised in the record is whether the widow had any right in her husband's lands, held in fee simple, which he had conveyed alone, or which had been sold at sheriff's sale, during coverture?

Held, That this question had been decided adversely to the widow in Strong *v.* Clem, 12 Ind. 37; which case has been approved by the following cases: 40 Ind. 575; 48 Ind. 347 et al.

HUSBAND AND WIFE—THE WIFE PAYING THE CONSIDERATION FOR PURCHASE OF LAND, AND THE HUSBAND FRAUDULENTLY TAKING A DEED TO HIMSELF.

4462. Tracy *v.* Kelly, Ripley C. C. Affirmed.

Biddle, C. J, delivering the opinion of the court, holding: 1. That if a husband fraudulently takes a conveyance of lands in his own name, the consideration having been paid by his wife, a trust thereby results in the wife's favor. This equitable rule has not been changed by the statute.

2. That the wife was a competent witness in the case as to all matters touching her own rights in the lands, (29 Ind. 570).

3. That the evidence sustains the general verdict and the special findings.

WHAT CONSTITUTES A VALID GIFT—DELIVERY TO TRUSTEE FOR USE OF THE PARTY TO BE BENEFITED—AMENDED COMPLAINT.

4724. Wyble and Sallie McPheters *v.* McPheters et al. Reversed.

Worden, J., delivering the opinion of the court.

Statement.—Complaint by the appellants against the appellees. The complaint was in two paragraphs, each seeking to recover an alleged gift to the plaintiffs from their father, of a trustee as it is claimed one of the defendants was. Demurrers to each paragraph of the complaint for want of sufficient facts was sustained, which ruling presents the principal question in the case. *Held*,

1. That both paragraphs of the complaint show a delivery, absolute and unconditional, to William M. McPheters, and that said party was unconditionally to deliver the subject of the gifts to the plaintiffs upon the death of the donor, an event which must have taken place. That the transaction created the relation of trustee and beneficiary between William M. McPheters and the plaintiffs; and that a delivery to a trustee for the use of a party to be benefited, is as effectual as a delivery to the party himself. (Miller *v.* Billingsly, 41 Ind., 489; Stone *v.* Hackett, ex'r, 12 Gray, 227; 1 De G., M. & G., 176; 50 Eng. C. L.; 32 Ind., 78.) *Held*,

2. That a complaint may be an amended one without appearing on its face to be such, and that the certificate of the clerk is conclusive that the complaint is an amended con-complaint.

PERSONAL LIABILITY OF DEVISEE WHO ACCEPTS LANDS CHARGED WITH A LEGACY.

3744. Burch *v.* Burch, Franklin, C. P. C. Affirmed.

Downey, J., delivering the opinion of the court.

Held, That a devisee who has accepted real estate devised to him, is personally liable for the payment of the legacies exclusively charged thereon.

PRACTICE—ORDER OF SALE OF LAND ON A JUDGMENT—EVIDENCE—RECORD OF JUDGMENT.

4697. Vandever et al *v.* Hardy et al., Switzerland C. C. Reversed.

Worden, J., delivering the opinion of the court.

Statement.—Action by appellees to recover possession of a tract of land. The plaintiffs claimed title through Charles Hardy, and the question involved is whether a sheriff's sale was shown to be valid. *Held*,

1. That where a circuit court gives judgment ordering land to be sold for the payment of a judgment rendered in a Common Pleas court, it is proper for an order of sale to issue from the circuit court for the sale of the land. *Held*,

2. That where the fact to be ascertained is whether there was a judgment ordering the sale of land, the judgment, order of sale, sheriff's return thereon and the sheriff's deed are sufficient evidence, where no objection is made to the introduction of the judgment without the residue of the record.

A Justice who Wouldn't.—Yesterday forenoon, says the Detroit *Free Press*, an honest looking man called into the office of a justice of the peace and wanted to know if he could commence suit against a neighbor for assault and battery. He was informed that he could, and he brightened up and continued:

"Well, make out a law suit right away. He kicked me mighty hard, and I want you to plug the law right to him."

As the justice reached for a warrant, his visitor asked:

"How much will you fine him?"

"I can't tell anything about the case until it is tried," was the reply.

"Then he may get off?"

"Yes,"

"And I may have the costs to pay?"

"Yes."

"And you won't agree to fine him?"

His honor began to read a frigid lecture on the practice of law, but the man for whom it was intended started for the door, saying:

"I won't fool around with law. I've got three dogs and two grown-up sons, and I guess the whole pile of us can lick him blind in two minutes."

SUPREME COURT OF ILLINOIS.

John M. Adams *v.* Charles Gardner.—Appeal from Superior Court of Cook.—Opinion by Sheldon, J.

DECLARATION AS TO DAMAGES.

Held, That whenever the damages sustained from a cause of action have not necessarily occurred from the act complained of, and are consequently not implied by law, then, in order to prevent surprise on the defendant, the declaration must state the particular damages, or the plaintiff will not be allowed to give evidence thereof.

CHICAGO LEGAL NEWS.

Lex vincit.

MYRA BRADWELL, Editor.

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We call attention to the following opinions, reported at length in this issue:

Liability of Town Officer for Refusing to Place upon the Tax-List Judgments.—The opinion of the Supreme court of the United States by Miller, J., holding where the defendants, supervisors of a town in Wisconsin, refused to place upon the tax-list of the town the amount of judgments recovered by the plaintiff against the town, that the plaintiff was entitled to recover only nominal damages, the taxable property of the town still remaining subject to the judgments. Many lawyers have supposed that the whole amount of the judgments could be recovered of the officer neglecting his duty and refusing to place the same upon the tax-list of the town.

Removal of Cause from State to Federal Court.—The opinion of the United States circuit court for the southern district of Illinois by Drummond, J., construing the third section of the act of Congress, which declares that a party seeking a removal from the State to the Federal court shall make and file a petition in the State court, before or at the term at which said cause could be first tried, and before the trial thereof. There has been a great conflict of opinion as to the meaning of this section. The difficulty has been to determine the meaning to be given to the words "before or at the term at which said cause could be first tried." This opinion of the learned judge will be of very general interest.

Liability of officer for not placing judgment on tax list.—The opinion of the United States circuit court for the southern district of Illinois, by Drummond, J., holding under the ruling of the Supreme Court of the United States that where the supervisors of a town refuse to enter judgments recovered against the town upon the tax-list, that the amount of the judgment cannot be recovered of such officers, but only nominal damages. If the Supreme Court adheres to its ruling that only nominal damages can be recovered, it will be very easy for any Board of Supervisors to defy the authority of the federal courts and prevent honest creditors from collecting their judgments entered in these tribunals against towns.

Indictment for Conspiracy—Verdict—Acquittal of One.—The opinion of the United States District Court for the Southern District of Ohio, by Swing, J., in the case of several persons indicted for entering into a conspiracy to defraud the government. The Court instructed the jury that if they were satisfied from the evidence that one of the defendants had conspired, not with his co-defendant, but with other persons to the government unknown, they might find a verdict of guilty as to him and not guilty as to his co-defendant, and that under the three counts in the indictment an acquittal of one was not an acquittal of both; that if they were satisfied one of the defendants was not guilty, they might return a verdict of not guilty as to him; and if, as to the other defendant, they were unable to determine as to the fact of his conspiring with persons unknown, whether he was guilty, they might return as to him that they could not agree upon a verdict.

Payment of Negotiable Paper before Due, and in the Absence of such Paper.—The opinion of the Supreme Court of Tennessee, by Jackson, Special J., holding that payments of negotiable paper before it is due, and in the absence of such paper, are not made in due course of business, and the party so paying should be held to do so at his own risk; that the maker of negotiable paper is not discharged if before the maturity of the paper, and after its transfer even as collateral security, he makes payment to any person other than the real holder, and that this is so, although the maker may have had no notice of such transfer at the time of making such payment.

NOTES TO RECENT CASES.

BANKRUPTCY—EXEMPTION.

The United States District Court for the Northern District of North Carolina, held, in the case of Martin that a bankrupt is entitled to an exemption of his household furniture and other necessary articles, although they were taken under an execution prior to the commencement of the proceedings in bankruptcy. 13 N. B. Reg., 397.

BANKRUPTCY—FORECLOSURE OF MORTGAGE.

It was held by the Supreme Court of Iowa, in Brown *v.* Gibbons, 13 N. S. Reg. 407, that a proceeding to foreclose a mortgage instituted in a State Court after the commencement of the proceedings in bankruptcy, without making the assignee of the mortgagor a party thereto, is valid as against all persons who are parties thereto; that if the assignee does not seek to redeem mortgaged property, the mortgagee may proceed in a State Court to foreclose the mortgage, and that such proceeding is not absolutely void.

FOREIGN LAW—EVIDENCE.

Held by the English Probate, Divorce, and Admiralty Division Court, in the goods of Bonell, 34 L. T. R. Rep., N. S. 32, that the law of a foreign country cannot be proved even by a juris consult of his knowledge if it be derived solely from his having studied it.

BANKRUPTCY—INFANT TRADER—ADJUDICATION AGAINST.

The English Court of Bankruptcy held in *ex parte* Lynch, 34 L. T. Rep.. N.S. 34, that a trader can be adjudicated bankrupt upon a debt contracted whilst under age, if at that time he by his conduct held himself out to the public as an adult.

INSURANCE—AUTHORITY OF AGENT.

The Court of Appeals of New York, in Bush *v.* Westchester Fire Ins. Co., 5 Ins. Law Journal, 207, held that the authority of an agent to receive proposals and countersign and deliver policies, is not authority to adjust losses or to waive the stipulated proofs, and bind the company. The fact that an agent assumes to do those acts, does not establish his authority, or entitle the assured to infer his authority.

INSURANCE—AUTHORITY OF AGENT.

The Supreme Court of Wisconsin, in Winans *v.* Allemania Fire Ins. Co., 5 Ins. Law J., 203, say it is the settled law of this court that the agent of an insurance company, authorized to take risks and issue policies against fire, may waive by parol a condition in a policy issued by him. This opinion is in conflict with the opinion of the New York Court of Appeals above cited.

Miss Goodell's case.—We call the attention of our readers to the review, by Miss Goodell, of chief justice Ryan's opinion refusing her admission to the Wisconsin bar, published in this issue. We judge from it that Miss Goodell has no intention of leaving Wisconsin. We understand she is still practicing in the lower court, where she was originally admitted. It is claimed by her friends that until that admission is revoked she can so practice. Why don't Judge Ryan commit her for contempt, when he has said no woman can practice in Wisconsin, and she keeps on practicing?

Recent Publications.

Reports of Cases at Law and in Chancery, Argued and Determined in the Supreme Court of Illinois. By Norman L. Freeman, Reporter. Volume LXVIII. Containing the remaining cases submitted at the June Term, 1873, and a portion of the cases submitted at the September Term, 1873. Printed for the Reporter. Springfield: 1876.

This volume contains 139 cases. Of these 72 are affirmed, and 66 reversed. There is one case of original jurisdiction, and 5 in which the opinions are per Curiam. The opinions delivered by Chief Justice Breese, affirm the judgments below in 6, and reverse them in ten cases. Those delivered by Walker, J., affirm them in 11, and reverse them in 11 cases. Those delivered by McAllister, J., affirm them in 3, and reverse them in 9 cases. Those delivered by Scholield, J., affirm them in 15, and reverse them in 9 cases. Those delivered by Scott, J., affirm them in 7, and reverse them in 11 cases. Those delivered by Sheldon, J., affirm them in 15, and reverse them in 5 cases. Those delivered by Craig, J., affirm them in 12, and reverse them in 9 cases. We give the names of the judges who tried the cases in the courts below, and how they were disposed of in the Supreme Court: S. L. Bryan, 17 affirmed, 18 reversed; M. C. Crawford, 2 affirmed, 1 reversed; Joseph Gillespie, 13 affirmed, 9 reversed; Thomas F. Tipton, 2 affirmed, 1 reversed; A. D. Duff, 4 affirmed, 5 reversed; H. B. Decius, 3 affirmed, 2 reversed; David L. Baker, 1 affirmed, 3 reversed; James M. Pollock, 1 affirmed, 2 reversed; E. S. Leland, 2 affirmed, 1 reversed; A. J. Gallagher, 1 reversed; R. S. Canby, 1 reversed; H. S. Baker, 1 affirmed; C. H. Wood, 5 affirmed, 4 reversed; Joseph E. Gary, 3 affirmed, 3 reversed; A. H. Smith, 3 affirmed, 1 reversed; W. W. Heaton, 3 affirmed, 2 reversed; John G. Rogers, 1 affirmed, 2 reversed; Lambert Tree, 1 reversed; W. W. Farwell, 2 affirmed; E. S. Williams, 2 affirmed, 1 reversed; S. Wilcox, 1 reversed; William A. Porter, 2 affirmed, 2 reversed; The Cook Circuit, 1 reversed; John A. Jameson, 1 reversed; Henry Booth, 2 affirmed; Josiah McRoberts, 1 affirmed; The Will Circuit Court, 1 affirmed; Richard G. Montony, 1 reversed; S. D. Puterbaugh, 1 affirmed; J. W. Cochran, 1 reversed.

A Treatise on the Law of Taxation, Including the Law of Local Assessments, by Thomas M. Cooley, LL. D., one of the justices of the Supreme Court of Michigan, and Jay professor of law in the University of Michigan. Chicago: Callaghan and Company, law book publishers. 1876.

Judge Cooley has for some years been engaged on this work, and the members of the profession have been awaiting its appearance, hoping that it would be as valuable an aid to them on all questions arising under the law of taxation as his former work has been upon constitutional questions. The work will more than satisfy the anticipations of the profession. It is clearly and concisely written, and methodically arranged. The author has not given a mere abstract or digest of the decisions, and left his reader to guess at what the law really is, but gives the general principles underlying the cases, and upon disputed points the learned author does not hesitate to express his opinions, and to support the same by an array of authorities in the notes, which show the thoroughness of the judge's investigations into the adjudications of the courts and the principles underlying the law of taxation. The authorities are brought down to the latest moment before going to press. The volume is divided into twenty-four chapters, as follows: 1. Taxes, Their Nature and Kind. 2. The Nature of the Power to Tax. 3. Limitations upon the Taxing Power. 4. The Purposes for which Taxes may be Laid. 5. The Purpose must Pertain to the District Taxed. 6. Equality and Uniformity in Taxation. 7. Apportionment of Taxes. 8. Official Action in Matters of Taxation. 9. The Construction of Tax Laws. 10. Curing Defects in Tax Proceedings. 11. The Voting of the Tax. 12. The Assessment of Property for Taxation. 13. The Collector's Warrant. 14. The Collection of the Tax. 15. The Sale of Lands for Unpaid Taxes. 16. Redemption of Lands from Tax Sales. 17. Proceedings at Law to Recover Lands Sold for Taxes. 18. Taxation of Business. 19. Taxes Under the Power of Police. 20. Taxation by Special assessment. 21. Local Taxation Under Legislative Compulsion. 22. The Remedies of the State Against Collectors of Taxes. 23. Enforcing Official Duty Under the Tax Laws. 24. The Remedies for Illegal and Unjust Taxation. The mechanical execution of this volume is excellent. It is a large volume and numbers over eight hundred pages. It will be one of the leading American textbooks.

Hon. Isaac F. Redfield.—Just as we go to press, we learn that Judge Isaac F. Redfield, one of the ablest jurors and law writers of the age, has departed this life.

ILLINOIS SUPREME COURT.

ABSTRACT OF OPINIONS FILED AT OTTAWA IN 1876.

American Express Co. *v.* R. Greenhalgh.—Appeal from Knox.—Opinion by Walker, J.

LIABILITY OF PUBLIC CARRIERS FOR GOODS SHIPPED C. O. D.

Statement.—Goods shipped to Greenhalgh, C. O. D. Consignee refused to receive them, but paid the express charges. Suit was brought by the consignors against the consignee, for the value of the goods. Pending the suit, the attorney for the consignee ordered the express company to return the goods. This was done, and the consignors receives them. Afterward, verdict was rendered against the defendant, who then demanded the goods of the express company, and thereon brought suit in trover. It was contended that the judgment gave absolute title to the defendant. *Held*,

1. That, if so, the action could only lie against the consignors for the goods so returned by order of the defendants.

2. If the agent of the company even knew of the pendency of the suit, yet he would be justified by such order in reshipping to the consignors.

3. It is not the duty of a public carrier to seek the true owner of goods, nor unasked, or unwarned, to seek to protect the contingent future interests of a consignee.

4. Although, should the public car-

rier deliver goods to a third party, is would devolve upon such carrier to prove that the delivery was to the true owner. But that is not this case.

C. D. & V. R. R. Co. *v.* Coyer et al. (tax payers).—Appeal from Kankakee.—Opinion by CRAIG, J.

SIGNATURES TO PETITION FOR SPECIAL ELECTION TO VOTE ON RAILROAD SUBSCRIPTION.

STATEMENT.—Bill to enjoin the issuing and delivering to appellant of township bonds, for $30,000, voted June 5, 1869. Bill granted. and appeal.

The objections to the election were, (1) Insufficiency of the petition for submission, in not being signed by twelve freeholders. (2) Insufficiency of notice in not being legally posted.

There were more than the names of twelve freeholders to the petition, but some did not personally sign.

Held, 1. That it was not necessary that the persons required by the statute to sign the petition before the election, should do so in person. Each person could authorize his signature to be attached by another. And this could be done at a prior public meeting, the names being taken down by the secretary, and afterwards attached by a committee appointed by the meeting. And persons so assenting at the public meeting are estopped from afterwards disputing their signatures.

[As to the notices, *held*, the proof showed they were properly given].

24.—Alfred Berrington *v.* Michael F. Casey.—Error to Cook.—Opinion by WALKER, J.

LEASE CONSTRUED—IMPLIED COVENANT OF POSSESSION—ELECTION AS TO FORM OF ACTION ON BREACH—WAIVER OF TENDER.

STATEMENT.—Suit in assumpsit for breach of the following lease:

"Chicago, Dec. 7, 1871.

"Received of M. F. Casey ten (10) dollars, on rent of store on corner of Lake and Canal streets, which Mr. Casey is to have for $100 per month until May, 1873.

Alfred Berrington."

While Casey was in New York, Berrington re-leased the store to another. On return, Casey offered to pay the $100 for the first month, but it was refused; and he brought suit. *Held*,

1. That the instrument was a lease, and not merely an agreement for a lease; and that, therefore, the law implied a covenant for possession; for the breach of which an action would lie.

2. It was optional with the lessee to bring assumpsit or ejectment in such case.

3. That the refusal of the defendant to receive the rent offered, released all obligation to make a formal tender.

258.—1874.—Kamphouse et al. *v.* Gaffner.—Appeal from Winnebago.—Opinion by SCHOLFIELD, J.

ONSTRUCTION OF LEASE—LICENSE TO WORK MINES — LOCUS IN QUO OF TRESPASS — MEANING OF WORDS—REVOCATION OF LICENSE.

STATEMENT.—Trespass *quare clausum* in mining lead on certain lands in Jo Daviess county, (whence the cause was removed by change of venue to Winnebago.)

Plea, a grant by lease, and a parol license to mine the lead. *Held*,

1. That it is error to instruct a jury that in regard to a lease, they should "consider the words used therein having reference to the description or location of said lands, and words denoting merely bearing or direction, must, in all cases, yield to words referring to fixed monuments or objects upon, or in the lands itself, when conflicting therewith," this leaving a construction of a written instrument to the jury which belongs to the court. The court must give to the jury, as matter of law, what the legal construction of the instrument is and the jury are bound absolutely to take the construction.

2. But it is for the jury to say whether a trespass was committed within the boundaries laid down in a lease.

3. It is also for the jury to determine whether in regard to mining, the words "crevice" and "range" are synonymous.

4. A beneficial privilege in lands, as a privilege to work mines, can only be granted by deed; so that every license that authorizes such acts as not only require to be performed upon the land, but which gives some usufruct of the land itself is properly a grant of an incorporeal hereditaments, and must be created and transferred by deed.

5. A license by parol is always revocable, while executory, and it is merely personal and cannot be transferred to another. Nor will any expenditure, or valuable consideration given by the grantee, take away its revocable quality.

6. The rule of law on this matter is, that a mere license, unaccompanied by any vested interest in the real estate created by deed or other writing, and independent of any title acquired by grant, prescription, or adverse possession or claim, for the limitation period, is, in its own nature, countermandable, and essentially revocable at the will of the owner of the fee.

7. Russell *v.* Hubbard, 59 Ill., 335, is overruled so far as it conflicts with this decision.

[The court decline to decide how far equity might interfere in cases of hardship.]

8. However, when fully executed, and not depending on continuous acts, it is not subject to revocation.

278.—1874.—C. B. & Q. R. R. Co. *v.* Van Patten, Adm'r.—Opinion by SCHOLFIELD, J.

LEGAL EFFECT OF ERROR—SPECIAL VERDICTS —COMPARATIVE NEGLIGENCE.

STATEMENT.—Suit for death of intestate by negligence of appellant. The case in the appellate court turns largely on the evidence. The following points were decided:

1. When, from all the evidence, it is evident that the same verdict must be rendered on a new trial, the court will not reverse a cause for error in the giving of instructions; but where the right of the successful party is not clear, and there is error in the instructions which might have misled the jury, the cause will be reversed.

2. Where a special verdict is required under the statute, the court exhausts its powers in submitting the interrogatories and it is error to inform the jury that if they are unable to answer the interrogatories because of the uncertainty of the evidence, they might so report; for this intimates that the court probably regards the evidence as uncertain. Also, to inform them that, in such case, they may, nevertheless, return a general verdict—especially if the interrogatories comprise the vital issues of the cause.

3. In actions of negligence, the plaintiff may recover, even if guilty of contributory negligence, if the negligence of the defendant is so gross as to make his negligence comparatively slight. And so as to an intestates in actions like the present.

Sarah Morse et al. *v.* Ellen Thorsell.—Appeal from Knox.—Opinion by WALKER, J.

DOWER—EVIDENCE—EQUITABLE ESTATE—PARTIES.

Held, 1. That title to real estate, when admissible by verbal evidence, can only be established when it is clear and satisfactory. And if, in a suit for dower, the petitioner can only testify that her husband, in his lifetime, paid the purchase money for the lot, from having heard him and the vendors say so, this is hearsay evidence, and should be rejected.

2. Dower cannot be assigned on an equitable estate, unless the title could have been converted into a legal title, by a bill for specific performance. Hence, a contract not performed cannot confer dower; and, if assigned before performance, a subsequent performance by the assignee cannot avail to give a dower right to the widow of the assignor.

3. Where suit for dower is brought against a married woman, the husband of the defendant is a necessary party, in consequence of his curtesy, or any other interest he may have in the lands.

Norman Frame *v.* Austin Badger.—Appeal from McHenry.—Opinion by WALKER, J.

ABSTRACT AND INAPPLICABLE INSTRUCTIONS —INSTRUCTIONS AS TO EVIDENCE.

Held, 1. That abstract and inapplicable instructions are erroneous, as tending to mislead the jury into the consideration of irrelevant circumstances, and so to bewilder and confuse them.

2. When evidence is slight, or is highly contradictory, it is unfair and misleading for the court to select isolated portions of the evidence, and give it prominence by calling the attention of the jury thereto especially.

Horace R. Kipp et al. *v.* Louis Lichtenstein,—Error to Woodford.—Opinion by SHELDON, J.

IMPLIED REPEAL OF CORPORATION ACT—DEFECTIVE DECLARATION.

STATEMENT.—Suit brought against the appellants as trustees of a corporation. The cause of action declared on was (1) indebtedness by the corporation; and (2) failure of defendants, trustees, to make an annual report, as required by the 12th section of the corporation act of Feb'y 10, 1849. *Held*,

1. That the said act was impliedly repealed by the act of Feb'y 18, 1857, as held in Culver *v.* Third National Bank, 64 Ills., 530.

2. If a declaration be so defective that it will not sustain a judgment, the defect may be taken advantage of on a motion to arrest of judgment, or on error.

3. Where a true cause of action is not declared on, the supreme court will not consider whether, under the facts, there is a ground for the liability of the defendants.

Jonas Berger *v.* Jonas Peterson.—Error to KNOX.—Opinion by CRAIG, J.

CONSTRUCTION OF WRITTEN CONTRACT—TENDER—INTEREST ON BREACH OF CONTRACT—RIGHT OF PARTY NOT IN DEFAULT.

STATEMENT.—Suit to foreclose a mortgage given to secure the fulfilment of the following contract:

"Whereas I, Jonas Berger, have, by my deed, bearing date the 6th day of May, 1868, sold and conveyed to Jonas Peterson, one-fourth interest in my patent for improvements in melodeons, and improvements in key coupling musical instruments, and for which the said Joseph Peterson has paid me the sum of $1000, I now hereby agree that, in case the said Jonas Peterson shall fail to realize the said sum of $1000 from the sales of said patent, or instruments made in pursuance of the same, within three years from this date, then, and in that case, I promise and agree to pay to him the said Jonas Peterson, said sum of one thousand dollars, upon his reconveying to me said interest so conveyed to him as aforesaid. Witness my hand this 5th day of August, 1868. Jonas Berger."

In May, 1874, Peterson tendered a reconveyance, but Berger refused to receive the deed, or pay the money. In the suit the $1000 was decreed, with interest from this time, (May, 1874.)

Held, 1. That this contract, not prescribing the degree of effort to be employed in effecting sales, the law will imply merely a reasonable effort, taking into consideration the ability and means at command.

2. If, at the expiration of the time prescribed in the contract, a demand was made by the patentee for a reconveyance, and an offer to refund the money, this was not sufficient to place the other party in fatal default, unless it was also shown that the patentee was ready to pay the money. A mere offer to pay, without present ability, constitutes no tender.

3. The contract provided no forfeiture; and, therefore, the $1000 becoming due on breach, remained due, and Peterson retained the right to enforce payment at any time. Forbearance worked no forfeiture of the right.

4. The allowance of interest from the time of offering the reconveyance, was correct.

Joseph Nowak *v.* The Excelsior Stone Co.—Error to Superior Court of Cook.—Opinion by SCOTT, J.

BILL OF EXCHANGE—REQUISITES—EFFECT OF ACCEPTANCE—CONSTRUCTION OF STATUTE—AMENDMENT OF COURT RECORDS.

Held, 1. That the essential requisites of a bill of exchange are, that it be drawn in the usual way, according to the custom among merchants; that it be for a specific sum; and that it be payable absolutely, and without conditions.

2. When a bill is accepted in writing, the acceptor will not afterwards be permitted to insist that there was no consideration for his acceptance; nor that he had no funds in his hands at the time of the acceptance, belonging to the drawer; nor that he was not then, and did not thereafter become, indebted to the drawee, in any manner.

3. The 9th section, ch. 98, R. S. 1874, p. 719, has no reference to bills of exchange; and therefore does not change the rules relating thereto.

4. The court may amend its records, as to mere clerical errors, on notice to the opposite party by the party applying for the amendment.

Franklin Hardaway *v.* Zephaniah Kelley.—Appeal from Whiteside.—Opinion by SCOTT, J.

IMPEACHING AWARD—PRESUMPTION AS TO AWARD.

Held, That, where a matter is submitted to arbitration, the law, in the absence of proof of fraud, will presume that the arbitrators considered all the evidence, and allowed such items to the respective parties as they regarded as proven. Their finding, like that of a court, must be regarded as embracing all matters submitted to them; and, unless impeached in some manner known to the law, must stand as conclusive of the rights of the parties.

Michael Byrne *v.* City of Chicago.—Appeal from Cook.—Opinion by BREESE, J.

NEGLIGENCE AS TO A CANAL BED.

STATEMENT.—Boat and cargo lost by striking on a rock in the bed of a canal. Averment on suit, that the rock was negligently left by the city when the canal was constructed. Defense that it was subsequently precipitated into the canal by a land-slide. Verdict for defendant. *Held*,

1. That where a land slide precipitates a rock into a canal, and the rock remains there undiscovered, negligence cannot be imputed, if loss thereby occurs; since the city could not reasonably be required to draw off the water periodically, in order to inspect the bed of the canal.

James Walsh *v.* The People.—Appeal from County Court of Cook.—Opinion by SCOTT, J.

CORRECTING ERRORS IN TAX ASSESSMENT.

Held, That under R. S. 1874, § 191, p. 889, a county court has plenary powers to correct errors in assessing taxes, and may relieve, therefore, against a mistaken double assessment, under different descriptions of land, and retain the proportion of taxes justly assessed.

Margaret Walker et al. *v.* Noah L. Deihl.—Appeal from County court of Winnebago.—Opinion by CRAIG, J.

SELLING LANDS OF AN ESTATE TO PAY DEBTS —PAYING CLAIM BEFORE ALLOWANCE.

Held, 1. That an administrator can only on petition and decree, obtain authority to sell lands in order to pay debts existing at the time of the decease of the intestate. He cannot subsequently contract a debt, and then obtain an order to sell lands to pay such subsequent debt, even if it be contracted in the course of settling the estate.

2. Where an administrator pays a claim before it is allowed by the court, he does so at his peril, and must take the risk of proving up the claim and getting it allowed, as any other creditor.

3. And this rule applies to taxes, insurance, and costs in ejectment suits.

UNITED STATES SUPREME COURT.

PROCEEDINGS OF.

Wednesday, March 15, 1876.

On motion of Matt. H. Carpenter, John T. Wilson, of Boston, Mass., was admitted.

On motion of Mr. Phillips, N. T. Stephens, of Lawrence, Kansas, was admitted.

On motion of J. W. Johnson, Charles S. Stringfellow, of Petersburg, Va., was admitted.

No. 167. Enoch Totten, administrator, v. United States. This cause was argued by Enoch Totten for appellants, and by Assistant Attorney General Smith for appellees.

No. 168. Horatio N. Spencer v. The United States. This cause was argued by Joseph Casey, for appellant, and by Assistant Attorney General Smith for appellees.

No. 169. John Doe, ex dem., Sidney Oaksmith et al., v. Horace S. Johnson. The argument for this cause was commenced by Edward Lander, of counsel for plaintiff.

Adjourned until Thursday at 12 o'clock.

Thursday, March 16, 1876.

On motion of W. W. Warren, John R. Baker of Ipswich, Mass., was admitted to practice.

On motion of W. A. Meloy, E. Willoughby Anderson, of Washington, D. C., was admitted.

No. 577. The Central Railroad and Banking Company v. The State of Georgia.

No. 578. The Southwestern Railroad Company v. the State of Georgia. The motion to advance these cases was submitted by B. H. Hill, in support of same.

169. John Doe, ex dem., Sidney Oaksmith, v. Horace S. Johnson. The argument of this cause was continued by A. G. Riddle for defendant, and concluded by W. A. Meloy for plaintiff.

No. 513. The United States v. John W. Norton. This cause was argued by Assistant Attorney General Smith, for plaintiff, and by Abram Wakeman for defendant.

No. 170. James B. Pace v. Rush Burgess, colleo-

tor, etc. The argument of this cause was commenced by Charles S. Stringfellow for plaintiff.
Adjourned until Friday at 12 o'clock.

Friday, March 17.

On motion of C. F. Peck, Joseph M. Pile, of Philadelphia, Pa., was admitted.

No. 170. James B. Pace v. Rush Burgess, collector, etc. The argument in this cause was continued by Assistant Attorney General Smith for defendant, and concluded by W. P. Burwell for plaintiff.

No. 171. Albert Grant v. Jay Cook & Co. No 172. Albert Grant v. William H. Rhawn. These causes were submitted on printed arguments by N. Wilson for defendants, no counsel appearing for the plaintiffs.

No. 173. Blakeley Wilson v. L. McCrellis.

No. 178. Blakeley Wilson v. Peter Boyce. The argument of these causes was commenced by H. A. Clover for plaintiffs, and continued by John D. S. Dryden for defendants.
Adjourned until Monday at 12 o'clock.

Monday, March 20.

No. 147. Wm. Barnes v. the District of Columbia. In error to the Supreme Court of the District of Columbia. Hunt, J., delivered the opinion, reversing the judgment of the said Supreme Court, with costs, and remanding the cause, with directions to affirm the judgment of the special term upon the verdict. Dissenting, Swayne, Strong and Bradley, JJ.

No. 137. Charles D. Maxwell v. The District of Columbia; No. 138. Francis X. Dant v. the District of Columbia in error to the Supreme Court of the District of Columbia. Hunt, J., delivered the opinion, reversing the judgments of said Supreme Court with costs, and remanding the causes, with directions to award a new trial.

No. 166. Harvey Terry v. Emily H. Tubman in error to the Circuit Court of the United States for the Southern District of Georgia, Hunt, J., delivered the opinion, affirming the judgment of said Circuit Court with costs.

No 11. Samuel N. Burbank, Tutor &c., v. E. B. Biglow, et al., appeal from the Circuit Court of the United States for the District of Louisiana, Bradley, J., delivered the opinion, reversing the decree of the Circuit Court, with costs and remanding the cause with directions to proceed therein in conformity to the law.

No. 104. Myra Clark Gaines v. Joseph Fuentes et al., in error to the Supreme Court of Louisiana, Field, J., delivered the opinion, reversing the judgment of the Supreme Court with costs, and remanding the cause with directions to reverse the judgment of the Second District Court for the Parish of Orleans, and to direct a transfer of the cause from that court to the Circuit Court of the United States for the District of Louisiana, pursuant to the application of the appellant. Dissenting, Bradley Justices Swayne, J. J. and Waite, C. J.

No. 164. Elon Farnsworth et al., appellants v. the Minnesota and Pacific Railroad Co. et al.; appeal from the Circuit Court of the United States for the District of Minnesota, Field, J., delivered the opinion of the court affirming the decree of the Circuit Court with costs.

No. 880. John and Thomas Henderson v. William H. Wickham, Mayor of New York, et al.; appeal from the Circuit Court of the United States for the Southern District of New York. Miller, J., delivered the opinion, reversing the decree of the Circuit Court with costs, and remanding the cause with directions to enter a decree for an injunction in conformity with the opinion of this court.

No. 633. The Commissioners of Immigration v. the North German Lloyd. Appeal from the Circuit Court of the United States for the District of Louisiana. Miller, J., delivered the opinion, affirming the decree of the said Circuit Court in this cause, with costs.

No. 478. Chy Lung v. J. H. Freeman et al.; in error to the Supreme Court of California. Miller, J., delivered the opinion reversing the judgment of the Supreme Court, with costs, and remanding the cause with instructions to enter an order discharging the prisoner from custody.

No. 162. John W. Morsell et al., appellants, v. the First National Bank of Washington. Appeal from the Supreme Court of the District of Columbia. Swayne J., delivered the opinion, reversing the decree of the Supreme Court, with costs, and remanding the cause with directions to overrule the exceptions to the auditor's report, and to enter a decree in conformity with the opinion of this court.

No. 148. Henrietta Hoffman v. the John Hancock Mutual Life Insurance Company. Appeal from the Circuit Court of the United States for the Northern District of Ohio. Swayne, J., delivered the opinion, affirming the decree of the Circuit Court, with costs.

No. 834. Chester A. Arthur, collector, etc., v. James P. Cumming et al. In error to the Circuit Court of the United States for the Southern District of New York. Swayne, J., delivered the opinion, affirming the judgment of the Circuit Court in this cause, with costs and interest.

No. 857. H. G. Angle v. The Northwestern Mutual Life Insurance Company. Appeal from the Circuit Court of the United States for the District of Iowa. Clifford, J., delivered the opinion, reversing the decree of the Circuit Court, with costs, and remanding the cause with directions to enter a decree in favor of the complainant.

No 155. John A. Hall et al., v. the United States.

No. 156. John A. Hall et al. v. the United States. In error to the Circuit Court of the United States for the District of Minnesota. Clifford, J., delivered theopinion, affirming the judgment of the said Circuit Court in these causes.

No 153. The Board of County Commissioners, County of Laramie v. Board of County Commissioners, counties of Albany and Carbon. Appeal from the Supreme Court of Wyoming. Clifford, J., delivered the opinion, affirming the decree of the Supreme Court, with costs.

No. 149. Henry H. Blease v. Albert C. Garlington; appeal from th circuit court of the United States for the district of South Carolina. Waite, C. J., delivered the opinion affirming the decree of the circuit court, with costs and interest.

No. 171. Albert Grant v. Jay Cooke & Co. No. 172. Albert Grant v. William H. Rhawn; in error to the Supreme court of the District of Columbia. Waite, C. J., announced the decision affirming the judgments of the supreme court in those causes, with costs and interest.

No. 576. David F. Barney v. the Steamboat D. R. Martin, etc.; appeal from the circuit court of the United States for the eastern district of New York. Waite, C. J., delivered the opinion dismissing the appeal, with costs.

No. 508, Peter B. Amory v. Samuel B. and James Amory, executors. No. 509, Peter B. Amory v. Samuel B. and James Amory, executors. Waite, C. J., announced the decision denying the motions to advance or dismiss these causes.

No. 168, H. N. Spencer v. The United States, appeal from the court of claims. Waite, C. J., announced the decision, remanding the record in this cause to the court of claims for further findings.

No. 684, The State of Louisiana et. al., J. P. Macauley v. Chas. Clinton, auditor. Waite, C. J., announced the decision of the court, denying the motion to dismiss this cause.
Adjourned until Tuesday at 12 o'clock.

Tuesday, March 21.

On motion of Matt H. Carpenter, W. E. L. Dillaway of Boston, was admitted.

On motion of George W. Paschal, James M. Burroughs, of Galveston, Tex., was admitted.

On motion of Assistant Attorney General Smith, Russell H. Conwell, of Boston, was admitted.

No. 830. William J. DeTreville v. Robert Smalls. On motion of James Lowndes, reinstated, on payment of costs.

No. 651. William Godfrey et al., v. Harvey Terry. The motion to advance this cause was submitted by James Lowndes, in support of the same, and Harvey Terry, in opposition thereto.

No. 224. Harvey Terry v. The Bank of Commerce. The motion for a certiorari in this cause was submitted by Harvey Terry, in support of the same.

No. 389. S. P. Boyer v. The First National Bank of New York. On motion of E. L. Stanton, dismissed, per stipulation on file.

No. 908. The United States v. John B. Raymond, assignee etc., and other cases. The motions of Casey and Jenner to remand for further findings and for certiorari in these causes was argued by them in support of the same and by Assistant Attorney General Simmons in opposition thereto. Assistant Attorney General Simmons also submitted a motion for additional findings.

No. 539. Marshall O. Roberts v. The United States. The motion to recall the mandate in this cause was argued by Assistant Attorney General Smith in support of the same and by Thomas Wilson in opposition thereto.

No. 173. Beakeley Wilson v. LaFayette McCrellis.

No. 178. Beakeley Wilson v. Peter Boyce. The argument of these causes was concluded by Isaac M. Scudder for the plaintiff.

No. 174. Jilson P. Harrison v. Esther B. Meyer, widow, etc. This cause was submitted on printed arguments by D. C. Labatt, for plaintiff in error, and by T. J. Durant and C. W. Hornor for defendant.

No. 175. Warren Hall, appellant, vs. The United States.

No. 182. the United States v. Margaret Roach, executrix. These causes were argued by C. Peck, for appellant in No. 175, and by T. A. N. McPherson, for appellee in No. 182, and submitted on printed arguments by Assistant Attorney General Smith, for appellee in No. 175.

No. 176. The United States v. Eugene Dickelman. The argument of this cause was commenced by Assistant Attorney General Smith, of counsel for the appellants, and continued by J. D. McPherson, for appellee.
Adjourned until Wednesday at 12 o'clock.

SHOULD WOMEN PRACTICE LAW IN WISCONSIN?

JUSTICE RYAN'S OPINION REVIEWED.

The argument of the learned judge, in denying the application of a woman for admission to the bar of the Supreme Court of Wisconsin, resolves itself into four leading heads, as follows:

1st. That the admission of women to the bar, would "lower the standard of professional excellence.

2d. That the right of the courts to establish a bar and regulate the admission to it, is paramount to that of the legislature.

3rd. That the common law has always excluded women from the bar, and that the statute law of Wisconsin does not modify the common law in this respect.

4th. The social argument.

We will consider these in their order:

1st. That the admission of women to the bar, would "lower the standard of professional excellence."

The learned judge implies, rather than asserts this proposition, when he says: "A good bar may be said to be a necessity of a good court. This is not always understood, perhaps not fully by the bar itself. On the bench, the lesson is soon learned, that the facility and accuracy of judicial labor are largely dependent on the learning and ability of the bar. And it well becomes every court to be careful of its bar, and jealous of the rule of admission to it, with the view of fostering in it the highest order of professional excellence." Were it a fact that the mental and moral qualifications of applicants for admission to the bar of the Supreme court, were carefully investigated, and that only those of learning and ability, thorough training and staunch integrity, were admitted, all others being refused, this argument would carry more weight, as showing the intention of the court thus to elevate the standard of professional excellence. But, as a matter of fact, a refusal to admit any applicant to the bar of the Supreme court, on his exhibiting to that court a certificate of admission to the lower courts of the State, is unprecedented. And it is rarely the case that an attorney is disbarred. Be his mental qualifications never so meagre, his scholarship never so poor; though he be besotted and imbruted by the excessive use of liquor and tobacco, and though his reputation for integrity be such that he is neither respected nor trusted by any who know him, he is admitted unchallenged, and with rare exceptions, retained within that same bar which refuses the application of a woman for admission — while admitting that her mental and moral qualifications are such that no personal objection can be raised—lest the standard of professional excellence should be lowered! Most heartily do I concur with the opinion of the honorable court, as to the importance of maintaining a high standard of professional excellence. But I do not understand that the honorable court proposes to maintain such a standard by practically applying either intellectual or moral tests to applicants; but that the only test it does apply—the statute being formally complied with—is that of sex.

With all deference to the wisdom of the honorable court, I would respectfully submit that the only method of attaining the highest intellectual and moral standard within the bar, is by admitting to its ranks all classes of mature citizens possessing suitable mental, educational and moral qualifications. The freest and fullest competition is necessary in any department of industry, to the development of the highest order of talent in that department. If one-half the human race is shut out from competition, just so much mental and moral ability is excluded, and the standard is necessarily lowered.

Let the standard be placed as high as the legislative or judiciary powers shall choose—build up the barriers never so high, against ignorance, incompetence and dishonesty, and if women can not scale those heights, she will gladly stay outside; if she can, she has earned the right, and it will promote the "highest order of professional excellence," for her to be admitted.

2nd. That the right of the courts to establish a bar and regulate admission to it, is paramount to that of the legislature.

This proposition seems to be thrown out rather as a hint that the legislature has no right to provide by enactment for the admission of woman, and that the court would refuse to be bound by such enactment, should it be effected, than as an argument bearing directly on this case; for the court claims that no such legislative provision now exists. The learned judge says: "The Constitution makes no express provision for the bar. But it establishes courts, amongst which it distributes all the jurisdiction of all the courts of Westminster Hall, in equity and at common law. Putnam *v.* Sweet, 2 Pew., 301. And it rests in the courts all the judicial power of the State. The constitutional establishment of such courts *appears* to carry with it the power to establish a bar to practice in them. And admission to the bar *appears* to be a judicial power. It may therefore become a very grave question for adjudication here, whether the constitution does not intrust the rule of admission to the bar, as well as of expulsion from it, exclusively to the discretion of the courts." The italics are ours.

This "seems" to be the enunciation of a new doctrine. Originally at common law, parties conducted their own cases, whether civil or criminal. Attorneys were first constituted by letters patent from the king, "*commanding* the justices to admit the person to be an attorney to such an one." Bacon Ab. I., p. 474. Cooley's Blackstone, II., p, 24. And during the earlier history of our country, the power of appointing attorneys was exercised exclusively by the colonial governors. (See opinion of Nott, J., in refusing the application of Belva Lockwood for admission to the Court of Claims, Washington; in 6 Chicago LEGAL NEWS, 277.) The admission of attorneys was, therefore, primarily an executive function, to which the judiciary was expected to yield, and to which it did yield, implicitly. Attorneys were not admitted in any other manner than by order of the king until legislation was had upon the subject. The first such legislation was the Stat. Westm. 2, c. 10. This statute has from time to time been followed up by subsequent legislation, authorizing the courts to admit attorneys under certain prescribed rules and regulations. "In both England and this country," says Judge Nott, in the above quoted opinion, "the power of appointment was *conferred upon courts by statute*." The italics are ours.

Whatever power, then, the courts may have in admitting attorneys is, and ever has been such, and such only, as has been conferred upon them by statute. To this legislation, so conferring the power, and prescribing the restrictions within which they shall be exercised, the courts appear always to have yielded without objection, making rules and regulations only "in aid and furtherance of the dispositions of the legislature." Bacon Ab., p. 481. The legislatures of our several States, following the English precedent, have likewise conferred upon the courts power, under certain rules and regulations, to admit attorneys; nor does it appear that the courts have ever objected to such legislation, or claimed that the admission of attorneys was not a suitable subject of legislative enactment.

The Supreme court of Wisconsin does not appear to have questioned this right till the prospect of a possible legislative enactment admitting women to its bar prompted it to do so; nor does it prescribe any rules whatever concerning the admission of attorneys; evidently considering the legislative provisions sufficient authority for its course in admitting them in accordance with those provisions. At the time the constitution of Wisconsin was adopted, the establishment of a bar was a legislative function, and the judiciary had never possessed any power for the admission of attorneys, excepting such as had been expressly conferred upon it, either by constitutional provision, or by legislative enactment. Previously to the adoption of the State constitution, and at the time of its adoption, the Wisconsin courts admitted attorneys by authority conferred upon them by the territorial legislative assembly, and subject to its restrictions. Had the framers of the constitution intended to take this power from the legislative and confer it upon the judicial branch of the government, an unequivocal expression of that intention would have been necessary; but no such expression was made. On the contrary, the powers of the judiciary are enumerated, and that of establishing a bar is not among them. And the constitution furthermore provided that "all laws now in force in the territory of Wisconsin, which are not repugnant to this constitution, shall remain in force until they expire by their own limitation, or be altered or repealed by the legislature." Art. XIV, section 2, Const. Wis. This, of course, recognized and continued in force the territorial legislative provision for the admission of attorneys. The constitution does not forbid the legislature to establish a bar, under such regulations as it shall deem suitable. That it is competent for the egislature to exercise legislative powers not forbidden by the constitution of the United States or of the State, see 10 Wis., 195. We have already shown that the establishment of a bar was, both in England and in this country, a legislative power. Hence, the constitution authorizes the legislature to establish a bar under such rules and regulations as it shall think fit, and does not give the courts authority to over-ride such rules.

3rd. That the common law has always excluded women from the bar, and that the statute laws of Wisconsin does not modify the common law in this respect.

If the question raised by the learned judge, "whether the Constitution does not intrust the rule of admission to the bar, as well as expulsion from it, exclusively to the discretion of the courts," be answered in the affirmative, as he strongly intimates that it should be, it is quite unnecessary to review the question of common or statutory law, in this connection. And here it may be observed that, while the court does not adopt this principle of the paramount authority of the judiciary in deciding what classes of persons shall be admitted to the bar, for the purpose of surmounting any supposed legal impediment to the admsision of women; and while it bases its refusal mainly on such alleged legal impediments, it nevertheless strongly intimates that should the legislature remove those impediments, the court would then, for the sole purpose of excluding women, decide that the legislature has no right to control the judiciary in this matter. In other words, the court refuses admission to woman on the ground that no statute exists, authorizing her admission, and in the same argument strongly intimates that, should such a statute be passed, it would still refuse her, on the ground that the admission of attorneys is a judicial, and not a legislative function.

"The common law has always excluded women from the bar, ever since courts have administered the common law," says the learned judge. This is the commonly received doctrine, but is it correct? Common law consists in immemorial usage, and is defined in the decisions of the courts, and in some declaratory statutes. Has immemorial usage "always," or *ever*, "*excluded* woman from the bar?" *Never;* because until within a few years, in America, women have never applied for admission; and now, when they have applied, under statutes making no express provision for the admission of woman, the weight of authority is in favor of their admission. That by "immemorial usage," women have not studied law, and applied for admission to practice, makes no common law

against their admission. As well might it be claimed that, because formerly, women did not receive a collegiate education, such an education for them is contrary to common law; or that because, formerly, women did not become editors, or authors, or type-setters, that it is now contrary to common law for them to become such. It does not appear that the English courts, in either ancient or modern times, have ever had an opportunity to "exclude" woman from admission to the bar by a judicial decision, for the very good reason that she has never applied; and if there is no precedent in English practice, for her admission, neither is there any precedent against it, and it may as well be claimed that the courts favor her admission, as that they oppose it, so far as the question of precedent is concerned.

[To be continued.]

SUPREME COURT OF ILLINOIS.

ABSTRACT OF OPINIONS FILED AT OTTAWA IN 1876.

Peter D. Hawver *v.* Henrietta Hawver.—Appeal from McHenry.—Opinion by SCOTT, J.

JUSTIFICATION IN SLANDER—HUSBAND AND WIFE TESTIFYING.

STATEMENT.—Suit for slander. The wife of defendant was excluded as an incompetent witness, but the husband of the plaintiff was admitted. There was a plea of justification in the case, *Held*,

1. That where a defendant, in an action for slander, fails to establish a plea of justification by the proof in preponderance, this failure is not, of itself, a conclusive evidence of malice. It is sufficient if he believed the charge was true, although he may have been unable to prove it.

2. The wife of the defendant is an incompetent witness in such case.

3. But the husband of the plaintiff may testify, because the right of action is property; and being the separate property of the wife, it is the exact case specified in the statute, where the husband and wife may testify for and against each other the same as other parties.

4. Another exception in the statute is, in cases where the wife, if unmarried, would be plaintiff, or defendant. And so, where the wife is entitled to bring suit in her own name as though she were unmarried.

[NOTE.—The present statute provides that a married woman may, in all cases, wherein she has a cause of action, sue without her husband; and otherwise, where a cause of action is against her, she may be sued without her husband. —W.]

Bolivar Blood *v.* Charlotte A. Barnes.—Appeal from Knox. — Opinion by BREESE, J.

SEPARATE PROPERTY OF MARRIED WOMEN—USE BY HUSBAND.

STATEMENT.—Appellant was a constable, and seized on types and materials in the office of "The Galesburg Free Press," under an execution he held; the articles being taken as the property of appellee's husband. She brought replevin, and recovered the property. To prove property in the husband, the fact was relied on that he used the types, etc., in order to earn a living for his family. *Held*,

That such use and control of the wife's property, even with her consent, does not render it liable for his debts, unless in case of divorce *a mensa et thoro*, in which the wife sets up a separate domestic establishment, entirely apart from the husband.

American Merchants' Union Express Co *v.* Isaac M. Wolf et al.—Appeal from Cook.—Opinion by CRAIG, J.

LIABILITIES OF AN EXPRESS COMPANY AS DISTINGUISHED FROM THOSE OF A RAILROAD COMPANY.

STATEMENT.—A lot of uniforms for a political campaign was shipped, through appeliant. The consignee, not having the money from the political club for whom they had been ordered, refused to take them. They were not taken at all; and the company failed to notify the consignor until the campaign was about over, and the goods were worthless. The package was marked C. O. D. *Held*,

1. The ordinary rules of railroad liabilities do not strictly apply to express companies. When goods are shipped by railroads, the railroad company may store the goods in a safe warehouse, to be held for the consignee, when he may call for them, and, ordinarily, no notice is required to be given either to consignor or consignee. But the further duty is enjoined upon an express company to deliver the goods at the residence or place of business of the consignee; and also, sometimes, the further duty of making collection of the price of the goods, and returning the money to the consignor.

2. Where goods are sent C. O. D., and are not taken by the consignee on presentation, it is the duty of the express company to notify the consignor at once, or in a reasonable time. And it is liable for damages in failing so to do.

William E. Hale et al. *v.* John Johnson. —Appeal from Cook. — Opinion by SHELDON, J.

PRIVATE NEGLIGENCE — CONTRACTORS OR SERVANTS—LIABILITY.

STATEMENT.—Appellee was a day-laborer, and, in excavating for the foundation of a building, was injured by the falling of a wall, so that he lost his arm. Judgment below was rendered against the appellants, contractors, and also against the owner, who had employed them to erect the house.

SHOULD A WOMAN LAWYER WEAR HER HAT IN COURT?

Chicago, Illinois, March 21, 1876.

EDITOR OF THE LEGAL NEWS:

Being in favor of complete legal and political equality of the sexes, I have been most deeply gratified to see my adopted State throw open to woman the doors of the legal profession, and have been no less keenly gratified to see the wisdom of that measure confirmed by the promptness with which several young ladies of acknowledged capability and irreproachable character have embraced the opportunity for honorable labor thus afforded them, and by the easy dignity and modest ability with which they discharge their duties. But I beg leave to propound, through the medium of your paper, which cannot be less friendly to the lady lawyer than to the law, a question to the bench and the bar, and especially to the lady members of the latter, concerning court-room etiquette. Would it not be more in keeping with their new office if they, the lady lawyers, would remove their hats, and address the court with head uncovered, as the gentlemen members of the bar are compelled to do? Are there not good reasons for such equality?

Yours very respectfully,

E. QUALITY.

CENTENIAL PAPER.—We have a quantity of ye olde style legal, note and letter paper, made by ye olde paper maker, and called centenial paper. We will sell the legal cap at the office for six dollars a ream, or in quarter ream boxes for $1.75 a box. We have the letter paper folded ike legal cap.

NEW LAW FIRM.—HERBERT, QUICK AND MILLER.—An addition has been made to the well-known law firm of Herbert & Quick, by the admission of John S. Miller to the firm. Mr. Miller is a gentleman of fine literary ability, as well as a good lawyer. He was for several years professor of Greek and Latin in the St. Lawrence University, at Canton, New York. He will prove a valuable addition to the firm. Mr. Herbert, the senior member, is a gentleman of markd ability, and has had many years' experience at the Chicago bar. Col. Quick is a high-toned, honorable practitioner.

CALLAGHAN & Co.—NEW LAW BOOKS.—The advertisement of Callaghan and Company of a large number of law books just published by that enterprising firm, will be found on the last page of this issue. It may be examined with profit by those in need of law books.

KAY & BRO.—NEW LAW BOOKS.—We call attention to the double column advertisement of Kay and Brother, on the first page of this issue, of new law books and books in preparation.

Land Title Notice.

STATE OF ILLINOIS, COUNTY OF COOK, SS.—Superior court of Cook county. Sylvester Willard, Jane F. Willard, the unknown heirs at law of Jonathan Burr, deceased, Robert W. Officer, Orpah F. Officer, Samuel P. Officer, Jane Officer, John Evans, Margaret Evans, John Nutt, Annie E. Nutt, Henry Brookes, Harriet N. Brookes, and to all whom it may concern:

Take notice that on the seventeenth day of March, A. D. 1876, a petition was filed by the undersigned in the Superior court of Cook county to establish his title to the following described lands, situated in said Cook county, to-wit: The east quarter of lot six (6) in block nineteen (19) in the original town of Chicago; the west half of lot six (6) in block thirty-three (33) in the original town of Chicago; the east half of the north half of lot four (4) in block fifty-four (54) in the original town of Chicago: the south twenty-eight (28) feet of lot eight (8), and the north twenty-four (24) feet of lot nine (9), all in block twelve (12) in fractional section fifteen (15) addition to Chicago: and lots one (1) to eleven (11) both inclusive, and lots twenty (20) to twenty-five (25) both inclusive, in John Woodbridge Jr.'s subdivision of the south half of block eight (8) and the whole of block nine (9) in Lyman, Larned and Woodbridge's subdivision of the east half of the northwest quarter, and the northwest quarter of the northeast quarter of section eleven (11), and that part west of the railroad of the southeast fractional quarter of section two (2), all in town thirty-eight (38) north of range fourteen (14) east of the third principal meridian, being the whole of said block nine (9). Now, unless you appear at the May term of said court, to be holden at the court house in Chicago, in said Cook county, on the first Monday of May, A. D. 1876, and show cause against said application, said petition will be taken for confessed, and the title or interest of said petitioner will be decreed and established according to the prayer of said petition and you forever debarred from disputing the same.

WILLIAM BLAIR, Petitioner.

WILSON & PERRY, Solicitors. 26-29

Land Title Notice.

JOHN H. DUNHAM, NATHAN MEARS, JAMES R. McKay, Charles Mears, Joseph E. Young, and Abram Kleinman, and to all whom it may concern, defendants.

Take notice, that on the 6th day of July, A. D. 1872, a petition was filed by the undersigned, in the Circuit court of Cook county, state of Illinois, to establish his title to the following described lands:

The southeast fraction of the northwest quarter of section number thirty (30), township thirty-seven (37), north of range fifteen (15), east of the third principal meridian, containing one hundred and seventeen and sixty-seven one-hundredths acres, more or less.

Now, unless you appear at the April term, A. D. 1876, of said court, to be holden at the court house, in the city of Chicago, and show cause against said application, said petition, as amended, will be taken for confessed, and the title or interest of said petitioner will be decreed and established, according to the prayer of said amended petition, and you forever barred from disputing the same.

ALEXANDER W. McCLURE, Petitioner.

ERRIAM & ALEXANDER, Solrs. 23-26

ALLEN, BARMM & ALLEN,
Attorneys.

ESTATE OF FRIEDRICH RUF, DECEASED.—Notice is hereby given to all persons having claims and demands against the estate of Friedrich Ruf, deceased, to present the same for adjudication and settlement at a regular term of the County court of Cook county, to be holden at the court house, in the city of Chicago, on the third Monday of May, A. D. 1876, being the fifteenth day thereof.

Chicago, March 1st, A. D. 1876.

CATHRINA RUF, Executrix.

ALLEN, BARMM & ALLEN, Attorneys for estate. 24-29

ESTATE OF GERTRUDE C. ALMY, DECEASED.—Notice is hereby given to all persons having claims and demands against the estate of Gertrude C. Almy, deceased, to present the same for adjudication and settlement at a regular term of the County court of Cook county, to be holden at the court house, in the city of Chicago on the third Monday of April, A. D. 1876, being the 17th day thereof.

Chicago, February 25th, A. D. 1876.

21-28 MILES ALMY, Executor

TRUSTEE'S SALE.—WHEREAS, DANIEL T. NELson, by his certain deed of trust, duly executed, bearing date the twenty-fourth day of November, A. D. 1874, and filed for record in the recorder's office of Cook county, Illinois, on the second day of January, A. D. 1875, and recorded in book 393 of records, at page 437, conveyed to Oscar F. Avery, of Chicago, Illinois, as trustee, all the premises situate in the city of Chicago, in the county of Cook, and State of Illinois, and known and described as follows, to wit: Lot three (3) in the subdivision of block seventy-eight (78), in the Canal Trustees' subdivision of the west half of section twenty-seven (27), township thirty-nine (39), north, range fourteen, east of the third principal meridian, in trust, to secure the payment of three principal promissory notes, bearing even date with said trust deed, made by the said Daniel T. Nelson, and payable to the order of Mary A. Merriman, at the Merchants National Bank of Chicago, Illinois, with interest as the rate of eight per cent. per annum, from the date thereof, payable half-yearly; one of said principal notes (numbered 1) being for the sum of one thousand dollars, and payable one year after the date thereof, the interest installments thereon for said one year being further evidenced by two interest notes or coupons, of forty dollars each; another of said principal notes (numbered 2), being for the sum of one thousand dollars, and payable two years after the date thereof, the interest installments thereon for said two years, being further evidenced by four interest notes or coupons, each for the sum of forty dollars; and the other of said principal notes being for the sum of twelve hundred dollars, and payable three years after the date thereof, the interest installments thereon for said three years being further evidenced by six interest notes or coupons, each for the sum of forty-eight dollars, all of said principal notes and the said interest notes or coupons, respectively, drawing interest, after maturity, at the rate of ten per cent. per annum, said principal notes amounting in the aggregate, to the sum of three thousand two hundred dollars, the same being the amount of the unpaid purchase money for said premises at the date of said notes, and said trust deed securing the same.

And whereas said deed of trust provides, that in case of default in the payment of the said promissory notes, or either of them, principal or interest, or any part thereof, then, on the application of the legal holders of said principal notes, or either of them, it should be lawful for the said trustee, his heirs, assigns, or successors in trust, to sell the said premises, and all the right, and equity of redemption of the said Daniel T. Nelson, his heirs and assigns therein, at public vendue, at a door of such building as shall then be used as the court house of the county of Cook, in the city of Chicago, Illinois, or upon said premises, to the highest bidder, for cash, having first given notice of such sale, in a newspaper published in the county where the said premises are situate, twenty days before such sale, and to execute and deliver to the purchaser or purchasers at said sale, a deed or deeds of conveyance in fee of the premises sold; and that it should not be obligatory upon the purchaser at said sale, to see to the application of the purchase money.

And whereas it was in and by said deed of trust stipulated and agreed, that in case of default in any of said payments of principal or interest, or of a breach of any of the covenants or agreements therein, then and in that case the whole of said principal sum secured by said deed of trust, and the interest to the time of sale, according to the tenor and effect of said indebtedness, should and might become due and payable, and the said premises be sold in like manner and with the same effect as if the said indebtedness had matured.

And whereas default was made in the payment of said principal note (numbered 1) due and payable one year after the date thereof, and also in the payment of the respective interest installments due and payable on May 24th, 1875, and November 24th, 1875, on all of said principal notes—no part of said principal notes or any installment of interest thereon having been paid—and by reason of such default, the said Mary A. Merriman, the legal holder of all of said notes, has elected and declared the whole of the principal sum secured by said deed of trust to be due and payable, and has applied to the undersigned (the trustee in said trust deed named) to advertise and sell the said premises for the purpose and in the manner provided in said trust deed.

Now, therefore, public notice is hereby given that I, the undersigned Oscar F. Avery, the trustee named in said deed of trust, in pursuance of said application, and under the powers and for the purposes expressed in said trust deed, will, on Wednesday, the nineteenth day of April, A. D. 1876, at the hour of ten o'clock in the forenoon of that day, at the most westerly door of the two north doors of the building standing on the southeast corner of LaSalle and Adams streets, in the said city of Chicago, and at the date of said trust deed, and now, used as the court-house of the said county of Cook, in the State of Illinois, sell at public vendue to the highest bidder for cash, the premises above and in the said trust deed described, and all the right and equity of redemption of the said Daniel T. Nelson, his heirs and assigns therein.

Chicago, March 11, 1876.

OSCAR F. AVERY, Trustee.

IRA SCOTT, Attorney. 26-30

UNITED STATES CIRCUIT COURT, NORTHERN District of Illinois. Wednesday, March 15, A. D. 1876.—Present, Hon. Henry W. Blodgett, District Judge. Wilder Bush vs. John J. McKinnon, et al.—In Chancery.

It appearing to the court, upon affidavit filed in said cause, that Aaron B. Gifford, Mary W. Gifford, Susan B. Gifford, John D. Gifford, Albert Crosby and —— Crosby, his wife, six of the defendants named in the above entitled cause, are non-residents of the said Northern District of Illinois, and that their respective place of residence is unknown, and that personal service cannot be had on said defendants, or either of them, and that neither of said defendants have voluntarily appeared in said cause, and it further appearing that this suit affects the title to real estate situate within this district, now, on motion of Grinnell and Marsh, it is ordered by the court that said defendants, Aaron B. Gifford, Mary W. Gifford, Susan B. Gifford, John D. Gifford, Albert Crosby and —— Crosby, his wife, appear, plead, answer or demur in above entitled cause on or before the first Monday of May, A. D. 1876, and it is further ordered that a certified copy of this order be served upon each of said absent defendants, if practicable, on or before the tenth day of April, A. D. 1876, and that this order be published in the Chicago Legal News, once a week for six successive weeks, before said first Monday of May A. D. 1876.

Northern District of Illinois, ss.—I, William H. Bradley, Clerk of the Circuit Court of the United States for said Northern District of Illinois, do hereby certify the above and foregoing to be a true and correct copy of the order entered of record in said court on the 15th day of March, A. D. 1876, in the cause wherein Wilder Bush is the complainant, and John J. McKinnon et al., are the defendants, as the same appears from the original thereof now remaining in my custody and control.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court, at my office in Chicago, in said District, this 17th day of March A. D. 1876.

[SEAL.]

WM. H. BRADLEY, Clerk. 27-32

ESTATE OF PATRICK J. WALSH, DECEASED.—Notice is hereby given to all persons having claims and demands against the estate of Patrick J. Walsh, deceased, to present the same for adjudication and settlement, at a regular term of the County court of Cook county, to be holden at the court house in the city of Chicago, on the third Monday of April, A. D. 1876, being the 17th day thereof.

Chicago, February 21, 1876.

MARY ANNE WALSH, Administratrix.

JAMES S. MURRAY, Atty. 23-28

ESTATE OF FRIEDRICH SCHUMACHER, DECEASED.—Notice is hereby given to all persons having claims and demands against the estate of Friedrich Schumacher, deceased, to present the same for adjudication and settlement at a regular term of the county court of Cook county, to be holden at the court house, in the city of Chicago, on the third Monday of May, A. D. 1876, being the 15th day thereof.

Chicago, March 11th, A. D. 1876.

26-31a WILHELMINA CRIEGER, Administratrix.

CHICAGO LEGAL NEWS.

SATURDAY, APRIL 1, 1876.

The Courts.

UNITED STATES SUPREME COURT.

No. 866.—OPINION FILED FEB. 21, 1876.

EDWIN M. LEWIS, Trustee of Jay COOK & Co., Bankrupts, Appellants, *v.* THE UNITED STATES.

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

BANKRUPTCY—EFFECT OF—STATUTE GIVING PRIORITY TO CLAIM OF THE UNITED STATES CONSTRUED.

1. On the 26th of Nov., 1873, all the persons composing the firm of Jay Cooke & Co. were adjudicated bankrupts, and this adjudication remains in full force. This includes the seven American members in the house of Jay Cooke, McCulloch & Co. The other three partners of this latter firm are not bankrupt. Under the proceedings in bankruptcy, the defendant Lewis was appointed trustee of the estates of the bankrupts of the firm of Jay Cooke & Co., and as such received and held their several separate individual estates and assets and the estates and assets of the firm as well. The estates of the bankrupts are insufficient to pay all their indebtedness. *Held*, that the United States, under the statutes, are entitled to priority of payment of their debt mentioned in the opinion, out of the separate estates of such members of the firm of Jay Cooke & Co., as were also members of the debtor firm of Jay Cooke, McCulloch & Co., and this proceeding was properly instituted to enforce it.

2. CLAIMS OF THE UNITED STATES. — That all claims of the United States are embraced by the statute, and the form of the indebtedness is immaterial. The debtors may be joint or several, and principals or sureties.

3. UNITED STATES NOT BOUND BY ACT.—That the United States are not bound by the Bankrupt Act; that the claim of the United States was not proved in the bankruptcy proceedings in question is therefore immaterial in this case.

4. DISSOLUTION OF FIRM.—That the bankruptcy of the American partners dissolved the firm of Jay Cooke, McCulloch & Co., not only as to themselves, but also, *inter sese*, as to the solvent partners, and the United States were under no obligations to pursue the partnership effects of Cooke, McCulloch & Co., before filing the bill in this case.—[ED. LEGAL NEWS.]

Mr. Justice SWAYNE delivered the opinion of the court.

This case turns upon legal propositions. There is no controversy about the facts. Jay Cooke, McCulloch & Co., bankers, of London, were appointed by the United States disbursing agents for the Navy Department. On the 19th of October, 1873, they were indebted to the department, for the balance of moneys placed in their hands for disbursement, in the sum of £131,610 9*s.* 8*d.* On or about the 20th of September, 1873, when the amount due to the department was considerably larger than that mentioned, the company placed in the hands of the United States or their agents a large amount of collaterals for the security of the debt. The United States claim the right to apply the proceeds of these collaterals to the payment of another and later debt arising in the same way. Irrespective of the collaterals, the amount first mentioned, with interest, is still due and unpaid.

The firm Jay Cooke, McCulloch & Co. consisted of Hugh McCulloch, J. H. Puleston, and Frank H. Evans, residents of Great Britain, and of Jay Cooke, Wm. G. Moorehead, H. C. Fahnestock, H. D. Cooke, Pitt Cooke, George C. Thomas, and Jay Cooke, junior, residents of the United States. For a long period previous to the time first mentioned there was a banking-house in Philadelphia under the name of Jay Cooke & Co. The members of that firm were the seven American partners in the house of Jay Cooke, McCulloch & Co., and James A. Garland. On the 26th of November, 1873, all the persons composing the firm of Jay Cooke & Co. were adjudicated bankrupts, and this adjudication remains in full force. This included the seven American members in the house of Jay Cooke, McCulloch & Co. The other three partners of this latter firm are not bankrupt. Under the proceedings in bankruptcy the defendant, Lewis, has been appointed trustee of the estates of the bankrupts of the firm of Jay Cooke & Co., and as such received and holds their several separate individual estates and assets, and the estates and assets of the firm as well. The estates of these bankrupts are insufficient to pay all their indebtedness. The United States, under the statutes in such case provided, claim priority of payment of their debt before mentioned out of the separate estates of such members of the firm of Jay Cooke & Co. as were also members of the debtor firm of Jay Cooke, McCulloch & Co. The trustee denies the validity of this demand. The United States have instituted this proceeding to enforce it.

On the 10th of April, 1875, there was already accumulated in the hands of the trustee of the funds so claimed by the United States the sum $267,844.80.

The bankrupt act of March 2, 1867, declares that, in the order for a dividend, "the following claims shall be entitled to priority or preference, and to be first paid in full in the following order:

"First. Fees, costs, and expenses of suits and of the several proceedings under this act, and for the custody of property, as herein provided.

"Second. All debts due to the United States, and all taxes and assessment under the law thereof."

The fifth section of the act of March 3, 1797, 1 Stat., 515 enacts:

"That where any revenue officer or other person hereafter becoming indebted to the United States, by bond or otherwise, shall become insolvent, or where the estate of any deceased debtor in the hands of executors or administrators shall be insufficient to pay all the debts due from the deceased, the debt due to the United States shall be first satisfied, and the priority hereby established shall be deemed to extend as well to cases in which a debtor, not having sufficient property to pay all his debts, shall make a voluntary assignment thereof, or in which the estate and effects of an absconding, concealed, or absent debtor shall be attached by process of law, as to the cases in which a legal act of bankruptcy shall be committed."

It may be well to pause here, and carefully analyze this section and consider the particulars of the category it defines, so far as its provisions apply to the case in hand.

Those affected are persons "indebted to the United States."

This language is general, and it is without qualification.

The form of the indebtedness is immaterial.

It may be by simple contract, specialty, judgment, decree, or otherwise by record. The debt may be legal or equitable, and have been incurred in this country or abroad. A valid indebtedness is as effectual in one form as another. No discrimination is made by the statute.

The debtors may be joint or several, and principles or sureties

Here again, no distinction is made by the statute. All are included.—Beaston *v.* The Bank of Delaware, 12 Pet., 134; U. S. *v.* Fisher, 2 Cr., 358.

There must be a bankruptcy or else insolvency, as the latter is defined by the statute and the authorities upon the subject.

As bankruptcy exists here, we need not look beyond that point in this case. Congress had power to pass the act.—2 Cr., 396.

Where the language of a statute is transparent and its meaning clear, there is no room for the office of construction. There should be no construction where there is nothing to construe.—U. S. *v.* Wiltberger, 5 Wheat., 95; Cherokee Tobacco, 11 Wall., 621.

That the facts disclosed in the record bring the case within the plain terms and meaning of the section in question, seems to us, viewing the subject from our stand-point, almost too clear to admit of serious controversy. Affirmative discussion, under such circumstances, is not unlike argument in support of a self-evident truth. The logic may mislead or confuse. It cannot strengthen the pre-existing conviction.—11 Wall., 621.

The statute must prevail, unless its effect shall be overcome by the considerations to which our attention has been called by the learned counsel for the appellant. They have argued their contentions with a wealth of learning and ability commensurate with the importance of the case.

We shall respond to their propositions without re-stating them.

The United States are in no wise bound by the bankrupt act. The clause above quoted is in *pari materia* with the several acts giving priority of payment to the United States, and was doubtless put in to recognize and re-affirm the rights which those statutes give, and to exclude the possibility of a different conclusion. That the claim of the United States was not proved in the bankruptcy proceedings in question, is therefore, quite immaterial in this case.—U. S. *v.* Herron, 20 Wall., 215; Harrison *v.* Sterry, 5 Cr., 289.

The case presented is that of a trust fund, a trustee holding, and a *cestui que trust*, claiming it. This gave the Circuit court original and plenary jurisdiction. That the fund arose and the trustee was appointed under the bankrupt act, did not affect the right of the United States to pursue both by the exercise of the jurisdiction invoked. The same remedies are applicable as if the fund had arisen and the trustee had been appointed in any other way.—12 Pet., supra; Thomson *v.* Smith, 2 Wheat., 425.

The United States were under no obligation to pursue the partnership effects of Cooke, McCulloch & Co., before filing this bill. The bankruptcy of the American partners dissolved the firm of Cooke, McCullock & Co., not only as to themselves, but, also, *inter sese*, as to the solvent partners. In analogy, to the proceeding at law, where there are joint debtors, and one is beyond the reach of the process of the court, and equity has jurisdiction, a decree may be taken against the other for the whole amount due.—Darwent *v.* Walton, 2 Atkyns, 510. In Nelson *v.* Hill, 5 How., 127, this court held that the creditor of a partnership may proceed at law against the surviving partner, or go in the first instance into equity against the representatives of the deceased partner, and that it was not necessary for him to exhaust his remedy at law against the surviving partner, before proceeding in equity against the estate of the deceased. The solvency of the surviving partner is immaterial. To the same effect are Thorpe *v.* Jackson, 2 Young & Collier Exch., 553; and Wilkinson *v.* Henderson, 1st Mylne & K., 582; Exparte Clegg, 2 Cox's Cases, 372; Camp *v.* Grant, 21 Conn., 41. A court of equity will not entertain the question of marshaling assets unless both funds are within the jurisdiction and control of the court.—Adams Equity, 6 Amer. Ed., 548, note; Denham *v.* Williams, 39 Georg'a, 312; see, also, Walker *v.* Covar, 2 South Car., N. S., 16; Dodds *v.* Snyder, 34 Ill., 53; Herriman *v.* Skillman, 33 Barb., 378; Shunk's Appeal, 2 Barr., 304; Coates' Appeal, 7 Watts & S., 99; Keyner *v.* Keyner, 6 Watts, 221. If a judgment at law be recovered against a co-partnership, the separate property of each partner is alike liable to execution with the property of the partnership, and equity will not interfere unless there are cogent special circumstances, such as have no existence here.—Meech *v.* Allen, 17 N Y., 300. These authorities are conclusive on the point under consideration. If there could otherwise be a doubt upon the subject, it is removed by the two statutes. The bankrupt law declares that the United States shall be first paid; the fifth section of the statute of 1797 enacts that where there is a debt and bankruptcy, they shall have priority of payment. Neither statute contains any qualification, and we can interpolate none. Our duty is to execute the law as we find it, not to make it. It would be a singular equity which would drive the appellees "beyond sea" to carry though a litigation of uncertain duration and results against parties there, before they can be permitted to proceed against the parties and property here.

It is a settled principle of equity that a creditor holding collaterals is not bound to apply them before enforcing his direct remedies against the debtor.—Kellock's Case, 3 Chy. Appeals, 769; Bonser *v.* Cox, 6 Beav., 84; Tuckley *v.* Thompson, 1 Johnson & Hemming's Chy. R., 126; Lord *v.* The Ocean Bank, 20 Penn., 384; Neff's Appeal, 9 Id., 36. This is admitted, but it is insisted there are special considerations here which ought to take the case out of the general rule. We think those considerations are all of the opposite tendency. One of them is found in the character and circumstances of a large portion of the collateral assets. The facts are set forth in the answer of the United States to the cross-bill of the appellant, and need not be more particularly adverted to. Another of these considerations applies to all the collaterals and is conclusive. There are parties entitled to be heard touching the application of the proceeds who were not, and could not be, brought before the Circuit court. According to the best considered adjudications, no burden touching these assets can be made to rest upon the United States, which they are not willing to assume. Doubtless questions will arise involving much delay before the administration of the fund is completed. In the meantime the United States can not be barred from enforcing any remedy to which they are entitled.

The court below committed no error in holding that the preference of the United States as a creditor of Cooke, McCulloch & Co., applied to the separate and individual estates of the bankrupt partners, thus superseding the rule in equity recognized by the bankrupt act—that partnership property is to be first applied in payment of the partnership debts, and individual property in payment of the individual debts. It is sufficient to say upon this subject that the learned and elaborate argument of the appellant's counsel in support of the opposite view overlooks the true meaning and effect of the statutes. The bankrupt parties in question were indebted to the United States, and they had separate estates. This entitled the United States to the preference claimed. One of the obvious purposes of the fifth section of the act of 1797 was to abrogate the rule insisted upon, and it has clearly done so. The provisions of the bankrupt act relied upon do not, as we have shown, affect the United States. The legal relations of those parties to the United States, in this controversy, are just what they would have been if those parties were individual debtors to the United States, and the firm of Cooke, McCulloch & Co. had never existed.

The separate and individual interest of the several partners in the partnership property of Jay Cooke & Co. can be only the share of each one of what may be left after discharging all the liabilities of the copartnership. This will be nothing, the firm being in bankruptcy and conceded to be hopelessly insolvent. The United States can, therefore, have no interest with respect to the administration of its affairs. Any rights as to the collaterals held by the United States, claimed by others must be settled outside of the present proceeding They cannot be adjudicated upon in this case.

The decree of the Circuit court is affirmed.

UNITED STATES SUPREME COURT.

No. 869 —OPINION FILED FEB. 21, 1876.

SAMUEL B. LOWER, the Supervisor, ALLEN S. WALTERS, the Town Clerk, and SAMUEL B. LOWER and PERRY F. REMSBURG, the Justices of the Peace of the Town of Ohio, in the County of Bureau and State of Illinois, Plaintiffs in Error,

v.

Uinted States of America, on the relation of George O. Marcy, Defendant in Error.

In error to the Circuit Court of the United States for the Northern District of Illinois.

MANDAMUS—POWER OF COURT TO COMPEL TOWN AUDITORS TO ALLOW A JUDGMENT —TAX LEVY—THE GRAB LAW.

1. That the answer in this case presents no defense to the collection of the judgment in the manner sought by the petition. The judgment was rendered upon certain coupon notes of the town of Ohio, and the object of the petition is to compel the plaintiffs in error, as town auditors, to audit it, so that it can be placed in process of collection in accordance with the Illinois township law.

2. THE ILLINOIS GRAB LAW.—That there is nothing in the point made by the plaintiffs in error that the judgments like the one in question can only be collected through the mode pointed out out in the funding act of 1869.

3. WHAT THE ACT DID.—That the State only assumed the character of a custodian of the money which reached the treasury. The act did not profess to change the terms of the securities, nor exempt the municipality from the obligation to pay them. They were, it is true, registered in the office of the auditor of public accounts and payable at the treasury of the State, but the holder was not required to resort only there for payment.

4. AUDITORS MAY BE COMPELLED TO ALLOW IT.—That this judgment does not differ from one obtained against the town for ordinary charges. Auditing it so that provision may be made for its payment by taxation is a mere ministerial act not involving the exercise of official discretion, the performance of which can be coerced by mandamus.

5. THE JUDGMENT.—The court below commanded the auditors to meet forthwith and audit the judgment. The order is so modified as to direct the board to assemble at its next regular semi-annual meeting and allow said judgment.—[ED. LEGAL NEWS.]

Mr. Justice DAVIS delivered the opinion of the court.

The answer in this case presents no defense to the collection of the judgment in the manner sought by the petition. The judgment was rendered upon certain coupon notes of the town of Ohio, a municipal corporation of Bureau county, and the object of the petition is to compel the plaintiffs in error, as town auditors, to audit it, so that it can be placed in process of collection in accordance with the Illinois township law. This law provides specifically for the auditing of town charges, among which judgments

are included, and for the levy of taxes to pay them, (Revised Statutes of Illinois, 1874, p. 1080,) but the plaintiffs in error say that judgments like the one in question can only be collected through the mode pointed out in the funding act of April 16, 1869.—(Id., p. 791 *et seq.*)

If this were so, the relator would be placed in an unfortunate predicament, as he could not resort to local taxation to collect his judgment, nor oblige the State to pay it.

The funding act, originating in the necessities of the indebted municipalities of the State, proposed a mode to help them, by the collection and disbursement of a State tax levied within their respective limits, but the State expressly disclaimed all liability on account of their indebtedness, and only assumed the character of a custodian of the money which reached the treasury. The act did not profess to change the terms of the securities, nor exempt the municipality from the obligation to pay them. They were, it is true, registered in the office of the auditor of public accounts, and payable at the treasury of the State, but the holder was not required to resort only there for payment. This means might fail, but, whether it did or not, his right secured in the instrument of holding the municipality liable for the debt was not thereby impaired. This is especially true when the coupons have been merged in a judgment, for there is no provision in the funding act to pay it. Even if it could be paid from the taxes levied by the State auditor, the remedy invoked by the relator is not taken away. It would be singular if it were, when the town owes the debt and the judgment so declares. The statute (Id., p. 691) provides "that the writ of mandamus shall not be denied because the petitioner may have another specific legal remedy, when such writ will afford a proper and sufficient remedy." Under it the inquiry whether there is even a better remedy than the one asked for does not arise. It is enough to know that the writ is an appropriate and efficient remedy to compel town auditors to audit a charge against the town when their action is necessary to determine the amount of money to be raised by taxation. In Illinois an ordinary execution does not issue on such a judgment, but the corporate authorities, on refusal to pay, can be required to levy a tax for the purpose when the board of auditors have certified that the charge against the town is a proper one. The relator took the necessary steps to have this certificate made, but the plaintiffs in error only allowed a small portion of the balance due on the judgment, without any legal excuse for not auditing the residue. They admit in their answer the existence of the judgment and the amount due thereon, and are not at liberty to question the liability of the town to pay it. It does not differ, so far as they are concerned, from one obtained against the town for ordinary charges. Auditing it, so that provision may be made for its payment by taxation, is a mere ministerial act not involving the exercise of official discretion, the performance of which can be coerced by mandamus. It was rendered by a court having jurisdiction of the parties and the subject-matter. and there is no controversy as to the amount due the relator.

The circuit court in this case commanded the auditors to meet forthwith and audit the judgment.

Although we are not prepared to say the court exceeded its power in this particular, yet we are of the opinion that the carrying out this order might lead to embarrassments, and that it were better it should be modified. The statute requires that the board of auditors shall meet semi-annually, to examine and audit town charges. It is made their duty to cause a certificate of their proceedings to be filed with the town clerk, for the purpose of having the same certified to the clerk of the county, in order that the amount certified may be by him levied and collected by taxation in the manner prescribed by the revenue laws of the State.

If the clerk should be advised that he was not authorized to extend a tax for the collection of this judgment, on a certificate of the auditors made at an irregular meeting, the relator would be still further delayed, as the writ in this case operates on the auditors and not on the clerk. In order to avoid the delay, if nothing more, which would occur if such a question were raised, it is advisable that the auditors be required to meet at a time authorized by the statute.

The judgment of the circuit court will, therefore, be modified, so as to direct the board to assemble at their next regular semi-annual meeting and allow said judgment.

We are indebted to the law firm of Pearre & McIlduff, of Dwight, Illinois, for the following opinion:

SUPREME COURT OF MISSOURI.

January Term, 1876.

The Metropolitan Bank *v.* Lucy G. Taylor et al.

Appeal from St. Louis Circuit.

MARRIED WOMAN'S NOTE—CHARGING HER SEPARATE ESTATE—WHAT QUESTIONS WILL BE CONSIDERED ON SECOND WRIT OF ERROR.

1. What Will be Considered on Second Writ of Error.—That when a case has been decided upon argument in the Supreme Court, and comes again before the same court on appeal or writ of error, only such questions will generally be noticed as were not determined in the previous decision; whatever was passed upon must be regarded as *res adjudicata*.

2. Married Woman's Note—Charging Separate Estate.—That a married woman is incapable of making a contract except in regard to her separate property, but in reference to that she is treated as a *femme sole*, and if she gives a note, the law implies, in the absence of proof to the contrary, that she intends to bond her separate estate. It may appear that there was no intention to bind the separate estate, but the intention must be manifested from the contract itself and cannot be shown by parol testimony.—[Ed. Legal News.]

Wagner, J.—This was a suit brought for the purpose of charging the separate estate of the defendant, Lucy G. Taylor, with the payment of a promissory note which she signed in conjunction with her husband. This case has been once before in this court [53 Mo., 444] and it was then held that the property now sought to be charged was the separate estate of the defendant, and as such liable for the debt. After the case was remanded here, it was again tried in the circuit court, and a judgment was rendered in favor of the plaintiff, subjecting the property specifically to the satisfaction of the demand.

At the trial the defendant admitted that she signed the note, and testified that it was done at the request of her husband; and that she received no part of the consideration and did not know for what purpose the note was made. She was then asked what connection the note had with her separate estate, but the question was objected to by the plaintiff and the objection was sustained. She was also asked if she knew that she had a separate estate, but this question was ruled out. The further inquiry was put whether by signing the note she intended to bind her separate estate; but the court excluded the question.

The point is presented now that was raised when the case was here before, that Mrs. Taylor had no separate estate, but this question was ruled against her in our former decision, and it must be considered as settled.

When the case of Roberts *v.* Cooper, 20 How., 467, was before the supreme court of the United States the second time, after it had been tried in the circuit court on the principles established by the supreme court in the first trial, it was decided that the court could not be compelled on a second writ of error in the same case to review their decision on the first; that after a case had been brought there and decided, and a mandate issued to the court below, if a second writ of error was sued out it brought up for review nothing but the proceedings subsequent to the mandate; that none of the questions which were before the court on the first writ of error could be re-heard or examined upon the second, and to allow a second writ of error or appeal to a court of last resort on the same questions which were open to dispute in the first, would lead to endless litigation; for there would be no end to a suit if every litigant could by repeated appeals compel a court to listen to criticisms on their opinions, or speculate on chances from changes in its members.

This doctrine has been approved and followed in this court, Chambers *v.* Smith, 30 Mo., 156; Overall *v.* Ellis, 38 Mo., 209. When a case has been decided upon solemn argument in this court, and again comes here on appeal or by writ of error, only such questions will generally be noticed as were not determined in the previous decision, whatever was passed upon must be regarded as *res adjudicata*.

We must, therefore, under the circumstances of this case, decline any further consideration of the character of the estate which was vested in the defendant.

The law in reference to married women binding their separate estates has been so long established in this State that it has become a rule of property and cannot now be shaken. It may be that their estates would be better protected, and that the policy of the law would be more fully carried out, if in all cases where the married woman was surety for another, or she made the contract for mere accommodation, no liability should be enforced against the estate, unless by an express instrument she made the debt a charge upon it.

But too many interests have grown up on the strength of a contrary rule to permit us now to change it. If a change is desirable it should not be made by the courts, but by the legislature, where its operations will be prospective, and cannot interfere with previous transactions which were had on the faith of our former decisions. A married woman is incapable of making a contract except in regard to her separate property. But in reference to that she is treated as a *femme sole*, and if she gives a note the law implies, In the absence of proof to the contrary, that she intends to bind it. It may appear that there was no intention to bind the separate estate, but the intention must be manifested from the contract itself, and cannot be shown by parol testimony. The intent that the separate property should not be bound, to be of any importance, should be a part of the contract; that is to say, that the writing or contract should show on its face, when properly interpreted, that no charge upon the separate estate was intended to be created. Kinun *v.* Weippert, 46 Mo., 532.

The court, therefore, did not err in ruling out the testimony which was offered for the purpose of showing that the defendant signed the note with an intention different from that implied by law. As the defendant, when she signed the note, possessed separate property, the law presumes that she intended to render that property liable for the satisfaction of the obligation, and as nothing different appears from the contract itself, the judgment should be affirmed.

All the judges concur, except Judge Vories, who is absent.

We have received from C. C. Bonney, of the Chicago Bar, the following opinion:

SUPREME COURT OF NEW YORK.

First Department, General Term, 1876.

John C. Fuller et al., *v.* Josiah D. Hunt.

FRAUDULENT CONSPIRACY TO OBTAIN POSSESSION OF PROPERTY WITHOUT PAYING FOR THE SAME.

Motion for a new trial on exceptions ordered by the Court to be heard by the General Term in the first instance.

Cyrus & N. D. Lawton and C. C. Bonney for appellants; Steel & Boyd for respondent Hunt; G. Tillotson for respondent Robinson; J. O. Robinson for respondent Bunster; S. H. Randall for respondent Richardson.

Davis, P. J.—At the close of the evidence on the part of the plaintiffs, the several defendants moved by their respective counsel for a non-suit, stating various grounds for the motion.

The Court granted the motion as to all the defendants, but without stating any grounds upon which it was granted.

The counsel for the plaintiffs duly excepted.

A careful examination of all the evidence contained in the case leaves little, and we may justly say no doubt that the plaintiffs were defrauded of the large amount of property sold and shipped by them to the defendant Richardson, and for which his acceptances were given, but dishonored. A gross deception was practiced upon the plaintiffs either by the defendant Hunt, or, through him as an innocent and deceived party, by one or more of the other defendants, by which the plaintiffs were induced to believe that the purchaser of their goods was one A. Richardson, a brewer, residing in Boston, a man of large wealth and good business reputation, and that he also had an office at 10 Barclay street, in the city of New York, and was there extensively engaged in the business of dealing in cigars.

There was, in fact, a Mr. A Richardson, of Boston, who was a man of large means and good reputation; but he was not, and never had been, engaged in business at 10 Barclay street, New York, in dealing in cigars, nor had he any connection with the concern carrying on business at that place. There was, however, one A. Richardson having an office—or, at least, a sign—at 10 Barclay street, whom the evidence tended to show to be a man of no business standing and of no means but, on the contrary, of bad business character.

Through some instrumentalities the plaintiffs were made to believe that they were dealing with Mr. Richardson of Boston, and that he was identical with the Richardson at 10 Barclay street; and a commercial directory containing the name and business standing of the former at Boston, but which contained no such name as in business at New York, was used as a basis, in part, of the deception.

The goods sold by the plaintiffs were shipped to Richardson, at 10 Barclay street, New York. They were there received by the defendant Bunster, and by him immediately sold to various persons in New York and elsewhere, at prices considerably less than the prices at which they were sold by the plaintiffs to Richardson. Bunster is shown to have had an office at 10 Barclay street, in the same room in which Richardson is claimed to have had his office; and evidence was given tending to show his knowledge of the real purchaser, Richardson, and that Bunster on several occasions, when inquired of respecting him, intimated to parties that he was a brewer doing business at Boston, and at the time when such inquiries were made that he was absent at Boston.

The defendant Robinson was shown to have forwarded the orders of Richardson or orders in his name, upon which the plaintiffs acted in shipping the goods, and in a letter, which accompanied the orders, or a portion of them, he represented in substance that Richardson was a man of responsibility and good business character, using this language: "Mr. R. is A No. 1 and good for all you can sell him."

At the time of making the sale Hunt was in the employ of the plaintiffs as their agent for the purpose of finding customers and making sales of the cigars manufactured by them at Joliet, Illinois.

As already stated the evidence shows that he was either a party to the fraud practiced upon the plaintiffs, or that he himself had been grossly deceived by some of the other parties to this action. There was some evidence tending to show that he occupied the former of these relations.

It consisted in substance in the positive character of the statements he made to the plaintiffs, as though upon his own knowledge, of the responsibility and character of Richardson, the purchaser, and of his identity with the Richardson who resided at Boston; in his haste to dispatch the goods under Richardson's orders, to the neglect of prior orders which plaintiffs had received from other purchasers, leading eventually to the interference of the plaintiffs themselves, for the purpose of fulfilling such former orders; in Hunt's insisting upon the importance to the plaintiffs of filling the orders of so valuable a customer as he represented Richardson to be, and in his leaving the employment of the plaintiffs before the expiration of his time and immediately after one of the plaintiffs had come to New York, where the true character of the transaction would be likely to be developed to him.

If Robinson, the party who forwarded the orders of Richardson, and who appears to have been a broker in this city, is not so clearly shown to have been connected with the fraud, there certainly was evidence of the character above mentioned sufficient to put him upon explanation, and in the absence of explanation, to have justified the jury in finding that he was a particeps criminis in the transaction.

As to the defendant Richardson the case as made seems to leave no doubt that he was a mere buyer in form, without credit or means, whose acceptances were of no value whatever, but were used, and were so intended, as the acceptances of a man of high standing and excellent business reputation, with whom he had neither identity nor any

business connection; and the direct and unexplained connection of Bunster with the cigars when received in New York, together with his occupancy of the same office with Richardson, and his efforts to convey on several occasions the impression of Richardson's identity with the brewer in Boston, standing as they do in the case, and taken in connection with the sales made by him, and particularly those to Hill, Kirkpatrick & Co. of Philadelphia, and the letters written by him to that firm tending to show that the cigars shipped by the plaintiffs were under his control before their arrival in New York, in the absence of any explanation, would have required the jury to have found him to have been interested in and a party to the alleged frauds.

The impression upon our minds from an examination of the evidence is that Richardson was a mere willing decoy in the hands of Bunster, whose name the latter was using to get possession of the plaintiff's goods without subjecting any responsible party to liability for their payment.

Upon the whole case, as laid before the jury by the plaintiffs, had it continued—when presented to the jury—wholly unrebutted and unexplained, it would have been surprising to us had the jury failed to find all the elements of a fraudulent conspiracy consummated by successfully obtaining the possession of the property, with no intent on the part of either of the parties that the plaintiff should ever receive a dollar of its value. But it is enough to see that, in the absence of all explanation, the case made was a proper one for the consideration of the jury, whose special province it would be to pass upon the plaintiffs' allegation of fraud and conspiracy, and determine from the facts and circumstances whether they had been established against all the defendants or any of them.

It was error to take these questions from the jury, and it would have been competent for the jury to render a verdict against such of the defendants as they were satisfied were participants in the alleged frauds.

There were several exceptions taken, on the part of the plaintiffs, both to the exclusion of evidence offered by themselves and to the admission of testimony on cross-examination, some of which were, we think, well taken. But it is not important to discuss them, as the case was disposed of by a non-suit, which we find ourselves unable to uphold on the evidence which was received.

The motion for a new trial should be granted, with costs to abide the event.

Opinion by DAVIS, P. J.; BRADY and DANIELS, JJ., concurred.

ILLINOIS SUPREME COURT.

ABSTRACT OF OPINIONS FILED AT OTTAWA IN 1876.

Wm. R. Raybourn *v.* E. J. Ramsdell.—Appeal from Warren. — Opinion by WALKER, J.

LEASE—USE AND OCCUPATION—FORFEITURE.

STATEMENT.—Lease containing conditions that a hedge should be set out on the land, etc. Breach thereof and suit. The declaration containing accounts for use and occupation. Judgment and appeal.

Held, That where a lessee enters and occupies under a lease providing for the payment of rent by making improvements, and makes default therein, the lessor, on such breach, can only exact the damage sustained thereby. A mere breach of the contract does not, of itself, work a forfeiture, and convert the tenant into one liable to pay for use and occupation, until steps are taken to terminate the lease, the lessee is to be held as holding under the lease.

J. W. Morgan et al. *v.* D. R. Stevens.—Appeal from Warren. — Opinion by BREESE, J.

NUNCUPATIVE WILL—PROOF.

STATEMENT.—Refusal of probate, in the county court, to a nuncupative will. Appeal to circuit court, and reversal of decision of county court. From the decision of the circuit court, contestant's appeal.

Held, 1. That the provisions of a statute as to nuncupative wills, must receive a rigid and strict construction and enforcement from the courts. Such wills are only allowed on the ground that the testator being *in extremis*, had not time to make a more deliberate will.

2. In the probate thereof, the testamentary capacity and the *animis testandi* must appear by the clearest and most incontestable proof; as also that the proof must embody the real testatory intentions of the deceased.

3. Under our statute, such a will must be proved by two or more credible witnesses, who were present at the speaking and publishing thereof, and who shall so testify; and that they heard the testator speak the said words; and that they believed him to be of sound mind and memory; and that he did, at the time, desire the persons present, or some of them, to bear witness that this was his will, or words to that effect.

Keithsburg & Eastern R. R. Co. *v.* H. A Henry.—Appeal from Mercer.—Opinion by WALKER, J.

COMPENSATION FOR RIGHT OF WAY—WHAT MAY BE CONSIDERED.

Held, That in estimating the damages or compensation for taking land for the construction of a railroad track, not only must the value of the land taken be estimated, but there are many other elements of damage which may be properly considered; as, for example, that it puts the land in worse shape for cultivation or pasturage; that it renders some portion of it less convenient or more dangerous for use; that there may be inconvenience or danger in crossing the road with stock to water; that it would require a person to drive the stock to and from watering, in crossing the track. Also, the danger of fire from passing engines, and all other actual inconvenience and damage the property might sustain in its use, and consequently prospective, as well as present, disadvantages.

Wm. P. Henry *v.* Charles Holloway.—Appeal from LaSalle. — Opinion by CRAIG, J.

BILL OF EXCEPTIONS—PRESUMPTIONS.

Held, That where a bill of exceptions does not profess to contain all the evidence introduced on the trial, the Supreme Court will presume that other testimony was heard in the court below, which was sufficient to authorize the judgment rendered.

Prucilla Richardson *v.* Benjamin Robinson.—Appeal from Livingston.—Opinion per curiam.

TRIAL BY COURT ALONE—JUDGMENT IN REPLEVIN.

Held, 1. That where a court tries a case without a jury, its finding will be treated as the verdict of a jury.

2. Where a judgment in replevin embraces more property than is claimed in the writ, it is fatally erroneous.

James McMillen *v.* Joseph Lee.—Appeal from Warren.—Opinion by SHELDON, J.

WIFE AND HUSBAND LIVING APART—NECESSARIES—PROMISE TO PAY IMPLIED.

STATEMENT.—Wife living apart from her husband by mutual consent, with a child, called in a physician to the child, which was sick. The physician sued the father for his services and recovered. The defendant appealed.

Held, 1. That where parents separate, and the father permits the mother to take a child with her, he thereby constitutes her his special agent to provide for the child, and is therefore liable for all necessaries.

2. There is no need for an express contract in such case; but a contract may be implied from the circumstances.

B. F. Sanborn et al. *v.* J. A. Benedict.—Appeal from Winnebago.—Opinion by BREESE, J,

CONTRACTS FOR GROWING GRAIN NOT FRAUDULENT—OFFER TO PERFORM—FUTURE DELIVERY—PROMISE FOR A PROMISE—OPTION OF BUYER TO DEMAND.

STATEMENT.—Contract to sell corn ot defendants at a definite price, at their warehouse, to be delivered ten days after notice given the seller. The corn was refused, and suit brought, in which the plaintiff recovered damages for the non-performance.

At the time of the contract ten dollars were paid, "to bind the bargain." The amount of grain was 2,000 bushels.

Held, 1. That it is not fraudulent to sell property not in present possession, and agree to deliver it in the future.

2. In a case where a large quantity of grain is contracted for, it is not necessary, in offering to perform, to convey the grain actually to the place of delivery. On account of the inconvenience of so doing, an offer is sufficient to constitute a tender, if, at the time, the grain is in possession.

3. A promise for a promise is a valid consideration.

4. As to notice to be given, the law allows a reasonable time for the buyer to exercise his option therein. And not being exercised within the reasonable time, would be a breach of the contract.

5. Growing grain may be a lawful and proper subject of sale, and a contract concerning it is not a gaming contract.

First National Bank of Chicago *v.* James W. Beresford.—Appeal from Cook.—Opinion by CRAIG, J.

REQUISITES OF APPEAL BY CERTIORARI—REQUISITES OF PETITION FOR THE WRIT.

STATEMENT.—Case brought by certiorari into the Circuit Court, from a justice's court, after the expiration of the time allowed for an appeal.

Held, 1. That in a case of certiorari, thus bringing up a case, the petition must *show*, not merely *allege* as a conclusion of the party, the facts prescribed by the statute.

2. A clerk of a justice of the peace is an officer unknown to the law, and if parties to a suit rely upon information obtained from such a one, they do so at their peril and the fact will avail nothing toward showing due diligence.

Niel McIntyre et al. *v.* Ephraim Storey.—Appeal from Carroll.—Opinion by SCOTT, J.

PROOF OF DEDICATION OF HIGHWAY.

Held, 1. That a dedication of the right of way for a highway may be variously proven. It may be established by parol or written instruments, or acts and declarations of the owner of the land. It may be inferred from long and uninterrupted use by the public, with the knowledge and consent of the owner.

2. But there must be a clear intent shown to make the dedication, or else such acts and declarations as will equitably estop the owner from denying such intent.

A. Sumner v. *J. J. McFarlan.*

SALE—WHEN TITLE PASSES.

1. Where property is delivered by the owner to a party seeking to purchase, upon the express agreement that no title shall pass until the price thereof is fully paid, and the price is not paid, the title does not pass, and such party can not, by a sale to one ignorant of the terms of such contract, transfer a good title as against the original owner.

John Patton v. *Antoine Furthmier.*

GUARDIAN AD LITEM FOR DEFENDANT, WHO IS OF AGE.

1. Where a defendant is of age and is under no legal disqualification, it is error to appoint a guardian ad litem and thus oust him from the control and management of his defense.

2. Where an action is commenced against a minor, and judgment rendered against him and without the appointment of a guardian ad litem, and without his appearance, at the trial, and thereafter, on his becoming of age, upon his petition the judgment is vacated and set aside and the case set down for trial, it is error then to appoint a guardian ad litem and permit such guardian to take charge of and control the defense, and a judgment rendered in such trial against him by his next friend and guardian ad litem will be reversed.

Andrew Pingreer, Ex'r, and Betsey P. N. Perkins *v.* Sarah D. P. Jones.—Appeal from Boone. — Opinion by BREESE, J.

INFLUENCE AS TO INSURANCE POLICY—COSTS IN A WILL CONTEST IN CHANCERY—DUTY OF EXECUTOR IN WILL CONTEST.

STATEMENT.—Will of the husband of Betsey Perkins (appellant) admitted to probate by the county court. Afterwards, bill brought to set aside the will, on the ground of undue influence, and insanity of the testator; and also to annul the marriage on the same grounds; and to require the widow to pay back to the estate the sum of $3,000, which, after the decease, she had received on a policy of life insurance on the life of the testator, on the ground that it was taken out under undue influence. The bill prayed an issue at law on the will and the marriage, which was granted—the verdict setting aside the will, and sustaining the marriage. New trial as to the first part of the verdict refused, and decree accordingly, also providing for the repayment of the insurance money to the estate. The decree also allowed claimant full costs, including her witness fees, with execution personally against the defendants for such costs; no part of the same to be charged against the estate. *Held*,

1. As to the insurance policy, that the wife had a perfect right to provide against her widowhood by inducing her husband to take out a policy, and that, as the money paid out in premiums belonged to him, he had a perfect right to take out the policy and pay the money.

2. Although a court of chancery has large discretion in the matter of costs, yet costs cannot be decreed arbitrarily; but, by a fair judicial discretion the matter is to be disposed of.

3. In a contest relating to a will, the person appointed by it is bound, by every principle of honor, justice and right to defend it. He owes it to the memory of the dead, who thus placed confidence in him during life. And, especially, where a will has been admitted to probate without opposition. To make him personally liable for costs is manifest injustice. It is a settled rule that an administrator can never be made liable for costs personally, except on proof of negligence or bad faith.

[No question was made in the Supreme court as to the finding of the jury on the will itself. The marriage, it was incidentally remarked, was evidently true and valid.]

F. F. Cole *v.* Joliet Opera House.—Appeal from Will.—Opinion by WALKER, J.

FRAUD AND CIRCUMVENTION—PLEADING.

STATEMENT.—Plea that the subscription given to the capital stock of the company, on which suit was brought, was obtained by fraud and circumvention; but no circumstances were set out in the plea.

Held, That, while under the plea of *non est factum*, a fraud that relates immediately to the giving of the instrument, as that it was misread to the signer, or his signature obtained to an instrument he did not mean to sign may be proved, yet a plea under the statute as to fraud and circumvention, must set out the facts of the fraud and circumvention in detail.

C. R. I. & P. R. R. Co. *v.* Myron Gore.—Appeal from LaSalle. — Opinion *per curiam.*

LIABILITY OF COMMON CARRIER.

Held, That to make a common carrier liable for goods lost, it must be shown that the goods actually came into the possession of the carrier, and a shipping receipt is not conclusive, but only *prima facie* evidence of that fact.

Napoleon Boardman *v.* George C. Cook, et al.—Appeal from Superior Court of Cook.—Opinion by SHELDON, J.

BILL OF EXCEPTIONS—APPLICATION TO SET ASIDE DEFAULT—AFFIDAVIT.

STATEMENT.—Pleas of appellant were stricken from the files, in the court below, and this decision was assigned for error. *Held*,

1. That, in such a case, the motion, and the evidence heard by the court thereon, must be set out in the bill of exceptions; or the presumption will prevail that the evidence was sufficient.

2. An application to set aside a default is addressed to the sound discretion of the court, and the exercise of this discretion will not be interfered with unless there is manifestly a gross abuse thereof.

3. On motion to set aside a default, the affidavit must not only state that defendant has a meritorious defense, but must set out the facts for the court to judge from, as to the character of the defense.

Mary Brownfield *v.* Mary Ann Wilson.—Appeal from Knox. — Opinion by WALKER, J.

INTERPRETATION OF WILLS.

STATEMENT.—Will of Christian Brownfield contained this clause, "I give and bequeath to my beloved wife Mary Brownfield forty acres, viz: the north forty, where the house and orchard now stand on." And this, "I give and bequeath to my heirs, [the names] to share equally and alike in my real estate, and also my personal property; the personal property to be sold after my death, and the real estate after Mary Brownfield's

death." The wife was a step-mother to these heirs. A bill was brought praying the court to decree that, under these provisions, she took only a life estate. This prayer was granted, and the widow appealed. *Held*,

1. That wills are liberally construed, as to the terms thereof, and, as far as possible, all the provisions thereof are made effective. The question, in all cases, is, what did the testator intend?

2. A later clause in a will is held, if repugnant, to be intended to modify or abrogate the former.

3. The first clause of the will above quoted, expressed the intention to give the wife of the testator certain lands in fee; and as it is unreasonable to suppose that he instantly changed his mind, and limited, or modified that devise, in the next clause, it is to be held that the devise of the fee in the first remained unchanged by the second.

4. The requirement of the sale of the real estate, then, is to be taken to mean the real estate over and above the forty acres. Nor is that construction subverted by the fact that the real estate was to be sold after the widow's death, since there might have been good reason for this; and it is not the business of courts to inquire into reasons, but the actual intention of a testator.

5. While outward circumstances may, in cases of doubt, be resorted to, in construction, they are only aids, and cannot control. Nor can the courts even resort to declarations of a testator before or after the execution of the will to control its provisions.

6. In cases of doubt, courts should look at the fact who were the natural objects of the testator's bounty, as explaining the testator's intentions.

7. A testator may dispose of his property to whom he likes, even to the disinheriting of his own children; and the will will be enforced where the intention is manifest.

Harvey Ruth *v.* City of Abingdon.—Appeal from Knox.—Opinion by SHELDON, J.

EVIDENCE UNDER A CITY LIQUOR ORDINANCE —DEGREE NECESSARY TO CONVICT.

STATEMENT.—Prosecution under an ordinance against selling intoxicating drinks. Appeal to Circuit court, where this instruction was given:

"The jury are further instructed that it is not necessary in this case, to prove the defendant guilty beyond a reasonable doubt. It is sufficient to convict, if a preponderence of evidence is in favor of the plaintiff." *Held*,

Fatally erroneous.

Henry G. Richards *v.* Isaac R. Green.—Appeal from Warren.—Opinion by CRAIG, J.

ASSIGNMENT OF ERRORS—SETTING OFF HOMESTEAD—CHANGE OF VENUE.

STATEMENT. — Appellant executed a trust deed to exppellee in which his wife did not join. Appellee brought a bill making appellee and his wife defendants and praying the setting off of a homestead to them or one of them. The homestead was decreed to be in appellant's wife. This decree was reversed by the Supreme court, on the ground that the homestead should have been decreed to appellant himself. Then a decree was rendered below in conformity with this opinion, and he again appeals on the grounds that the court erred in denying the application of the conservator of the wife's estate to come in and defend, and that the rights of the wife were not determined before the final decree. *Held*,

1. That an appellant cannot urge errors which, if they exist at all, relate exclusively to one who is not complaining, and is not before the court.

2. Where commissioners are appointed to set off a homestead, it does not concern them as to whom the homestead is afterwards decreed.

3. A motion for a change of venue comes too late when a cause is brought to trial, and the court has intimated an opinion as to the merits of the cause.

City of Rock Island *v.* Sophia C. Van Landschoot.—Appeal from Rock Island.—Opinion by BREESE, J.

CITY LIABILITY FOR ACCIDENTS IN DEFECTIVE STREETS.

Held, That where it appears that a street crossing is made of rocks, etc., and that there are ruts and holes worn; but it appears, also, that the plaintiff was a married woman, riding with her husband, who was intoxicated, in a lumber wagon, with an unfastened seat, and the husband had driven over the crossing carelessly, and thrown his wife out, the city is not liable, if the husband's negligence in the matter was greater than its negligence—even where the wife sues alone for her injuries.

[Scott C. J. & Craig J. dissented; but did not state the grounds. The verdict below was for near $4000.]

Eben L. Clement *v.* Hannah S. Newton.—Appeal from Superior Court of Cook.—Opinion by SHELDON, J.

MECHANIC'S LIEN ON WIFE'S PROPERTY ON CONTRACT WITH HUSBAND.

Held, That, where a contract is made with a husband, for work to be done on his wife's seperate property, no mechanic's lien can be enforced, unless the husband's agency appears to have been authorized. Otherwiset, the contract will be regarded as a personal contract with him and the work to have been done upon his personal credit.

L. Taylor *v.* George W. Renn et al.—Appeal from Superior Court of Cook.—Opinion by BREESE, J.

QUANTUM MERUIT AS TO WORK PERFORMED.

Held, That where there is a special contract for work to be performed, and the entire work is performed, but not exactly according to the stipulations of the contract, the workman may recover on a *quantum meruit*, where there is any acceptance of the work by the owner of the premises on which it was done.

U. S. Life Ins. Co. *v.* Advance Co.—Appeal from Superior Court of Cook.—Opinion per curiam.

PRINCIPAL AND AGENT—PRESUMPTION.

STATEMENT.—Suit for a bill of advertising, made by the general agent of the appellee. There was an agreed statement of facts, in which it is said, "That it is the general custom with life insurance companies not to allow their general agents any discretion about contracting advertising bills, except as hereinafter stated; but that, in each case, they must get the consent of the company, before contracting any bill. And, further, that, in advertising, the general agents pay bills ordered by them, and settle with their companies themselves; for instance, in case of the company allowing a stipulated sum per annum towards the advertising, as is sometimes done, the agent settles the bills, and may turn the receipts into the home office, as vouchers for so much money, in their settlements with the company, to the stipulated amount. Sometimes the home office orders special advertising done through the agent, and he has it done; and sometimes it is done directly from the home office." *Held*,

1. That the acts of a general agent, or one whom a man puts in his place to transact all his business of a particular kind, will bind the principal, so long as the agent keeps within the scope of his authority, even when he acts contrary to his private instructions.

2. But, where a general custom exists, the presumption is that the parties were acquainted with it, and contracted with reference to it, which absolves the liability of the principal.

3. Nor is such presumption overcome by the last concession made above, in the statement of facts, in the closing sentence thereof.

Henry Harms *v.* John Aufield.—Appeal from Superior Court of Cook.—Opinion by SCOTT, J.

CONSIDERATION OF NOTE.

STATEMENT.—Suit on promissory notes. Plea, want of consideration; to which demurrer was sustained. The facts averred by the plea were, that the plaintiff was in possession of a certain tract of land owned by defendant, who had agreed by verbal contract, to sell and convey it to plaintiff; and the notes were given in consideration that the plaintiff should surrender the possession to the defendant, which he had acquired under that verbal contract. Also, it was averred, that the plaintiff held the possession without right; but it was confessed that the defendant, after possession taken, had accepted from plaintiff a partial payment on the purchase money. *Held*,

That a mere naked possession may be a sufficient consideration for notes given to buy off the possessor rather than lttigate a controversy concerning it.

H. C. Thomas *v.* S. C. Hinsdale et al.—Appeal from Superior Court of Cook.—Opinion by BREESE, J.

ATTACHMENT—TRESPASS THEREIN—ELECTION OF ACTION FOR WRONGFUL LEVY—WAIVER.

STATEMENT.—Trespass against magistrate, special constable and party for the wrongful issuing and service of an attachment writ. The defendant appeared before the magistrate, moved for and obtained a change of venue; and then made default. The special constable, appointed to save the writ, occupied the magistrate's office, claiming to be a lawyer. *Held*,

1. That ignorance of the law does not excuse a magistrate, in wrongfully issuing an attachment writ, nor an applicant for wrongfully suing it out.

2. Nor will a writ wrongfully sued out, justify an officer having the means of knowing its illegality, in serving it.

3. In such case a defendant may resist the attachment, sue on the attachment bond, or bring trespass.

4. Appearing before the magistrate to obtain a change of venue, is no waiver of defendant's rights.

250.—Elias Wenger *v.* Marshall Calder.—Appeal from Kankakee.—Opinion by SHELDON, J.

MALPRACTICE—MEASURE AND GROUND OF DAMAGES.

STATEMENT.—Suit for malpractice in the treatment of a dislocation of the elbow. The following instructions were given for plaintiff:

(1.) "The rule of damages, in this case, if you find for the plaintiff, is the pain and suffering undergone by the plaintiff, and any permanent injury to the arm shown by the evidence, and consequent pecuniary loss, for life, after the time of the plaintiff's coming of age." (2.) "If you believe, from the evidence, that the defendant, as surgeon, treated the arm of the plaintiff, and failed to use the reasonable care and skill in so treating it, and, if you believe, from the evidence, that the defendant was wilfully negligent in failing to use reasonable care and skill in treating the arm, then you may find for the plaintiff any sum you deem proper, under the evidence, not exceeding ten thousand dollars."

The second of these instructions was deemed irrelevant, and so erroneous, because there was no evidence of willful negligence.

As to the first, the court say: "The injury which the plaintiff originally received to his elbow was not produced by any agency or fault of the defendant; and there is no reason why he should be held to pay for the pain and suffering caused thereby. If there were any additional pain and suffering which the plaintiff underwent because of the want of reasonable care and skill in the treatment, that might have been considered by the jury in assessing damages, [this might be done] but nothing more. And there should have been the same limitation in the respect of any permanent injury.

George W. Plummer *v.* Charles W. Rigden.—Appeal from Superior Court of Cook.—Opinion by CRAIG, J.

NON-PERFORMANCE OF AGREEMENT TO CONVEY LAND—MEASURE OF DAMAGES—MISSTATEMENT OF VALUE OR COST—RESCISSION.

STATEMENT. — Agreement to convey lands, which was found to be impossible through the action of a part owner, not a party to the agreement. Suit for damages in the non-performance. *Held*,

1. That the measure of damages was the value of the land and not the actual damages suffered, to be estimated at the time it was to be conveyed. The rule is different in cases of eviction; and in England a different rule also prevails in suits for failure to convey; and courts in this country are divided on the question. But the doctrine held, (as above,) in our courts is sustained by the weight of authority. [Authorities cited.]

2. Nor is it clear why the same rule should apply to an action for breach of the covenant of seizin, and an action for the breach of an executory contract, as failure to convey. The latter should be under the general rule which gives a vendee the value of the specific article on the day it is to be delivered.

3. A mere misstatement, by a vendor of property, as to its cost, or value, in the absence of any fiduciary relation between the parties, does not authorize a rescission of the contract.

262. James Cuddy *v.* Alice Brown et al —Appeal from Will.—Opinion by BREESE, J,

HEIRSHIP—BARGAIN AND SALE OF LANDS.

Held, 1. That whether certain parties are heirs at law of a deceased person, is a question of pedigree; and hearsay evidence is admissible. And, for the purpose of identity, family names, circumstances. etc., may be proved.

2. Where one bargains with another that he will convey certain lands to his son, on condition that that son should live with him and be reared by him as his child, such contract will not be regarded as a bargain and sale; but may raise an equity in behalf of the child so taken, which a court of equity will carry out and enforce.

Henry Peterson et al. *v.* George B. Griffin.—Appeal from Superior Court of Cook.—Opinion by CRAIG, J.

EJECTMENT—WHAT PASSES UNDER A MORTGAGE—HOUSE BUILT AFTER THE MORTGAGE GIVEN—INJUNCTION AGAINST REMOVAL—REAL ESTATE—WHAT IT IS.

STATEMENT.—Pending a suit in ejectment, under a mortgage, a house was removed off the premises—and *Held*, thereon,

1. That if the house was real property, it could be recovered. But if personal property, it could be rightfully removed.

2. If it were real property, a court of equity would interfere to prevent the removal.

3. A building erected by a tenant, on leased premises, by an agreement with the landlord, may be removed at the end of the term; but no such rule applies to the relation between mortgagor and mortgagee. It is a fundamental rule that real estate embraces lands, tenements and hereditaments; and so, buildings erected on, and fixed to lands, become a part thereof, and belong to the owner of the land; and also all improvements of a permanent character.

4. When, therefore, a building is erected on lands, it is *prima facie* a part of the lands, and this presumption must be rebutted (in ejectments) by the defendant.

5. [However, a mortgagor and mortgagee might stipulate for the removal of a building subsequently erected, no doubt. W.]

270. Harvey B. Peters et al. *v.* Alexander Elliott et al.—Appeal from Mercer.—Opinion by SHELDON, J.

ATTACHMENT—PRIORITY OF LIEN—TRANSFER OF PROPERTY IN TRANSITU—CONSIDERATION THEREFOR—RIGHTS OF SHIPPER AND ATTACHING CREDITORS UNDER THE LIEN OF A PLEDGE GIVEN—DELIVERY.

STATEMENT.—Levy of attachment; a question of property arose under the transfer of a shipping receipt for flour. *Held*,

1. That a sale, mortgage, or pledge, of property in the course of transportation, may be legally made, and the title passed by the delivery of the shipping bill; and that even where the bill is marked "not transferable," by the railroad company, —this being only for the interest of the company, and having no bearing on the rights of the parties.

2. And indebtedness between the shipper and assignee is a sufficient consideration for the transfer.

3. Where there is such a transfer as a pledge for securing indebtedness, the interest of the shipper is only the surplus over and above the indebtedness, and attaching creditors can acquire no greater right than the value of such surplus.

4. In such case, the bill of lading, or shipping receipt, is a symbol of the goods, and the delivery thereof with the intention to transfer the property in the goods is a symbolical delivery of the goods. And the interest acquired dates at the time of delivery, although payment be not made till afterwards; and will take precedence of attachments levied after delivery and before payment. And where interest is that of a lien to secure the return of an advance made on a draft, this lien has priority in the same manner. And also liens may secure even future advances, and have therein like priority.

(*Continued upon page* 223.)

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Lex vincit.

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We call attention to the following opinions, reported at length in this issue:

Bankruptcy — Priority of Claim of United States.—The opinion of the Supreme Court of the United States by Swayne, J., that the court below committed no error in holding that the preference of the United States, as a creditor of Cooke, McCulloch & Co., applied to the separate and individual estates of the bankrupt partners, thus superseding the rule in equity recognized by the bankrupt act—that partnership property is to be first applied in the payment of the partnership debts, and individual property in payment of the individual debts. The bankrupt parties in question were indebted to the United States, and they had separate estates. This entitled the United States to the preference claimed.

Mandamus—Power of Court to Compel Town Auditors to Allow a Judgment—Tax Levy—The Grab-Law.—The opinion of the Supreme Court of the United States, by Davis. J., construing the law of 1869, known as the Grab-law, and holding that there was nothing in the point made by the plaintiff in error, that judgments, like the one in question, against a town, can only be collected in the mode pointed out in the funding act of 1869; that the State only assumed the character of a custodion of the money which reached the treasury; that the act did not profess to change the terms of the securities, nor exempt the municipality from the obligation to pay them; that they were registered in the office of the Auditor of Public Accounts, and payable at the treasury of the State. But the holder was not required to resort only there for payment. That the judgment in question does not differ from one obtained against the town for ordinary charges; that auditing it so that provision may be made for its payment by taxation, is a mere ministerial act, not involving the exercise of official discretion, the performance of which can be coerced by mandamus. This opinion will be of unusual interest to persons holding bonds issued under the funding act of 1869, commonly called the Grab-law, which has been decided, by our Supreme Court, to be unconstitutional.

Second Writ of Error—Married Woman's Note—Charging Her Estate.—The opinion of the Supreme Court of Missouri, by Wagner, J., as to what questions may be reviewed on a second writ of error, and holding that a married woman is incapable of making a contract except in regard to her separate property, but in reference to that she is treated as a *femme sole*, and if she give a note, in the absence of proof to the contrary the law implies that she intended to bind her separate estate. This places the decision of the Supreme Court of Missouri upon a principal. The reasons upon which the old English decisions on the questions of charging a married woman's separate estate rest no longer exist. When those decisions were made, a married woman could own no personal property; the moment it was acquired by her it became her husband's in law. Now she can sue and be sued, contract and be contracted with, and own property without the intervention of a trustee; and there is no reason why, when she gives a note, she and her property should not be bound to the same extent that the husband and his property would be bound if he gave a note.

Fraudulent Conspiracy.—The opinion of the Supreme Court of New York for the First Division in General Term, by Davis, J., as to what constitutes a fraudulent conspiracy to obtain possession of personal property.

The *London Law Times* says: "American law books seem to grow more rapidly than English law books, and it is by no means a promising feature of this growth that the annotation of cases goes on cumulatively, no attempt being made to get rid of decisions no longer of importance." The difficulty seems to be for a law writer to determine just what cases are important and what cases are not. Some writers imagine that every word that proceeds out of a judge's mouth is to be received as law, and commented upon, and cited. The opinions are getting so numerous upon many questions that, if a writer cites them all, he only confuses his reader, and makes him doubt, amid a multitude of conflicting authorities, what the law really is. What should be done to lessen the increasing volume of law, is a question that should receive the careful consideration of the American bar.

NOTES TO RECENT CASES.

BANKRUPTCY—CERTIFICATE OF DISCHARGE —AFTER ACQUIRED PROPERTY.

The Chancery Division of the English court in re Pettit's Trusts, 34 L. T. Rep. N. S., 51, held that after an order closing a bankpuptcy has been made, the bankrupt, although he has not obtained his certificate of discharge, is entitled to the property which he subsequently acquires.

DEVISE—REMAINDER—LIMITATION.

The Supreme Court of Pennsylvania, in Morgan *v.* Quinleven, 33 Leg. Intel., 109, held where there is a devise to one for life, with remainder to his issue as tenants in common, with a limitation to the heirs general of the issue, they take as purchasers in fee.

RIGHT OF EXECUTOR OR ADMINISTRATOR TO ERECT MONUMENT.

The Orphan's Court, of Philadelphia, in the matter of the estate of Barclay, 33 Leg. Intel., 108, held that an executor will not be surcharged, as respects legatees and next of kin, with the cost of a monument over his testator which is reasonable, accords with the means and position of the testator, and has been approved by the majority of the legatees and next of kin, but the cost and enclosure of a burial lot being on the same footing as the improvement of other real estate, will not be allowed an executor as against objecting parties in interest

RECORDER—NEGLIGENCE IN MAKING SEARCH.

The Supreme Court of Pennsylvania, 33 Leg. Int., 108, in Houseman *v.* The Girard M. & L. Ass., held that the recorder of deeds is liable in damages for losses suffered by a mortgagee by reason of a false certificate of mortgage search issued from the recorder's office; that it is not *prima facie* negligence in a mortgagee or his conveyancer to allow the proposed mortgagor to procure the necessary mortgage search. In this county, where the county has its own abstract books, it is a matter of interest to the people to know to what extent the recorder or the county may be liable for the mistakes of the recorder in making searches or giving abstracts from the county books for a consideration. Our Supreme Court has decided when an abstract firm in making an abstract fails to give a tax sale which appears of record, they are liable to pay the damage occasioned thereby. Will the county or the recorder be held to the same liability?

PAROL INSURANCE.

The Supreme Court of Penna., in Patterson *v.* The B. F. Ins. Co., 23 *Pitts. Legal Journal*, 126, held that an insurance company may be bound by a parol insurance before the policy is made out and delivered, to protect the insured in the interim between the taking of the risk and payment of the premium, and the issuing of the policy. In such case, the insurance company must not only have the power to make the verbal contract. but the contract must be clearly established.

COLLATERAL SECURITY—ADVANCES.

It was held by the Supreme Court of Penna., in First N. B. of Clarion *v.* Gregg et al., 23 Pitts. Leg. J., 127, that where a party takes a note as collateral security, and does not make any advances or give any new credit, he has no better title than his assignor.

INSCRIPTION ON TOMBSTONE—THE WORD "REVEREND."

The Judicial Committee of the Privy Council, on appeal from the Arches Court of Canterbury, in Keet *v* Smith et al., 33 L. T. Rep., N. S. 794, held that "the word reverend" is nothing more than a laudatory epithet. It is not a title of honor, to be exclusively possessed by the clergy of the established church, as having episcopal ordination. The appellant was described on a tombstone as "the Rev. H. K., Wesleyan minister." It was held, reversing the judgment of the court below, that this was not a sufficient reason for refusing a faculty for the erection of such tombstone.

RAILROAD — LIABILITY TO KEEP STREET CLEAR..

The Supreme Court of Pa., in P. & B. P. R. R. Co. *v.* Pittsburgh, reported 33 Leg. Intel., 92, held that a passenger railway, which is required by its act of incorporation and by a city ordinance to keep the streets upon which its track is in good repair, is liable to clear away debris, etc., carried on to the street by an unprecedented freshet.

CORPORATION CREATED BY LEGISLATURE OF A REBEL STATE.

The Supreme Court of the United States, in United States *v.* Insurance Companies, 3 Legal Gazette, 77, held that corporations created by the legislature of a rebel State, while the State was in armed rebellion against the government of the United States, have power, since the suppression of the rebellion. to sue in the Federal courts, if the acts of incorporation had no relation to anything else than the domestic concerns of the State; and there were neither in their apparent purpose nor in their operation hostile to the Union or in conflict with the constitution, but were merely ordinary legislation, such as might have been had there been no rebellion,—and that such corporations may in proper cases sue under the captured and abandoned property act.

ADMISSION OF TRAVELERS TO HOTEL.

The United States District Court for the Eastern Dtstrict of Pa., in United States *v.* Newcomer, 33 Leg. Intel., 94, held that the act of congress of March 1, 1875, is authorized by the 14th amendment of the constitution of the United States, and a clerk in charge of the reception of travelers at a hotel may be liable to conviction for a violation of the provisions of the act.

Recent Publications.

Reports of Cases argued and determined in the Supreme Court of the State of Wisconsin, with tables of the cases and principal matters, and the rules of the several courts in force since 1838. By S. U. Pinney. Vol. III. Containing cases decided from the December term, 1850, until the organization of the separate Supreme Court in 1853. Chicago: Callaghan & Company, Law Publishers, 1876.

This is a neat appearing volume. In addition to the cases reported it contains the rules of practice of the District Courts of Wisconsin Territory, and all rules of practice adopted for the County, Circuit and Supreme Courts, since the organization of the State; with sketches of the judges of the first Supreme Court. Orders for this volume, which is the third of the series, should be addressed to the publishers, Messrs. Callaghan & Company.

Table of Contents.—Our readers will find a table of contents of the matters contained in this issue on the first page.

A Justice Caned.—On the 27th of this month, a large number of the citizens of Jefferson, in this county, determined to express their opinion, in a forcible manner, of Newton Linscott, a justice of the peace of that town. They proceeded to the jewelry establishment of C. D. Peacock, of this city, and purchased one of his best gold-headed canes, and on arriving at the house of Justice Linscott, they presented it to him, as a mark of their esteem for him as a justice and an old and respected citizen of the town.

AGENCY—DOCTRINE OF DELEGATION.

DELEGATION OF AUTHORITY BY AGENTS.

The general principle of our law is consistent with that of the civil law in denying to agents, except in certain cases, the right of delegating the authority with which they have been invested. The maxim "*Delegata potestas non potest delegari*" is equally appropriate to both systems of law. If no express authority for the power of delegation exists, there is a presumption that the agent has no such power. When the maxim has been applied various reasons have been given for its application. Thus it is said an agent cannot delegate his authority where his personal skill is essential (Burial Board of St. Margaret Rochester *v.* Thompson (L. Rep. 6 C. P. 457) or where the authority is a judicial authority (Baker *v.* Cave, 1 H. & N. 678), or where it is a trust and confidence reposed in the agent (Bac. Abr. "Authority," D), or where the authority gives the agent a discretionary power (Alexander *v.* Alexander, 2 Ves. 640), unless the discretion is to be exercised in respect of a merely ministerial act, in which case a deputy may be appointed (per Willes J., in Burial Board, &c. *v.* Thompson, sup. p. 458).

Upon the grounds indicated in the above principles, Lord Hardwicke decided that when a father had a power of appointment to his children over a real estate, and he delegated the power to his wife, the power must be considered as a power of attorney which could be executed only by the husband, to whom it was solely confined, and was not in its nature transmissible or delegatory to a third person (Ingram *v.* Ingram, 2 Atk. 88, and see Hamilton *v.* Royse, 2 Sch. & Lef. 330). So, where personal estate was given to such charitable use as A. should appoint, and he directed the money to be applied as B. should appoint, the delegation was held void (Attorney-General

v. Berryman, 2 Ves. 643). So, too, where a testator gave his wife a power to appoint personalty among their children, and she delegated the power by will to others: (Alexander *v.* Alexander, sup.) consent was made requisite to the due execution of a power, he could not empower another to give consent to it as his attorney: Hawkins *v.* Kemp, 3 East, 410.) Again if A. lends B. a horse to ride to York, B. cannot let his man ride him, for the license is a matter of pleasure annexed to the person of B., and cannot be transferred (Boinglo *v.* Morris, Mod. 210); but it is otherwise where a certain time is limited for the loan of a horse, for here B. has an interest in the horse, and may let his servant ride him: (Ib. and 2 Ld. Raym, 913, 915, 916). Upon the same ground, where there was a trust to dispose of certain property to such of the relations and kindred of the testator, in such manner as his trustees and executors should think proper, and the trustees and executors died, the survivor devising the trust estates to A. and B., and making them executors as to the personal part of the property, Sir William Grant decided that A. and B. could not execute the power, for the reason that wherever a power was of a kind that indicated a personal confidence, it must *prima facie* be understood to be confined to the individual to whom it is given, and will not, except by express words, pass to others to whom by legal transmission the same character may and appears to belong: (Cole *v.* Wade, 16 Ves. 27.)

By an agreement B. was to have a claim upon a coach supplied by him until the debt was paid. B. died, and his administratrix sent the coach to H. for repairs. H. detained it. "If Howes," said Lord Tenterden, in delivering the judgment of the court, "had lived, and the coach, on non-payment of the bill, had been taken out of his possession, and he had brought an action, the defendant might. in bar of that, have relied on the instrument. But as the license was a mere personal license, not transferable, supposing the property had been transferred by the act of the party or by operation of law, we are of opinion that the defendant was not entitled to take and detain the coach:" (Howes *v.* Bell, 7 B. & C., 481.)

The principles stated by the earlier legal writers upon the subject under examination do not differ in any essential particular from the principles in force at the present day. They are, indeed, identical in substance, and may be traced to the same general principle that an authority to delegate a delegated authority will not be presumed when such delegated authority is enjoyed as a personal trust. Thus, inasmuch as a principal employs a broker from the opinion he entertains of his personal skill and integrity, a broker has no right, without notice, to turn his principal over to another of whom he knows nothing (Per Lord Ellenborough; Cockram *v.* Irlam, 2 B. & S. 301, n). So if a notice to quit is given by an agent of an agent it is invalid unless authorized by the principal: (Doe *v.* Robinson, 3 Bing. N. C. 677). So, too, when an act of Parliament for building a bridge, ordered that when any notice was to be given by the trustees appointed and acting under it, such notice should be in writing or in print, signed by three or more of the trustees, or by their clerk or clerks, the Court of Queen's Bench held that a notice signed with the names of the clerks to the trustees, but signed in fact by a clerk employed by them, was insufficient on the ground, *inter alia*, that the authority of the clerks could not be delegated. Again, if A. delivers goods to B. for sale by him at a particular place, B. has no right to send them elsewhere under the care of another person in search of a market, although he is unable to sell them at the place appointed: (Catlin *v.* Bell, 4 Camp. 183.) On the same grounds, it was remarked by Lord Eldon, that it is a very dangerous doctrine to maintain that if an auctioneer is authorized to sell, all his clerks, when he goes out of town are in consequence of any usage in that business, agents for the person who authorized him: (Coles *v.* Trecothick, 9 Ves. 250.)

An important distinction to be borne in mind in oonsidering whether an agent may or may not appoint a deputy to do wholly or in part that which the agent is himself appointed to do, is founded upon the distinction between a ministerial and a judicial officer. The former may, whereas the latter, unless expressly authorized, may not, appoint a deputy (1 Roll. Abr. 591; Tit. "*Deputie*," affirmed by Parke, B., in Walsh *v.* Southworth, 6 Ex. 156; Com. Dig. "Officer" D. i).

For a similar reason, where a person's Hence, it was said, a constable, a chamberlain, an alderman, an auditor in the exchequer, an escheator, a sheriff, a dean, a parish clerk, being ministerial officers, could appoint a deputy: (See authorities cited, Com. Dig. "Deputy" D. i). The true distinction would appear to be that which is drawn between acts which are ministerial and acts which are judicial in their character. Thus, at the trial of a cause under the Writ of Trial Act (3 & 4 Will. 4, c. 42), before the sheriff, a verdict was by consent taken for the plaintiff, subject to a reference. It was agreed by both parties that the arbitrator should have power to order a verdict to be entered for either party. The award was made and judgment signed accordingly. The plaintiff then obtained a rule calling upon the defendant to show cause why the award, the verdict, and the judgment should not be set aside. The court set aside the two latter, but not the former. Alderson, B., having pointed out that the sheriff did not, under the above Act, enjoy all the powers of a judge at Nisi Prius, went on to say: "The sheriff had no authority to give power to another to alter the verdict of the jury. It would be very inconvenient that a sheriff should have power to order a reference of cases sent to be tried before him": (Wilson *v.* Thorpe, 6 M. & W. 721). The distinction between acts judicial and acts ministerial is fully recognized in Baker *v.* Cave (per Pollock, C. B., 1 H. & N. 678). "Judicial acts," says the learned Chief Baron, "must contain in themselves the source of the power, but that rule does not apply to ministerial acts;" (Baker *v.* Cave, ubi sup.) Many of the cases under this head refer to the doings of arbitrators.

In Little *v.* Newton (2 Scott N. R. 509) a reference was made to a barrister and two merchants for their award, or the award of any two of them. After all the matters in dispute had been discussed, it was agreed between the barrister and one of the merchants to make an award in favor of the plaintiffs, subject to the decision of a barrister upon a point of law. The latter accordingly, having decided the point in favor of the plaintiff, drew up the award in his favor without any further communication with either of the other arbitrators. The court set the award aside on the ground that the parties were entitled to have the joint judgment of two at least of the arbitrators upon every point submitted to them, and that the judicial authority possessed by each arbitrator could not be delegated by him. "It is true," said Chief Justice Tindal, "that both arbitrators named by the plaintiff and defendant respectively had declined to interfere in the question of law, and had given up their opinion to that of the third. But there is no principle of law that we are aware of which will authorize any such delegation of the judicial authority conferred upon the three; and it is impossible to say that if the determination of the legal arbitrator had been disclosed to either of the other arbitrators before the signature of the award, some argument or observation might not have been made which would have led to a different conclusion." When matters in difference are submitted to arbitrators, it is presumed that the arbitrators will themselves exercise their judgment. Of course, where arbitrators are authorized to call in a competent person to assist them, it is no objection that they have availed themselves of the assistance of such person in deciding the questions submitted to them: (Williams *v.* Wallace, 3 Cl. & F. 26.) Nor can there be any doubt that a legal arbitrator might properly consult an eminent scientific person upon a question within the scope of his profession, and adopt his opinion: (See per Blackburn, J., in Whitmore *v.* Smith, 7 H. & N. 513; 31 L. J. 107, Ex.). But, although an arbitrator may consult such persons, his award must be the act of his own mind: (Eads *v.* Williams, 4 De Gex Mac. & G. 674.) The cases here cited show how necessary it is to avoid confusing a consultation with eminent scientific men, or a giving way by one arbitrator to the opinion of another with a delegation of authority: (See Eardley *v.* Stoer, 4 Dowl. 423.)—*The London Law Times.*

SHOULD WOMEN PRACTICE LAW IN WISCONSIN?

JUSTICE RYAN'S OPINION REVIEWED.

(*Continued from page* 216.)

At common law, before the enactment of any statute relative to attorneys, parties pleaded their own causes; a privilege which is still accorded them by the constitution of Wisconsin. At common law, therefore, woman has always been admitted to the bar, if she chose to plead there in her own behalf, as a party to the suit. Such being the common law, previous to any statutory enactment, it would seem that it would have required a statutory prohibition to have excluded her from practicing as an attorney. No such statutory prohibition appears ever to have been enacted. Judge Nott, of the Court of Claims, in refusing Mrs. Lockwood admission, while claiming that the spirit of the common law was against the admission of woman, declares his conclusions inferentially, and says: "That there has been *no express provision by statute*, and that there was *no exceptional rule at common law*, to prevent any such dangerous and scandalous practice," (i. e. the admission of woman to the bar,) "certainly indicates that the law has never been considered to authorize the admission of women to the bar." Here we have the concession of Judge Nott, while refusing a woman admission to the bar, on the ground that such admission is unauthorized by common law, that "there has been no express provision by statute, and that there was no exceptional rule at common law to prevent" her admission. Instead of inferring that women *may* be admitted because the common law does not expressly exclude them, Judge Nott infers the reverse—that they should not be admitted because the common law does not expressly provide for their admission! The decision of the Supreme Court of Illinois, in refusing Myra Bradwell's application, contents itself with simply saying that "female attorneys at law were unknown in England;" while the Supreme Court of Wisconsin only remarks, generally, that the common law has "excluded" woman from the bar "ever since courts have administered the common law." None of these learned judges quote a single decision of a court, or a single statute, in support of these assertions. Nor can they. The simple fact is that, until very recently, women have never applied for admission, and consequently the courts have had no opportunity to pass upon the question of her admissibility, and no rulings which could be common law with us have ever been made either for or against her admission. The common law, inasmuch as it has always acknowledged the right of a woman to appear at the bar in her own behalf, and has also recognized her capacity to act as agent for another, must be presumed to favor her admission to the bar to act as agent or attorney for another, unless, either by judicial decision, or legislative enactment, made early enough to be common law in this country, the contrary appears. Judge Nott acknowledges that there has been no such exceptional ruling, and neither the Supreme Courts of Illinois or Wisconsin quote any to sustain their positions. Until this is done, we must take the assertion that the common law has always excluded women from the practice of law, as at least "not proven." Judicial decisions in this country, under statutes not expressly authorizing the admission of women, are as follows: In favor of her admission—Maine, Michigan, Missouri and Iowa; against—Illinois, Wisconsin, and court of claims, Washington, D. C.; so that the weight of authority is to the effect that she may be admitted at common law, unmodified by express statutory enactment.

The learned judge claimed that the pronouns "he" and "his" in the statute providing for the admission of attorneys, are sufficient to exclude woman from its provisions, and that the statute providing that "every word importing the masculine gender only may extend and be applied to females as well as to males," is permissive merely, and leaves to the discretion of the court the question of the intent of the legislature as to its application to any particular statute. Granting the statute to be permissive, merely, the discretion of the court in interpreting the intention of the legislature, is not an arbitrary one, but is subject to certain principles. The rule has been repeatedly laid down, by the Supreme Court of this State, that "general words in a statute must receive a general construction; and if there is no express exception, the court can create none." *See Enchling* v. *Simmons*, 28 *Wis.*, 272; *Harrington* v. *Smith*, 28 *Wis.*, 43; *Chase* v. *Whiting*, 30 *Wis.*, 544. How, then, can it interpret the general word "person" in the statute providing for the admission of attorneys, so as to restrict its provisions to male persons. Again, it has been decided that "it has always been considered competent for the legislature to enact rules for the construction of statutes, present and future, and when it has done so, each succeeding legislature, unless a contrary intention is plainly manifested, is supposed to employ words and frame enactments with reference to such rules." *Prentiss* v. *Danaher*, 20 *Wis.*, 311. The statute providing that "words importing the masculine gender only may extend and be applied to females as well as to males," was enacted previously to the existing statute providing for the admission of attorneys; and therefore the legislature framing the latter statute is supposed to have done so with reference to the rule of construction above quoted, and a contrary intention not being plainly manifested, it is evident that the legislature must be supposed to have intended the extension and application of the masculine words therein used to women.

A labored effort has been made by the learned judge to do away with the argument embodied in the petition, to the effect that the legislature has provided for the admission of woman to the bar by enacting, first, that she may be admitted to the State University—and second, that all graduates of the law department of the University shall be entitled to admission to the bar of all the courts of the State. His honor begins by complaining that the statutes were not stated fairly. He says:

"The act of 1867 is an amendment of sec. 4 of the act of 1866, re-organizing the University. The section of 1866 provided, without qualification, that "the University in all its departments and colleges shall be open alike to male and female students." The section of 1867 substitutes the provision that "the University shall be open to female as well as male students, under such regulations and restrictions as the Board of Regents may deem proper." In both statutes the section provides that all able-bodied male students shall receive military instruction, and makes no other reference to a military department. And the argument that the admission of females under the statute of 1867 to all departments except the military, necessarily contemplated their admission to the law department, falls to the ground, because the statute neither mentions all departments nor excepts the military—if there be a military department. The inaccuracy is the more striking from the fact that the section of 1866 does expressly include all departments and colleges, and the amendment of 1867 evidently *ex industrio* omits them. The change of an absolute right of admission to all departments and colleges of the University in 1866, to admission to the University under discretionary regulations and restrictions of the regents in 1867, is very significant; the more so that it is the only amendment made. It seems likely that the Legislature came to regard the absolute and indiscriminate right of 1866 as dangerously broad, and to consider it necessary to make the right subordinate to the judgment of the regents. And if the law school had then been established by statute, it would be very doubtful whether the admission of females to it would be sanctioned by the act of 1867. But there was no such statute; and the law school was in fact established, not by statute, but—as we learn—by the authorities of the University sometime in 1868, after the enactment of the section in both forms. The first class of students, all males, graduated in 1869, without color of right to practice. Hence the statute of 1870 to give the right, presumably passed without thought of the admission of females to the bar."

This labored effort to invalidate the arguement contained in the petition derogates nothing from its force. That the enactment of 1867 was an amendment of the act of 1866, made to so qualify the former act as to admit women to the University "under such regulations and

restrictions as the board of regents may deem proper," instead of admitting them unqualifiedly as before, proves nothing bearing on the point in issue. The legislature itself places *no* restrictions upon the admission of women to any and all departments of the University, whether then existing or to be created in future, except impliedly to the military by introducing the word "male" in making provision for military instruction. That this enactment does not admit women to all departments of the University, because the statute does not explicitly *mention* "all departments," when it says, "The University shall be open to female as well as male students, under such regulations and restrictions as the board of regents may deem proper," is a subterfuge too weak to require a moments consideration.

By this statute, as was argued in the petition, the board of regents *may*, at least, admit women, if they choose to do so, to every department of study in the University except the military, whether then existing or afterwards created, and *may* allow them to graduate therefrom; and according to the law of 1870, such women, so graduating from the law department, are entitled to admission to the bar of every court in the state. Construing the enactment of 1867 in the strictest manner against women, the board of regents are empowered by the legislature to decide whether women shall be graduated from the law department, and so admitted to the bar of the Supreme court; and the inquiry in the petition—"Can it have been the intention of the legislature to give the board of regents of the State University the power to admit women to the practice of law in the Supreme court of this State, and at the same time to withhold that very power from the Supreme court itself?"—loses none of its force.

The learned judge "presumes" that the law of 1870 was passed "without thought of the admission of females to the bar." What reason has he for so presuming? The law department had been in existence two years; a class had been graduated; women were being admitted to the University in accordance with the statute of 1867; in other states women were already studying law, and applying for admission to the bar. At any time they might apply to pursue the course of law study, provided in the University, and with the approval of the board of regents—if not by right, according to the statute—they might be allowed to graduate from the law department. In the face of all these facts, and all these probabilities, the legislature without qualification or restriction enacted that "all graduates of the law department of the Wisconsin University, shall be entitled to admission to the bar of all the courts of this State, upon presenting to the judge or judges thereof, certificate of such graduation." It is not to be "presumed" that our legislators were unaware of the full scope and effect of the laws they enacted.

4th. The Social Argument.

His honor, with a humility at once touching and *naive*, assumes that matrimony is so undesirable a state for woman that, were she allowed freely to earn an honorable and lucrative support in any other manner, she would never enter it. The well-being of society requires her to marry, and she should therefore be forced to do so by having no other alternative! Possibly this is so, though I confess I am slow to believe it. Yet, granting it, for argument sake, would it not be better to render the lot of a married woman more attractive by according her fuller rights therein, and by effort on the part of husbands to so refine and ennoble themselves as to become more desirable companions than so to lower the standard as to take wives who marry because no other alternative is open to them? What honorable and self respecting man would wish to marry a woman who would never have consented to become his wife could she have been allowed to follow a successful professional career." No; let every honorable employment be opened as freely to woman as to man, let her be as independent of matrimony as a means of support as he is; and then if he cannot induce her to marry him, let him conclude that the fault is in himself, and proceed to render himself more worthy of her. If we have fewer marriages, for a time, we shall also have fewer devorces, and fewer discordant families and unhappy children.

Again, his honor assumes in strange contradiction to his previous assumption, that admitting woman to the bar is forcing her into a profession against her will for which she is utterly unfitted, and which would be revolting to her better instincts. There is no force used in permitting her to practice when she asks the privelege. The force is in refusing her. No woman would be *obliged* to follow the legal profession, against her taste or inclination, simply because the Supreme court would admit her, if she applied, and was duly qualified. If the legal profession is not fitted to her, or she to it, practical experiment will convince her of the fact more speedily and effectually than any amount of theorizing can do. No law exists to prevent women from becoming hod-carriers, and yet women do not become hod-carriers. So, if they are unfitted for the practice of law they will soon find it out, and cease to practice; and that will settle the question. But tell them they shall not practice, and there is nothing on earth they want to do so much; and rest assured they will give courts and legislatures no peace till they are accorded the opportunity.

The learned judge declares that the legal profession "has essentially and habitually to do with all that is selfish and extortionate, knavish, and criminal, coarse and brutal, repulsive and obscene in human life;" forgetting that this is but the reverse side of the picture, and that the theory of law has, and its practice should have, if it has not, essentially and habitually to do with all that is unselfish and noble, honest and honorable, high and holy, refined and pure, in human life. The object of law is the administration of justice, and the righting of wrongs, and carries with it a consideration of very many of the most weighty and important questions affecting the welfare of humanity; questions which can be more carefully and thoroughly investigated, and more successfully handled, by one who has had practical experience in dealing with them in the concrete than by any other. In the consideration of these questions, the peculiar qualities of womanhood which the honorable court sets forth so eloquently, are needed no less than the sterner and hardier traits of manhood. "It is not good for man to be alone," even in courts of justice; and this his honor unwittingly proves in endeavoring to prove the reverse. He tells us that the presence of the petitioner in court prevented him from using a certain smutty illustration to demonstrate a point of law which he mentions, and which could have been as well demonstrated by a cleaner one. If this be so the petitioner is glad she was there, and discovers an additional reason why she should be admitted.

His honor gives as a reason why women should not be permitted to practice law, the fact that in their business relations they would meet with so many bad men, whose society would be unpleasant and contaminating. And yet, according to his theory, these very women should marry these men; and should even be forced to marry them, by being shut out from the higher class of employment, lest possibly they might seek a way of escape!

The honorable judge claims that the practice of law is a peculiarly masculine prerogative, and that a woman forsakes the ways of her sex for the ways of his, in adopting that profession. So, once, authorship was considered a masculine employment. As recently as within the last century, Miss Mitford regretted the necessity of being obliged to resort to so peculiarly masculine a vocation for a livelihood, and declared that she would gladly engage in scrubbing, or any "more feminine" occupation, if it would pay her as well!

Education was once considered a peculiarly masculine prerogative. In ancient Greece, an educated woman was considered "unsexed;" she had "forsaken the ways of" her "sex," "for the ways of" man's; and was therefore considered unworthy his respect; as now his honor insinuates a woman learned in the law must needs be. But an advanced civilization demands higher culture for woman, and now she is welcomed in literature and on the rostrum, as she will soon be within the bar; a co-worker with man in the advancement of justice and righteousness.

That a large proportion of women will marry, and will become too largely occupied with home duties to devote themselves to professional labor, is undoubtedly true. It is equally true that a large proportion of men will remain outside the professions, and equally desirable that they should, else who would be our farmers, mechanics, merchants, and laborers? These matters will adjust themselves, only give full scope to labor, and fair competition.

If nature has built up barriers to keep woman out of the legal profession, be assured she will stay out; but if nature has built no such barriers, in vain shall man build them, for they will certainly be overthrown.

LAVINIA GOODELL.

Janesville, Wis., March 20, 1876.

(*Continued from page* 220.)

SUPREME COURT OF ILLINOIS.

ABSTRACT OF OPINIONS FILED AT OTTAWA IN 1876.

267. Buradella G. Simpson, *v.* Wm H. Ham et al.—Appeal from LaSalle.—Opinion by SCOTT, J.

RENTS AND PROFITS ACCRUING WHILE SUIT FOR DOWER IS PENDING—EQUITY JURISDICTION.

STATEMENT.—This suit was for an account of rents and profits, that accrued during the pendency of appellant's suit for dower, in cultivated lands. On demurrer, bill dismissed. *Held*,

That, under our statute, on the assignment of dower, the court at law may, as a part of the proceeding, assess all damages, on the verdict of a jury. But where this is not done, and the dower case passes from the docket, a petitioner under the statute will not be permitted to thus abandon the statutory proceeding, and then invoke the aid of chancery to take an account of the mesne profits; not even if, afterwards, there was a motion made to reinstate the cause in the court of law, to have the damages assessed, and the motion was denied. The method of correcting this denial is by a direct appeal.

Samuel W. Fleeshman *v.* Jonas Moore.—Appeal from Cook.—Opinion by SCOTT, J.

SPECIFIC PERFORMANCE.

Held, That a court of equity will always withhold a decree for specific performance, where the contract is indefinite, and is not supported by a clear preponderance of proof.

Amos T. Hall *v.* John S. Gould et al.—Appeal from Cook.—Opinion by WALKER, J.

LIEN OF LEVY IN ATTACHMENT—STRICT CONSTRUCTION OF LEGAL LIENS ON LAND.

[This is an elaborate case, but turning mainly on facts.]

Held, 1. That a levy on lands by attachment creates no lien until the certificate of levy is filed for record.

2. Execution, attachment, or judgment liens are only to be created by statute, in a strict compliance with the requirements thereof. Mere notice makes no lien.

283. Nelson Monroe *v.* J. W. Chaldeck.—Appeal from Cook.—Opinion by CRAIG, J.

TENDER; AND COSTS THEREON—EXCESSIVE TENDER.

STATEMENT.—Action of covenant to recover $150 which had been paid in advance, as rent under a lease of premises, which, after such payment was not possessed by plaintiff, and by the fault of a former tenant of the defendant. Tender was made after suit; but the money was not actually paid into court. Tender accepted, and judgment for the amount, with costs, against defendant. *Held*,

1. That a tender, once made, must be kept good; and is an admission that the amount tendered is due; and if a tender is ever made for a larger sum than is actually due, it is error for the court to order any part of the sum to be refunded.

2. Where a tender is made before suit and afterwards the money is brought into court, judgment for costs goes against the plaintiff; but, otherwise, against the defendant.

284. Edward Iverson *v.* Michael Mortmer.—Appeal from Cook. Opinion by SCOTT, J.

HARMLESS ERROR IN INSTRUCTIONS.

Held, That mere inaccuracies in instructions will not reverse a cause, where it is evident that, notwithstanding, substantial justice has been done.

UNITED STATES SUPREME COURT.

PROCEEDINGS OF.

Wednesday, March 22, 1876.

On motion of B. F. Butler, Chas C. Dame, of Newberryport, Massachusetts, was admitted.

On motion of Assistant Attorney-General Smith, George J. Sicard, of Buffalo, New York, was admitted.

On motion of E. C. Palmer, James H. Davidson, of St. Paul, Minnesota, was admitted.

No. 176. The United States v. Eugene Diekelman. The argument of this cause was continued by J. D. McPherson for appellee, and concluded by Assistant Attorney-General Smith for appellants.

No. 6. Jos. A. Walker v. Charles S. Sauvinet. This cause was argued by C. W. Horner for plaintiff, and submitted on printed arguments, by J. Q. A. Fellows for defendants in error.

No. 183. Henry and Geo. A. Meyer v. Chester A. Arthur, collector. This cause was argued by Edward Hartley, for plaintiffs in error, and by Assistant-Attorney General Smith for defendant in error.

No. 184 John Montgomery, jr., assignee, plaintiff, v. The Bucyrus Machine Works. This cause was submitted on printed arguments by James Baker, of counsel for plaintiff in error, and by T W. Bartley and S. E. Jenner for defendant.

Adjourned until Thursday at 2 o clock.

Thursday, March 23, 1876.

On motion of T. F. Bayard, Joseph B. Batchelor, of Raleigh, N. C., was admitted.

On motion of D. D. Field, A. P. Sprague, of Troy, N. Y., was admitted.

On motion of Joseph Casey, Augustus Ford, of New York City, was admitted.

No. 185. Henry Miller et al. v. George W. Dale et al. This cause was argued by S. O. Houghton, of counsel for plaintiffs, and by J. S. Black for defendants.

No. 181. The steamship "City of Washington," etc., v. Peter R. Baillie et al. This cause was argued by James W. Gerard for appellants, and by H. J. Scudder for appellees.

Adjourned until Friday at 12 o'clock.

Friday, March 24.

On motion of Assistant Attorney General Smith, William G. Choate, of New York City, was admitted.

No. 186. Robert A. Phillips v. Charles W. Paine. The argument of this cause was commenced by W. Willoughby for plaintiff, and continued by R. T. Daniel for defendant. Further argument postponed until Monday.

No. 187. The steamship Hammonia v. William Ives and John Waters. Passed.

No. 188. John P. Verree and William A. Mitchell v. J. Wilcox Brown et al. Continued.

No. 189. Joseph Hobson and Jose M. Hurtago v. Daniel W. Lord. The argument in this cause was commenced by William G. Choate for plaintiffs.

Adjourned until Monday at 12 o'clock.

Monday, March 27.

No. 144. Mary R. Kohl et al., executors, et al. v. the United States; in error to the Circuit Court of the United States for the Southern District of Ohio. Strong, J., delivered the opinion, affirming the judgment of the Circuit Court. Dissenting, Field, J.

No. 825 Town of Coloma v. David W. Eaves; in error to the Circuit Court of the United States for the Northern District of Illinois. Strong, J., delivered the opinion affirming the judgment of the Circuit Court, with costs and interest. Dissenting, Miller, Davis and Field, JJ.

No. 53. Town of Venice v. Evander Murdock.

No. 54. Town of Genoa v. James D. Woodruff et al.

No. 55. Town of Venice v. James O. Woodruff.

No. 56. Town of Venice v. William L. Matson.

No. 90. Town of Venice v. Opher Edson: in error to the Circuit Court of the United States for the Northern District of New York. Strong, J., delivered the opinion affirming the judgments of the Circuit Court, with costs and interest. Dissenting, Miller, Davis and Field, JJ.

No. 160. William A. Cheatham and wife v. H. L. Norvell, collector, etc.; in error to the Circuit Court of the United States for the middle district of Tennessee. Miller, J., delivered the opinion, affirming the judgment of the Circuit Court, with costs.

No. 513. The United States v. John W. Norton. On a certificate of division of opinion between the judges of the Circuit Court of the United States for the Southern District of New York. Swayne, J., delivered the opinion of the court, answering the first question certified in the affirmative, and the second in the negative.

No. 145. The United States v. Hiram Reese and Matthew Foushee. In error to the Circuit Court of the United States for the District of Kentucky. Waite, C. J., delivered the opinion, affirming the judgment of the Circuit Court. Clifford, J., dissented from the opinion but not from the judgment Hunt, J., dissenting.

No. 339. The United States v. Wm. I. Crinkshank et al.: in error to the Circuit Court of the United States for the District of Louisiana. Waite, C. J., delivered the opinion, affirming the judgment of thd Circuit Court. Clifford, J., dissented from the opinion, but not from the judgment.

No. 179. The schooner Maggie Cain, etc., v. Wm. M. Shakspeare; in error to the Supreme Court of the State of Pennsylvania. Waite, C. J., announced the opinion, affirming the decree of the Supreme Court, with costs.

No. 926. G. Beigner v. Angelina Padethorp, trustee. Waite, C. J., announced the decision of the court, dismissing the writ of error for want of jurisdiction.

No. 428. —— & P. Monroe v. Dover Stamping Company; on motion of P. Phillips dismissed per stipulation.

No. 450. J. L. L. McCall v. J. W. Demoes et al.; on motion of P. Phillips, dismissed with costs.

Adjourned until Tuesday at 12 o'clock.

Tuesday, March 28.

On motion of M. Blair, Albert T. Foster, of Mason City, Mo., was admitted.

On motion of E. C. Palmer. James Gilfiller, of St. Paul, Minn., was admitted.

No. 3, original, the State of Florida v. E. C. Anderson, et al. The argument of the motion of H. Bisbee, Jr., to discharge the receiver, was com-

menced by him in support of the same, and continued by M. H. Carpenter for Holland in opposition thereto and in support of his motion to continue the receiver. The petition of Anderson, et al., for further direction under the decree was argued by W. W. Boyce in support of same. The petition of the J. P. and M. R. R. Co., to intervene pro inter esse suo, was argued by W. G. M. Davis in support of the same, and opposed by D. P. Holland. H. Bisbee, Jr., concluded in opposition to all the motions, and in support of his motion to discharge the receiver. The petition for payment of legal costs and charges, etc., was argued by William Birney in support of the same, and by D. P. Holland in opposition thereto.

No. 189, Joseph Hobson and Jose M. Hartado v. Daniel W. Lord. The argument of this case was continued by E. B. Smith for the defendant.

Adjourned until Wednesday at 12 o'clock.

LEGALITY OF SLAVE MARRIAGES —'SQUIRE LOCKWOOD WINS THE CASE.

The Washington *Republican* of a recent date says:

Yesterday the important case was argued before Justice Wylie, in the Equity court, that of Newbern *v.* Washington. The complainant had asked for the assignment of dower in the estate of her deceased husband, the defendant demurring because of unpaid trusts, and on the overruling by Justice Olin had demanded strict proof of marriage. Upon proof it was shown that the complainant was the second wife, and was married in accordance with the slave laws of North Carolina, and that she removed to this district with her husband after the passage of the act of 1866, regulating the marriage of colored persons in the District of Columbia. Justice Wylie ruled that the marriage of the petitioner was legalized by the statute, and that she was consequently the heir to the whole estate, the first marriage never having been legalized and the second marriage without issue. Belva A. Lockwood, esq., appeared for the complainant, and George F. Appleby, esq., for the defense. This was a novel case of importance, some $10,000 being involved. The complainant's counsel deserves much credit for the ability which she exhibited in the conduct of this case. Some time since the complainant was ejected from the premises in litigation, but since the strong arm of the law has interposed itself she will soon be reinstated in possession thereof.

APPOINTMENT AND JURISDICTION OF MAGISTRATES.—Mr. Hopwood has given notice in the House of Commons that he will, on an early day after Easter, call attention to the law regulating the appointment and jurisdiction of justices of the peace, and the administration by them of the criminal law in summary cases in England, and the necessity for its amendment. He will also move a resolution praying inquiry into the state of the law. Whatever may be the result of the motion, it has been felt (observes the *Law Times*) that in spite of the many advantages attending the present system of unpaid magistrates, it is a system which is open to improvement. How that improvement is to be brought about is a difficult question to determine. There are numerous reasons for retaining the country gentry on the bench, and much of the work at quarter sessions is of a kind which they are most competent to perform. Perhaps the best solution of the difficulty, one which, at any rate, will tend to remedy the evils apparently indicated by Mr. Hopwood's motion, lies in a more general distribution of stipendiaries. The greater expense attending such a change would be more than balanced by the greater uniformity which would soon be apparent in the decisions.—*Public Opinion.*

SUPREME COURT OF ILLINOIS.

ABSTRACT OF OPINIONS FILED AT OTTAWA IN 1876.

278. The People ex rel. Miller *v.* P. H. Brislin et al.—Appeal from County Court of Cook.—Opinion by BREESE, J.

ASSESSMENT OF TAXES BY PARK COMMISSIONERS—CONSTITUTIONALITY OF ACT OF 1871 ETC.

STATEMENT.—The matter herein involved is that of a tax assessment by the Park Commissioners. The objections (53 in number) are held, by the supreme court, to be concentrated in No. 48, namely: "Because the act entitled 'an act to enable the corporate authorities of two or more towns, for park purposes, to issue bonds,' etc., approved June 16, 1871, under and by virtue of which said assessment was levied and confirmed, is void and unconstitutional; for the reason that the same has never received the assent or approval of the legal voters of said towns intended to be affected thereby; and for the reason that it authorizes the issue of a new and unlimited amount of bonds, bearing interest at seven per cent., payable annually, for the payment of which, both principal and interest, the lands and lots of the objectors are bound; and for the further reason that it authorizes interested parties to levy assessments upon lots and lands in said towns; and for the reason that it authorizes the Circuit court to confirm and establish the assessment, when made, without personal notice to the parties interested; and for the reason that it imposes heavy burdens upon the property owners and legal voters of said towns, to which they have never, in any manner, assented: and for the reason that said act is repugnant to the terms of the constitution; and all proceedings under the same are null and void." *Held*,

1. That where an original act provides for a submission to a vote of the people, which vote is given affirmatively establishing the act, it does not follow that subsequent amendments enlarging, curtailing or restricting the chartered rights acquired under the act, must also be submitted to a popular vote, where the essential corporate rights are not invaded.

2. The amendatory act of 1871 did no contravene the provisions of the constitution, nor was the original park act amended by it, interfered with by the constitution of 1870.

3. It is competent for a Circuit court, on confirming the assessment of the park commissioners, to divide the assessment into annual installments.

4. As to the point that the assessment was not made on contiguous property, this question, and all others bringing up the levy and assessment, having been passed on by the Circuit court, are *res adjudicata*, and cannot be made in the Supreme court. There is ajudgment pronounced by a court of competent jurisdiction, and the question must rest there.

5. That the commissioners were themselves property owners within the district, was not a disqualification to make the assessment.

6. The county of Cook is under township organization; the constitution of 1870 making no change in its status in this respect.

7. All the objections urged are untenable.

286. John L. Doran *v.* Catharine Mullen.—Appeal from Cook.—Opinion by WALKER, J.

PROBATE OF WILLS—EXAMINATION OF WITNESSES—APPEAL—WHAT MAY BE SHOWN IN IMPEACHMENT OF A WILL—PRESUMPTION.

STATEMENT.—Action to revoke letters of administration, and admit to probate a will which had been refused probate by the County court. *Held*,

1. That a court has no discretion as to admitting a will to probate, or otherwise; but must judge the matter according to the evidence.

2. A mere discrepancy of dates does not prove a will to be a forgery. And especially such an objection cannot be first raised in the appellate court.

3. The asking of leading questions, in such case, is discretionary with the court. When a witness is unwilling, or very ignorant, the administration of justice requires leading questions to be allowed. And the exercise of this discretion is not subject to review.

4. It is a presumption of law that a testator signed a will with knowledge of its contents, and there is no distinction herein between persons who can, and persons who cannot, write.

5. Where, on an appeal from the County to the Circuit court, a party consents that the Circuit court may review the decision of the County court, instead of trying the matter *denovo*, he cannot afterwards object to the proceeding. He cannot disclaim his own act.

6. In the matter of a will, it may be shown that the will was not in fact read to the testator, that he was ignorant of its contents, that he was in a situation to be readily imposed on, or was in fact imposed upon.

[Will admitted to probate.]

CHANCERY NOTICE.—STATE OF ILLINOIS. County of Cook, ss. Circuit court of Cook county. March term, A. D. 1876. Gottlieb Brussok vs. William O. Cole, Adolph Heile, George Gardner, William R. Graham, Charlotte D. Flagg, and James M. Flagg.—In chancery.

Affidavit of the non-residence of William R. Graham, defendant above named, having been filed in the office of the clerk of said Circuit court of Cook county, notice is hereby given to the said William R. Graham, that the complainant heretofore filed his bill of complaint in said court, on the chancery side thereof, and that a summons thereupon issued out of said court against said defendants, returnable at the court house in the city of Chicago, in said county, on the third Monday of December, 1875, as is by law required.

Now, unless you, the said William R. Graham, shall personally be and appear before said Circuit court of Cook county, on the first day of a term thereof, to be holden at Chicago, in said county, on the third Monday of May, 1876, and plead, answer or demur to the said complainant's bill of complaint, the same, and the matters and things therein charged and stated, will be taken as confessed, and a decree entered against you according to the prayer of said bill. JACOB GROSS, Clerk.

BRANDT & HOFFMAN, Complts. Solr. 28-31

CHANCERY NOTICE.—STATE OF ILLINOIS, County of Cook, ss. Circuit Court of Cook county. April term, A. D. 1876. Mary Reuter vs. Gustav Reuter.—In chancery.

Affidavit of the non-residence of Gustav Reuter, defendant above named, having been filed in the office of the clerk of said Circuit court of Cook county, notice is hereby given to the said Gustav Reuter, that the complainant heretofore filed her bill of complaint in said court, on the chancery side thereof, and that a summons thereupon issued out of said court against said defendant, returnable at the court house in the city of Chicago, in said county, on the third Monday of April next (1876), as is by law required.

Now, unless you, the said Gustav Reuter, shall personally be and appear before said Circuit court of Cook county, on the first day of a term thereof, to be holden at Chicago, in said county, on the third Monday of May, 1876, and plead, answer or demur to the said complainant's bill of complaint, the same, and the matters and things therein charged and stated, will be taken as confessed, and a decree entered against you according to the prayer of said bill. JACOB GROSS, Clerk.

C. J. RICHARDSON, Complts. Solr. 28-31

CHANCERY NOTICE.—STATE OF ILLINOIS, County of Cook, ss.—Superior court of Cook county. April Term, A. D. 1876. George H. Laflin vs. Samuel J. Walker, Dwight F. Cameron, Fannie E. Cameron, Russell M. Larned, Lycurgus Laflin and Mathew Laflin.—In chancery.

Affidavit of the non-residence of Russel M. Larned, and that upon diligent inquiry the place of residence of Fannie E. Cameran cannot be ascertained, having been filed in the office of the Clerk of the Superior Court of Cook county, notice is hereby given to the said Russell M. Larned and Fannie E. Cameron that the above-named complainant heretofore filed his bill of complaint in said court on the chancery side thereof, and that a summons thereupon issued of said court against the above-named defendants, returnable on the first day of the term of the Superior Court of Cook county, to be held at the court house in Chicago, in said Cook county, on the first Monday of April next, (1876,) as is by law required, and which suit is still pending.

JNO. J. HEALY, Clerk.

THOMPSON & BISHOP, Compl'ts Sol'rs. 25-28

CHANCERY NOTICE.—STATE OF ILLINOIS' county of Cook, ss. Superior court of Cook county. April term, A. D. 1876. Telam J. Dayton vs. Ella Jane Dayton.—In chancery.

Affidavit of the non-residence of Ella Jane Dayton, defendant above named, having been filed in the office of the clerk of the Superior Court of Cook county, notice is hereby given to the said Ella Jane Dayton, that the above named complainant heretofore filed his bill of complaint in said court on the chancery side thereof, and that a summons thereupon issued out of said court against the above named defendant, returnable on the first day of the term of the Superior court of Cook county, to be held at the court house in Chicago, in said Cook county, on the first Monday of April next, (1876,) as is by law required, and which suit is still pending.

JNO. J. HEALY, Clerk.

WM. S. CADMAN, Complts. Solr. 26-29

HOYNE, HORTON & HOYNE,
Attorneys. 88 LaSalle St.

UNITED STATES CIRCUIT COURT, NORTHERN District of Illinois. Wednesday, March 8, A. D. 1876. Present, Hon Henry W. Blodgett, District Judge. Northwestern Mutual Life Insurance Company vs. George R. Chittenden, F. Prentice et al.—In chancery.

Upon motion of the solicitors for the complainant in the above entitled cause, upon affidavit filed, it appearing to the court that it is impracticable to serve a copy of the rule entered in this cause, on the fourth day of February last, upon the said defendant, F. Prentice. It is ordered by the court that said defendant, F. Prentice, appear, plead, answer or demur to said complainant's bill on or before the first Monday in May next.

It is further ordered that publication of this order be made in the Chicago Legal News for six consecutive weeks prior to the said first Monday of May next.

Northern District of Illinois, ss.—I, William H. Bradley, Clerk of the Circuit Court of the United States for said Northern District of Illinois, do hereby certify the above and foregoing to be a true and correct copy of the order entered of record in said court on the 8th day of March, A. D. 1876, in the cause wherein Northwestern Mutual Life Insurance Company is the complainant, and George R. Chittenden et al. are the defendants, as the same appears from the original thereof, now remaining in my custody and control.

[SEAL.] In testimony whereof, I have hereunto set my hand and affixed the seal of said court, at my office in Chicago, in said district, this 8th day of March, A. D. 1876.

WM. H. BRADLEY, Clerk.

25-30

JOHN P. ALTGELD,
Attorney, 39 Reaper Block.

STATE OF ILLINOIS, COUNTY OF COOK, SS.—Superior court of Cook county, March term, 1876. Lizzie Anderson vs. Oley Anderson.—In chancery.

Affidavit of the non-residence of Oley Anderson, the above named defendant, having been filed in the office of the clerk of the Superior court of Cook county, notice is hereby given to the said Oley Anderson, that the above named complainant heretofore filed her bill of complaint in said court on the chancery side thereof, and that a summons thereupon issued out of said court against the above named defendant, returnable on the first day of the term of said court to be held at the court house in Chicago, in said county of Cook, on the first Monday of March, 1876, as is required by law, and which suit is still pending.

JOHN J. HEALY, Clerk.

JOHN P. ALTGELD, Complts. Solr. 26-29

WALTER M. HOWLAND
Attorney.

ESTATE OF GEORGE F ARMS, DECEASED.—Notice is hereby given to all persons having claims and demands against the estate of George F. Arms, deceased, to present the same for adjudication and settlement at a regular term of the County court of Cook county, to be holden at the court house of said county, in the city of Chicago, on the third Monday, of May, A. D. 1876, being the 15th day thereof.

Chicago, April 1st, A. D. 1876.

MAY W. ARMS, Executrix.

WALTER M. HOWLAND Attorney. 28-33

BARKER, BUELL & WAIT,
Attorneys, Room 9, McCormick Block.

ESTATE OF PETER MCKARI ALIAS PETER McCary, deceased.—Notice is hereby given to all persons having claims and demands against the estate of Peter McKari alias Peter McCary, deceased, to present the same for adjudication and settlement at a regular term of the County court of Cook county, to be holden at the court house, in the city of Chicago, on the third Monday of May, A. D. 1876, being the 15th day thereof.

Chicago, March 24th, A. D. 1876.

MARGARET BISCHOFF, Administratrix.

BARKER, BUELL & WAIT, Attys. 28-33a

GENERAL NOTICE.—A SPECIAL MEETING OF the stockholders of the Joseph H. Brown Iron and Steel Company, will be held at the hour of two o'clock P. M., on the twenty-second day of April, A. D. 1876, at the office of said Company, at the city of Chicago, in Cook county, in the State of Illinois, for the object and purpose of submitting to a vote of such stockholders the question and proposition of increasing the capital stock of said Company from three hundred thousand dollars to five hundred thousand dollars. Dated at Chicago, Illinois, this twenty-first day of March, A. D. 1876.

JOSEPH H. BROWN,
SAMUEL HALE,
CHAS. B. HALE,
J. T. TORRENCE,
ROSWELL R. BUCK,

Directors of the Joseph H. Brown Iron and Steel Company. 27-29

ESTATE OF MARY F. MILLER, DECEASED.—Notice is hereby given to all persons having claims and demands against the estate of Mary F. Miller, deceased, to present the same for adjudication and settlement at a regular term of the County court of Cook county, to be holden at the court house, in the city of Chicago, on the third Monday of May, A. D. 1876, being the fifteenth day thereof.

Chicago, March 9, A. D. 1876.

CHARLES S. CUSHING, Administrator.

BONNEY, FAY & GRIGGS, Attys. 26-30

ADMINISTRATOR'S SALE.—NOTICE IS HEREBY given that on Saturday, April 22, 1876, between the hours of 10 o'clock in the forenoon and five o'clock in the afternoon, at the auction rooms of Wm. A. Butters & Co., Nos. 118 and 120 Wabash ave., in the city of Chicago, the personal property of Matthew Fox, deceased, consisting of furniture and other articles, will be sold at public sale. Terms cash.

Dated March 14th, 1876.

JULIUS ROSENTHAL, Administrator.

TULEY, STILES & LEWIS, Attys. 26-29

ESTATE OF THOMAS HARBRIDGE, DECEASED. Notice is hereby given to all persons having claims and demands against the estate of Thomas Harbridge, deceased, to present the same for adjudication and settlement at a regular term of the County court of Cook county, to be holden at the court house, in the city of Chicago, on the third Monday of May, A. D. 1876, being the 15th day thereof.

Chicago, March 17th, A.D. 1876.

WALTER S. BABCOCK.
Administrator with the will annexed.

RICABY & LANDIS, Attys. 26-31

ESTATE OF JOHN TALBOT, DECEASED.—Notice is hereby given to all persons having claims and demands against the estate of John Talbot, deceased, to present the same for adjudication and settlement at a regular term of the County court of Cook county, to be holden at the court house, in the city of Chicago, on the third Monday of April, A. D. 1876 being the 17th day thereof.

Chicago, February 29th, A. D. 1876.

HENRY CORDES, Administrator.

SNOWHOOK, JOHNSTON & GRAY, Attys. 24-29 a.

ESTATE OF VIRGINIA S. K. LATSHAW, DECEASED.—Notice is hereby given to all persons having claims and demands against the estate of Virginia S. K. Latshaw, deceased, to present the same for adjudication and settlement at a regular term of the county court of Cook county, to be holden at the court house, in the city of Chicago on the third Monday of April, A. D. 1876, being the 17th day thereof.

Chicago, March 3d, A. D. 1876.

24-29 JOHN F. LATSHAW, Administrator.

ESTATE OF LUDWIG KRUEGER, DECEASED. —Notice is hereby given to all persons having claims and demands against the estate of Ludwig Krueger, deceased, to present the same for adjudication and settlement at a regular term of the County court of Cook county, to be holden at the court house, in the city of Chicago, on the third Monday of April, A. D. 1876, being the 17th day thereof.

Chicago, Febuary 25th, A. D. 1876.

23-28a CATHARINE KRUEGER, Administratrix.

CHICAGO LEGAL NEWS.

SATURDAY, APRIL 8, 1876.

The Courts.

UNITED STATES SUPREME COURT.

No. 104.—OCTOBER TERM, 1875.

MYRA CLARK GAINES *v.* JOSEPH FUENTES and others.

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

1. In cases where the judicial power of the United States can be applied only because they involve controversies between citizens of different States, it rests with Congress to determine at what time the power may be invoked and upon what conditions; whether originally in the federal court, or after suit brought in the State court; and in the latter case, at what stage of the proceedings; whether before issue or trial by removal to a federal court, or after judgment upon appeal or writ of error.
2. As the Constitution imposes no limitation upon the class of cases involving controversies between citizens of different States, to which the judicial power of the United States may be extended, Congress may provide for bringing, at the option of either of the parties, all such controversies within the jurisdiction of the federal judiciary.
3. The act of Congress of March 2d, 1867, in authorizing and requiring the removal to the Circuit Court of the United States of a suit pending or afterwards brought in *any* State court involving a controversy between a citizen of the State where the suit is brought and a citizen of another State, thereby invests the Circuit Court with jurisdiction to pass upon and determine the controversy, when the removal is made, though that court could not have taken original cognizance of the case.
4. A suit to annul a will as a muniment of title and to restrain the enforcement of a decree admitting it to probate, is in essential particulars a suit in equity, and if by the law obtaining in a State, customary or statutory, such a suit can be maintained in one of its courts, whatever designation that court may bear, it may be maintained by original process in the Circuit Court of the United States if the parties are citizens of different States.

Mr. Justice FIELD delivered the opinion of the court.

This is an action in form to annul an alleged will of Daniel Clark, the father of the appellant, dated on the 13th of July, 1813, and to recall the decree of the court by which it was probated. It was brought in the second district court for the parish of Orleans, which, under the laws of Louisiana, is invested with jurisdiction over the estates of deceased persons, and of appointments necessary in the course of their administration.

The petition sets forth that on the 18th of January, 1855, the appellant applied to that court for the probate of the alleged will; and that by decree of the Supreme court of the State, the alleged will was recognized as the last will and testament of the said Daniel Clark, and was ordered to be recorded and executed as such; that this decree of probate was obtained *ex parte*, and by its terms authorized any person at any time, who might desire to do so, to contest the will and its probate in a direct action, or as a means of defense by way of answer or exception, whenever the will should be set up as a muniment of title; that the appellant subsequently commenced several suits against the petitioners in the Circuit Court of the United States to recover sundry tracts of land and properties of great value, situated in the parish of Orleans and elsewhere, in which they are interested, setting up the alleged will as probated as a muniment of title, and claiming under the same as instituted heir of the testator; and that the petitioners are unable to contest the validity of the alleged will so long as the decree of probate remains unrecalled. The petitioners then proceed to set forth the grounds upon which they ask for a revocation of the will and the recalling of the decree of probate, these being substantially the falsity and insufficiency of the testimony upon which the will was admitted to probate, and the status of the appellant, incapacitating her to inherit or take by last will from the decedent.

A citation having been issued upon the petition and served upon the appellant, she applied in proper form, with a tender of the necessary bond, for removal of the cause to the Circuit Court of the United States for the district of Louisiana, under the twelfth section of the judiciary act of 1789, on the ground that she was a citizen of New York and the petitioners were citizens of Louisiana. The court denied the application, for the alleged reason that, as the appellant had made herself a party to the proceedings in the court relative to the settlement of Clark's succession by appearing for the probate of the will, she could not now avoid the jurisdiction when the attempt was made to set aside and annul the order of probate which she had obtained. The court, however, went on to say in its opinion that the federal court could not take jurisdiction of a controversy having for its object the annulment of a decree probating a will.

The appellant then applied for a removal of the action under the act of March 2d, 1867, on the ground that from prejudice and local influence she would not be able to obtain justice in the State court, accompanying the application with the affidavit and bond required by the statute. This application was also denied, the court resting its decision on the alleged ground that the federal tribunal could not take jurisdiction of the subject matter of the controversy.

Other parties having intervened, the application was renewed and again denied. An answer was then filed by the appellant, denying generally the allegations of the petition, except as to the probate of the will, and interposing a plea of prescription. Subsequently a further plea was filed to the effect that the several matters alleged as to the status of the appellant had been the subject of judicial inquiry in the federal courts, and been there adjudged in her favor. Upon the hearing a decree was entered annulling the will and revoking its probate. The Supreme Court of the State having affirmed this decree, the case was appealed to this court.

In the view we take of the application of the appellant to remove the cause to the federal court, no other question than the one raised upon that application is open for our consideration. If the application should have been granted, the subsequent proceedings were without validity, and no useful purpose would be obtained by an examination of the merits of the defense, upon the supposition that the State court rightfully retained its original jurisdiction.

This action, as already stated, is in form to annul the alleged will of Daniel Clark of 1813, and to recall the decree by which it was probated. But as the petitioners are not heirs of Clark, nor legatees, nor next of kin, and do not ask to be substituted in place of the appellant, the action cannot be treated as properly instituted for the revocation of the probate, but must be treated as brought by strangers to the estate against the devisee to annul the will as a muinment of title, and to restrain the enforcement of the decree by which its validity was established, so far as it affects their property. It is in fact an action between parties; and the question for determination is whether the federal court can take jurisdiction of an action brought for the object mentioned between citizens of different States, upon its removal from a State court. The Constitution declares that the judicial power of the United States shall extend to "controversies between citizens of different States," as well as to cases arising under the Constitution, treaties, and laws of the United States; but the conditions upon which the power shall be exercised, except so far as the original or appellate character of the jurisdiction is designated in the Constitution, are matters of legislative direction. Some cases there are, it is true, in which, from their nature, the judicial power of the United States, when invoked, is exclusive of all State authority. Such are cases in which the United States are parties; cases of admiralty and maritime jurisdiction, and cases for the enforcement of rights of inventors and authors under the laws of Congress. (The Moses Taylor, 4 Wallace, 429; Railway Co. *v.* Whitton, 13 Ibid, 288.) But in cases where the judicial power of the United States can be applied only because they involve controversies between citizens of different States, it rests entirely with Congress to determine at what time the power may be invoked and upon what conditions; whether originally in the federal court, or after suit brought in the State court; and in the latter case, at what stage of the proceedings; whether before issue or trial by removal to a federal court, or after judgment upon appeal or writ of error. The judiciary act of 1789, in the distribution of jurisdiction to the federal courts, proceeded upon this theory. It declared that the Circuit courts should have original cognizance, concurrent with the courts of the several States, of all suits of a civil nature at common law or in equity, involving a specified sum or value, where the suits were between citizens of the State in which they were brought and citizens of other States; and it provided that suits of that character by citizens of the State in which they were brought might be transferred, upon application of the defendants, made at the time of entering their appearance, if accompanied with sufficient security for subsequent proceedings in the federal court. The validity of this legislation is not open to serious question, and the provisions adopted have been recognized and followed with scarcely an exception by the federal and State courts since the establishment of the government. But the limitation of the original jurisdiction of the federal court, and of the right of removal from a State court, to a class of cases between citizens of different States involving a designated amount, and brought by or against resident citizens of the State, was only a matter of legislative discretion. The Constitution imposes no limitation upon the class of cases involving controversies between citizens of different States, to which the judicial power of the United States may be extended; and Congress may, therefore, lawfully provide for bringing, at the option of either of the parties, all such controversies within the jurisdiction of the federal judiciary.

As we have had occasion to observe in previous cases, the provision of the Constitution, extending the judicial power of the United States to controversies between citizens of different States, had its existence in the impression that State attachments and State prejudices might affect injuriously the regular administration of justice in the State courts. It was originally supposed that adequate protection against such influences was secured by allowing to the plaintiff an election of courts before suit, and when the suit was brought in a State court, a like election to the defendant afterwards. (Railway Co. *v.* Whitton, 13 Wallace, 289.) But the experience of parties immediately after the late war, which powerfully excited the people of different States, and in many instances engendered bitter enmities, satisfied Congress that further legislation was required fully to protect litigants against influences of that character. It therefore provided, by the act of March 2d, 1867, (14 Statutes, 559), greater facilities for the removal of cases involving controversies between citizens of different States, from a State court to a federal court, when it appeared that such influences existed. That act declared that where a suit was then pending, or should afterwards be brought in *any* State court, in which there was a controversy between a citizen of the State in which the suit was brought, and a citizen of another State, and the matter in dispute exceeded the sum of five hundred dollars, exclusive of costs, such citizen of another State, whether plaintiff or defendant, upon making and filing in the State court an affidavit that he had reason to believe, and did believe, that from prejudice or local influence he would not be able to obtain justice in the State court, might at any time before final hearing or trial of the suit, obtain a removal of the case into the Circuit court of the United States upon petition for that purpose and the production of sufficient security for subsequent proceedings in the federal court. This act covered every possible case involving controversies between citizens of the State where the suit was brought and citizens of other States, if the matter in dispute, exclusive of costs, exceeded the sum of five hundred dollars. It mattered not whether the suit was brought in a State court of limited or general jurisdiction. The only test was, did it involve a controversy between citizens of the State and citizens of other States, and did the matter in dispute exceed a specified amount. And a controversy was involved in the sense of the statute whenever any property or claim of the parties, capable of pecuniary estimation, was the subject of the litigation, and was presented by the pleadings for judicial determination.

With these provisions in force, we are clearly of opinion that the State court of Louisiana erred in refusing to transfer the case to the Circuit court of the United States upon the application of the appellant. If the federal court had by no previous act, jurisdiction to pass upon and determine the controversy existing between the parties in the parish court of Orleans, it was invested with the necessary jurisdiction by this act itself, so soon as the case was transferred. In authorizing and requiring the transfer of cases involving particular controversies, from a State court to a federal court, the statute thereby clothed the latter court with all the authority essential for the complete adjudication of the controversies, even though it should be admitted that that court could not have taken original cognizance of the cases. The language used in Smith *v.* Rines, cited from the 2nd of Sumner's Reports, in support of the position that such cases are only liable to removal from the State to the Circuit court as might have been brought before the Circuit court by original process, applied only to the law as it then stood. No case could then be transferred from a State court to a federal court on account of the citizenship of the parties, which could not originally have been brought in the Circuit court.

But the admission supposed is not required in this case. The suit in the parish court is not a proceeding to establish a will, but to annul it as a muniment of title, and to limit the operation of the decree admitting it to probate. It is in all essential particulars a suit for equitable relief—to cancel an instrument alleged to be void, and to restrain the enforcement of a decree alleged to have been obtained upon false and insufficient testimony. There are no separate equity courts in Louisiana, and suits for special relief of the nature here sought are not there designated suits in equity. But they are none the less essentially such suits; and if by the law obtaining in the State, customary or statutory, they can be maintained in a State court, whatever designation that court may bear, we think they may be maintained by original process in a federal court, where the parties are on the one side citizens of Louisiana, and on the other citizens of other States.

Nor is there anything in the decisions of this court in the case of Gaines *v.* New Orleans, reported in the 6th of Wallace, or in the case of Broderick's will, reported in the 21st of Wallace, which militate against these views. In Gaines *v.* New Orleans this court only held that the probate could not be collaterally attacked, and that until revoked it was conclusive of the existence of the will and its contents. There is no intimation given that a direct action to annul the will and restrain a decree admitting it to probate might not be maintained in a federal as well as in a State court, if jurisdiction of the parties was once rightfully obtained.

In the case of Broderick's will, the doctrine is approved, which is established both in England and in this country, that by the general jurisdiction of courts of equity, independent of statutes, a bill will not lie to set aside a will or its probate; and whatever the cause of the establishment of this doctrine originally, there is ample reason for its maintenance in this country, from the full jurisdiction over the subject of wills vested in the probate courts and the revisory power over their adjudications in the appellate courts. But that such jurisdiction may be vested in the State courts of equity by statute, is there recognized, and that when so vested the federal courts, sitting in the States where such statutes exist, will also entertai concurrent jurisdiction in a case betweer proper parties.

There are, it is true, in several decisions of this court, expressions of opinion that the federal courts have no probate jurisdiction, referring particularly to the establishment of wills, and such is undoubtedly the case under the existing legislation of congress. The reason lies in the nature of the proceeding to probate a will as one in rem, which does not necessarily involve any controversy between parties; indeed, in the majority of instances no such controversy exists. In its initiation all persons are cited to appear, whether of the State where the will is offered or of other States. From its nature and from the want of parties, or the fact that all the world are parties, the proceeding is not within the designation of cases at law or in equity between parties of different States, of which the federal courts have concurrent jurisdiction with the State courts under the

judiciary act. But whenever a controversy in a suit between such parties arises respecting the validity or construction of a will, or the enforcement of a decree admitting it to probate, there is no more reason why the federal courts should not take jurisdiction of the case than there is that they should not take jurisdiction of any other controversy between the parties.

But, as already observed, it is sufficient for the disposition of this case that the statute of 1867, in authorizing a transfer of the cause to the federal court, does, in our judgment, by that fact, invest that court with all needed jurisdiction to adjudicate finally and settle the controversy involved.

It follows from the views thus expressed that the judgment of the Supreme Court of Louisiana must be reversed, with directions to reverse the judgment of the parish court of Orleans, and to direct a transfer of the cause from that court to the Circuit court of the United States, pursuant to the application of the appellant; and it is so ordered.

UNITED STATES SUPREME COURT.

No. 145.—OCTOBER TERM, 1875.

THE UNITED STATES, plaintiffs, *v.* HIRAM REESE and MATTHEW FOUSHEE.

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

THE ENFORCEMENT ACT—THE FIFTEENTH AMENDMENT—POWER TO PUNISH ELECTION INSPECTORS—THE LAW UNCONSTITUTIONAL, BECAUSE IT EMBRACES MORE THAN THE CONSTITUTIONAL PROVISION

1. In this case the indictment contains four counts, under sections 3 and 4 of the Act of May 31, 1870, against two of the inspectors of a municipal election for refusing to receive and count at such election the vote of William Garner, a citizen of the United States, of African descent.

2. ACT NOT EFFECTIVE.—That the act under which the indictment was found cannot be made effective for the punishment of inspectors of elections who refuse to receive and count the votes of citizens of the United States, having all the qualifications of voters, because of their race, color, or previous condition of servitude.

3. AN ACT MUST BE DECLARED TO BE A CRIME.—That if Congress has not declared an act done within a State to be a crime against the United States, the courts have no power to treat it as such.

4. THE FIFTEENTH AMENDMENT.—That the fifteenth amendment does not confer upon Congress authority to impose penalties for every wrongful refusal to receive the vote of a qualified elector at State elections; it is only when the wrongful refusal at such an election is because of race, or previous condition of servitude. That the language of the third and fourth sections of the act does not confine their operation to unlawful discriminations on account of race, etc.

5. THE STATUTE GENERAL NOT SPECIFIC.—That a statute so general as this in its provisions, cannot be made available for the punishment of those who may be guilty of unlawful discrimination against citizens of the United States while exercising the elective franchise, on account of their race, etc. The courts cannot introduce words of limitation into a penal statute and make it specific when, as expressed, it is general only.—[ED. LEGAL NEWS.]

Mr. Chief Justice WAITE delivered the opinion of the court.

This case comes here by reason of a division of opinion between the judges of the circuit court in the district of Kentucky. It presents an indictment containing four counts, under sections 3 and 4 of the act of May 31, 1870, (16 Stat., 140,) against two of the inspectors of a municipal election in the State of Kentucky, for refusing to receive and count at such election the vote of William Garner, a citizen of the United States of African descent. All the questions presented by the certificate of division arose upon general demurrers to the several counts of the indictment.

In this court the United States abandon the first and third counts, and expressly waive the consideration of all claims not arising out of the enforcement of the fifteenth amendment of the Constitution.

After this concession, the principal question left for consideration is, whether the act under which the indictment is found can be made effective for the punishment of inspectors of elections who refuse to receive and count the votes of citizens of the United States, having all the qualifications of voters, because of their race, color, or previous condition of servitude.

If Congress has not declared an act done within a State to be a crime against the United States, the courts have no power to treat it as such.—(U. S. *v.* Hudson, 7 Cranch, 32.) It is not claimed that there is any statute which can reach this case, unless it be the one in question.

Looking, then, to this statute, we find that its first section provides that all citizens of the United States, who are or shall be otherwise qualified by law to vote at any election, etc., shall be entitled and allowed to vote thereat, without distinction of race, color, or previous condition of servitude, any constitution, etc.. of the State to the contrary notwithstanding. This simply declares a right without providing a punishment for its violation.

The second section provides for the punishment of any officer charged with the duty of furnishing to citizens an opportunity to perform any act which, by the constitution or laws of any State, is made a prerequisite or qualification of voting, who shall omit to give all citizens of the United States the same and equal opportunity to perform such prerequisite and become qualified on account of the race, color, or previous condition of servitude of the applicant. This does not apply to or include the inspectors of an election, whose only duty it is to receive and count the votes of citizens designated by law as voters, who have already become qualified to vote at the election.

The third section is to the effect that whenever, by or under the constitution or laws of any State, etc., any act is or shall be required to be done by any citizen as a prerequisite to qualify or entitle him to vote, the offer of such citizen to perform the act required to be done, "as aforesaid," shall, if it fail to be carried into execution by reason of the wrongful act or omission "aforesaid" of the person or officer charged with the duty of receiving or permitting such performance or offer to perform, or acting thereon, be deemed and held as a performance in law of such act; and the person so offering and failing as aforesaid, and being otherwise qualified, shall be entitled to vote in the same manner and to the same extent as if he had in fact performed such act; and any judge, inspector, or other officer of election, whose duty it is to receive, count, etc., or give effect to the vote of any such citizen, who shall wrongfully refuse or omit to receive, count, etc., the vote of such citizen, upon the presentation by him of his affidavit stating such offer, and the time and place thereof, and the name of the person or officer whose duty it was to act thereon, and that he was wrongfully prevented by such person or officer from performing such act, shall for every such offense forfeit and pay, etc.

The fourth section provides for the punishment of any person who shall by force, bribery, threats, intimidation, or other unlawful means, hinder, delay, etc., or shall combine with others to hinder, delay, prevent or obstruct any citizen from doing any act required to be done to qualify him to vote or from voting at any election.

The second count in the indictment is based upon the fourth section of this act, and the fourth upon the third section.

Rights and immunities created by or dependent upon the Constitution of the United States, can be protected by Congress. The form and the manner of the protection may be such as Congress, in the legitimate exercise of its legislative discretion, shall provide. These may be varied to meet the necessities of the particular right to be protected.

The fifteenth amendment does not confer the right of suffrage upon any one. It prevents the States or the United States, however, from giving preference, in this particular, to one citizen of the United States over another, on account of race, color, or previous condition of servitude. Before its adoption this could be done. It was as much within the power of a State to exclude citizens of the United States from voting on account of race, etc., as it was on account of age, property, or education. Now it is not. If citizens of one race having certain qualifications are permitted by law to vote, those of another having the same qualifications must be. Previous to this amendment there was no constitutional guaranty against this discrimination. Now there is. It follows that the amendment has invested the citizens of the United States with a new constitutional right which is within the protecting power of Congress. That right is exemption from discrimination in the exercise of the elective franchise, on account of race, color, or previous condition of servitude. This, under the express provisions of the second section of the amendment, Congress may enforce by "appropriate legislation."

This leads us to inquire whether the act under consideration is "appropriate legislation" for that purpose. The power of Congress to legislate at all upon the subject of voting at State elections, rests upon this amendment. The effect of article I., section 4, of the Constitution in respect to elections for senators and representatives is not now under consideration. It has not been contended, nor can it be, that the amendment confers authority to impose penalties for every wrongful refusal to receive the vote of a qualified elector at State elections. It is only when the wrongful refusal at such an election is because of race, color, or previous condition of servitude, that Congress can interfere and provide for its punishment. If, therefore, the third and fourth sections of the act are beyond that limit, they are unauthorized.

The third section does not in express terms limit the offense of an inspector of elections, for which the punishment is provided, to a wrongful discrimination on account of race, etc. This is conceded, but it is urged that when this section is construed with those which precede it, and to which, as is claimed, it refers, it is so limited. The argument is that the only wrongful act on the part of the officer whose duty it is to receive or permit the requisite qualification, which can dispense with actual qualification under the State laws, and substitute the prescribed affidavit therefor, is that mentioned and prohibited in section 2, to wit: discrimination on account of race, etc., and that consequently section 3 is confined in its operation to the same wrongful discrimination.

This is a penal statute, and must be construed strictly; not so strictly, indeed, as to defeat the clear intention of Congress, but the words employed must be understood in the sense they were obviously used.—(U. S. *v.* Wiltberger, 5 Whet., 85.) If, taking the whole statute together, it is apparent that it was not the intention of Congress thus to limit the operation of the act, we cannot give it that effect.

The statute contemplates a most important change in the election laws. Previous to its adoption, the states, as a general rule, regulated in their own way all the details of all elections. They perscribed the qualifications of voters and the manner in which those offering to vote at an election should make known their qualifications to the officers in charge. This act interferes with this practice and prescribes rules not provided by the laws of the states. It substitutes, under certain circumstances, performance wrongfully prevented for performance itself. If the elector makes and presents his affidavit in the form and to the effect prescribed, the inspectors are to treat this as the equivalent of the specified requirement of the state law. This is a radical change in the practice, and the statute which creates it should be explicit in its terms. Nothing should be left to construction if it can be avoided. The law ought not to be in such a condition that the elector may act upon one idea of its meaning and the inspector upon another.

The elector, under the provisions of the statute, is only required to state in his affidavit that he has been wrongfully prevented by the officer from qualifying. There are no words of limitation in this part of the section. In a case like this, if an affidavit is in the language of the statute, it ought to be sufficient both for the voter and the inspector. Laws which prohibit the doing of things and provide a punishment for their violation should have no double meaning. A citizen should not unnecessarily be placed where, by an honest error in the construction of a penal statute, he may be subjected to a prosecution for a false oath, and an inspector of elections should not be put in jeopardy because he, with equal honesty, entertains an opposite opinion. If this statute limits the wrongful act which will justify the affidavit to discrimination on account of race, etc., then a citizen who makes an affidavit that he has been wrongfully prevented by the officer, which is true in the ordinary sense of that term, subjects himself to indictment and trial, if not to conviction, because it is not true that he has been prevented by such a wrongful act as the statute contemplated; and if there is no such limitation, but any wrongful act of exclusion will justify the affidavit and give the right to vote without the actual performance of the prerequisite, then the inspector who rejects the vote because he reads the law in its limited sense and thinks it is confined to a wrongful discrimination on account of race, etc., subjects himself to prosecution, if not to punishment, because he has mis-construed the law. Penal statutes ought not to be expressed in language so uncertain. If the legislature undertakes to define, by statute, a new offence and provide for its punishment, it should express its will in language that need not deceive the common mind. Every man should be able to know with certainty when he is committing a crime.

But when we go beyond the third section and read the fourth we find there no words of limitation, or reference, even, that can be construed as manifesting any intention to confine its provisions to the terms of the fifteenth amendment. That section has for its object the punishment of all persons who, by force, bribery, etc., hinder, delay, etc., any person from qualifying or voting. In view of all these facts we feel compelled to say that in our opinion the language of the third and fourth sections does not confine their operation to unlawful discriminations on account of race, etc. If congress had the power to provide generally for the punishment of those who unlawfully interfere to prevent the exercise of the elective franchise without regard to such discrimination, the language of these sections would be broad enough for that purpose.

It remains now to consider whether a statute, so general as this in its provisions, can be made available for the punishment of those who may be guilty of unlawful discrimination against citizens of the United States, while exercising the elective franchise, on account of their race, etc.

There is no attempt in the sections now under consideration to provide specifically for such an offence. If the case is provided for at all, it is because it comes under the general prohibition against any wrongful act or unlawful obstruction in this particular. We are, therefore, directly called upon to decide whether a penal statute enacted by congress, with its limited powers, which provides in general language broad enough to cover wrongful acts without as well as within the constitutional jurisdiction, can be limited by judicial construction so as to make it operate only on that which congress may rightfully prohibit and punish. For this purpose we must take these sections of the statute as they are. We are not able to reject a part which is unconstitutional, and retain the remainder, because it is not possible to separate that which is unconstitutional, if there be any such, from that which is not. The proposed effect is not to be attained by striking out or disregarding words that are in the section, but by inserting those that are not now there. Each of the sections must stand as a whole or fall all together. The language is plain. There is no room for construction, unless it be as to the effect of the Constitution. The question, then, to be determined is whether we can introduce words of limitation into a penal statute so as to make it specific, when, as expressed, it is general only.

It would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders and leave it to the courts so step inside and say who could be rightfully detained and who should be set at large. This would, to some extent, substitute the judicial for the legislative department of the government. The courts enforce the legislative will when ascertained, if within the constitutional grant of power. Within its legitimate sphere, congress is supreme and beyond the control of the courts, but if it steps outside of its constitutional limitations and attempts that which is beyond its reach, the courts are authorized to, and when called upon in due course of legal proceedings must, annul its encroachments upon the reserved power of the states and the people.

To limit this statute in the manner now asked for, would be to make a new law, not to enforce an old one. This is no part of our duty.

We must, therefore, decide that congress has not as yet provided by "appropriate legislation" for the punishment of the offence charged in the indictment, and that the circuit court properly sus-

tained the demurrers and gave judgment for the defendants.

This makes it unnecessary to answer any of the other questions certified. Since the law which gives the presiding judge the casting vote in cases of division, and authorizes a judgment in accordance with his opinion, (Rev. Stat., sec. 650,) if we find that the judgment as rendered is correct, we need not do more than affirm. If, however, we reverse, all questions certified, which may be considered in the final determination of the case according to the opinion we express, should be answered.

The judgment of the circuit court is affirmed.

UNITED STATES SUPREME COURT.

No. 146.—OCTOBER TERM, 1875.

In Error to the Supreme Court of the State of South Carolina.

HENRY H. RAYMOND, plaintiff in error, *v.* WILLIAM M. THOMAS.

REBELLION—POWER OF COMMANDER OVER PROCEEDINGS OF COURTS.

Held, that an order of General Canby entered on the 28th of May, 1868, declaring a certain decree of one of the courts of South Carolina annulled, was absolutely void.—[ED. LEGAL NEWS.]

Mr. Justice SWAYNE delivered the opinion of the Court.

The facts in this case, as disclosed in the record, are somewhat involved and complicated. So far as it is necessary to consider them for the purposes of this opinion, they are not voluminous.

On the 25th of August, 1863, Mary Raymond bought from Thomas, the defendant in error, a small house and lot, situated in Greenville, South Carolina, for which she gave him her note for $7,000, payable six months after the ratification of peace between the Confederates and the United States, or before, at her option, with annual interest from the 1st day of September, 1863. The premises were conveyed at the time of the sale, and the grantee gave back a mortgage to secure the payment of the note.

On the 28th of May, 1866, Thomas filed his bill in the Court of Common Pleas of Greenville county to foreclose the mortgage. The vendee answered. The case was heard in July, 1866, before Chancellor Johnson. The chancellor held that the note was intended by the parties to be payable in Confederate money, and that in view of all the circumstances, the amount of principal equitably due upon it was $2,500. The case was referred to a master to compute the aggregate principal and interest due upon this basis. This decree, upon the appeal of Thomas, was affirmed by the court of errors of the State, at its December term, 1867. On the 25th of January, 1868, Chancellor Carrol, sitting in the common pleas, decreed that the amount due in conformity to the master's report was $3,265.62; that unless that sum was paid as directed, the commissioner should sell the premises, and that if the proceeds were insufficient to pay the debt and costs, the complainant might issue execution for the balance.

On the 28th of May following, General Canby issued an order whereby he annulled this decree. The order contains a slight error in the description of the decree, but the meaning of the order is clear. The discrepancy is, therefore, immaterial. On the 24th of December, 1868, the military order, *non obstante*, the commissioner reported that he had sold the premises for $1,005. On the 2d of January, 1869, Mary Raymond filed her bill in the Court of Common Pleas of Charleston county, setting forth the facts above stated, and further, that the sheriff of that county was about to proceed to collect from her the balance still due upon the decree, amounting to $2,653.26. She prayed that Thomas and all others be perpetually enjoined from further enforcing the decree. The court decreed accordingly. Subsequently, Gaillard, the purchaser, and Thomas answered, and moved to dissolve the injunction. In July, 1869, this motion was overruled, and the injunction again ordered to be made perpetual. An appeal was taken to the Supreme court of the State, but failed for want of prosecution.

In December, 1870, Thomas obtained leave to amend his original bill of foreclosure. He did so, setting forth, among other things, that the original defendant, Mary Raymond, had died, and that Henry H. Raymond had been appointed her executor, and making him a party. In due time he answered, denying that he was either executor or administrator of the deceased, and insisting that he was not bound to answer, and that no decree could be taken against him. He admitted that he was in possession of her estate and averred that he was ready to pay all her just debts. The amended bill and this answer set forth other things not necessary to be repeated.

The case in this new aspect came on to be heard. It was decreed that the sale of the mortgaged premises be confirmed and that the purchaser have a writ of assistance to enable him to obtain possession, and that the complainant have leave to enter up a judgment against the defendant for the balance due him, and interest and costs, as before decreed. Raymond thereupon removed the case by appeal to the Supreme court of the State. That court, at the April term, 1873, affirmed the decree of the lower court. This writ of error was thereupon sued out by Raymond, and the judgment of the Supreme court is thus brought before us for review.

Outside of the record our attention has been called to an act of the Legislature of South Carolina, of the 2d of September, 1868, touching certain military orders therein mentioned. The act does not embrace or affect the order of General Canby in question in this case.

Nothing more need be said in regard to the act.

The only point insisted upon here by the counsel for the plaintiff in error is the order of General Canby, on the 2d of May, 1868, and its disregard by the Supreme court of South Carolina in the judgment before us. The validity of the order is denied by the defendant in error. Our remarks will be confined to that subject.

The war between the United States and the insurgents terminated in South Carolina, according to the judgment of this court, on the 2d of April, 1866.—The Protector, 12 Wall, 701. The national Constitution gives to Congress the powers, among others, to declare war and suppress insurrections. The latter power is not limited to victories in the field and the dispersion of the insurgent forces. It carries with it inherently, rightful authority to guard against an immediate renewal of the conflict, and to remedy the evils growing out of its rise and progress.—Stewart *v.* Kahn, 11 Wall., 506.

The close of the war was followed by the period of reconstruction and the laws enacted by Congress with a view to that result.

These laws are the acts of March 2, 1867, (14 Stat., 428,) the act of July 19, 1867, (15 Stat., 14,) and the act of July 11, 1868, (15 Stat., 703.) The two acts first mentioned defined the powers and duties of the military officers placed in command in the several States lately in rebellion. The act of July 11, 1868, provided, among other things, that whenever the Legislature of South Carolina should ratify the 14th amendment to the Constitution of the United States she should be again admitted to representation in Congress, and that it should be the duty of the President, within ten days after receiving official information of the ratification, to issue a proclamation announcing the fact. Such a proclamation was issued on the 11th of July, 1868.—(15 Stat., 704.) This replaced the State in her normal relations to the Union. Nothing further was necessary but the elections provided for, which speedily followed, to render her rehabilitation complete.

We have looked carefully through the acts of March 2, 1867, and July 19th, 1867. They give very large governmental powers to the military commanders designated, within the States committed respectively to their jurisdiction, but we have found nothing to warrant the order here in question. It was not an order for mere delay. It did not prescribe that the proceeding should stop until credit and confidence were restored and business should resume its wonted channels. It wholly annulled a decree in equity regularly made, by a competent judicial officer, in a plain case, clearly within his jurisdiction, and where there was no pretence of any unfairness, of any purpose to wrong or oppress, or of any indirection whatsoever.

The meaning of the legislature constitutes the law. A thing may be within the letter of a statute but not within its meaning, and within its meaning though not within its letter.—Stewart *v.* Kahn, supra.

The clearest language would be necessary to satisfy us that Congress intended that the power given by these acts should be so exercised.

It was an arbitrary stretch of authority needful to no good end that can be imagined. Whether Congress could have conferred the power to do such an act is a question we are not called upon to consider. It is an unbending rule of law that the exercise of military power, where the rights of the citizen are concerned, shall never be pushed beyond what the exigency requires.—Mitchell *v.* Harmony, 13 How., 115; Warden *v.* Bailey, 4 Taunt., 67; Fabrigas *v.* Moysten, 1 Cowp., 161; S. C., 1 Smith's L. C., pt. 2, p., 934. Viewing the subject before us from the standpoint indicated, we hold that the order was void.

This is the only Federal question presented for our consideration. As the Supreme court of the State decided it correctly, our jurisdiction terminates at this point; we can look no further into the case.

The judgment is affirmed.

U. S. CIRCUIT COURT, N. D. ILLINOIS.

LYDIA A. JARVIS *v.* THE CONNECTICUT MUTUAL LIFE INS. CO.

LIFE POLICY—SUICIDE—INSANITY—CAUSED BY INTEMPERANCE.

1. THE RULE AS TO RECOVERY.—The court states the law as laid down by the Supreme Court in such cases, stating when a recovery may be had, although the party insured takes his own life, and when not.

2. BURDEN OF PROOF.—Self destruction renders the policy void. The burden of proof is on the plaintiff to show such kind and degree of insanity as will relieve the act of that consequence.

3. EFFECT OF INTEMPERANCE.—The court instructed the jury, that if they found that the assured had impaired his health by intemperance, then the policy was void; that this was sufficient of itself to defeat a recovery. He agreed that he should not impair his health by intemperance, and if he broke that provision a recovery cannot be had on the policy.

4. INSANITY AS AN EXCUSE.—If the mental condition, which would otherwise avoid the effect of the self-destruction clause, was produced by intemperance, the plaintiff cannot recover. Insanity induced by violation of one condition of the policy cannot be set up as an excuse for the violation of another condition.

Charge of Judge HOPKINS.

Gentlemen of the jury: This is an action upon a life policy for $2,000 dated May, 1866, on the life of one Jarvis, issued by the defendant, payable to the plaintiff. He died December 4, 1871. The proof of death is admitted to have been made December 23d, 1871. This entitles the plaintiff to a verdict, unless it is shown that the deceased violated some of the conditions of the policy. The provisions claimed to have been broken are first, that the insured became intemperate so as to impair his health, and second, that the party came to his death by his own hand. The plaintiff has admitted that the insured came to his death by his own hand. This entitles the defendant to a verdict, unless the plaintiff has shown that the deceased was insane so as to be incapable of committing the act in the sense these words are used in the policy, that is to such an extent as to relieve the act of the character of self-destruction. The plaintiff on this point has the burden of proof upon him.

I will read and adopt the charge of Judge Dillon, which has been approved by the Supreme Court, with reference to the meaning of these words in the policy, and as to what must be shown to avoid the act of self destruction.

"It is not every kind or degree of insanity which will so far excuse the party taking his own life, as to make the company insuring liable.

"To do this, the act of self-destruction must have been the consequence of the insanity, and the mind of the decedent must have been so far deranged as to have made him incapable of using a rational judgment in regard to the act which he was committing.

"If he was impelled to the act by an insane impulse, which the reason that was left him did not enable him to resist, or if his reasoning powers were so far overthrown by his mental condition that he could not exercise his reasoning faculties on the act he was about to do, the company is liable. On the other hand, there is no presumption of law, *prima facie*, or otherwise, that self-destruction arises from insanity; and if you believe from the evidence, that the decedent, although excited, or angry, or distressed in mind, formed the determination to take his own life, because in the exercise of his usual reasoning faculties, he preferred death to life, then the company is not liable, because he died by his own hand, within the meaning of the policy."

The Supreme Court summed up the rule in this language:

"We hold the rule on the question before us, to be this: If the assured, being in the possession of his ordinary reasoning faculties, from anger, pride, jealousy, or a desire to escape from the ills of life, intentionally takes his own life, the proviso attaches, and there can be no recovery. If the death is caused by the voluntary act of the assured, he knowing and intending that his death shall be the result of his act; but when his reasoning faculties are so impaired that he is not able to understand the moral character, the general nature, consequences and effect of the act he is about to commit, or when he is impelled thereto by an insane impulse which he has not the power to resist, such death is not within the contemplation of the parties to the contract, and the insurer is liable."

This construction of these words in the policy, and the quantity of evidence to avoid them, is binding upon this court, and the testimony must be considered with reference to that construction.

If you find that the testimony brings the insured's condition of mind within this doctrine thus laid down by the Supreme Court, the defense of self-destruction is answered. Upon this point, you will look at the evidence as to his usual habits, his condition, his circumstances, and all the surroundings and influences tending to such an act, and bearing upon his mental condition, and determine whether, or not, the insured was in the condition mentioned in the foregoing instructions. If he was, then he was not morally responsible for the act, and, in a legal sense, there was no self-destruction. If he was in the enjoyment of his faculties to the extent hereinbefore mentioned, the condition of the policy was broken, and the defendant is not liable.

There is still the question of intemperance. If you should find that the insured had impaired his health by intemperance, then the policy is void. This is sufficient of itself to defeat a recovery. He agreed that he should not impair his health by intemperance, and if he broke that provision, he cannot recover. If the evidence shows you that such is the case, the policy is void; but the burden of proof upon that point, is upon the defendant. The defendant must show, to your satisfaction, that after the policy was issued, the insured did impair his health by habits of intemperance. If the evidence shows that, it avoids the policy. You must find it, however, upon the evidence.

If you should find that his intemperance produced the mental condition relied upon to avoid the effect of the self-destruction clause in the policy, then the plaintiff cannot recover. If the insanity was produced by habits prohibited by the policy, then it cannot be set up in avoidance of a breach of another condition. Intemperance avoids the policy, and if intemperance produced the insanity, this insanity cannot be set up as an excuse for the violation of the self-destruction clause.

The weight of the testimony is for you to settle, and it is for you to draw conclusions from it. Opinions of witnesses are admissible in some cases, and when admissible, it is the duty of the jury to give them such weight as they deem them entitled to. They are not absolutely binding upon you, but you may reject or receive them, as you think them worthy.

If you find for the plaintiff, you will find the sum mentioned in the policy, with interest at six per cent., after ninety days from Dec. 23, 1871—that is, from March 23rd, 1872.

R. L. DIVINE, and HUNTER & PAGE, for plaintiff.

ISHAM & LINCOLN, for defendants.

In this case, the jury failed to agree.

ILLINOIS SUPREME COURT.

ABSTRACT OF OPINIONS FILED AT OTTAWA IN 1876.

George W. Myers *v.* First National Bank of Fairbury.—Appeal from Livingston.—Opinion by SCOTT, J.

SURETY—EXTENSION OF TIME WITHOUT CONSENT—CONSIDERATION RELEASE OF SURETY.

Held, 1. That, where an extension of time is given a principal debtor, for the payment of money, by a valid and binding agreement, without the assent of the sureties, the sureties are thereby released.

2. The consideration for such an extension may be the payment of interest, even at a usurious rate, on the indebtedness.

287. Town of Partridge *v.* John Snyder. Appeal from Woodford.—Opinion by SHELDON, J.

APPEAL FROM A JUSTICE—WHEN ALLOWED—BOND OF TOWN—DEFECTIVE BOND—AMENDMENT.

STATEMENT.—Prosecution for obstructing highway. Defendant dismissed; and appeal by the people. *Held*,

That, although, in criminal cases, indictable in the name of the people of Illinois, as also in cases of misdemeanor, no appeal lies to the Circuit court from a justice of the peace, yet, where the action is only a *quasi criminal* suit, for the recovery of a fine or penalty, it is to be regarded as virtually a civil action, and thus appealable.

2. In such a case as this, the appeal bond should be by the supervisor, in the name of the town.

3. The Circuit court should give opportunity to amend a defective bond; and errs if it dismisses the appeal, on the ground of the deficiency.

288. Alvin S. Widhams *v.* Francelia M. Hotchkiss.—Appeal from Superior Court of Cook.—Opinion by SCHOLFIELD, J.

AMENDMENT IN ACTIONS BEFORE A J. P.—PRESUMPTION—MISTAKE IN APPEAL—JURISDICTION—TRANSFER—CIRCUIT JUDGES HOLDING COURTS IN CHICAGO—SELECTION OF COURT BY APPELLANT.

STATEMENT.—Appeal from J. P. to the Superior court. *Held*,

1. That, in amending an error as to the name of a party, it is not requisite that a record be made showing a request and by whom made, nor that the request be made in writing, and preserved with the papers. And the change will be presumed to haveeen made before the trial.

2. Where an appeal is taken to the Superior court, and, by mistake, the papers are filed in the Circuit court, which, on discovering the mistake, orders the cause transferred to the Superior court, the Circuit court does not thereby acquire jurisdiction, and has a right to order the transfer.

Wm. S. Proudfoot *v.* John Wightman.—Appeal from Superior Court of Cook.—Opinion by CRAIG, J.

SPECIFIC PERFORMANCE—SALE OF LANDS BY AGENT—PROOF OF AGENCY—BURDEN OF PROOF—DEGREE OF PROOF.

STATEMENT.—Bill for the specific performance of a contract for the sale of lands, executed in writing, by a real estate agent, for the owner. Defense that he was not an agent. Bill dismissed. *Held*,

That, while parol authority is sufficient to authorize an agent to contract for the sale and conveyance of lands, yet, when a purchaser relies upon the parol authority of an agent to sell real estate, the proof to establish the power of the agent should be clear, certain, and specific; and the burden of proof is on the purchaser, when he brings a bill for specific performance. And, more than a preponderance of evidence is requisite, especially where the land was contracted for at a great reduction of value.

E. M. Gleason *v.* The Village of Jefferson.—Appeal from Superior Court of Cook.—Opinion by WALKER, J.

...TLE IN A SUIT TO ENJOIN MAKING OF ...STREETS—PROOF OF POSSESSION.

...ATEMENT.—Bill to enjoin the village ...s street commissioners from grading and improving as streets certain slips of ground. *Held*,

1. That, in such an action, there must appear more than a naked right of possession, in behalf of the complainant, as to the land. It must be an ownership in fee simple to justify the restraining power of the court to be exercised. And the evidence must be quite clear. Evidence which would support an action for trespass will not sustain an action of this kind.

2. Even possession is not proven by the existence of a string of fence, any farther than the actual enclosure extends.

James Thompson *v.* Frederick Bulson.—Appeal from Knox.—Opinion by SCHOFIELD, J.

DIVISION FENCE—COMPELLING REPAIRS—REQUISITES TO PROCEEDING.

STATEMENT.—The question in this case was whether, if one of the parties to a division fence neglects to keep his part in repairs, the other can, under the statute, select the viewers alone, and without notice to the party in default in keeping up the fence; and obtain a binding result by their proceeding. *Held*,

That, collating the several statutes and sections relating to the action of fence viewers together, it is a logical construction that one party cannot, without notice to the other, select viewers, and bind the other by the proceeding.

Marcus Belden *v.* S. D. Perkins.—Appeal from Warren.—Opinion by CRAIG, J.

ASSUMPSIT FOR MONEY HAD AND RECEIVED—EQUITY RULES THEREIN—PLEDGES AND TRANSFERS THEREOF.

Held, 1. That, in assumpsit, on a common count for money had and received, the main inquiry is, whether the defendant holds money which *ex equo et bono* belongs to the plaintiff. It has frequently been called an equitable action, and it approaches nearer to a bill in equity than any other common law action; and indeed has many of the advantages, without the artificial formalities and dilatory proceedings, of a chancery suit. Equitable rules must control in the trial of such a count.

2. But where it appears that property was placed in the hands of a creditor, as security for the payment of rent, even if the debtor had the right of deciding when the property should be sold, it will have the legal status of pledged property.

3. If, in such case, the pledgee sells the property, without notice to the pledgor, and appropriates the money, and the pledgor brings an action in assumpsit for money had and received, the judgment must be only for the surplus, over and above the amount of the debt on which it had been pledged.

4. When property is pledged, the pledgee acquires a special property in the goods, and a mere transfer of the pledged property does not destroy the original lien. The pledgee may deliver the goods to a stranger without consideration, or he may sell and assign all his interest, absolutely or conditionally, by way of pawn, without, in either case, destroying the original lien, or giving the owner a right to reclaim them, on any other or better terms than he could have done before such delivery, or assignment. Whatever doubt may be indulged as te a mere factor, in case of a strict pledge, if the pledgee transfers the same to his own creditor, the latter may hold the pledge until the debt of the original owner is discharged.

William Goldie *v.* Alexander McDonald.—Appeal from Superior Court of Cook.—Opinion by SCOTT, J.

FILING AFFIDAVIT OF CLAIM—TIME—NOTARIAL CERTIFICATE AND AMENDMENT THEREOF—PRESUMPTION OF DEFENDANT'S RESIDENCE.

Held, 1. An affidavit of merits filed by a plaintiff, according to the statute, will be held as filed with the declaration, within the meaning of the statute, if it is filed more than ten days before the term at which the declaration is filed.

2. A certificate of a notary in another State may be amended; and will then be *prima facie* evidence that an oath required by law was taken before that officer.

3. It will be presumed that a defendant is a resident of the county where he was served with process.

Daniel Healey *v.* Charles M. Charnley.—Appeal from Superior Court of Cook.—Opinion by SCOTT, J.

AFFIDAVIT OF CLAIM A PLEADING—AMENDMENT THEREOF.

Held, 1. That an affidavit of claim filed by a plaintiff, is a pleading; and is amendable, like any other pleading.

2. The statute allows an extension of time to file it, and an amended affidavit of claim will be regarded as a new one, and the leave of the court to file it will be regarded in effect as an extension of the time of filing, and so within the statute.

Simpson *v.* Bradner.—Appeal from Woodford.—Opinion per curiam.

REPEAL OF STATUTE BY IMPLICATION.

STATEMENT.—Action against trustees of a coal company for failing to make report of their doings, as required by § 12, of the act of 1849, title "Corporations." *Held*,

That the act of 1849 was superseded by the act of 1857; and thereby virtually repealed.

Eleanor Fight *v.* Thomas Holt.—Appeal from LaSalle.—Opinion by SCOTT, J.

HOMESTEAD RIGHTS AGAINST HEIRS—PARTITION—GRANTEES OF HEIRS—SALE OF LANDS IN PARTITION—DOWER.

Held, 1. That the acts of 1851, and 1857, in relation to homesteads, only created an exemption from forced sales, or alienations by the husband, and did not extend to the widow the right of homestead in premises of which her husband died seized, as against the heirs.

2. A grantee, or purchaser from an heir, occupies exactly the same position as the heir; and is entitled to assert the same rights in the premises.

3. Where there is a petition for partition, if the premises are not susceptible of division, it is proper to decree a sale subject to the widow's dower.

T. S. Dobbins *v.* H. C. Higgins.—Appeal from Superior Court of Cook.—Opinion by WAKKER, J.

QUANTUM MERUIT, OR PAYMENT PRO TANTO IN ABANDONED CONTRACT—SET-OFF—INTEREST.

Held, 1. That where there is a contract to perform work, and to be paid monthly therefor, and the person for whom the work is done fails in the monthly payment, the other party may abandon the contract, and recover *pro tanto* at the contract price.

2. The party in default can not set-off money paid to the hands of the contractor, unless the contractor authorizes him to make such payment.

3. Interest at six per cent. may be allowed when judgment is rendered for the amount due, from the time the default occurred.

Artemas Carter *v.* Lewis D. Webster.—Appeal from Cook.—Opinion by SCOTT, J.

REAL ESTATE AGENT'S COMMISSIONS.

Held, That, where land is left with a real estate agent for sale, he is entitled to his commission, if, through information given by himself, or others for him, a buyer goes to the owner and concludes a bargain, thus without the direct intervention of the agent.

William H. Watchter *v.* Harriet Albee, Adm.—Appeal from Cook.—Opinion by CRAIG, J.

REQUISITES OF NEW PROMISE UNDER STATUTE OF LIMITATIONS.

Held, That a new promise under the statute of limitations, may arise out of such facts as identify the debt, the subject of the promise, with such certainty as will clearly determine its character, fix the amount due, and show a present unqualified willingness and intention to pay it, at the time acted upon and acceded to by the creditor. It is not sufficient that the debtor admits the correctness of the amount, or that he had received the goods, or the money, or had executed the note sued on; but he must go further, and admit that the debt is still due, and had never been paid—the bare admission of the correctness of the amount being no more a satisfactory answer to the statute, than would be the testimony of a witness to the same fact. It must be an express promise to pay the money, or an unqualified admission that the debt is due, and unpaid; and nothing being said or done at the time, rebutting the presumption of a promise to pay. And the promise must be made to the party interested in the claim, or his agent, and not to a stranger.

Michigan Central R. R. Co. *v.* E. F. Curtis.—Appeal from Cook.—Opinion by WALKER J.

NEGLIGENCE OF COMMON CARRIER—PROXIMATE AND REMOTE INJURIES—EXCUSE.

STATEMENT.—Trees shipped at Rochester, N. Y., for transportation to various points in this State, (1) by New York Central; and (2) by the road of appellant, to be delivered at Chicago to other roads, were frozen and spoiled *in transitu*, in the fall of 1871. There was a delay in shipment, both at Detroit and Chicago. The defense was that the great fire had destroyed the freight-house of the defendant, and they had, therefore, to await facilities for shipment. *Held*,

1. That where a common carrier is charged with loss of goods by negligence, the rule is, that the carrier is liable for direct or immediate consequences of negligence; but where these consequences are remote, and the negligence is but one of a train of causes, there is no liability.

2. Appellants being the last in the chain of transportation agents, and their delay having caused the exposure of the goods to the freezing weather, they are to be held to have caused the injury by proximate negligence, and therefore liable.

3. Nor is the fire a sufficint excuse, especially as it did not evidently render the transportation impossible.

Frank W, Palmer *v.* The Nassau Bank.—Appeal from Superior Court of Cook.—Opinion by SHELDON, J.

POSSESSION OF NOTE INDORSED IN BANK—TRANSFER BY BANK.

Held, 1. Possession of a note indorsed in bank, is evidence of title.

2. A bank may, through its president, transfer the legal title to a note to that president as an individual.

C. & P. R. R. Co. *v.* Marion Munger.—Appeal from Superior Court of Cook.—Opinion by SCHOLFIELD, J.

LUNACY — SUIT BY LUNATIC — PLEA IN ABATEMENT.

Held, That when a claim is due to a lunatic, and there has been no conservator appointed, the action must be brought in the name of the lunatic, and a plea in abatement that the plaintiff is a lunatic, is bad, in not giving a better writ.

Aurora Hort. & Agri. Society *v.* Henry C. Paddock.—Appeal from Kane.—Opinion by CRAIG, J.

POWER OF PRIVATE CORPORATION TO MORTGAGE REAL ESTATE—ULTRA VIRES.

Held, 1. That the power of a corporation to mortgage its real estate, is to be regarded as a necessary incident to the power to acquire and hold real estate. It is the common law rule, that corporations have an incidental right to alien or dispose of their lands and personal property, unless specially restrained by their charter, or by statute; and especially can a mortgage be given for purchase money.

2. Even *ultra vires* claims may be afterwards enforced, although they might have been enjoined beforehand, on proper application.

William Empson *v.* The People.—Error To Henry.—Opinion by SHELDON. J.

IMPANELING A GRAND JUROR WHERE PANNEL FAILS—SPECIAL VENIRE.

STATEMENT.—The plaintiff in error claimed that where there is a deficiency in the panel of grand jurors, it should be supplied by ordering the clerk to draw from the jury-box, in the county clerk's office. But, *Held*,

That, while this was the mode under the statute of 1872, yet, under the statute of 1873. which repealed the former act, the mode is that the county board of the county, at least twenty days before the sitting of the court, shall select twenty-three persons to serve as grand jurors for the ensuing term, who shall be summoned as a grand jury for such term. But where these are discharged (from being irregularly drawn, as in this case,) there is no other mode open, under the statute of 1873, to obtain a needed grand jury, than summoning from the body of the county (as was done in this case), or from the bystanders.

(*Continued upon page* 230.)

CHICAGO LEGAL NEWS.

Lex vincit.

MYRA BRADWELL, Editor.

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We call attention to the following opinions, reported at length in this issue:

Judicial Power of United States—Removal of Causes from State Courts—Contest of Will.—The opinion of the Supreme Court of the United States by Field, J., holding that where the judicial power of the United States can be applied only because they involve controversies between citizens of different States, it rests with congress to determine at what time the power may be invoked and upon what conditions; whether originally in the Federal Court, or after suit brought in the State Court, and in the latter case, at what stage of the proceedings; whether before issue or trial by removal to a Federal Court, or after judgment on appeal or writ of error; that as the constitution imposes no limitation upon the class of cases involving controversies between citizens of different States, to which the judicial power of the United States may be extended, congress may provide for bringing, at the option of either of the parties, all such controversies within the jurisdiction of the federal judiciary; that the act of congress of March 2d, 1867, in authorizing and requiring the removal to the Circuit Court of the United States of a suit pending or afterwards brought in any State court involving a controversy between a citizen of the State where the suit is brought, and a citizen of another State, thereby invests the Circuit Court with jurisdiction to pass upon and determine the controversy, when the removal is made, though the court could not have taken original cognizance of the case; that a suit to annul a will as a muniment of title and to restrain the enforcement of a decree admitting it to probate, is, in essential particulars, a suit in equity, and if by the law obtaining in a State, customary or statutory, such a suit can be maintained in one of its courts, whatever designation that court may bear, it may be maintained by original process in the Circuit Court of the United States if the parties are citizens of different States. Of the many opinions of the Supreme Court of the United States upon the subject of the removal of causes from State to Federal Courts this would seem to be one of the most important. The question arises, could not a controversy about a claim against a decased person's estate be removed into the Federal Court the same as any other suit, upon the question of the right of Federal Court to interfere in the distribution and settlement of a deceased person's estate when the State laws provided for an equitable distribution of the same, we would refer the reader to the opinion of the Federal Supreme Court by Davis, J., in Yonley *v.* Lavender et al., reported 7 Chicago Legal News, 154.

The Fifteenth Amendment—The Enforcement Act—Power to punish Election Inspectors—The Third and Fourth Sections Unconstitutional.—The opinion of the Supreme Court of the United States by Waite, C. J., holding that the fifteenth amendment to the constitution of the United States does not confer upon congress authority to impose penalties for every wrongful refusal to receive the vote of a qualified elector at State elections; that it is only when the wrongful refusal at such an election is because of race, or previous condition of servitude; that the third and fourth sections of the Act do not confine their operation to an unlawful discrimination on account of race, etc.; that a statute so general as this in its provisions cannot be made available for the punishment of those who may be guilty of unlawful discrimination against citizens of the United States, while exercising the elective franchise, on account of their race, etc.; that the courts cannot introduce words of limitation into a penal statute and make it specific, when, as expressed, it is general only. This opinion seems to go the length, that where a statute is general and embraces two subjects, one of which is constitutional, and the other is not, the court must, on an indictment for a crime, hold that the whole statute is unconstitional.

Rebellion — Power of Commander over Proceedings of Courts.—The opinion of the Supreme court of the United States by Swayne, J., holding that an order entered by General Canby on the 28th day of May, 1868, annulling a decree entered by one of the courts of South Carolina, was absolutely void.

Life Policy—Self-Destruction — Intemperance.—The charge of Hopkins, J., in the United States Circuit court for the Northern District of Illinois, in a case brought to recover on a policy of insurance, where the deceased had taken his own life. The learned judge instructed the jury that if they found the assured had impaired his health by intemperance, then the policy was void.

Third Class Mail Matter.—The bill which was introduced in the house at the commencement of the session, and passed that body, to repeal that portion of the postal law of last session doubling the postage to be paid on transient newspapers, pamphlets, magazines, proof-sheets, etc., now seems to be sleeping quietly in the senate, and unless it soon finds some more active friends than it has yet had in that body, it will sleep the sleep of death. The members of the popular branch of the national legislature understand that the people are in earnest in desiring to have the old rates restored. The members of the senate are older men—further removed from the people—are less active in discerning the popular will, and less desirous of following it. The bill which passed the house on the 26th of January, has been in the hands of the senate committee on post-offices and post-roads, of which Senator Hamlin is chairman, for more than two months, and no report has been made upon it, but that committee has been foolish enough to propose a bill of its own, the main feature of which is to restore the old and exploded system of a sliding scale of rates, according to distances. The present system is based upon the theory of uniform rates without regard to distance. It is well understood by the people, is convenient, and not calculated to cause mistakes. Just let this proposed bill of the senate committee become a law, and a person, every time he applied a postage stamp to a package of the third class, would have to calculate the distance to the place of destination, and, if he happened to make a mistake in his calculation, the package would be liable to be returned to him—or, if forwarded, the person to whom it was sent would have to be subjected to the payment of the additional postage. This bill should be laid upon the table as soon as possible—the house bill taken up and passed.

The Southern Law Review.—The April number of this very valuable law quarterly, being No. 1 of volume II., is received. Its contents are: 1. Controversies of Modern Continental Jûrists, by U. M. Rose. 2. The Dartmouth College Causes and the Supreme Court of the United States. 3. The Works of Joel Prentiss Bishop, by Hon. Wm. Lawrence. 4. The Cases in which the Master is Liable for Injuries to Servants in His Employ, by Thomas M. Cooley. 5. Concerning the Burden of Proof, by Francis Wharton. 6. The Federal Courts, by Gustavus Schmidt. 7. Notes on Current European Topics, by W. G. Hammond. 8. Book Reviews. 9. Books Received. 10. Notes. This is one of the most interesting numbers of the *Review* ever issued. The article upon the works of Mr. Bishop is worth more than a year's subscription to any lawyer.

We regard Mr. Bishop as one of the greatest, if not the greatest, of living law writers. He is concise, clear and bold in his style. He fears not to announce a principle and follow it to its legitimate results, even if his conclusions are contrary to the adjudications of a court, no matter how eminent such court may be. The article in question, under the caption of "The Works of Joel Prentiss Bishop," treats of the difficulties of authorship, the requisites of a good treatise on law, the classes of books on unwritten law, and the value of treatises. In stating what Mr. Bishop has accomplished, it says he has stated the law correctly; that he has stated it on legai principle and reason; that he has established legal doctrines, as the result of adjudication, not stated by judges or other text writers; that a large portion of Mr. Bishop's books consists of legal doctrine not found in those of prior authors; that the new matter introduced by Mr. Bishop is the most important of all. Mr. Bishop's First Book of the Law, and his work on the Law of Married Women, are appropriately noticed. This number contains a portrait and sketch of Chancellor Cooper of Tennessee.

This being the first number of the volume, now is a good time to subscribe. Those wishing to do so, should send five dollars to G. I. Jones & Co., St. Louis, Missouri.

Ordinances of the Village of Lemont.—Lemont is a village organized under the General Law of 1872. Its ordinances have been carefully revised by Hon. William H. Skelly, the village attorney. They make a neat volume of about sixty pages, and were issued from the Legal News press on the first of this month. These ordinances are divided into chapters preceded by head lines and head notes. Very similar in form to the Revised Statutes, which make them of easy reference.

Mrs. Lockwood's Hat.—The Washington Law Reporter, of last Saturday, republishes from the *Legal News* the letter of E. Quality, asking "Should a woman lawyer wear her hat in court?" and says: "Mrs. Lockwood always removes her hat. Precedents are powerful in law and in fashion." If a woman lawyer should follow strictly what is known as etiquette, she would not remove her hat in court; but if she should consider the court room as a place where she has to earn her living upon an equality with her brother members of the bar, she would probably remove her hat, from the same reasons that her brethren do their hats, overcoats and overshoes when trying a case—because they only serve as incumbrances—and it is more respectful to the court to remove them.

Served him right.—At the Manchester assizes on the 12th of March, one Charles Taylor was sentenced by Mr. Justice Blackburne to penal servitude for life for sending a threatening letter to Mr. George Edmund Legge Pearce, surgeon of London, with a view to extort money from him. If some of the black mailers and bribe-takers of America were punished in the same way it would perhaps have a good effect on evil doers.

Fees of Official Referees.—The *Public Opinion* of the 18th of last month, says:

The Lord Chancellor has, with the concurrence of the Treasury, issued an order that the fees to be taken by any official referee attached to the Supreme court under the provisions of section 83 of the Supreme court of Judicature Act, 1873, shall be as follows:—Upon a reference, for every hour or part of an hour the official referee is occupied, £1. 1s. Where the sittings under a reference are held elsewhere than in London there shall be paid in addition £1. 11s. 6d. for every night the official referee, and 15s. for every night the official referee's clerk, is absent from London, together with reasonable costs of traveling. Where the sittings are held elsewhere than in London the plaintiff shall provide at his expense a place to the satisfaction of the official referee in which the sittings may be held.

We in America would complain most bitterly, if we had to pay over five dollars an hour for the fees of a referee or court commissioner and when the reference is out of the city, the expenses of the referee and his clerks, even the United States District Judges when holding court out of their districts, do not get their expenses paid or any additional compensation.

GOVERNOR JOHN MATTOCKS.

Mrs. Myra Bradwell, Editor of Chicago Legal News.

My Dear Madam:—The inclosed sketch was written by the late Judge Redfield just previous to his last illness,—for publication in a family memorial of Governor Mattocks of Vermont, who died in 1847. As a Vermonter you feel interested in all that relates to your native state, as well as in the profession which now mourns the loss of so eminent a member as the late Judge Redfield. I therefore take pleasure in presenting this sketch to the bar, through the columns of your widely extended paper.

I am very truly yours,

John Mattocks.

Chicago, April, 5th, 1876.

My first recollection of Governor Mattocks, of Peacham, Vermont, dates from the year 1816, when at the age of twelve years I was a pupil at the academy in that town, and in the "town and gown" contests, in ball playing, or other games, General Mattocks, as he was then called, was the champion of the academy boys. I trust it will not be considered scandalous to name here, that the prize in one of these contests, was a gallon of pure whiskey. That was before the days of modern scientific discovery that all stimulus in health is either useless or hurtful, or that the Bible is a myth.

I cannot say that my personal knowledge of Governor Mattocks was of much account from that time until my admission to the bar, in Orleans county, Vermont, in 1827. At that time he stood decidedly at the head of the bar, in that section of the state, and had done so for nearly forty years. He read law, I think, at Middlebury, Vt., with his brother-in-law, Miller, who was a very distinguished member of the bar of that day, when it embraced as much talent to say the least, as it has ever done since. He subse-

quently removed to Peacham, where he spent the remainder of his life, mainly in the practice of his profession.

Those who think of Peacham as it has been for the last thirty years, isolated from public travel, and equally from that great source of assumed modern enlightment, the conversion by means of rapid revolution and more rapid progress; perched upon hills a thousand feet above tide water, more completely shutting it out from the sunshine of modern progress, than a thousand miles of distance, have no adequate comprehension of what it was in the early years of the present century; when John Mattocks, the young giant, in his profession, and the young leader in the politics of the state, (for that was still in the hands of the old Federalists, the most national, and the most upright and talented party the country has ever produced); the champion of every field and always *facile princeps inter pares*, might not unjustly be said to wield a wider and more controlling influence than any man of his years had ever done before or has ever done since in the state.

I know this will seem like exaggeration to those in the cities and large towns of the state, and who have not the slightest comprehension how any man, not in contact with the railway and the telegraph can possibly acquire any influence upon anybody or anything. But such men have yet much to learn of the real elements of greatness, whether in individual character or in that of states and empires. When the state was controlled by such men as Isaac Tichenor, Nathaniel and Daniel Chipman, Chauncey Langdon, Charles H. Williams, David Edmonds, Samuel Swift and his brother Benjamin, Samuel Miller, Daniel Farrand, Daniel Buck, Elijah Paine, John Mattocks, Samuel Prentiss and others of like character and calibre Peacham was in fact the headquarters of the council chambers of the party for all the most essential practical ends, and Peacham Academy was then under the leadership of such head masters as Ezra Carter and David Chassell whose equals could not now be found in any similar positions in all New England, and sent forth such pupils as Thaddeus Stevens, the great American commander, and Samuel Merrill, the early political leader in Indiana, and Wilbur Fisk, the almost inspired disciple and preacher of Methodism throughout America, and an army of others of like eminent character and gifts. At such a time we need not wonder that such men as Leonard Worcester, the eloquent preacher and wise and conscientious guide and counselor, and William Chamberlin, and John W. Chandler, (1.) and John Mattocks all residents of Peacham, wielding and surrounded by such influences were able to make an important impression upon public sentiment throughout the state. And such was most unquestionably the fact during all the period of the Federal ascendancy in the state, until the year 1815, with occasional interruptions of more or less extent before that time.

But Gov. Mattocks' great life work was certainly not accomplished mainly in public political positions, although he undoubtedly secured a very large share of the public confidence throughout the whole period of a full and rounded term of earthly existence. He was always the representative of his town in the legislature, whenever he desired it. He was in Congress for two terms before 1827; and again for another term just after 1840. He was a member of the Supreme Court from 1833 to 1835, and governor of the State for two years about 1840, during which period the former vice-president of the United States, Richard M. Johnson, visited the State, and was received by the governor and general assembly in joint session, the governor making one of his always happy speeches of welcome—concluding, in his own inimitable manner, "How are you, Dick Johnson? I am glad to welcome you to this State, and to this chamber." The vice-president afterwards said, he was sorry he had not known his excellency's sobriquet, that he might have replied, "How are you, Jack Mattocks? God bless you!"

But I must hasten to conclude my brief exposition of the public and professional life of one of the most eminent and highly gifted men of my native State—the most gifted, as it always seemed to me, among them all, with the single exception of Senator Phelps, who unquestionably bears the palm in that respect above all others of the State to the present time.

But Gov. Mattocks' great field of excellence and glory was the bar. There is no shamming, and no short-cuts to eminence there. Stern justice applies its measuring-rod with unflinching impartiality to all comers there, whether from the walls of the universities, or from the fields and the flocks, or the highways and byways of common life in any department. There is there no favoritism, and no stinted or grudging recognition of power and strength in that field. The humblest may there expect a patient hearing, and the most highly favored can demand no more. It was my fortune, when I came to the bar in Orleans county, to find all the important advocating in the hands of lawyers from other counties. And of this number, Gov. Mattocks was far the most eminent, although there were many others, such as Fletcher, Cushman, Paddock and Bell, that it would not be easy to match anywhere in the State, at any time since. We naturally felt some humiliation at such a state of things, but we could not break it up, since the clients would control the matter to a large extent, in spite of the advice of the local bar. But we could and did seek redress in another way. Some of the members of that bar attended the terms in the adjoining counties, and returned the favor they did us by arguing their causes. This was always kindly received by Gov. Mattocks, His position was too assured to feel any twinges of envy or jealousy. He said to his old companions of the bar, that it had something of the sound of old Roman times, "*delendo est Carthago*," more in sport or badinage than in earnest, no doubt.

The most effective and eloquent address I ever heard from Governor Mattocks, was the closing address to the jury on behalf of the Information in the trial of *Cleveland*(2.)for murder in procuring an abortion. (?) The accused was connected by affinity, with some of the most influential families in the state, who naturally shrunk from being declared kindred with a murderer, which gave great interest to the trial in many important aspects. The court was composed of the chief justice and one other judge of the Supreme Court, with two lay assistants. The law was discussed at the bar from day to day, during the trial, and was supposed to be definitely settled before Mr. Mattocks arose to make his closing argument. The popular sentiment seemed quietly to have settled down into the expectation of a verdict of manslaughter. But Mr. Mattocks had not spoken twenty minutes before we all felt that he was carrying everything before him, with the power of the enchanting wand. The spectators, the bar, and the court, and especially the jury comprehended at a glance that Mattocks would accept nothing less than a verdict of murder in the first degree, and that this he must and would have, in spite of all obstruction from the public opinion, or the charge of the court His manner was cool, almost to solemnity, his diction plain even to the very verge of the common places of the vernacular in ordinary conversation. His person short and dumpy, and his eye almost obscured by fixed introversion, gave no special force to his look, or his manner, which was indeed that of fixedness, rather than of expression. But his words possessed such a power as words never seemed to me to have on any other occasion. He arranged the evidence in such a manner it had never before assumed, and the rule of law which he invoked from the court as the only security of the life of the body politic, and of each of its members, was so simple and natural, as to seem irresistible, and such it proved for the court at once acceded to it, withdrawing all its former announcements.

I have listened to Webster, and to most of the more distinguished American orators, both at the bar and in congress, and to the most distinguished orators of England at the present time, in parliment, as well as at the bar, but for real maddened eloquence, I have never heard anything which seemed to me quite up to this argument of Governor Mattocks. It is scarcely needful to add that Cleveland was convicted of murder and sentenced to death, a most salutary example, but finally his punishment was commuted.

I have listened to a great many of Governor Mattock's arguments at the bar both to court and jury, sometimes when not myself engaged in the cause; sometimes when acting as opposing counsel, and sometimes while sitting as judge, and in all of them there seemed to me great power and ability. I had no reason to suppose myself a particular favorite of the Governor at any time. Our position as opposing counsel in every case where we were both engaged naturally led to no very special intimacy, and in addition to this the effort of a young man to compete as far as possible with one so much his senior, naturally tended to create the feeling of assumption and pretension on my part, unless I was more fortunate than falls to the common lot in such cases. But in our last tournament at the bar, just before his elevation to the bench, where he remained till his own voluntary retirement, when my labors at the bar had been exchanged for others of a graver nature, he acted the part of a noble and generous competitor, saying to some of his friends who urged him to attend to the re-argument of the case, directed by the Supreme Court, that he could never have a better time to retire than when he had made a drawn game with the young lion of the North. It was said with no expectation to have it reach me. He was far too delicate for anything of that character.

But I felt that it was generous and sincere, and as Junius says, "that it would wear well, because it was extorted from him;" and I repeat it here more in justice to him than from any gratification it can give me, when I scarcely expect consolation for the sorrows of advancing years from things of that character.

I am conscious that I have dwelt mainly upon the more serious elements in his character, which were always predominant in all his great efforts at the bar. But in times of relaxation, and when no deep sense of responsibility rested upon him, he was a man of great geniality and playfulness of character. His witticisms in the undertone of the bar, are more remembered than those of almost any other in the state, and many of them are more worth repeating than most of those we meet in collections of the kind. But I have already far transcended the proper limits of such a sketch.

ISAAC F. REDFIELD.

Boston, January 6, 1876.

NOTE.—In our brief enumeration of some of the prominent men in Vermont with whom Governor Mattocks associated and acted, I did not name any of the opposite party although many such existed whose names are held in deserved veneration. Richard Skinner(3.)of Manchester, for many years successively governor and chief justice of the state, was among the ablest and best men which the state has ever had in its public services. The Bradleys, father and son, are remembered with universal respect. Israel Smith, senator in congress, Horatio Seymour, twice senator in Congress, chief justice Aldis, and many others will long be held in the highest esteem as among the most able and faithful of the public servants of the state. There are of course many others to whom reference might be made in a general review of the public men of the state but there is no occasion for it here.

I. F. R.

(1.) John W. Chandler was a near relative of Gen. John L. Thompson, of the law firm of Williams and Thompson of this city, and George W. Chandler of the law firm of Goudy & Chandler also of this city.

(2) Cleveland was sentenced to be hung, and if the sentence was executed, it would be the duty of the sheriff to hang him. The sheriff was the father of the Hon. John A. Jameson, Judge of the Superior court of this county and of Mr. Jameson of the well known printers' Jameson & Morse.

Cleveland was one of the most intimate friends of Sheriff Jameson. After the conviction, the Sheriff realizing his position as the official executioner of one of his dearest friends, suffered untold agonies of mind, from which he was only relieved by the commutation of his sentence. The public feeling ran so high that the Governor feared to commute the sentence himself, and a special act of the legislature had to be obtained. Upon receiving the news of the passage of the act, Sheriff Jameson giving way to the wildest exclamations of joy, every now and then would in a loud voice cry out, "Thank God, he is saved and I havn't got to hang him!"

(3.) Richard Skinner of Manchester, our native town, was the father of Hon. Mark Skinner of this city.—[ED. LEGAL NEWS.]

(*Continued from page* 228.)

ILLINOIS SUPREME COURT.

ABSTRACT OF OPINIONS FILED AT OTTAWA IN 1876.

A. R. Wing *v.* C. L. Dodge.—Appeal from Cook.—Opinion by WALKER, J.

GUARDIAN IN OTHER STATES ACTING IN THIS—PRESUMPTIONS—OBJECTIONS, WHEN TO BE MADE—CAVEAT EMPTOR—DISSOLUTION OF INJUNCTIONS—SUGGESTIONS OF DAMAGES THEREON.

Held, 1. That where a guardian for a lunatic is appointed by a court of another State, competent, under the statute of that State, to make such appointment, and a court afterwards authorizes a sale of the lands of the lunatic, and recites in the decree that the appointment was legally made, the finding cannot be collaterally impeached, or even questioned in the courts of this State. And it does not matter that the finding may have been based on insufficient evidence.

2. Under our statute, our circuit courts can act on the petition of a guardian of a lunatic, appointed in another State, for leave to sell real estate of the lunatic, situated in this State.

3. Even if improper persons, under the foreign statutes, are appointed guardians, our courts will not attempt to remedy the matter, in any way, nor withhold recognition from such guardians *de facto*.

4. And where it is alleged that, in making a sale, the guardian was not present personally, the Supreme court will not hear the objection, where it was not urged below on the coming in and confirmation of the report; at least, if the sale was not actually fraudulent.

5. The rule of *caveat emptor* applies to sales of this character, as well as to all other judicial sales.

6. And all objections to the regularity of the sale must be made in season, in the court below.

7. On dissolving an injunction, the court should permit suggestions of damages to be filed, before the suit is finally disposed of. [On cross-errors by appellee, this was decided.]

A. G. Comson *v.* George Browning.—Error to Superior Court of Chicago.—Opinion by WALKER, J.

APPEAL BOND—ESTOPPEL—PLURALITY OF JUDGES.

Held, 1. That where an appeal bond is sued on, after a case has been decided in the Supreme Court, the appellant is estopped from impeaching the validity of the bond; having derived from it the benefit of having his appeal heard in the Supreme Court, unless the bond actually contravenes some statute, or some rule of public policy.

2. Even if a bond is not a good statutory bond, it may be a good bond at common law, and thus be obligatory.

3. It is error for the judges of the Superior Court or Circuit Court, to set in banc, or as a body. All proceedings should purport to have taken place under a single judge, and not by one judge presiding over others sitting with him.

Archibald Zuel *v.* Thomas Brown.—Appeal from Grundy.—Opinion by WALKER. J.

EXECUTION OF NOTE IN SUIT BEFORE A J. P. —PROOF THEREOF — PARTNERSHIP LIABILITY — PLEAS IN ABATEMENT AS TO JOINT LIABILITY—PLEA AS TO WRONGFUL USE OF FIRM NAME.

STATEMENT.—Suit on a promissory note for $200, before a J. P. This plea was put in on the trial: "And now comes the said Archibald Zuel, one of the said defendants in the above entitled cause, and says that he neither signed, or authorized, nor consented to the execution of the said note declared on, and of the truth of this he puts himself upon the country." The note was signed "Randall and Zuel." They were summoned by the names of "Archibald Zuel and Gersham Randall, firm of Randall & Zuel." It was objected that the plea, though sworn to, was an insufficient denial of the execution of the note, so that

plaintiff was not under obligation to prove such execution. *Held*,

1. That technicalities are not regarded in proceedings before a justice of the peace.

2. That no plea needed to be entered, but an affidavit would have been sufficient.

3. Though the two defendants were partners, yet one could not sign a note in the partnership name, outside the partnership business, without the express consent of the other.

4. At the common law, a party offering any kind of an instrument in evidence, was required to prove its execution. But, under our statute, this needs not to be done, unless the execution is denied under oath—yet then it is essential to recovery.

5. Where a partnership does not exist, the joint liability must be denied by plea in abatement. But if a partnership exists, and the firm name is wrongfully used for the private purposes of one of the partners, the proper course is to file a plea denying the execution of the instrument, verified by affidavit.

Samuel Getts *v.* Barrett C. Clark.—Appeal from Will.—Opinion by SCOTT, J.

LIABILITY FOR NECESSARIES OF MINOR AWAY FROM HOME VOLUNTARILY.

STATEMENT.—Goods sold to a minor daughter, which were necessary to make her comfortable; but she was living away from the home of her father, and working for wages, and reserving the benefit of her own labor, although her father was a man of considerable wealth. As no reason was shown for this, the court *Held*,

That it must be presumed that he would have supplied her wants, had she remained at home. An express promise, or circumstances from which a promise may be implied, must be shown to justify holding a father liable for necessaries supplied to minor children.

Guy Wilson *v.* Rupert Church.—Appeal from McHenry.—Opinion by CRAIG, J.

ENTIRE CONTRACT FOR SERVICE.

Held, That where a contract for services is absolutely for one year, and the employer discharges the employee, without sufficient cause, the employee can recover for the whole term. But if the employee consented to the discharge, he cannot recover, whether the consent is expressed by word or acts.

W. H. Ovington *v.* G. W. Smith,—Appeal from Cook.—Opinion by SCHOLFIELD, J.

CONSTRUCTION OF BOND—OBLIGATION OF INJUNCTION BOND CONSTRUED.

Held, 1. That on a bond, the undertaking of the surety is to be strictly construed, and he can not be held liable beyond the precise terms of the instrument.

2. So, where the condition of an injunction bond is, to pay A. and B. the damages they sustain by the issuing of the injunction writ, on the dissolution, and it is dissolved only as to A., and continues as to B., A cannot bring an action on the bond, since there was no undertaking to pay him such damages as he should sustain by the dissolution as to him alone.

C. B. & Q. R. R. *v.* Clara M. Harwood.—Appeal from Stark.—Opinion by SHELDON, J.

ACCIDENT AT CROSSING OF RAILROAD—COMPARATIVE NEGLIGENCE—LEGAL REQUIREMENT—RULE OF DAMAGES—INCONSISTENT INSTRUCTIONS.

STATEMENT.—Suit for damages on the death of plaintiff's husband, from collision with a passing train, in driving a team across a public crossing of a railroad. *Held*,

1. That it is the duty of a person, coming to a railroad crossing of a highway, to exercise care and caution to avoid collision with any passing train; and to use precaution, before going thereon, to ascertain whether there is any train approaching. And the failure to ring a bell, or sound a whistle, does not exempt the traveler from this duty.

2. Inconsistent instructions, which leave a jury at discretion to select one or the other as the guide to a verdict, constitute fatal error.

3. There is no requirement of law that in approaching a highway a train must slacken its speed.

4. The rule of damages in a case of this kind is the pecuniary damage suffered.

(CRAIG, J., dissenting as to the legal effect of the instructions, taken together.)

Homer *v.* Spellman.—Appeal from Superior Court of Cook.—Opinion by BREESE, J.

AUTHENTICATION OF COURT RECORDS FROM OTHER STATES—PLEA OF DISCHARGE BY BANKRUPTCY, WHEN NOT ALLOWED.

STATEMENT.—Action of debt on a judgment rendered in Connecticut. Plea *nul tiel record*, and a claim that the record was not sufficiently authenticated. *Held*,

1. That under the acts of Congress, it is a sufficient authentification of such a record, where the clerk of the court certifies under the seal of the court, and the presiding judge certifies that the attestation is in due form.

2. A plea of discharge in bankruptcy cannot be entered where an action is for "the covins, frauds, wrongs and injuries" committed by defendant. No debt originating in fraud is discharged by bankruptcy.

James Mix *v.* Sarah Baldue.—Appeal from Kankakee.—Opinion by SHELDON, J.

SPECIFIC PERFORMANCE—WAIVER OF DEFAULT—CONSIDERATION—MUTUALITY.

STATEMENT.—Suit for specific performance on this instrument:

"I will sell Sarah Delora the north half of lot number four, in block No. forty-four, in town of Momence, for fifty dollars, dating the transaction from this day; and will execute her papers whenever she is prepared to pay, within three years, as she is a widow.

Momence, Ill., April 15, '63.

JAMES MIX."

Decree granted.

There had been a prior contract with the husband, before his death, for the sale of the lot; under which he, with his family, took possession, and made improvements thereon.

Under the above stipulation, the widow did not offer pay within the time, nor within a reasonable period thereafter. *Held*,

1. That, though the delay might be excusable, yet, without excuse, it was fatal; unless there was proof of waiver. But a waiver may be inferred from acts, (as in this case.)

2. It being objected that the above instrument was invalid, because of a want of mutuality. as the complainant did not therein promise to pay, it was held that making improvements on the lot would be sufficient to raise a consideration.

City of Chicago *v.* Caroline McGiven.—Appeal from Superior Court of Chicago.—Opinion by SHELDON, J.

NEGLIGENCE IN SIDEWALKS—EXPERT TESTIMONY AS TO CONDITION OF THE WALK—READING LAW BOOKS TO JURY—MEASURE OF CITY'S OBLIGATION IN CONSTRUCTING SIDEWALKS.

STATEMENT.—Action for injuries received in slipping and falling upon a glass plate, inserted in a sidewalk, in Chicago; which plate had just been covered with a light fall of snow. It was situated nearly three feet from a basement staircase; and fifteen feet from the outer curbstone. On the trial, a mechanic was introduced, as an expert witness, to give his opinion that the glass was dangerous in that position. Also, an attorney was allowed to read law-books to the jury. *Held*,

1. That a mere slippery condition of sidewalks, arising from ice and snow not accumulated so as to constitute an obstruction, is not such a defect as will make the city liable for accidents.

2. A city is not required to construct its sidewalks so as to secure immunity from injury in using them. nor is it bound to employ the utmost care and exertion to that end. Its duty, under the law, is only to see that its sidewalks are reasonably safe, for persons exercising ordinary care and caution in using them.

3. It is only in matters of science and skill that an expert witness can be allowed to give his opinion. Where a jury are able to draw proper inferences from the facts proved, they must be left to do so without expressed opinions of experts. In this case, therefore, expert testimony was inadmissible; for the jury could decide for themselves whether the sidewalk was reasonably safe.

4. It is a reprehensible practice for attorneys to read law books to a jury, and should not be allowed in a civil case.

[Except on this last point, Chief Justice Scott dissented both from the reasoning and conclusions of the court.]

People ex rel. Montony *v.* Common Council of Aurora et al.—Mandamus.—Opinion per curiam.

JUDGE'S CLAIM TO COMPENSATION ON FAILURE OF ELECTION.

The above case rules this; but there is this distinct feature here, namely—that the judge sues out a mandamus for compensation since the failure to hold the election. And his petition was granted.

SUPREME COURT OF INDIANA.

WE take the following abstract of an important case from the Indianapolis *Sentinel*:

ACTION BY MARRIED WOMAN TO RECOVER, AFTER BECOMING OF AGE, HER SEPARATE REAL ESTATE, SOLD AND CONVEYED WHEN SHE WAS AN INFANT UNDER COVERTURE—COMPETENCY OF JURORS—WHEN THE HUSBAND'S ATTORNEY BECOMES THE WIFE'S ATTORNEY—ADMISSIBILITY OF TRANSCRIPT OF JUDGMENT AS EVIDENCE—THE DEED OF AN INFANT MARRIED WOMAN IS NOT VOID, BUT VOIDABLE MERELY, UNDER THE STATUTE—DEED MUST BE DISAFFIRMED WITHIN A REASONABLE TIME AFTER REACHING AGE—ESTOPPEL.

3985. Arabela Scranton *v.* Stewart and Rickets, Ohio C. C. Reversed. Opinion by BUSKIRK, J.

By this action the appellant sought to recover the possession of certain described real estate, upon the ground that when she and her husband conveyed the same to the appellee, Stewart, she was an infant under the age of twenty-one, and a femme covert. Rickets was the tenant of Stewart.

The court is of opinion that the jurors objected to were competent, and that the court committed no error in overruling the objections to them. The rule laid down in Fahnstock *v.* the State, 23 Ind., 231, is the most accurate, comprehensive and practical one on this point.

The court is of opinion that Davis should be regarded as the attorney of both Mr. and Mrs. Scranton, and that the communication made by Mrs. Scranton was privileged. The rule laid down by Taylor in his work on evidence, vol. 1, p. 826, is as follows: "So if a wife were induced by her husband to deal with her separate interests under the advice of her husband's attorney, such attorney would be regarded by the client as acting for both husband and wife."

The evidence referred to in the 5th, 7th and 9th reasons for a new trial was admissible as tending to establish a ratification of the conveyance of the land by Mrs. Scranton.

The admissibility of a transcript of a judgment is a question of law to be decided by the court. And the court erred in admitting the transcript of the judgment of the appellant against her husband as it appeared of record that the judgment was obtained by fraud.

The instructions, number 13, 14 and 15, complained of present three questions:

1. Is the deed of an infant married woman void or is it voidable merely?

2. Was the appellant required after she arrived at the age of twenty-one years, and while she remained under coverture, to disaffirm her conveyance to appellee, and if she was, did she, within reasonable time, disaffirm such conveyance?

3. Are the facts recited in the 13th or 15th instructions sufficient to estop the appellant from disaffirming her said conveyance and recovering back the real estate in controversy?

As to the first question, section 6, 1 G. & H. 258, provides that "the joint deed of husband and wife shall be sufficient to convey and pass the lands of the wife, but not to bind her to any covenants therein." The fifth and sixth sections of the act concerning the marriage relations are as follows: "Section 5. No lands of any married woman shall be liable for the debts of her husband, but such lands, and the profits therefrom, shall be her separate property, as fully as if she was unmarried. Provided that such wife shall have no power to incumber or convey such lands except by deed, in which her husband shall join." "Section 6. The separate deed of the husband shall convey no interest in the wife's lands." 1 G. & H. 374.

The capacity of a married woman to convey her real estate is the creature of the statute law; and to make her deed effectual the forms and solemnities prescribed by the statute must be followed. It has been decided that the joint deed of the husband and wife, as between them and the grantee, will be valid, although not acknowledged by the wife. (33 Ind., 393; 25 Ind., 347.)

Section 6 supra declares that the joint deed of husband and wife shall be sufficient to convey and pass the lands of the wife. In section 5 the language is: "No lands of any married woman," etc; nothing is said about infancy, in connection with the power to convey. Any married woman may convey her lands if her husband joins with her. If it be true that the statute does not embrace an infant married woman, then it must result that all conveyances by married women who are infants are absolutely void; but it has been repeatedly held that the deed of an infant married woman, where her husband joins with her, is not void, but is voidable merely. (7 Blackf., 442; 4 Ind., 403, 7 do, 398; 12 do, 76; 13 do, 396; 24 do. 385; 41 do, 586.)

At the time of the execution of the deed appellant was both a femme covert and an infant. The infancy of the plaintiff presents a distinct question from that of her coverture. Each disability must be considered by itself, and neither can derive any additional force from being coupled with the other. Under our statute a femme covert can not convey her lands unless her husband joins with her in the deed, and unless the deed is executed in the mode prescribed by statute, and when a deed is thus executed, the disability of coverture is removed, and that of infancy alone remains. The deed of a married woman is void when the statutory requirements are not complied with. The deed of an infant, whether married or unmarried, is not void but voidable merely. [See 17, Wend., 119; 36 Maine, 336; 3 Robertson N. Y., 429; 52 Barb, 141; 34 Ala., 150; 5 Ohio State, 319; 17 Texas, 341.]

As to the second question: There is a distinction between contracts executory and executed contracts on this point. To render an infant liable on an executory contract, he must expressly ratify it on reaching twenty-one; when the act is executed, as where a deed has been made, the infant must, on arriving at full age, do some act to disaffirm the contract. (40 Ind., 148; 41 Ind., 586.) The deed to the appellee being voidable merely, the title to the land was in the grantee until divested by some act of the maker of the deed. The appellant was required to disaffirm her conveyance within a reasonable time after arriving at age, (41 Ind., 586) and if Wiles *v.* Singerman (24 Ind., 385) rules, otherwise it is incorrect. Three years after arriving at age was a reasonable time within the meaning of this rule.

But it is insisted that appellant was estopped by her acts from disaffirming her contract. It is well settled that a married woman may be estopped by matters in pais. (6 Ind., 289; 21 do, 344.)

The most material act relied upon as an estoppel is that when the appellant came of age there was due her husband, upon the notes given for purchase money of the land in dispute, the sum of $1,250, and that she remained silent and permitted the appellee to pay such sum. To constitute this an estoppel it must appear that appellant knew that the purchase money was unpaid, and that the appellee was ignorant of the fact that the appellant was an infant when the deed was made.

The evidence is such as to preclude the estoppel under this rule. The 13th and 15th instructions were defective in the light of this rule.

UNITED STATES SUPREME COURT.

PROCEEDINGS OF.

Wednesday, March 29, 1876.

No. 189. Joseph Hobson and Jose M. Hurtado, plaintiffs in error, v. Daniel W. Lord. The argument in this cause was continued by Mr. E. B. Smith of counsel for the plaintiff in error, and concluded by William G. Choate for the plaintiff in error.

No. 186. Robert A. Phillips, plaintiff in error, v. Charles W. Payne. The argument of this cause was concluded by Samuel Shellabarger of counsel for the plaintiff in error.

No. 190. Selah Chamberlain, appellant, v. the St. Paul and Sioux City R. R. Co. The argument

of this cause was commenced by Gordon E. Cole of counsel for the appellant.
Adjourned until Thursday at 12 o'clock.

Thursday, March 30, 1876.

On motion of James Lowndes, Samuel Lord, Jr., and Ch. Richardson Miles, of Charleston were admitted.

No. 190. Selah Chamberlain v. the St. Louis and Sioux City Railroad Company. The argument of this cause was continued by Gordon E. Cole for the appellants, E. C. Palmer and James Gilfillan, for appellees, and concluded by Wm. M. Evarts, for appellant.
Adjourned until Friday at 12 o'clock.

Friday, March 31.

No. 191. Charles E. Phillips v. McGehee, Snowden & Violet. On motion of F. J. Lippite dismissed with costs, under sixteenth rule.

No. 192. Wm. Buchanan v. Jerry B. Clarkson. This cause was argued by James Carr for plaintiff in error. The court declined to hear counsel for defendant.

No. 193. The First National Bank of Charlotte v. the National Exchange Bank of Baltimore. This cause wns submitted on printed arguments by John Scott, Jr., the plaintiff in error, and by Wm. F. Frick for defendant.

No. 194. Harvey Terry v. the Commercial Bank of Alabama. This cause was submitted on printed arguments by Henry Terry. No counsel appeared for the appellee.

No. 295. Jacob Magee and Henry Hall v. the Manhattan Life Insurance Company; passed.

No. 197. (substituted for 196) Francis L. Markey, et al v. W. C. Langley, et al. The argument of this, cause was commenced by Samuel Lord, Jr., for appellants, and continued by Mr. C. R. Miles for appellees.
Adjourned until Monday at 12 o'clock.

Monday, April 3.

On motion of D. Dudley Field, Isaac Dayton, of New York City, was admitted.

On motion of William Pinkney Whyte, T. M. Norwood, of Savannah, Ga., A. T. Caperton, of Monroe, West Va., and N. J. Hammond, of Atlanta, Ga., were admitted.

No. 192. William Buchanan v. Jerry B. Clarkson. In error to the Supreme Court of Missouri. Waite, C. J., announced the decision, affirming the judgment of the Supreme Court, with cost.

No. 653. M. V. and A. G. Cochrane v. H. A. Clarke et al. The motion to dismiss this cause was submitted on printed arguments by A. G. Riddle, in support of the same, and by Albert H. Pike and R. W. Johnson, in opposition thereto.

No. 693. Daniel Hand v. Thomas C. Dunn, Comptroller General, etc. The motion to advance this cause was submitted on printed arguments by D. T. Corbin, in support of the same, and by P. Phillips in opposition thereto.

No. 788. Erasmus D. Foree, in error, v. William N. McVeigh. The motion to dismiss or advance this cause was submitted on printed arguments by P. Phillips in support of same, and by S. F. Beach, in opposition.

No. 197. Francis L. Markey et al., v. William C. Langley et al. The argument of this cause was continued by C. R. Miles for appellees, and concluded by James Lowndes for appellants.

No. 196. S. C. Savage, executrix, etc., v. the the United States. The argument of this cause was commenced by Conway Robinson for appellants. The court declined to hear argument in behalf of appellees.

Nos. 199 and 200 (substituted for No. 198) Branch, Sons & Co. v. City Council of Charleston. City Council of Charleston v. Branch, Sons & Co. The argument of these causes was commenced by James Connor for Branch, Sons & Co., and continued by T. D. Corbin for City Council of Charleston.
Adjourned until Tuesday at 12 o'clock.

Tuesday, April 4.

On motion of Geo. W. McCrary, G. L. Fort, of Lacon, Ill., was admitted.

No. 199. Branch Sons & Co. v. City Council of Charleston.

No. 200. City Council of Charleston et al. v. Branch, Sons & Co. The argument of these causes was concluded by A. G. Magrath for the appellants.

No. 136, (assigned,) John Garsel v. Wm. A. Beall et al. The argument of this cause was commenced by R. Toombs for appellant and continued by B. H. Hill for appellees, and by R. Toombs for appellant.
Adjourned till Wednesday at 12 o'clock.

ILLINOIS CASES.

Maria L. Wolcott *v.* George B. Heath.—Appeal from Iroquois.—Opinion by SCOTT, Ch. J.

TIME CONTRACTS—WITNESS REFERRING TO BOOK ENTRIES—INSTRUCTIONS ON SUFFICIENCY OF EVIDENCE.

Held, 1. That time contracts, made in good faith, for the future delivery of grain, or any other commodity, are not prohibited by common law, nor any statute of this State. But the delivery must be imperative, and nothing contingent but the time. The law forbids contracts where the delivery is contingent also.

2. Where a business consists of a long series of transactions, as that of a commission merchant, between parties, it is error for a court to refuse to allow a party testifying to refer to his books, in order to refresh his recollection. A witness who would pretend to carry in his memory all the details of a complicated business, would be unworthy of credit; and to exclude testimony based on book entries would be to close up, in many cases, all channels of correct information.

3. An instruction must leave it to the jury to decide whether, on a certain kind of evidence failing in a cause, there is any other evidence to sustain the issues. A judge should not express his opinion on the sufficiency or weight of evidence.

People ex rel. Smith *v.* Common Council of Aurora, et al.—Mandamus.—Opinion by SCHOLFIELD, J.

CONSTRUCTION OF REPEALING STATUTE AS TO CITY COURTS.

STATEMENT.—By the act of 1859, the cities of Elgin and Aurora elected a judge of common pleas court jointly. And the act provided that if, for any cause, an election was not held at the time appointed, the clerks of the courts in the two cities should issue a call for a special election, within four weeks. An election thus failed, and the clerks refused to issue a call. A writ of mandamus was sued out and awarded. *Held*,

1. That the act of 1874, repealing the act of 1859, did not abolish the said courts. And the fact that the later act employs only the word "city," and not "cities," has no significance; since the statute expressly lays down the general rule of construction, that "Words importing the singular number may extend and be applied to several persons or things, and words importing the plural number may include the singular." (R. S. of 1874, p. 1011.) And herein, the word "city," in the singular, is used merely as a designation of the election district; which, as to courts thereafter to be organized, was to be a single city.

LAW BOOKS—CRITICISM.

GALESBURG, ILL.,

ED. CHICAGO LEGAL NEWS: The criticism of the *London Law Times*, upon the general character of recent American text-books (so called), seems unfortunately just; and your comments thereon, well worthy attention.

It seems scarcely desirable, much less practicable, for the general practitioner thoroughly to familiarize himself with the mass of decided cases.

Cases, as such, are of special value as authority, in so far only as they correctly announce and apply legal principles to the determination of points in difference; but apparently this fact is not considered of importance by most recent authors of legal treatises; hence, instead of judiciously discriminating analysis of the legal principles pertaining to the matter in hand, supported or amplified by citations of such adjudged cases only, as upon principle, clearly tends to exemplify and sustain, or successfully controvert the propositions contained in the text; the writer too often contents himself with loosely stating the propositions gleaned from some decided case, and backing them with, or rather burying them under, a conglomorate mass of cited cases, nine-tenths of which tend to confuse, rather than enlighten. The profession owe it to themselves to decline purchasing such works, since, to a good lawyer they are of but trifling advantage at best, while to purchase them is to pay a premium for charlatanism. W.

LORD ST. LEONARDS' WILL.—We sometime since gave an account of the admission to probate in the court below, of the will of Lord St. Leonard, under very peculiar circumstances. The *Hour* of March 14, in refering to the opinion of the Appellate court in affirming that judgment says:

The court of Appeal, composed of a very strong bench, yesterday affirmed the decision of Mr. Justice Hannen in the case of the late Lord St. Leonards' will. The judgment of Chief Justice Cockburn fully recognizes the soundness of the doctrine that a missing will must be taken in the absence of evidence to the contrary to have been destroyed by the testator for the purpose of revoking it. He, however, is of opinion that the surrounding circumstances of the case show that the will was not destroyed by Lord St. Leonard's. Reliance is mainly placed on the known character of the deceased lawyer, his abhorrence of intestacies in general, and the pride he took in this very missing document, and also on the fact that the testamentary casket was well known to the servants, and that it was capable of being opened by several keys in the house. . . .

The strangeness of the mystery which surrounds the disappearance of the late ex-Chancellor's will is only equalled by the remarkable feat of memory performed by his daughter, which form the two features of the case. Luckily, the one has been set off against the other, and the great lawyer who made so many wills for others has not been allowed to die without one of his own. If he could see what has been the result of his keeping his will in his own hands, he would probably change the opinion he expressed against the practice of persons depositing their wills in the Registry as soon as made. It is not every one who has a living testamentary depositary like Miss Sugden at hand, and, therefore, the best way to keep his heirs out of a lawsuit is to send his will at once to Somerset House instead of trusting it to the frail security of a desk or a drawer.

The court has in this case taken a step in advance of what it has done in any other case, there can be no doubt but the Chief Justice stated the rule correctly when he said that a missing will must be taken in the absence of evidence to the contrary, to have been destroyed by the testator for the purpose of revoking it, but we do not believe that it was in accordance with the law to hold that this presumption of destruction was overcome by "the known character of the deceased lawyer, his abhorrence of intestacies in general, and the pride he took in this very missing document, etc." It is a fact well known to the profession that attorneys who spend most of their lives in drawing the wills of others or in administering probate law, seldom make their own wills and if they do make a will for themselves often make some mistake in it. Judge Rucker who was judge of the Probate court of this county for eight years made a will, but probate of it was refused in the very court over which he had presided for so many years with marked ability. We could name many instances of this kind. We presume the reluctance of probate lawyers to make wills for themselves may be accounted for from the fact that they see so much litigation over the construction of wills, and so many wills that work great hardship, that they conclude that the law which is the experience of the ages if they die intestate will distribute their peoperty better for them than any will that could be drawn, we have no doubt in nine cases out of ten this conclusion is correct.

THE LEGAL PRESS ON THE SUPREME COURT OF NEW HAMPSHIRE.—The London *Solicitor's Journal* says:

An American contemporary, in noticing a recent volume of transatlantic law reports, complains bitterly of the prolixity of the judges. "In Eastman *v.* Clark it was adjudged that participation in profits is not a decisive test of partnership. It takes two judges and seventy-eight pages to say this. Judge Smith starts off modestly and succinctly in fourteen pages, but Judge Doe brings up the rear with sixty-three! The point in Fay *v.* Parker is that exemplary damages are not recoverable in a civil action for a tort which may also be criminally punished. Judge Foster occupies sixty-nine pages in saying this, and in querying whether they are recoverable in any civil action. It is evident that Judge Foster was determined not to be outdone by his brethren in length or learning. He quotes from Milton's 'Paradise Lost,' also from Dante. Judge Foster is also sarcastic; he gives many other judges very severe 'wipes.' Finally comes Aldrich *v.* Wright. A statute provided that mink should not be destroyed between certain dates, under a prescribed penalty. The defendant shot mink on his own land, while they were chasing his geese. Held, that under the constitution, which gave him a right to "protect property," he had a 'natural, essential and inherent right' to kill those mink. Judge Doe rises to the consideration of this grave topic in an opinion of thirty pages, and cites, among other authorities, Sidney Smith's 'Essay on Spring Guns.'"

THE ADVANTAGE OF STEREOTYPING LEGAL NOTICES.—It is known to all printers that legal notices, when kept in type from week to week, and lifted from form to form, are liable to be changed by having letters or figures drop out. To avoid this, when requested we stereotype legal notices without additional cost, in one solid block of metal, type high, which makes it impossible for a letter or figure to drop out. This process prevents any change being made by accident after it is once cast into plate. We shall be glad to show the advantages of stereotyping legal notices to attorneys or real estate dealers calling at our office.

THE COST OF AN ARBITRATION.—A parliamentary return shows that the sums paid for services in the Albert Arbitration were—to the arbitrator, £2,000; the assessor, 5,700 guineas; and the liquidators, £12,275 18s. The gross amount paid to solicitors and parliamentary agents for costs was £19,264 10s. 11d. The expenses in the Court of Chancery were £71,668 1s. 7d.

LEGAL BLANKS.—We call attention to the advertisement of our Legal Blanks, on page 573, of this issue.

BLANKS TO ORDER.—We have the stereotype plates of all our trust deeds, deeds and leases, and will print one hundred of either of these forms, without change, with red lines, on Weston's linen paper, with the card of the person ordering on the back, for four dollars—or two hundred for seven dollars.

OUR LEGAL AND CONVEYANCING BLANKS.—We are now printing all our blanks on Byron Weston's linen paper, which will bear folding and re-folding without cracking or breaking, and is pleasant to write upon. These blanks will be furnished at the office for seventy-five cents a quire.

CHICAGO LEGAL NEWS.

SATURDAY, APRIL 15, 1876.

The Courts.

UNITED STATES SUPREME COURT.

No. 339.—OCTOBER TERM, 1875.

THE UNITED STATES, Plaintiffs in Error, *v.* WILLIAM J. CRUIKSHANK, WILLIAM D. IRWIN, and JOHN P. HADNOT.

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

THE ENFORCEMENT ACT—THE 14TH AND 15TH AMENDMENTS TO THE CONSTITUTION CONSTRUED—THE RIGHTS OF CITIZENS OF THE UNITED STATES.

1. WHAT IS A CRIME UNDER THE ACT.—This was an indictment under the sixth section of the Enforcement Act. The court held, that the offences provided for by the statute in question do not consist in mere "banding" or "conspiring" of two or more persons together, but in their banding or conspiring with the intent or for any of the purposes specified; that to bring the case under the operation of the statute, it must appear that the right the enjoyment of which the conspirators intended to hinder or prevent, was one granted or secured by the Constitution or laws of the United States; that it does not appear that the criminal matter charged has been made indictable by any act of Congress.

2. RIGHTS OF CITIZENS—NATURE OF GOVERNMENT.—That in our political system we have a government of the United States and of each of the several States. Each one of these governments is distinct from the other, and each has citizens of its own, who owe it allegiance, and whose rights, within its jurisdiction, it must protect. The same person may be at the same time a citizen of the United States and a citizen of a State, but his rights of citizenship under one of these governments will be different from those he had under the other.

3. THE GOVERNMENT OF THE U. S.—That the Government of the United States was erected for special purposes, and endowed with all the powers necessary for its preservation and the accomplishment of the ends its people had in view. It can neither grant nor secure to its citizens any right or privilege not expressly, or by implication, placed under its jurisdiction.

4. ATTRIBUTES OF NATIONAL CITIZENSHIP.—The court states what are attributes of national citizenship that will be protected by the Government of the United States.

5. THE 14TH AMENDMENT.—The 14th amendment prohibits a State from depriving any person of life, liberty, or property, without due process of law, but it adds nothing to the rights of one citizen as against another; it simply furnishes an additional guaranty as against any encroachment by the States upon the fundamental rights which belong to every citizen as a member of society.

6. RACE OR COLOR.—That in as much as it does not appear in these counts that the intent of defendants was to prevent these parties from exercising their right to vote on account of their race, etc., it does not appear that it was their intent to interfere with any right granted or secured by the Constitution or laws of the United States.

7. CHARGING OFFENSE.—That where the definition of an offence includes generic terms, it is not sufficient that the indictment shall charge the offense in the same generic terms as in the definition but it must state the species—it must descend to particulars.—[ED. LEGAL NEWS.]

Mr. Chief Justice WAITE delivered the opinion of the Court.

This case comes here with a certificate by the judges of the Circuit Court for the District of Louisiana, that they were divided in opinion upon a question which occurred at the hearing. It presents for our consideration an indictment containing sixteen counts, divided into two series of eight counts each, based upon section 6 of the enforcement act of May 31, 1870. That section is as follows:

"That if two or more persons shall band or conspire together, or go in disguise upon the public highway, or upon the premises of another, with intent to violate any provision of this act, or to injure, oppress, threaten, or intimidate any citizen, with intent to prevent or hinder his free exercise and enjoyment of any right or privilege granted or secured to him by the Constitution or laws of the United States, or because of his having exercised the same, such persons shall be held guilty of felony, and, on conviction thereof, shall be fined or imprisoned, or both, at the discretion of the court—the fine not to exceed five thousand dollars, and the imprisonment not to exceed ten years—and shall, moreover, be thereafter ineligible to, and disabled from holding, any office or place of honor, profit, or trust created by the Constitution or laws of the United States.—(16 Stat., 141.)

The question certified arose upon a motion in arrest of judgment after a verdict of guilty generally upon the whole sixteen counts and is stated to be whether "the said sixteen counts of said indictment are severally good and sufficient in law, and contain charges of criminal matter indictable under the laws of the United States."

The general charge in the first eight counts is that of "banding," and in the second eight that of "conspiring" together to injure, oppress, threaten, and intimidate Levi Nelson and Alexander Tillman, citizens of the United States, of African descent and persons of color, with the intent thereby to hinder and prevent them in their free exercise and enjoyment of rights and privileges "granted and secured" to them "in common with all other good citizens of the United States by the Constitution and laws of the United States."

The offences provided for by the statute in question do not consist in the mere "banding" or "conspiring of two or more persons together, but in their banding or conspiring with the intent or for any of the purposes specified. To bring this case under the operation of the statute, therefore, it must appear that the right, the enjoyment of which the conspirators intended to hinder or prevent, was one granted or secured by the Constitution or laws of the United States. If it does not so appear the criminal matter charged has not been made indictable by any act of Congres.

We have in our political system a government of the United States and a government of each of the several States. Each one of these governments is distinct from the others, and each has citizens of its own who owe it allegiance, and whose rights, within its jurisdiction, it must protect. The same person may be at the same time a citizen of the United States and a citizen of a State, but his rights of citizenship under one of these governments will be different from those he has under the other. (Slaughter-House Cases, 16 Wall., 74.)

Citizens are the members of the political community to which they belong. They are the people who compose the community, and who, in their associated capacity, have established or submitted themselves to the dominion of a government for the promotion of their general welfare and the protection of their individual as well as their collective rights. In the formation of a government the people may confer upon it such powers as they choose. The government when so formed may, and when called upon should, exercise all the powers it has for the protection of the rights of its citizens and the people within its jurisdiction, but it can exercise no other. The duty of a government to afford protection is limited always by the power it possesses for that purpose.

Experience made the fact known to the people of the United States that they required a national government for national purposes. The separate governments of the separate States, bound together by the articles of confederation alone, were not sufficient for the promotion of the general welfare of the people in respect to foreign nations, or for their complete protection, as citizens of the Confederate States. For this reason the people of the United States, "in order to form a more perfect Union, establish justice, insure domestic tranquility, provide for the common defence, promote the general welfare, and secure the blessings of liberty," to themselves and their posterity, (Const. Preamble,) ordained and established the government of the United States, and defined its powers by a constitution, which they adopted as its fundamental law and made its rule of action.

The government thus established and defined is to some extent a government of the states in their political capacity. It is, also, for certain purposes, a government of the people. Its powers are limited in number, but not in degree. Within the scope of its powers, as enumerated and defined, it is supreme and above the states, but beyond it has no existence. It was erected for special purposes and endowed with all the powers necessary for its own preservation and the accomplishment of the ends its people had in view. It can neither grant nor secure to its citizens any right or privilege not expressly, or by implication, placed under its jurisdiction.

The people of the United States resident within any state are subject to two governments, one state and the other national, but there need be no conflict between the two. The powers which one possesses the other does not. They are established for different purposes and have separate jurisdictions. Together they make one whole and furnish the people of the United States with a complete government, ample for the protection of all their rights at home and abroad. True, it may sometimes happen that a person is amenable to both jurisdictions for one and the same act. Thus, if a marshal of the United States is unlawfully resisted while executing the process of the courts within a state, and the resistance is accompanied by an assault on the officer, the sovereignty of the United States is violated by the resistance, and that of the state by the breach of peace in the assault. So, too, if one passes the counterfeited coin of the United States within a state, it may be an offence against the United States and the state; the United States, because it discredits the coin, and the state, because of the fraud upon him to whom it is passed. This does not, however, necessarily imply that the two governments possess powers in common or bring them into conflict with each other. It is the natural consequence of a citizenship which owes allegiance to two sovereignties and claims protection from both. The citizen cannot complain because he has voluntarily submitted himself to such a form of government. He owes allegiance to the two departments, so to speak, and within their respective spheres must pay the penalties which each exacts for disobedience to its laws. In return he can demand protection from each within its own jurisdiction.

The government of the United States is one of delegated powers alone. Its authority is defined and limited by the Constitution. All powers not granted to it by that instrument are reserved to the States or the people. No rights can be acquired under the Constitution or laws of the United States except such as the government of the United States has the authority to grant or secure. All that cannot be so granted or secured are left under the protection of the States.

We now proceed to an examination of the indictment, to ascertain whether the several rights, which it is alleged the defendants intended to interfere with, are such as had been in law and in fact granted or secured by the Constitution or laws of the United States.

The first and ninth counts state the intent of the defendants to have been to hinder and prevent the citizens named in the free exercise and enjoyment of their "lawful right and privilege to peaceably assemble together with each other and with other citizens of the United States for a peaceful and lawful purpose." The right of the people peaceably to assemble for lawful purposes existed long before the adoption of the Constitution of the United States. In fact, it is, and always has been, one of the attributes of citizenship under a free government. It "derives its source," to use the language of Chief Justice Marshall, in Gibbons *v.* Ogden, 9 Wheat., 211, "from those laws whose authority is acknowledged by civilized man throughout the world." It is found wherever civilization exists. It was not, therefore, a right granted to the people by the Constitution. The government of the United States when established found it in existence, with the obligation on the part of the States to afford it protection. As no direct power over it was granted to Congress, it remains, according to the ruling in Gibbons *v.* Ogden, 9 Wheat., 203, subject to State jurisdiction. Only such existing rights were committed by the people to the protection of Congress as came within the general scope of the authority granted to the national government.

The first amendment of the Constitution prohibits Congress from abridging "the right of the people to assemble and to petition the government for a redress of grievances." This, like the other amendments proposed and adopted at the same time, was not intended to limit the powers of the State governments in respect to their own citizens, but to operate upon the national government alone. (Barron *v.* The City of Baltimore, 7 Pet., 250; Lessee of Livingstone *v.* Moore, 7 Pet., 551; Fox *v.* Ohio, 5 How., 434; Smith *v.* Maryland, 18 How., 76; Withers *v.* Buckley, 20 How., 90; Pervear *v.* The Commonwealth, 5 Wall., 479; Twitchell *v.* The Commonwealth, 7 Wall., 321; Edwards *v.* Elliott, 21 Wall., 557.) It is now too late to question the correctness of this construction. As was said by the late Chief Justice, in Twitchell *v.* The Commonwealth, (p. 325,) "the scope and application of these amendments are no longer subjects of discussion here." They left the authority of the States just where they found it, and added nothing to the already existing powers of the United States.

The particular amendment now under consideration, assumes the existence of the right of the people to assemble for lawful purposes, and protects it against encroachment by Congress. The right was not created by the amendment; neither was its continuance guaranteed, except as against congressional interference. For their protection in its enjoyment, therefore, the people must look to the States. There is where the power for that purpose was originally placed, and it has never been surrendered to the United States.

The right of the people peaceably to assemble for the purpose of petitioning Congress for a redress of grievances, or for anything else connected with the powers or the duties of the national government, is an attribute of national citizenship, and as such, under the protection of, and guaranteed by, the United States. The very idea of a government, republican in form, implies a right on the part of its citizens to meet peaceably for consultation in respect to public affairs and to petition for a redress of grievances. If it had been alleged in these counts that the object of the defendants was to prevent a meeting for such a purpose, the case would have been within the statute and within the scope of the sovereignty of the United States. Such, however, is not the case. The offense, as stated in the indictment, will be made out if it be shown that the object of the conspiracy was to prevent a meeting for any lawful purpose whatever.

The second and tenth counts are equally defective. The right there specified is that of "bearing arms for a lawful purpose." This is not a right granted by the Constitution. Neither is it in any manner dependent upon that instrument for its existence. The second amendment declares that it shall not be infringed; but this, as has been seen, means no more than that it shall not be infringed by Congress. This is one of the amendments that has no other effect than to restrict the powers of the national government, leaving the people to look for their protection against any violation by their fellow-citizens of the rights it recognizes, to what is called in The City of New York *v.* Miln, 11 Pet., 139, the "powers which relate to merely municipal legislation, or what was, perhaps, more properly called internal police," "not surrendered or restrained" by the Constitution of the United States.

The third and eleventh counts are even more objectionable. They charge the intent to have been to deprive the citizens named, they being in Louisiana, "of their respective several lives and liberty of person without due process of law." This is nothing else than alleging a conspiracy to falsely imprison or murder citizens of the United States, being within the territorial jurisdiction of the State of Louisiana. The rights of life and personal liberty are natural rights of man. "To secure these rights," says the Declaration of Independence, "governments are instituted among men, deriving their just powers from the consent of the governed." The very highest duty of the States, when they entered into the Union under the Constitution, was to protect all persons within their boundaries in the enjoyment of these "unalienable rights with which they were endowed by their Creator." Sovereignty, for this purpose, rests alone with the States. It is no more the duty or within the power of the United States to punish for a conspiracy to falsely imprison or murder within a State, than it would be to punish for false imprisonment or murder itself.

The fourteenth amendment prohibits a state from depriving any person of life, liberty, or property, without due process of law, but this adds nothing to the rights of one citizen as against another. It simply furnishes an additional guaranty against any encroachment by the states upon the fundamental rights which belong to every citizen as a member of society. As was said by Mr. Justice Johnson, in Bank of Columbia vs. Okely, 4 Wheat., 244, it secures "the individual from the arbitrary exercise of the powers of government, unrestrained by the established principles of private rights

and distributive justice." These counts in the indictment do not call for the exercise of any of the powers conferred by this provision in the amendment.

The fourth and twelfth counts charge the intent to have been to prevent and hinder the citizens named, who were of African descent and persons of color, in "the free exercise and enjoyment of their several right and privilege to the full and equal benefit of all laws and proceedings, then and there, before that time enacted or ordained by the said State of Louisiana and by the United States; and then and there, at that time, being in force by the said State and District of Louisiana, aforesaid, for the security of their respective persons and property, then and there, at that time enjoyed at and within said State and District of Louisiana by white persons, being citizens of said State of Louisiana and the United States, for the protection of the persons and property of said white citizens." There is no allegation that this was done because of the race or color of the persons conspired against. When stripped of its verbiage the case as presented amounts to nothing more than that the defendants conspired to prevent certain citizens of the United States, being within the State of Louisiana, from enjoying the equal protection of the laws of the state and of the United States.

The fourteenth amendment prohibits a state from denying to any person within its jurisdiction the equal protection of the laws; but this provision does not, any more than the one which precedes it, and which we have just considered, add anything to the rights which one citizen has under the Constitution against another. The equality of the rights of citizens is a principle of republicanism. Every republican government is in duty bound to protect all its citizens in the enjoyment of this principle, if within its power. That duty was originally assumed by the states, and it still remains there. The only obligation resting upon the United States is to see that the states do not deny the right. This the amendment guarantees, but no more. The power of the national government is limited to the enforcement of this guaranty.

No question arises under the civil rights act of April 9, 1866, (14 Stat., 27,) which is intended for the protection of citizens of the United States in the enjoyment of certain rights, without discrimination on account of race, color, or previous condition of servitude, because, as has already been stated, it is no where alleged in these counts that the wrong contemplated against the rights of these citizens was on account of their race or color.

Another objection is made to these counts that they are too vague and uncertain. This will be considered hereafter in connection with the same objection to other counts.

The sixth and fourteenth counts state the intent of the defendants to have been to hinder and prevent the citizens named, being of African descent and colored, "in the free exercise and enjoyment of their several and respective right and privilege to vote at any election to be thereafter by law had and held by the people in and of the said state of Louisiana, or by the people of and in the parish of Grant aforesaid." In Minor vs. Happersett, 21 Wall., 178, we decided that the Constitution of the United States has not conferred the right of suffrage upon any one, and that the United States have no voters of their own creation in the states. In U. S. vs. Reese, just decided, we hold that the fifteenth amendment has invested the citizens of the United States with a new constitutional right, which is, exemption from discrimination in the exercise of the elective franchise on account of race, color, or previous condition of servitude. From this it appears that the right of suffrage is not a necessary attribute of national citizenship, but that exemption from discrimination in the exercise of that right on account of race, etc., is. The right to vote in the states comes from the states, but the right of exemption from the prohibited discrimination comes from the United States. The first has not been granted or secured by the Constitution of the United States, but the last has been.

Inasmuch, therefore, as it does not appear in these counts that the intent of the defendants was to prevent these parties from exercising their right to vote on account of their race, etc., it does not appear that it was their intent to interfere with any right granted or secured by the Constitution or laws of the United States. We may suspect that race was the cause of the hostility, but it is not so averred. This is material to a description of the substance of the offence, and cannot be supplied by implication. Everything essential must be charged positively, and not inferentially. The defect here is not in form but in substance.

The seventh and fifteenth counts are no better than the sixth and fourteenth. The intent here charged is to put the parties named in great fear of bodily harm and to injure and oppress them, because, being and having been in all things qualified, they had voted "at an election before that time, had and held according to law by the people of the said State of Louisiana, in said State, to wit: on the 4th day of November, A. D. 1872, and at divers other elections by the people of the State, also before that time had and held according to law." There is nothing to show that the elections voted at were any other than State elections, or that the conspiracy was formed on account of the race of the parties against whom the conspirators were to act. The charge as made is really of nothing more than a conspiracy to commit a breach of the peace within a State. Certainly it will not be claimed that the United States have the power or are required to do mere police duty in the States. If a State cannot protect itself against domestic violence, the United States may, upon the call of the executive, when the legislature cannot be convened, lend their assistance for that purpose. This is a guaranty of the Constitution (Art. IV., section 4), but it applies to no case like this.

We are, therefore, of the opinion that the first, second, third, fourth, sixth, seventh, ninth, tenth, eleventh, twelfth, fourteenth, and fifteenth counts do not contain charges of a criminal nature made indictable under the laws of the United States, and that consequently they are not good and sufficient in law. They do not show that it was the intent of the defendants, by their conspiracy, to hinder or prevent the enjoyment of any right granted or secured by the Constitution.

We come now to consider the fifth and thirteenth and the eighth and sixteenth counts; which may be brought together for that purpose. The intent charged in the fifth and thirteenth is "to hinder and prevent the parties in their respective free exercise and enjoyment of the rights, privileges, immunities, and protection granted and secured to them respectively as citizens of the United States and as citizens of said State of Louisiana," "for the reason that they, * * being then and there citizens of said State and of the United States, were persons of African descent and race, and persons of color, and not white citizens thereof," and in the eighth and sixteenth, to hinder and prevent them "in their several and respective free exercise and enjoyment of every, each, all, and singular the several rights and privileges granted and secured to them by the Constitution and laws of the United States." The same general statement of the rights to be interfered with is found in the fifth and thirteenth counts.

According to the view we take of these counts the question is not whether it is enough, in general, to describe a statutory offence in the language of the statute, but whether the offence has here been described at all. The statute provides for the punishment of those who conspire "to injure, oppress, threaten, or intimidate any citizen, with intent to prevent or hinder his free exercise and enjoyment of any right or privilege granted or secured to him by the Constitution or laws of the United States." These counts in the indictment charge, in substance, that the intent in this case was to hinder and prevent these citizens in the free exercise and enjoyment of "every, each, all, and singular," the rights granted them by the Constitution, etc. There is no specification of any particular right. The language is broad enough to cover all.

In criminal cases, prosecuted under the laws of the United States, the accused has the constitutional right "to be informed of the nature and cause of the accusation."—(Amendment VI.) In U. S. v. Mills, 7 Pet., 142, this was construed to mean that the indictment must set forth the offence "with clearness and all necessary certainty, to apprise the accused of the crime with which he stands charged;" and in U. S. v. Cook, 17 Wall., 174, that "every ingredient of which the offence is composed must be accurately and clearly alleged." It is an elementary principle of criminal pleading that where the definition of an offence, whether it be at common law or by statute, "includes generic terms, it is not sufficient that the indictment shall charge the offence in the same generic terms as in the definition, but it must state the species—it must descend to particulars." (1 Arch. Cr. Pr. and Pl., 291.) The object of the indictment is, first, to furnish the accused with such a description of the charge against him as will enable him to make his defence, and avail himself of his conviction or acquital for protection against a further prosecution for the same cause; and second, to inform the court of the facts alleged, so that it may decide whether they are sufficient in law to support a conviction, if one should be had. For this, facts are to be stated, not conclusions of law alone. A crime is made up of acts and intent, and these must be set forth in the indictment, with reasonable particularity of time, place, and circumstances.

It is a crime to steal goods and chattels, but an indictment would be bad that did not specify with some degree of certainty the articles stolen. This because the accused must be advised of the essential particulars of the charge against him, and the court must be able to decide whether the property taken was such as was the subject of larceny. So, too, it is in some States a crime for two or more persons to conspire to cheat and defraud another out of his property, but it has been held that an indictment for such an offence must contain allegations setting forth the means proposed to be used to accomplish the purpose. This, because, to make such a purpose criminal, the conspiracy must be to cheat and defraud in a mode made criminal by statute, and as all cheating and defrauding has not been made criminal, it is necessary for the indictment to state the means proposed in order that the court may see that they are in fact illegal.—(State v. Parker, 43 N. H., 83; State v. Keach, 40 Vt., 118; Alderman v. The People, 4 Mich., 414; State v. Roberts, 34 Maine, 32.) In Maine it is an offence for two or more to conspire with the intent unlawfully and wickedly to commit any crime punishable by imprisonment in the State prison, (State v. Roberts,) but we think it will hardly be claimed that an indictment would be good under this statute, which charges the object of the conspiracy to have been "unlawfully and wickedly to commit each, every, all and singular the crimes punishable by imprisonment in the State prison." All crimes are not so punishable. Whether a particular crime be such an one or not is a question of law. The accused has, therefore, the right to have a specification of the charge against him in this respect, in order that he may decide whether he should present his defence by motion to quash, demurrer, or plea; and the court, that it may determine whether the facts will sustain the indictment. So here, the crime is made to consist in the unlawful combination with an intent to prevent the enjoyment of any right granted or secured by the Constitution, etc. All rights are not so granted or secured. Whether one is so or not is a question of law to be decided by the court, not the prosecutor. Therefore, the indictment should state the particulars, to inform the court as well as the accused. It must be made to appear, that is to say, appear from the indictment without going further, that the acts charged will, if proven, support a conviction for the offence alleged.

But it is needless to pursue the argument further. The conclusion is irresistible that these counts are too vague and general. They lack the certainty and precision required by the established rules of criminal pleading. It follows that they are not good and sufficient in law. They are so defective that no judgment of conviction should be pronounced upon them.

The order of the Circuit court arresting the judgment upon the verdict is, therefore, affirmed, and the cause remanded with instructions to discharge the defendants.

UNITED STATES SUPREME COURT.

No. 135.—OCTOBER TERM, 1875.

WILLIAM W. LATHROP, Assignee in Bankruptcy of JAMES W. ADAMS, Appellant,
v.
SAMUEL DRAKE and JOHN DRAKE, Jr., Executors of JOHN DRAKE, deceased, WINFIELD S. HULICK, Administrator, DERRICK HULICK, deceased, and SAMUEL DRAKE, now or late doing business as DRAKE, HULICK & CO.

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

BANKRUPTCY — WHERE ASSIGNEE MAY BRING SUIT.

Held, that under the Bankrupt Act as passed in 1867, an assignee in bankruptcy, without regard to the citizenship of the parties could maintain a suit for the recovery of assets in the Circuit Court of the United States in any district other than that in which the decree of Bankruptcy was made.—[ED. LEGAL NEWS.]

Mr. Justice BRADLEY delivered the opinion of the court.

The question in this case is whether, under the bankrupt act as passed in 1867, an assignee in bankruptcy, without regard to the citizenship of the parties, could maintain a suit for the recovery of assets in the Circuit court of the United States in any district other than that in which the decree of bankruptcy was made? If not, whether the amendatory act of 1874 (18 Stat., 178, § 3) validitated such a suit already commenced.

The jurisdiction of the Circuit courts in cases of bankruptcy, as conferred by the act of 1867, was two-fold, original and appellate; the latter being exercised in two different modes, by petition of review and by appeal or writ of error. But the enacting clauses which confer this jurisdiction make such direct reference to the jurisdiction of the District court, that it is necessary first to examine the latter jurisdiction. Of this there are two distinct classes: first, jurisdiction as a court of bankruptcy over the proceedings in bankruptcy initiated by the petition and ending in the distribution of assets amongst the creditors and the discharge or refusal of a discharge of the bankrupt; secondly, jurisdiction as an ordinary court, of suits at law or in equity brought by or against the assignee in reference to alleged property of the bankrupt or to claims alleged to be due from or to him. The language conferring this jurisdiction of the District courts is very broad and general. It is, that they shall have original jurisdiction in their respective districts in all matters and proceedings in bankruptcy. The various branches of this jurisdiction are afterwards specified, resulting, however, in the two general classes beforementioned. Were it not for the words "in their respective districts" the jurisdiction would extend to matters of bankruptcy arising any where, without regard to locality. It is contended that these words confine it to cases arising in the district. But such is not the language. Their jurisdiction is confined to their respective districts, it is true; but it extends to all matters and proceedings in bankruptcy without limit. When the act says that they shall have jurisdiction in their respective districts, it means that the jurisdiction is to be exercised in their respective districts. Each court within its own district may exercise the powers conferred; but those powers extend to all matters of bankruptcy without limitation. There are, it is true, limitations elsewhere in the act; but they affect only the matters to which they relate. Thus, by section 11, the petition in bankruptcy, and by consequence the proceedings thereon, must be addressed to the judge of the judicial district in which the debtor has resided or carried on business for the six months next preceding; and the District court of that district being entitled to and having acquired jurisdiction of the purticular case, necessarily has such jurisdiction exclusive of all other District courts, so far as the proceedings in bankruptcy are concerned. But the exclusion of other District courts from jurisdiction over these proceedings, does not prevent them from exercising jurisdiction in matters growing out of, or connected with, that identical bankruptcy, so far as it does not trench upon or conflict with the jurisdiction of the court in which the case is pending. Proceedings ancillary to, and in aid of, the proceedings in bankruptcy may be necessary in other districts where the principal court cannot exercise jurisdiction; and it may be necessary for the assignee to institute suits in other districts for

the recovery of assets of the bankrupt. That the courts of such other districts may exercise jurisdiction in such cases would seem to be the necessary result of the general jurisdiction conferred upon them, and is in harmony with the scope and design of the act. The State courts may undoubtedly be resorted to in cases of ordinary suits for the possession of property or the collection of debts; and it is not to be presumed that embarrassments would be encountered in those courts in the way of a prompt and fair administration of justice. But a uniform system of bankruptcy, national in its character, ought to be capable of execution in the national tribunals, without dependance upon those of the States, in which it is possible that embarrassments might arise. The question has been quite fully and satisfactorily discussed by a member of this court in the first circuit, in the case of Shearman *v.* Bingham, 7 Bankruptcy Register, 490; and we concur in the opinion there expressed, that the several District courts have jurisdiction of suits brought by assignees appointed by other District courts in cases of bankruptcy.

Turning now to the jurisdiction of the circuit courts, we find it enacted in section two of the act of 1867, first, that the circuit courts within and for the districts where the proceedings in bankruptcy are pending, shall have a general superintendence and jurisdiction of all cases and questions arising under the act. This is the revisory jurisdiction before referred to, exercised upon petition or bill of review. Secondly, "said circuit courts shall also have concurrent jurisdiction with the district courts of the same district of all suits at law or in equity * * brought by the assignee in bankruptcy against any person claiming an adverse interest, or by such person against such assignee, touching any property or rights of property of said bankrupt transferable to or vested in such assignee." The act of 1874 changes the words "the same district" to "any district," and adds to "person claiming an adverse interest" the words "or owing any debt to such bankrupt." These changes make the jurisdiction of the circuit court for the future clear and undoubted in cases like the present. But we are endeavoring to ascertain what jurisdiction was conferred by the act as originally passed. Reverting to the language used in the second clause, above cited, it seems to be express and unqualified, that the circuit court shall have concurrent jurisdiction with the district courts of the same district. If, therefore, the district court has jurisdiction of suits brought by an assignee appointed in another district, the circuit court of the same district has concurrent jurisdiction therewith. There is no escape from this conclusion unless the phrase "the same district" is made to refer back to the beginning of the section, where mention is made of circuit courts within and for the districts where the proceedings in bankruptcy are pending. But the words "the same district" used in the second clause, refer more naturally to the district in and for which the circuit court is held. The phrase "the circuit courts shall have concurrent jurisdiction with the district courts of the same district" is, by itself, so clear and unambiguous that a doubt could not have been raised as to its meaning had it not been embraced in the same section with the other clause. And it is in accord with the general intent of the act to invest the circuit court with jurisdiction co-extensive with that of the district court, except that it is only revisory in reference to the proceedings in bankruptcy.

If jurisdiction was conferred (as we have seen it was) on the various district courts, to entertain suits brought by assignees appointed in other districts, there seems to be no reason why the same jurisdiction should not have been conferred on the various circuit courts; but, on the contrary, very cogent reasons why it should have been. Important cases would be very likely to arise, both in amount and in the questions involved, which it would be desirable to bring directly before the circuit court, in order, if necessary, that an early adjudication might be had in the court of last resort.

As, therefore, the reason for such a provision, the general intent of the act, and the words themselves, all coincide, we do not hesitate to say that the circuit court had jurisdiction of suits at law and in equity under the original act, co-extensive with the district courts, unless the qualifying words, at the end of the clause, confining the jurisdiction to cases "touching any property or rights of property of said bankrupt transferable to, or vested in, such assignee," may be deemed a restriction. In this case, however, the suit does concern and have reference to property transferable to the assignee. It is brought to compel the defendants to restore to the bankrupt's estate the value of property sold by them under a judgment alleged to have been confessed in fraud of the bankrupt act, and within four months of the commencement of proceedings in bankruptcy.

The amendatory act of 1874 has but little bearing upon the construction of the original act in the particular involved in this case. Different views had been expressed in relation to its meaning and the jurisdiction of the courts under it. The amendatory act removed any ambiguity that may have existed; but did not thereby impress a more restricted meaning upon the language of the original act than was due to it by a fair judicial construction.

As to the merits of the case, it is almost too plain for argument. The general denial of fraud in the answer of the defendants is equivalent to nothing more than a denial of a conclusion of law. The allegation that they were led to believe, by the letters and representations of the bankrupt, that he was solvent at the time of the confession of judgment, and was worth seven thousand dollars over and above his indebtedness, has but little force. If this were true why did they immediately levy on and sell his whole stock of goods? That sale produced but little more than half the amount of their judgment. These unquestioned facts are sufficiently significant, and the evidence of the bankrupt makes the case a very strong one for the complainant. He had executions against him and wrote to the defendants that he was in trouble, and requested them to come to his aid. They refused to do anything unless he would confess judgment for the amount due them, including the amount of the prior judgments. They then immediately levied on all his goods and sold him out. It was a clear case of preference by a debtor in insolvent circumstances, and known to be such by the judgment creditor.

The prior executions, one in favor of A. Coran & Co. for about six hundred dollars, and the other in favor of Henry Bloss for about nine hundred dollars, were probably valid. If the appellees satisfied those executions, or advanced the money for that purpose, the amount being embraced in their judgment, their own execution was good to that extent, and they should have credit therefor. As to the rest they were answerable for the value of the goods levied on and sold.

The decree of the circuit court must be reversed and the record remitted with directions to enter a decree in favor of the complainant below for the value of the goods of the bankrupt sold on the defendants' execution, with interest from the time that the same was demanded of them by the assignee, less the amount to which they may be justly entitled for advances to satisfy the said executions of A. Coran & Co. and Henry Bloss.

WE are under obligations to D. DON. DICKINSON, of the law firm of DICKINSON & GRIFFIN, of Detroit, for the following opinion:

U. S. CIRCUIT COURT, E. D. MICH.

LOWELL W. TINKER, Plaintiff in Error, *v.* PHILIP J D. VAN DYKE, et al., Trustees, etc., Defendants in Error.

BANKRUPT LAW—EFFECT OF REPEALS AND AMENDMENTS UPON RIGHTS GIVEN BY STATUTE.

1. THE AMENDMENTS TO THE BANKRUPT LAW.—The clause in section 5021 amending section 390 of the bankrupt law, by inserting the word *knew* instead of the words *had reasonable cause to believe*, is not to be applied to proceedings in bankruptcy commenced before the 1st of December, 1873.

2. REPEAL OF PENAL STATUTES.—Those clauses of the bankrupt law which authorize an assignee to recover the amount of unlawful preferences paid to particular creditors are not in their nature penal, and their repeal are not subject to the rule of construction applicable to the repeal of penal statutes.

3. EFFECT OF REPEAL OF LAWS.—When substantial rights are created by statute, or commercial contracts are regulated, the repeal of laws upon which they depend will not receive a retro-active application unless the law expressly or by necessary implication so declares.

4. CASES DISAPPROVED.—The cases Voorhees v. Frisbie, 25 Mich., 476, and Brigham v. Claflin, 7 N. B. R., 412, which decide that this clause of the bankrupt law is penal, and therefore will not be enforced in the State courts, disapproved and the cases contra cited and acquiesced in.

5. EFFECT OF REPEAL ON EXISTING CONTRACTS.—Judgments holding that statutes imposing liability upon corporators in certain exigencies for debts of the corporation were penal and consequently would not be enforced in other States, held not to be analogous to that clause of the bankrupt law. It is suggested they are all at war with 2 Wal., holding that the repeal of such clause as to existing contracts, impaired their obligation.

EMMONS, Circuit Judge.

Van Dyke was appointed trustee before the amendment of 1874, which so changed the former law as to require that a creditor obtaining a preference should *know* that the debtor was insolvent instead of "having reasonable cause to believe he was so insolvent." The bankrupt law transfers all the property of the bankrupt to the assignee as of the day of adjudication, Van Dyke, for the benefit of creditors, had a right unconditionally to one thousand dollars, in the hands of Tinker, as the immediate conveyance of the adjudication under the former law, but, as his suit was not commenced nor tried before the amendment, it is claimed by the defendants that it was necessary to prove under it, that he knew the insolvency of his debtor, and that "having reasonable cause to believe" was not sufficient.

It has been argued at two different hearings, with far more than ordinary pertinacity, that this clause in section 39 of the bankrupt act, is penal in that sense which brings it within the familiar rule that rights arising under such laws are gone by their repeal. It is said also to be remedial, so as to bring it within the rule of construction which applies statutory alterations of the mere form of the remedy to pending proceedings. The defence also, with much confidence, relied upon the frequently misapplied rule that actions given by statute are gone by its repeal.

No question of constitutional power is involved in this discussion. The authority of Congress to divest vested rights, and impair contracts in the enactment of a bankrupt law, is conceded. The question before us is purely one of interpretation: Did Congress, having an undoubted right so to do, intend to make the new rule applicable to pending causes?

As a very general rule, when we have repeatedly ruled a point, as we have this one, sustained as it is, by so much express decision, we should not deem it necessary to prepare a formal judgment. The exceptional labor of the argument for the defendant, and an influential dictum by Judge Dillon, we think justify the attention we give it.

The following judgments, expressly deciding this question, for the sake of that conformity which should characterize judicial rulings, ought to be followed, even if we did not as fully as we do, approve their principle.

11 B. R., 308, Van Dyke *v.* Tinker, is the report of this case in the court below. The learned District Judge relies chiefly upon the provision in the amendatory act, that the alteration of Section 39 here in question, shall apply to all cases of involuntary bankruptcy, commenced since Dec. 1, 1873, which he holds is equivalent to an express legislative declaration that it shall not apply to any cases commenced before that time. We see no answer to this argument. The repealing clause, properly construed and modified by the proviso of Section 39, leaves the whole of this section as it formally stood, in full force as to all causes pending before Dec. 1, 1873. 10 B. R., 461, Brooke *v.* McCraken, is a very intelligent opinion, holding that the amendment to Section 35, is not to be applied to pending proceedings; it notices the provision limiting the application of a similar amendment to Section 39, and declares that the 35th section comes within the general principle that all laws affecting substantial rights, are to be applied to the future only. Judge Deady cites the following federal judgments, announcing this rule: Harvey *v.* Tyler. 2 Wall., 347; Steamship Co. *v.* Jolliffe, id., 458; McEwen et al *v.* Densessee, 24 How.. 244; U. S. *v.* Stan, Kemp., 471; Schenck *v.* Paley, 1 Wool, 175; *Ex parte* Bieling, 3 Ben., 212; *Ex parte* Hope Ins. Co., 1 Sawyer, 110. We have examined these cases; they fully sustain the application of the rule to the case before the court. 2d Wallace, 458, Steamship Co. *v.* Jolliffe, was a case where a statute gave a pilot half fees for tendering his services. The tender was made, but before the action was brought, the statute was repealed, and another enacted in its stead, providing for the performance of the same duties. The opinion of Justice Field is somewhat ambiguous, but we think he does not intend to rest it upon the ground that by retro-active application of the law, the obligation of contracts would have been impaired, or the property of a citizen divested, without due process of law. He does call it a *quasi* contract, and speaks of the right as a vested one, but concludes this portion of his judgment by placing it upon the presumed intention of the legislature, and quoting Chief Justice Shaw, in Wright *v.* Oakley, 5 Met., 406, where it is substantially said that when one statute is repealed, and another modifying it only contemporaneously entered in its stead, the old law may be considered as still in existence in reference to causes of action which accrued under it. We think that the argument of Judge Field intends to concede the power of the legislature, by express enactment, to have barred the recovery; but that in all cases where such rights were involved as those which he decided the pilots in that case to be, the presumption was of a contrary intent. We think it a precedent for holding here, that the intention was, not to divest the unconditional right of the assignee to this sum of money. The right of the creditors was perfect, and should not be divested without express enactment, or an implication wholly unambiguous.

10 B. R., 173, Hamlin *v.* Pettibone. Judge Hopkins very fully considers this question, and decides that the amendment is not to have a retro-active application to causes arising anterior to Dec., 1873. He relies not only upon the express limitation in the act to that period, but applies the rule that statutes affecting substantial rights divesting causes of action which have fully accrued, are not without express declaration or the strongest implication, to be applied to past transactions.

In Hitchcock *v.* Way, 6 Ad. & El., 943, cited by him, an English court refused to apply *ex post facto* a statute which took away a defence in gaming contracts. even in favor of a bona fide purchaser, without notice. And see 12 B. R. in re Montgomery, p. 341, 12 B. R. 299, Bradbury *v.* Galloway, follows from the preceding cases, and quotes, as quite decisive of this question, Section 13 of the Revised Statutes, which provides "that the repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture or *liability* incurred under such statute, unless the repealing act shall so expressly provide, etc." The words "penalty" or "forfeiture" have no application here, unless the far-fetched argument be tenable, that this clause in section 89 be penal; we elsewhere say we think it is not. The law cited disposes of this question in favor of the plaintiff if it is so, and the word *liability* would serve the rights of the assignee in this case, whatever may be its nature. 12 B. R., 208, Singer *v.* Sloan, recently decided by Judge Dillon, contains a dictum relied on by the defendant to give this clause a retrospective application. Evidently the learned and usually careful judge had not, as he was not called upon to do, fully examined the subject. He cites Sedgwick Stat. and Com. Law, 129 *et seq.*, that all rights dependent upon a statute fall by its repeal; but this same author, on p. 134, in discussing the same subject, after having noticed one exception to the rule quoted by Judge Dillon, says that a second exception is constituted of those cases "which affect rights of action which have attached and become vested under the original law, and existing at the time of the repealing statute." The facts upon which the judgments rest, cited by Mr. Sedgwick in illustration of this exception, clearly show it is applicable to the case before us. The words here quoted are almost literally like those in the judgment of Justice Field in Joliffe *v.* Steamboat Co., *ante*. 10 B. R., 566, In re King, by Justice Miller, held that the amendment providing that a bankrupt should be discharged although his assets did not pay 50 per cent., as provided by the original law, was applicable to cases commenced before the amendment in this respect, differing from the conclusion of Judge Blatchford, 10 B. R., 438. It may well be that this clause was intended to apply as Justice

Miller holds, while that before us should not be construed to divest the action of the assignee.

Upon authority, the question comes before us with six well considered judgments, holding directly upon the question before us, that the amendment did not apply to proceedings in bankruptcy commenced before Dec., 1873. The dictum of Judge Dillon is all that we find opposed to it.

Beyond this reference to these judgments upon the question before us, we shall do little more than testify that we have gone over the ground of the argument, and that suitors have had the benefit of our consideration of the labor of their counsel.

The following cases, unquestionably resting upon the penal character of the rights which were held to be abrogated by a repeal of the law, are acquiesced in as sound and wholesome law—21 Mich., 390, 3 Howard, 534. In the later case, Chief Justice Taney draws the line clearly between penal provisions in a law and its other clauses creating contracts and relating to substantial rights. 2 Dana, 330, 5 Rand., 657, 1 Wash. C. C. R., 84, 5 Cranch, 281, 13 How., 429, are all of the same general character, and are no more appropriately cited here than a very great number of other like adjuditions.

A few cases have been referred to upon statutes regulating political rights, supposed to be analogous to the clause now before us for construction. We see no similarity. In reference to such laws, it would require a very strong expression of the legislative will for the court not to apply them retrospectively in reference to all unclosed matters. 8 Mich., 128, Tivey *v.* People, People *v.* Green, 58 N. Y., 295, and 3 How., 534, 3 Peters, 157, 10 How., 402, 7 Wal., 506, are all of such character.

Several judgments were cited and analyzed to show the power of the State and Federal legislatures to effectuate the intention of parties by retroactive legislation, giving validity to imperfect contracts and insufficient action under former laws. This necessary and beneficent power is not questioned. All such laws should receive a most liberal construction to effectuate such purpose. Of this class are 16th Ohio, 377, 57 N. Y., 177. Similar adjudications in the Federal and State courts are numerous.

Decisions upon statutes which affect the form of remedy only are equally foreign to the case before us, such are all the following cases in defendant's brief: 1 Mich., 673, Robinson *v.* Steamer Red Jacket, and Moses *v.* Steamboat Missouri, referred to in it, contains the true distinction upon the subject; 21 Pick., 169, 9 Barn. & Cres, 750, 50 Mo., 554, 11 N. Y., 281, are to like effect. The general subject treated in these cases is too familiar to require additional citation and treatment.

To show that this clause which equally distributes all the property of a bankrupt among his creditors is penal, and consequently that a State court will not enforce it—the able judgment of Justice Christiancy, in 25 Mich.. 476, Voorhees *v.* Frisbee and Brigham *v.* Claflin. 74 B. R., 412, are cited.

Whatever we might have said of those judgments had jurisdiction been declined, upon the ground that the Federal Courts were the more fit forum for such actions, we most emphatically dissent from that portion of the reasoning, upon which they rest, declaring this clause of the bankrupt law to be penal in its character and applying the inapplicable rule announced in 3 Wheat., 240, Gilston *v.* Hoyt and 10 Wheat., 66 The Antelope.

One of these cases was in reference to a particular regulation of a foreign government, and the other a penal forfeiture to the United States. Their inapplicability to this clause of the bankrupt law is manifest. Neither the Michigan or the Wisconsin court takes any notice whatever of any one of the following judgments, many of them by the most elaborate and convincing argument deciding the point directly the other way. Brown *v.* Cuming, 2 Caims, 33, Barstow *v.* Adams, 2 Day, 70, Assignees of Barclay *v.* Carson, 2 Hayw., 243, Keely *v.* Holdship, 1 Brown, 36, Sullivan *v.* Bridge, 1 Man., 511 and in 1846, Dewey J., in 10 Met., 583, under the bankrupt law of 1841 cites the foregoing cases under the former law as setting at rest this question at that period. His discriminating judgment draws the distinction between a home National Bankrupt law, which *ex rigore* operating upon persons and property within the State, passes title *in praesenti* to the assignee, and a foreign one who must come here claiming rights solely under his judicial appointment. In 101 Mass., p. 109, Stephens *v.* Mechanics Bank, this principle was deemed so clearly applicable to the present bankrupt law that, as the court say, it was abandoned in argument. See fully in accord 102 Mass., 428, 7 Bush, 66, 64 Penna, 74.

We think these judgments could not have been called to the attention of the learned courts of Michigan and Wisconsin. These two opinions being recently cited in New York, called from the court of appeals in Cook *v.* Waters, 9 B. R., 155, a citation of a portion of the preceding cases and a most pointed dissent from the assertion that this clause of the law had any element of a penal character. Some respect is due to so long and unbroken history, and we can hardly be asked to follow two judgments asserting principles so novel and at war with precedent. The adverse adjudications might be greatly multiplied.

The 12 Green, 438, Halcey *v.* McLean and 33 Maryland, 487, and other similar adjudications holding that when laws impose liabilities upon the officers and shareholders of corporations for the non-performance of some duty upon the ground that they are penal in their character, they will not be enforced in foreign jurisdictions, have been cited as analogies for holding this clause of the bankrupt law to be of a similar penal character, whether these and the numerous other similar decisions collected and well analyzed in 33d Maryland are consistent with the judgment in 2d Wallace, 10, we briefly consider hereafter.

A law imposing liability for the debt of another as a consequence of a wrongful omission of duty, is clearly distinguishable from one which provides for the equal distribution of a bankrupt's assets among his creditors.

It is no more penal to declare that a creditor who receives payment in violation of the bankrupt law shall hand over what he receives to the assignee, than that he who holds personal property belonging to the bankrupt shall be subject to an action in trover if he refuses to deliver it upon demand.

As well might it be said that an action on the case for fraud in violation of the common law is penal in its character, because the citizen is made to respond for the consequences of his wrong. The many judgments authorizing suits in State courts by assignees in bankruptcy, declare that their rights rest upon the same general principles as if they accrued under the common law.

In 3d McLean Grant *v.* Hamilton, of which there is a very imperfect report only, which we argued when at the bar. an action was sustained in the Federal court to recover back property won upon a horse race under a statute of Michigan.

Upon a very full review of judgments Judge McLean held that the law was not a penal one, that it created property rights between citizen and citizen, and, like any other obligation created by law, could be enforced in the Federal courts—a penal law, it was conceded, could not be. Numerous adjudications were cited to his honor, showing that the many State laws, authorizing recovery back of property, which passed from citizen to citizen, in violation of law, were not penal unless a greater amount was authorized to be recovered than was actually received.

These cltations do not appear in his judgment. They have not been cited to us, and we have no time to reproduce them. They are all directly at war with the doctrine of the cases which hold the liability of corporations to be penal.

It would be unpardonable in a case like this to discuss at any length the rectitude of judgments, after having declared their inapplicability to the point in judgment.

The analogy, however, between the cases we have been considering and that of a suit to recover back money from a creditor who has unlawfully received a preference, was so urgently pressed that we add a word in regard to them. These judgments are so many and from courts of such high respectability, that we should feel great reluctance in disregarding them. We submit, with great respect, that they have entirely misapplied the doctrines upon which they rest. A law which creates a liability between citizen and citizen, as further security for the contracts of a corporation of which the obligated person is a member, has in it no penal element whatever in that sense which makes one court refuse to enforce the penalties of foreign governments. The history of this principle shows that it had its origin in the political hostility of opposing nations; laws intended to guard the revenue; penalties to enforce the political regulations of other countries were not enforced by tribunals, whose government was presumed to be opposed to the policy which such laws were intended to promote.

The rule never had any application to the colonies and much less to the several States and the federal judiciary after we became one nation, with a common commerce and a common interest in the power, peace, and prosperity of the whole people.

When penal actions founded upon the laws of other States were rejected by our courts, as in some instances upon the ground of comity they might have been, this old rule should not have been invoked.

All those provisions of law intended to secure the performance of private contracts, and in which the property rights of private citizens alone were concerned, should never have been deemed penal statutes within the rule excluding jurisdiction.

The federal courts would decline jurisdiction in a *qui tam* action under a State law for a penalty for a violation of the Sabbath, for defrauding a State tax law or any other law of a purely political character; here the rule would be applicable; to extend it to that large and rapidly growing class of cases, where the citizens of one State have rights of action against those of another, under laws creating liabilities for corporate premises, will make a fearful inroad upon the jurisdiction of the federal judiciary.

A very large percentage of all the commerce, manufacturers and trading of the country is coming to be done by State corporations; the citizen relies in large degree upon the security afforded by those obligations imposed upon officers and shareholders for an omission of their duty. To call this obligation a penalty is to exclude the jurisdiction of the federal courts by a mere name. We can see no distinction in principal between a State statute which should repeal a provision in a railroad or bank charter, rendering liable directors and shareholders if they incurred debts beyond the amount of the capital paid in, or failed to make proper scrutiny and publicity of the accounts of their corporation, and a law divesting such a liability unanimously held to be unconstitutional in 2 Wal. Hawthorne *v.* Calif.

In this case a railroad charter provided that shareholders should be liable to the extent of their shares for the debts of the corporation if there was a deficiency of corporate assets. This provision was repealed anterior to the bringing of an action; held, it violated the obligation of the contract implied between the shareholders and the creditor growing out of the statute and their reciprocal action under it. In this case the liability was fully statutory; there was no liability at common law on the part of the corporators for the debts of the corporation.

The court cites as analogous, Woodruff *v.* Trapnal, 10 How., 190, in which it was held that the repeal of a law which made bills issued by a bank receivable in payment of State debts, could not deprive a citizen of the liberty of so applying them. Corning *v.* McCullough, 1 Coms., 47, is also approbated, which quite fully accords with the principles stated.

Between the statute involved in 2 Wal., 10, and those which the State judgments cited, have held to be pure penalties, and therefore cognizable only in the courts of the State which enacts them, we see no such difference in principle as to cause a Circuit court of the United States to refuse to entertain an action upon the ground that one is penal, and to entertain it under the other because it is a contract.

To erect such a distinction into a rule of law, would enable State legislatures, by the mere form and phraseology of a statute, to create property rights of which the Federal Courts could take no cognizance, and thus do indirectly, what, in Ins. Co. *v.* Morse, 20 Wall., 445, the Supreme court said they could not do directly.

This liability constitutes a part of the law of the contract. See, also, 21 Wall., 252, 253, Ochetten *v.* R. R. Co.

The rule so frequently quoted in the books, that which is created by statute may be taken away by statute, was also largely relied upon at the bar. We remarked during the argument, and now repeat, there never was any such rule administered anywhere.

When remedies are created, penalties enacted, crimes defined and punished, political regulations established by statute, they may be abrogated by their appeal.

When repealed, the presumption is in favor of a retro-active application. It is a misdescription of the principle involved in these classes of cases, to say the right of action is gone *becaase they are statutory.*

They are gone on account of the nature of the statute, the right regulated, and the persons to be affected; because, in these peculiar instances, and other analogous cases, statutory rights are abrogated by repeal of the law, it by no means follows that all other statutory rights of a different character, creating substantial property rights, upon which business transactions between citizen and citizen are vested, fall in the same circumstances.

Large numbers of the latter class are protected by various constitutional inhibitions—Federal and State.

When you pass beyond the protection of the Constitution, and arrive at those vested rights which involve substantial property values, then, although the abstract proven may exist to destroy them, the presumption will be that the legislature did not intend to do so, unless it expressly so declares.

From the multitude of cases so declaring, we cite in addition to those already referred to, only the following: Dash *v.* Van Kluk, 7 J. R. 477, which contains a full discussion by most able judges, and reviews the elementary writers and decisions down to their date.

The duty of construing all laws prospectively, where rights are affected, is strongly insisted upon; and see 4 S. & R., 401; 2 Cranch, 272.

No principle is more familiar in the Federal jurisprudence.

It was also argued that, however courts might deal with affirmative provisions of law which prescribe new rules of conduct, and create new obligations, applying them prospectively only, when such appeared to be the intention of the lawmaker, that no such liberty of interpretation existed when a statute was unconditionally repealed.

We see no difference whatever, in principle, between the two cases, deeming it, in all instances, a mere matter of construction, depending upon the subject matter and language of the law. We should have thought it unworthy of consideration, but for the answer made by Justice Cowen, in Butler *v.* Palmer, 1 Hill, 324, to some judgments cited in favor of a wholly prospective application of a law in judgment before him.

He does distinguish them by saying they are cases of positive enactments, and not unconditional repeals. If we might impute to that learned judge the absurdity of saying, that in no case could the legislature repeal a clause in a statute, saving all rights accrued under it, his language, literally interpreted, might be read to mean that in every case of repeal, irrespective of circumstances, the courts are forbidden to confine its effects to future cases only. He cites many old English judgments in reference to political, penal, remedial and criminal statutes, in reference to which such a rule of presumption is rightfully declared; but all that is meant in the judgment, is that in case of a repeal, stronger language and more persuasive circumstances are required to authorize a limited application than will produce the same effect in reference to a new affirmative enactment.

The judgment, instead of being at war with our own, when rightfully understood, is an argument to show that in every instance the legislative will is to be ascertained and executed.

DON. M. DICKINSON, for defendant in error.

ALFRED RUSSELL, for plaintiff in error.

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Lex vincit.

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We call attention to the following opinions, reported at length in this issue:

The Enforcement Act—The Fourteenth and Fifteenth Amendments Construed—The Rights of Citizens of the U. S.—The opinion of the Supreme Court of the United States by Waite, C. J., construing the Enforcement Act, the fourteenth and fifteenth amendments to the constitution of the United States defining the rights of citizens of the Federal and State governments, and holding on an indictment for conspiring, etc., brought under the sixth section of the Enforcement Act, that to bring the case under the operation of the statute, it must appear that the right, the enjoyment of which the conspirators intended to hinder or prevent, was one granted or secured by the constitution or laws of the United States; that the fourteenth amendment prohibits a State from depriving any person of life, liberty or property, without due process of law, but this adds nothing to the rights of one citizen as against another; it simply furnishes an additional guaranty against any encroachment by the States upon the fundamental rights which belong to every citizen as a member of society; that it does not appear in these counts that the intent of the defendants was to prevent the parties from exercising their right to vote on account of race or color.

Bankruptcy—Where Assignee May Bring Suit.—The opinion of the Supreme Court of the United States by Bradley, J., holding that under the Bankrupt Act, as passed in 1867, an assignee in bankruptcy, without regard to the citizenship of the parties, could maintain a suit for the recovery of assets, in the Circuit Court of the United States, in any district other than that in which the decree of bankruptcy was made. There has been great conflict of opinion among the District judges upon this question. Judge Hopkins, of Wisconsin, was one of the first to hold that such suit could be brought in any district, and now his opinion is sustained by the Supreme Court of the United States. Judge Hopkins is a sound reasoner, a deep thinker, and is very generally right in his conclusions.

Effect of the Repeal or Amendment of a Statute.—The opinion of the United States Circuit Court for the Eastern District of Michigan, by Emmons, J., holding the clause in Section 5021, amending Section 390 of the Bankrupt Law, by inserting the word "knew," instead of the words "had reasonable cause to believe," is not to be applied to proceedings in bankruptcy commenced before the first of December, 1873; that those clauses of the bankrupt law which authorize an assignee to recover the amount of unlawful preferences paid to particular creditors, are not in their nature penal, and their repeal are not subject to the rule of construction applicable to the repeal of penal statutes; that when substantial rights are created by statute, or commercial contracts are regulated, the repeal of laws upon which they depend, will not receive a retro-active application, unless the law expressly, or by necessary implication, so declares.

Indictment for Burning a Building.—The opinion of the Supreme Court of this State, in a case where the accused was indicted for setting fire to a building with a view to defrauding an insurance company; and holding that the indictment should state that the company was incorporated, or, if not incorporated that he set the building on fire with intent to injure the persons composing that company, stating the names of such persons.

Preliminary Examination—Prisoner no Power to Waive.—The opinion of the Supreme Court of Nevada, by Hawley, C. J., stating when a party be found guilty of prison-breaking, and holding that in all cases where a person has been arrested, charged with crime and brought before a magistrate, an examination should take place; that the practice of allowing such party to waive an examination, is irregular, and should be discontinued. The general practice, all through the country, is, in preliminary examinations, to allow the prisoner to waive such examination, if he wishes.

Cause of Action for Injury Resulting in Death—Statute of Limitations.—The opinion of the Supreme Court of Tennessee, by McFarland, J., holding that there is no distinction made in the statutes between classes of cases where the injured party lives a time, and suit is brought in his lifetime, and where death is instantaneous; that both classes of cases are put upon the same footing; and whether the action be brought by the party himself, or by his representatives after his death, the cause of action is the same, and is governed by the same laws. This opinion is against the weight of authority in other States, and will well repay a careful reading.

NOTES TO RECENT CASES.

SALE IN PARTITION—MORTGAGE.

The Supreme Court of Pennsylvania. in Wright *v.* Vicars, Admrs., 33 *Leg. Intel.* 131, held, that a sale in partition discharges a mortgage made by one of the co-tenants upon his interest, and that the act of March 20, 1867, does not prevent this.

BANKRUPTCY—ASSIGNMENT UNDER STATE LAW.

The court of Common Pleas of Franklin Co., Pa., held, in Shryock et al. *v*, Bashore, 13 N. Reg. 481, that whether an assignment in proceedings under a State insolvent law is void is a question that may be raised in a collateral action; that a State law providing for the distribution of the assets of an insolvent bank is superseded by the bankrupt law; that an assignment made as a part of the machinery of a State insolvent law, and deriving all its validity from the statute, is void; that an assignment for the benefit of creditors which gives priority to certain creditors is void, except as against the assignee in bankruptcy.

BANKRUPTCY—AMENDMENT OF JUNE 22, 1874.

The New York Supreme Court of Oneida county, in Slafter *v.* Greer, T. S. & Co., 13 N. Y. R., 220, held, that the amendment of June 22, 1874, does not effect a suit brought to recover a preference which was brought prior to Dec. 1, 1873.

ACT OF BANKRUPTCY—DEPOSITION TO PROVE.

The United States District Court for the Western District of Ohio, in Cunningham *v.* Cady, 13 N. B. R., 525, held that a deposition to an act of bankruptcy consisting of a fraudulent conveyance, must allege or show the fraudulent intent of the debtor in making the conveyance; that a deposition to prove a claim in involuntary bankruptcy must show whether the claim is secured or unsecured; that a petition will not be dismissed because the depositions in support thereof are defective; but the petitioning creditor, on motion, will be allowed to file supplemental depositions.

MORTGAGE—MORTGAGEE IN POSSESSION OF BUSINESS PREMISES—RIGHT TO CARRY ON BUSINESS.

The English, High Court, Chancery Division, in Cook *v.* Thomas, 24 Weekly Reporter, 427, held that a mortgagee in possession of business premises is entitled to carry on the business for a reasonable time, so as to enable him to sell as a going concern, and for that purpose to use the name of the mortgagor's firm.

PATENT—WHEN USE OF DISCONTINUED.

The United States Circuit Court, W. D. Pa., 22 *Int. Rev. Rec.*, 114, held in Shoup et al. *v.* Henrici et al., that where a device has been used, but discontinued, this does not give a subsequent inventor the right to take it up and appropriate it exclusively.

SECRETARY OF STATE—SALARY.

The Supreme Court of Nebraska, in State *ex rel.* Tzschuck *v.* Weston, 10 *Western Jurist*, 221, held that the Secretary of State is not ineligible to the office of Adjutant-General, and the allowance to him of a salary as such officer, does not conflict with that section of the Constitution fixing the salary of the Secretary of State at $2,000 per annum, and providing that he shall not receive to his own use "any fees, costs, or other compensation." We think the court would have been justified in holding that the office of Adjutant-General was incompatible with that of Secretary of State. In case of war the Secretary of State could not, without neglecting his civil duties, properly attend to his military duties as Adjutant-General. Many of the accounts of the Adjutant-General have to pass through the hands of the Secretary of State.

DEPOSITION OF WITNESS BEFORE GRAND JURY.

Under the English practice it was held, in Neg *v.* Gerrans, 34 L. T. R. N. S., 145, at the Hampshire Spring Assizes, that when a witness is unable to attend a trial, through illness, his deposition may be presented to the grand jury without any preliminary proof that the witness is ill, and that such deposition was regularly taken. In such case, the grand jury should be told that the court permits them to look at the deposition, and to act upon it if they think proper.

MASTER AND SERVANT—NEGLIGENCE OF FELLOW SERVANT—COMMON EMPLOYMENT.

The English Court, Common Pleas, Decision in Lowell *v.* Howell, 34 L. T. R. N. S., 183, held that to exempt a master from liabiliay to a servant for the negligence of a fellow servant, it is not necessary that the servant injured, and the servant whose negligence causes the injury, should be engaged in the same work. In this case, the plaintiff was hired to attend defendant's barges at defendant's wharfs during certain hours. He was sent for to defendant's counting-house for orders, at a time when he need not have been attending to the barges. On the way, he was injured by the negligence of defendant's servants, who were drawing up sacks to defendant's warehouse; and the court held that plaintiff was acting in the course of his employment in going to the counting-house for orders, and that the persons whose negligence caused the injury were fellow servants with the plaintiff, and a rule to enter a verdict for the plaintiff was discharged. This opinion, although supported by numerous English authorities, is in conflict with the opinions of the courts of several of the American States.

MECHANICS—GAS FIXTURES.

The Supreme Court of Pennsylvania, in Jarecki *et al. v.* the Philharmonic Society, 23 *Pitt's Legal Journal*, 134, held that gas fixtures, as distinguished from gas fitting, are not subject to Mechanic's lien, and do not belong to the building, and therefore do not pass to the purchaser of a house.

Recent Publications.

Leading and Select Cases on the Disabilities Incident to Infancy, Coverture, Idiocy, etc., with Notes. By Marshall D. Ewell. Boston: Little, Brown and Company. 1876 Sold by E. B. Myers, Law Book Publisher, Chicago.

This is a large handsome volume of 813 pages. It is a sufficient guarantee of its superior mechanical execution to say that it is from the press of John Wilson & Son, of Cambridge. We visited this printing establishment during the past winter, and found it one of the most complete and extensive in the country.

Mr. Ewell, in presenting this collection of cases upon the Disabilities of Infancy, Coverture, etc., did not intend it as an exhaustive presentation of the law upon those subjects respectively, but to present, in a convenient form for use by the practising lawyer and student, a collection of cases discussing the more salient points of the respective subjects, with especial reference to their influence upon the capacity to contract, through the subjects of testamentary capacity, torts, estoppel, and the marital rights over the wife's property, are to some extent also considered. The author, in referring to the subject of coverture says the law in this country not being as yet in a settled and stable condition, but in a transition state, rapidly tending towards the complete emancipation of woman from the antiquated illiberality and tyranny of the old common law respecting her rights in property, and towards a condition of complete equality with man in this respect, so that it could not with propriety be said, that there was any leading cases on the subject, in the sense in which that term is generally understood, it was therefore deemed expedient to restrict the selection of cases upon this subject to those discussing questions existing, at common law, the learning of which must long continue to be indispensably necessary in determining the true construction of the statutes making the innovations upon the common law.

Mr. Ewell has shown excellent judgment in the selection of cases, and when there has been a conflict of authority upon the question under consideration, cases discussing both sides have generally been presented, and what seemed to be the weight of authority has been pointed out in the notes, with the authorities supporting both sides of the question. These notes are very elaborate, and abound in the citation of authorities. In this respect Mr. Ewell has exercised great care and shown commendable industy. In our judgment this volume is worthy of the patronage of the profession.

WE have received from THOMAS SHIRLEY, of the Chicago bar, the following opinion:

SUPREME COURT OF ILLINOIS.

OPINION FILED FEB. 3, 1876.

NICHOLAS STAADEN *v.* THE PEOPLE.

Error to DuPage Co.

INDICTMENT FOR BURNING A BUILDING TO DEFRAUD AN INSURANCE CO.

When a person is indicted for burning a building which is insured with a view of getting the insurance, etc. It should allege the insurance company is an incorporated company, etc., where the charge is the intent was to injure a body of persons by a company name, unless such company is incorporated it should be averred the accused set the building on fire with intent to injure the persons composing the company, stating the names of such persons.—[ED. LEGAL NEWS.]

Opinion PER CURIAM.

The indictment in this case was found under section 14, division 1, of the criminal code, and charges that plaintiff in error unlawfully, wilfully, feloniously and maliciously set fire to a building, used as and for a storeroom and dwelling, which building was insured against loss by fire in the Ætna Insurance Company of Hartford, Connecticut, with intent to injure that insurance company, contrary to the form of the statute. R. S., 1874. p. 354, sec. 14.

One objection taken is fatal to the present indictment. It was necessary to aver the guilty intent, viz.; that the buiding was insured against loss by fire, and that the accused set it it on fire with intent to injure the insurer. Although the pleaded has attempted to make such an averment in this indictment, it is defectively done. It is apprehended the insured must be a natural person or a body corporate, some party capable of being injured. It is not alleged the Ætna Insurance, of Hartford, Connecticut, is an incorporated company, under the laws of that State.

Where the charge is the intent was to injure a body of persons by a company name, unless such company is incorporated, it should be averred the accused set the building on fire with intent to injure the persons composing that company, stating the names of such persons. The case of Wallace *v.* The People, 63 Ill., 451, is an authority for this view of the law.

This was not done, and the motion to quash the indictment ought to have been allowed. The judgment will be reversed and the cause remanded.

Reversed and remanded.

THOMAS SHIRLEY for Staaden.

WE are indebted to the Official Reporter for the following opinion:

SUPREME COURT OF NEVADA.

OCTOBER TERM, 1875.

Ex Parte AH BAU and AH YOU.

PRELIMINARY EXAMINATION OF PRISONER —PRISON-BREAKING.

PRELIMINARY EXAMINATION SHOULD NOT BE WAIVED.—In all cases where a party has been arrested, charged with crime and brought before a magistrate, an examination should take place; the practice of allowing such a party to waive an examination is irregular and should be discontinued.

WHEN WAIVED NO GROUND FOR DISCHARGE.—The fact that the justice of the peace issued his commitment without the introduction of any testimony, although erroneous, furnishes no ground for petitioner's discharge upon *habeas corpus*.

PRISON-BREAKING ESSENTIALS OF THE OFFENSE.—Before any person can be found guilty of prison-breaking, the imprisonment from which he attempted to break must be shown to be lawful.

It is not merely those who are guilty of a crime that may be lawfully confined in a county jail for under circumstances many persons who are wholly innocent may be lawfully imprisoned by legal process, and in such cases they are bound to submit to the confinement until discharged by law.

If a party imprisoned upon a regular commitment, issued by a justice of the peace, charging him with a felony, breaks prison, he is guilty of the offense of prison-breaking, and may be convicted of said offense without being indicted, tried or convicted of the principal felony.

By the court, HAWLEY, C. J.:

Petitioners are held in custody by the sheriff of Washoe county, by virtue of a commitment issued from the justice's court of Reno township, which recites that they have been held to answer upon a charge of attempting to break jail. They ask their discharge upon two grounds: First. Because no examination has been had upon the charge alleged in the commitment. Second. Because, at the time of the alleged offense of prison-breaking, they were not lawfully confined in the county jail.

1. The statute contemplates that in all cases where a person has been arrested, charged with crime and brought before a magistrate, that an examination shall take place. The practice of allowing such person to waive an examination is irregular and should be discontinued. It appears that when petitioners were brought before the justice of the peace they were allowed to waive an examination and the justice issued the commitment without the introduction of any testimony. This action, although erroneous, does not furnish any ground for their discharge upon *habeas corpus*. They are entitled to a hearing, and upon demand the justice will undoubtedly grant it.

2. At the time of their alleged attempt to break jail, petitioners were in the custody of the sheriff, and were confined in the county jail under and by virtue of a regular commitment holding them to answer upon the charge of an attempt to kidnap. This court, upon a writ of *habeas corpus*, after examining the depositions taken before the committing magistrate on that charge and hearing oral testimony, decided that there was no reasonable or probable cause for their detention and discharged them. It is now claimed that such discharge, in legal effect, amounted to a decision that they were unlawfully held in custody and that they had the right to break jail.

The statute provides that, "every person lawfully confined in a county jail, or in the custody of any officer or person, under a lawful arrest, who shall escape or break away from such officer or person, or shall escape from or break out of or attempt to escape from or break out of, such jail, * * * and in case such person is under arrest, or confined in jail upon a charge of felony, and so escape, or break away from, such arrest, or escape from or break out of, or attempt to break out of, such jail, then, upon conviction, he shall be punished," etc. (1 Comp. L. 589, 2467.)

Upon a careful examination of the authorities it will be found that the law demands that before any person should be adjudged guilty of this offense, the imprisonment from which he attempted to break should be shown to be lawful. It will not be seriously contended that a person confined in jail contrary to law, should be found guilty of this offense for attempting, even forcibly, to regain his liberty. But it is equally clear that it is not merely those who are actually guilty of a crime that may be *lawfully confined in a county jail*; for under many circumstances persons who are wholly innocent may be lawfully imprisoned by legal process, and in such cases they are bound to submit to the confinement until discharged by due course of law.

The doctrine applicable to this case is thus expressed in 2 Hawkin's Pleas of the Crown, 185, ch. 18: "It is clear that if a person be taken upon a *capias* awarded on an indictment or appeal against him, for a supposed treason or felony, he is within the statute if he break the prison, whether any such crime were in truth committed by him, or any other person, or not; for that there is an accusation against him on record, which makes his commitment lawful, be he never so innocent, and the prosecution never so groundless." (Sec. 5.) "Also, if an innocent person be committed by a lawful *mittimus* on such a suspicion of a felony, actually done by some other, as will justify his imprisonment, though he be neither indicted nor appealed, he is certainly within the statute if he break the prison, for that he was legally in custody, and ought to have submitted to it till he had been discharged by due course of law." (Sec. 6.) "And on the other side, if the party be taken up for such slight causes of suspicion of a felony actually done as will not in strictness justify the arrest, yet if the justice before whom he is brought think them of such weight as to require a commitment, and do accordingly send the party to jail by a regular *mittimus*, it seems very dangerous for him to break the prison; for the practice of justices of peace in making such commitments being now grown into settled law, it seems reasonable that their *mittimus* be a good justification of the imprisonment which it commands, for a crime within their jurisdiction regularly brought before them; from whence it follows, that to break from such imprisonment must be unlawful." (Sec. 8.) This is substantially the principal announced by the various authors who have written upon this subject (2 Coke's Inst. 592; 1 Hale's Pleas of the Crown, 610; 1 Russ. on Cr. 428; 2 Bish. on Cr. L., Secs. 1033, 1034), and it is supported by all the authorities we have found bearing directly upon this question. (State *v.* Murray, 15 Me. 100; Commonwealth *v.* Miller, 2 Ashmead, 61.)

Petitioners' counsel relies upon a remark made by Sir Matthew Hale, as follows: "And yet I hold that if A. be indicted of felony and committed, and then breaks prison, and then be arraigned of the principal felony and found not guilty, now A. shall never be indicted for the breach of prison; or if indicted of it before the acquittal, and then he is acquitted of the principal felony, he may plead *that* acquittal of the principal felony in bar to the indictment for the felony for breach of prison." (1 Hale's Pleas of the Crown, 612.) This doctrine, if admitted to be correct, is of no avail to petitioners in this application, for they have not been acquitted of the principal charge. All the authorities agree that a party may be arraigned, tried and convicted for prison-breaking before he is convicted of the crime for which he was imprisoned. (1 Hale's Pleas of the Crown, 611; 2 Coke's Inst. 592; 1 Russ. on Cr., 430.)

In the case of the Commonwealth *v.* Miller, *supra*, the defendants were imprisoned by virtue of certain commitments issued by a justice of the peace charging them with the crime of "feloniously burning St. Peter's church," and the defendants while so in custody broke jail. At a subsequent term of court, and pending the indictments for prison-breaking, the grand jury returned the bills "*ignoramus*." The defendants on being arraigned "pleaded these facts in bar to the indictments for the breach of prison, and averred that they were, in truth and in fact, arrested and detained without any reasonable or probable cause of suspicion." Darlington, president of the court, to whom the question of the sufficiency of the demurrers was submitted, held "that if a man be imprisoned upon an indictment found, or upon a regular commitment, under the hand and seal of a justice of the peace, for a particular felony, or suspicion thereof, plainly set forth in the warrant, and he breaks prison and escapes, that he is guilty of felony, and this without his being indicted, tried or convicted of the principal felony" (p. 68).

Notwithstanding their discharge from custody, under the commitment accusing them of an attempt to kidnap, upon the ground that they were held without any reasonable or probable cause, petitioners might be indicted, tried and convicted of said offense; hence it follows that such an order is no bar to an indictment for prison-breaking, whatever might be the effect of an acquittal by a jury.

Petitioners are remanded to the custody whence they came.

ILLINOIS SUPREME COURT.

ABSTRACT OF OPINIONS FILED AT OTTAWA IN 1876.

H. C. Todd, trustee, etc., *v.* K. & I. R. R. Co.—Appeal from Kankakee. — Opinion by WALKER, J.

ESTIMATING DAMAGES FOR RIGHT OF WAY—BENEFITS—TOWN BLOCKS.

Held, 1. That, in estimating damages for right of way to construct a railroad, benefits to the tract occupied may be set off; but not benefits to other tracts of the same owner, arising from the location of the road.

2. Where a town has long been laid off into blocks and streets, and ever since been so treated, then, for the purposes of assessing damages, the blocks are to be regarded as separate tracts, even if not platted as required by the statute.

Conrad Ross *v.* Eliza Ross.—Appeal from Peoria.—Opinion by WALKER, J.

ALIMONY — PROPORTION — MODE — PAYING WIFE'S DEBTS.

Held, 1. That, in a case of divorce, the allowance of alimony ranges from one-third to one-half of the income, and it is erroneous to allow the divorced wife the bulk of the husband's property.

2. Where there are special reasons, in allowing alimony, to vest the fee of real estate in the wife, this may be done, yet otherwise, this should not be done, but an annual allowance made.

3. A decree of alimony cannot properly require the defendant to pay the complainant's debts.

Wm. B. Ogden et al. *v.* Abner Kirby.—Appeal from Superior Court of Cook.—Opinion by CRAIG, J.

CONDITIONAL RAILROAD SUBSCRIPTION—LAW AND FACT.

STATEMENT.—Suit brought to recover a railroad subscription conditioned that payment should be made when the road was completed and in operation between certain points.

The terminus was a town of 3,000 inhabitants, and there was a very large township of the same name in which it was situated. It was not designated distinctly which was meant, the township or village, in the subscription.

Held, 1. That which was meant was purely a question of fact for the jury.

2. Also, when a railroad is completed and in operation is a question of fact.

3. But the facilities afforded by the railroad does not necessarily enter into the consideration of such contract, unless prescribed specifically in the condition—except that there should he reasonable facilities, such as are usual in a new road.

Commissioners of Highways *v.* Thomas Newell et al.—Appeal from Knox.—Opinion by WALKER, J.

TAXES FOR ROAD REPAIRS AND IMPROVEMENTS.

Held, 1. That a tax levied for repairs and improvements need not be actually collected before the work is begun, under the road and bridge law.

2. Work may even be done in anticipation of a levy the subsequent year, under the road and bridge law, where, from a flood or other inevitable cause, immediate repairs are necessary.

Thomas Crowley *v.* Catharine Crowley et al.—Appeal from Grundy.—Opinion by CRAIG, J.

PROBATE OF WILL—EVIDENCE REQUISITE.

STATEMENT.—Probate of a will refused by the county court and appeal to the Circuit court.

Held, 1. That, to entitle a will to be admitted to probate, four things must concur, namely: The will must be in writing, and signed by the testator, or in his presence, by some one under his direction. 2. It must be attested by two or more credible witnesses. 3. Two witnesses must testify that they saw the testator sign the will in their presence, or that he acknowledged the same to be his act and deed. And 4, they must swear that they believe the testator to have been of sound mind and memory at the time of signing and acknowledging the same.

2. If probate is refused, appeal may be taken, and then any competent evidence is available. But two witnesses must even then concur. This requisite of the statute cannot be dispensed with.

3. Verdicts cannot be directed in this State.

4. Only prejudicial error will reverse a cause.

143.—C. H. Harrison *v.* C. H. Willett.—Appeal from Superior Court of Cook.—Opinion by BREESE, J.

AFFIDAVIT OF MERITS IN ASSUMPSIT.

STATEMENT.—Suit on promissory note accompanied by affidavit of merits. Defendant pleaded and filed counter affidavit of merits; which affidavit was adjudged insufficient, and the pleas stricken from the files, because the affidavit was not in the exact language of the statute. *Held*,

That such an affidavit need not be in the exact words of the statute. It is sufficient if it substantially complies with the practice act.

141.—William Davis *v.* William A. Mericks.—Appeal from Knox.—Opinion *per curiam*.

DELIVERY OF GROWING CROPS.

Held, That a sufficient delivery of growing crops is effected, when ownership is transferred as far as the property is capable of it, and then, as fast as harvested, it is set apart for the claimant.

James Powell et al. *v.* Theodore Webber et al.—Error to city court of Aurora.—Opinion by SHELDON, J.

MECHANICS LIEN—TIME—ACT OF 1861.

Held, That, in express contracts, a lien for furnishing materials can only be enforced when the contract specifies a certain and not an indefinite time, within

which the materials are to be furnished.

2. The act of 1861 only applies to implied contracts.

3. To deliver in a reasonable time is not sufficiently definite to sustain a lien.

SUPREME COURT OF INDIANA.

UNLAWFUL EXPULSION FROM RAILROAD CAR —VERDICT BY COMPROMISE WHEN THE ACTION IS FOR UNLIQUIDATED DAMAGES—RIGHTS AND DUTIES OF RAILROADS AS TO TICKET REGULATIONS—IMPROPER CONDUCT OF ATTORNEY—HOW MADE AVAILABLE.

4131. The St. Louis & Southwestern Railroad Co. *v.* Myrtlle, Posey, C. C. Affirmed. Opinion by BUSKIRK, J.

STATEMENT.—This was an action by the appellee to recover damages for an alleged injury and ejectment from the cars of the appellant. The complaint is in two paragraphs. The first alleges that it was a rule of the company not to permit passengers to travel on freight trains without tickets, and that plaintiff entered the cars of the company, but was unable to first procure a ticket, because the ticket-office of the company was not open before the train passed. That upon his failure to furnish a ticket, he tendered his fare to the conductor, who refused to receive it, but with force expelled him from the train, etc.

The second paragraph is substantially as the first. Verdict for plaintiff for $562.50.

Held, 1. That in an action to recover unliquidated damages, the jury may resort to means to arrive at a verdict, that are not allowed in criminal actions, or in a civil action where the damages are liquidated; and that if it did appear that the verdict for $562.50 was the result of a compromise, it would not violate it. (11 Ind., 156.)

2. That the appellant had a right to adopt a regulation that all persons who travel on a freight train should procure a ticket before entering the cars. (46 Ind., 293.) But such a regulation imposes the duty upon the company of having the ticket office open sufficiently long enough before the departure of the train to enable passengers to procure tickets.

3. That the expulsion of plaintiff from the train was wrongful, and that after careful consideration, the verdict cannot be disturbed on account of excessive damages.

4. That in order to make available as error, the improper conduct of an attorney, in going outside of the evidence and making improper comments in his argument to the jury, it must appear that objection was urged to such argument, or that the court was called upon to stop counsel and confine him within the record, and that the failure of the court to interpose, when opposing counsel are present and do not ask the interposition of the court, or object to the line of argument, will not entitle the party to a new trial.

SUPREME COURT OF TENNESSEE.

OPINION FILED APRIL 5, 1876.

H. P. FOWLKES, Admr., *v.* The N. & D. R. R. Co.

CAUSE OF ACTION FOR INJURY RESULTING IN DEATH.—STATUTE OF LIMITATIONS.—There is no distinction made in the statutes between classes of cases where the injured party lives a time, and suit is brought in his life time, and where death is instantaneous. Both classes of cases are put upon the same footing, and whether the action be brought by the party himself or by his representative after his death, the cause of action is the same and governed by the same laws.

DAMAGES.—The rule introduced by some of the cases, in regard to damages, in cases where the action is brought by the representative, that is, damages for the loss of husband and father, or relative, to the widow or next of kin, might be allowed beyond what would be proper where the action is brought by the party himself, doubted. The decisions of other States, being founded on their own statutes, are not controlling.—[THE COM. AND LEGAL REPORTER.]

M'FARLAND, J.

The question arises upon the plea of the statute of limitations.

The action is by a personal representative under section 2291 of the Code, as follows: "The right of action which a person who dies from injuries received from another, or whose death is caused by the wrongful act or omission of another, would have had against the wrongdoer, in case death had not ensued, shall not abate or be extinguished by his death, but shall pass to his personal representative for the benefit of his widow and next of kin, free from the claims of creditors." There is no statute of limitation made expressly applicable to this class of cases. But Sec. 2772, in the article prescribing the limitation of personal actions, provides that actions for personal injuries shall be commenced in one year after the *cause of action accrued*. It is manifest that if the injured party commenced the action in his life time, this statute would be applicable; and it is equally manifest that the action is for the same cause whether brought by the injured party himself in his life time or by his representative after his death, so that one year after the *cause of action accrued* is the limitation. But the question is, *when does the cause* of action accrue, and when does the statute begin to run.

It is apparent that under this statute cases often arise, where the injured party lives a time after the injury and then dies of the injury; and many other cases occur where death is, in the common acceptation of the term, instantaneous. In the first class of cases, where the injured party lives a time, it would seem clear that the cause of action accrued when the injury was received, or at the time of the wrongful act or omission. If in such cases an action be brought in the life time of the party and a recovery be had, or a settlement and a release of the claim, or accord and satisfaction, and the party afterwards die of the injury, his representative certainly could not then sue and recovery. See Sherman and Redfield on Negligence, Section 301.

This being so, the only question remaining is whether there is any distinction between cases where the death is instantaneous. There is certainly no such distinction indicated in the statute. Both classes of cases are put upon the same footing.

The purpose seems simply to have been to repeal that rule of the common law that actions for personal injuries die with the person, in those cases where the injured party dies of the injury; but whether the action be brought by the party himself or by his representative after his death, the cause of action is the same and is governed by the same laws. To show this conclusively, it is only necessary to refer to Section 2293, which in terms provides that if the action be brought by the party in his life time, it shall continue after his death without revivor, showing that in either case the action is essentially the aame.

The argument against this view is, that the action allowed by this statute is a new action *given to the personal representative*, an action which the injured party could not have maintained. That the action is given to the personal representative, *on account of the death* of the injured party. That *his death* is the cause of action. And this of course could not accrue to the injured party himself, but only accrues to his representative, and could not accrue to him until his appointment. This argument, though plausible, is not sound. As we have seen, the statute is equally applicable to cases where the injured party lives a time, and to cases where death is instantaneous. When the injured party lives a time after the injury, he has a right of action without the statute. If an action be brought by the party himself, and he then die of the injury before judgment, the effect of the statute is to prevent an abatement, and allow the cause to proceed *notwithstanding the death*, but not on account of the death. The cause of action was the injury, and in such case the action after the death is prosecuted for the same cause for which it was brought, and is the same action. In cases where no action is brought by the injured party himself, the statute allows the action to be brought by the representative.

This could not have been done at the common law, and it is therefore in this sense a new and statutory action. But it is brought for the same cause as if the injured party had himself brought the action.

The general rule is, that if a canse of action accrue in the life time of a party the statute of limitations begins to run and is not suspended during the time that elapses between his death and the appointment of his representative. Angell on Lim., Sec. 56.

It is different if the cause of action does not accrue until after the death; then in general the statute does not begin to run until the appointment of a representative. Angell on Lim. Chapter VII. Thurman *v.* Shelton, 10 Yerg.

The argument is, that the cause of action in cases of instantaneous death, could not accrue to the party in his life time, and it is true that for practical purposes it could not; but upon the theory that there is no such thing literally as instantaneous death the cause of action might be held to accrue to the party in his life time, though he should die before he could possibly bring an action.

But at any rate no distinction is made in the statute between the two classes of cases. Where the injured party lives long enough it is clear the action accrues to him and the statute begins to run. We are not authorized to establish a different rule where the death is in the common acceptance of the term, instantaneous. We could not determine how soon after the injury death should occur in order to take the case out of the other rule.

It is true that some of the cases seem to have introduced a new element of damages in cases where the action is brought by the representative, that is, damages for the loss of society of the husband and father, or relative, to the widow or next of kin; that in such cases damages might be allowed beyond what would be proper where the action is brought by the party himself.

Some of these cases stand upon doubtful grounds, but even where the action is brought by the party himself, damages might in a proper case be given to the same extent as if death had ensued. That is, where the injury permanently disables the party for life, the injury, in a pecuniary sense, would be the same as if death had ensued.

We have found no authority that we regard as controlling; the decisions of other States being founded upon their own statutes, which are not identical with ours. The case of Whitford *v.* The Panama R. R. Co., 23 New York Court of Appeals, is founded upon the New York statute, and conceding that the statute of that State is substantially the same as ours, it seems to us that the reasoning of Ch. Justice Constable, in a dissenting opinion, is far more convincing and satisfactory. Upon contrary holding, an action might be brought twenty years after the injury or death of the party.

Judgment should be affirmed.

LVI NEW HAMPSHIRE.

Our thanks are due John M. Shirley, Official Reporter, for advance sheets of the 56 New Hampshire Reports, from which we take the following head-notes:

PROBATE OF WILL—APPEAL—ATTESTATION.

Stewart v. *Harriman.*

The statute of July 2, 1822, provided, that in case any will should be proved without notice to the parties interested, any party interested should be entitled to have the probate re-examined, on petition presented to the judge of probate, etc., with this proviso: "*Provided*, that no such application shall be sustained unless preferred within one year from the time of the probate, nor if an appeal from such probate has been prosecuted before the Superior Court." By Gen. Stats., ch. 175, sec. 7,—which is the same as in the Revised Statutes of 1842,—it is provided that "Any party interested may have the probate of any will which has been proved without notice re-examined, and the will proved in solemn form before the court of probate, at any time within one year of such probate, if no appeal from such probate has been prosecuted before the Supreme Court." *Held*, that this change in the language did not change the meaning of the statute, and that the petition would be in season if filed within one year from the time of the probate in common form.

The attesting witnesses to a will must be competent at the time of attestation.

The executor named in the will, as also his wife, is a competent attesting witness, if he takes no beneficial interest under it.

The fees and commissions to which an executor is by law entitled in this State, do not constitute such a beneficial interest as to render him or his wife incompetent to attest the execution of a will.

SURPLUS CAPITAL OF NATIONAL BANKS—POWER OF A STATE TO TAX.

First National Bank v. *Peterborough.*

Chapter 49, section 5, of the General Statutes, subjecting the surplus capital on hand of banking institutions to taxation, is applicable to banks organized under the act of congress establishing national banks, approved June 3, 1864—13 Stats. at Large 111—as well as to banks established by the legislature of this State.

The taxation of the surplus capital of such banks, in excess of the amount they are required by said act to carry to their surplus fund semi-annually, is not prohibited by congress, and is not an encroachment upon the constitutional powers vested in the federal government.

The taxation of such surplus by State authority is not the taxation of the means or agencies employed by the general government for the execution of its constitutional powers, but is the taxation of the property of such agents. The right to tax such property has never been surrendered by the States to the general government.

UNITED STATES SUPREME COURT.

PROCEEDINGS OF.

Wednesday, April 5, 1876.

On motion of John A. Grow, George W. Carter, of New Orleans, La., was admitted.

No. 136. John Garsed v. William A. Beall et al. The argument of this cause was concluded by R. Toombs for appellant.

No. 201. The Coastwise Company, administrators, v. Nicholas de las Casas. No. 202. Nicholas de las Casas, appellant, v. the steamer Alabama. The argument of these causes was commenced by John E. Parsons for N. de las Casas, and continued by Edwards Pierrepont for steamer Alabama and by W. R. Beebee for steam tug Garnecock.

Adjourned until Thursday at 12 o'clock.

Thursday, April 6.

On motion of John E. Parsons, Carlisle Norwood, Jr., New York City, was admitted.

No. 204. The Coastwise Company, claimants of steamer Alabama, etc., v. Nicholas de la Casas. No. 202. Nicholas de la Casas v. the steamer Alabama, etc. The argument of these cases was continued by W. R. Beebe for steam-tug Garnecock, and concluded by John E. Parsons for N. de las Casas.

No. 557. The Central Railroad and Banking Company v. the State of Georgia. No. 578, the Southwestern Railroad Company v. the State of Georgia. The argument of these cases was commenced by A. R. Lawton for plaintiff, and continued by N. J. Hammond for defendant, and by David Dudley Field for the plaintiffs.

The Court heard arguments in the cases of the "Central Railroad and Banking Company," of the State of Georgia v. the State of Georgia, and the Southwestern R. R. Co. v. the State of Georgia. These cases came up on writs of error by the companies from the Superior Court of the State of Georgia, 1874. The question at issue is the collection of taxes alleged to be due the State from the companies, amounting to $46,034 from the Central Railroad and Banking Company, and $28,203 from the Southwestern Railroad Company. Arguments were made by A. R. Lawton for plaintiffs, N. J. Hammond, Attorney-General, for the State of Georgia, and David Dudley Field for plaintiffs, and will be continued to-morrow by Robert Toombs on the part of the State.

Adjourned until Friday at 12 o'clock.

Friday, April 7.

On motion of D. Dudley Field, William A. Boyd, of New York City, was admitted.

No. 577. The Central Railroad and Banking Company v. the State of Georgia. No. 578, the Southwestern Railroad Company v. the State of Georgia. The argument of these cases was continued by R. Toombs for defendant, and concluded by J. S. Black for plaintiff.

No. 203. The town of Danville v. J. B. Pace.

No. 294. The town of Danville v. J. B. Pace. Dismissed with costs.

No. 198. Gains Whitfield v. the United States. The argument of this cause was commenced by P. Phillips for appellant, and continued by Solicitor General Phillips for appellees.

Adjourned until Monday at 12 o'clock.

Monday, April 10.

On motion of F. J. Lippitt, Herman B. Magruder, Esq., of New York City, was admitted.

No. 178. Blakely Wilson v. Peter Boyce, and

No. 173. Blakely Wilson v. L. McClellis. In error to the Circuit Court of the United States for the Eastern District of Missouri. Hunt, J., delivered the opinion of the court, affirming the judgment of the Circuit Court in these causes with costs.

No. 609. The Board of Liquidation, State of Louisiana, et al., v. H. S. McComb. Appeal from the Circuit Court of the United States for the District of Louisiana. Bradley, J., delivered the opinion affirming the decree of the Circuit Court so far as it prohibits the funding of the debt due to the Louisiana Levee Company in the consolidated bonds issued, or to be issued under the funding act of January 24, 1874, and reversing said decree as to so much thereof as prohibits the issue of any other bonds to the Louisiana Levee Company in liquidation of its debts. Costs to be paid by appellants.

Mr. Justice Field did not sit in this cause and took no part in the decision.

No. 183. H. & George A. Meyer v. Chester A. Arthur, collector, etc. In error to Circuit of the United States for the Southern District of New York. Bradley, J., delivered the opinion, affirming the judgment of the Circuit Court in this cause, with costs.

No. 43. The Town of Concord v. The Portsmouth Savings Bank. In error to the Circuit Court of the United States for the Northern District of Illinois. Strong, J., delivered the opinion, reversing the judgment of the Circuit Court, with costs, and remanding the cause, with directions to award a new trial.

No. 532. The County of Moultrie v. the Rockingham Ten Cents Savings Bank. In error to the Circuit Court of the United States for the Southern District of Illinois. Strong, J., delivered the opinion, affirming the opinion of the Circuit Court, with costs and interest. Dissenting, Miller, Davis, and Field, JJ.

No. 848. Joshua Converse v. City of Fort Scott. In error to the Circuit Court of the United States for the District of Kansas. Strong, J., delivered

the opinion, reversing the judgment of the Circuit Court, with costs, and remanding the cause, with directions to award a new trial.

IMPORTANT TO SECRET SERVICE AGENTS.

No. 167. Enoch Totten, admr., etc., v. The United States. Appeal from the Court of Claims. FIELD, J., delivered the opinion, affirming the judgment and holding that an action cannot be maintained in the Court of Claims upon a contract with the President for secret service to the Government. The ground of the decision is that the contract for secret service seals the mouths of both parties. The service was to be a secret service, and if, upon such a contract, an action against the Government may be maintained in the Court of Claims whenever an agent is dissatisfied with his compensation, the whole service in any case, and the manner of its discharge, may be exposed, to the serious detriment of the public. A secret service, with liability to publicity in such a way, would be impossible; and as such services are sometimes indispensable to the Government, its agents in those services must look for their compensation to the contingent fund of the department employing them, and to such allowance from it as those who dispense that fund may award.

AN HONORABLE DISCHARGE FROM THE ARMY DOES NOT ENTITLE TO FORFEITED PAY AND ALLOWANCES.

In this case it is held that an honorable discharge of a soldier from service does not restore to him pay and allowances forfeited by desertion, including bounty, as heard by the Court of Claims.

THE OSAGE LAND CASE DECIDED IN FAVOR OF THE GOVERNMENT.

Case 401. Leavenworth, Lawrence and Galveston Railway Company v. The United States. Appeal from the Circuit Court for the district of Kansas. This was the action of the government to vacate the patents issued to the road for what are known as the Osage ceded lands in Kansas. The patents were issued by the Governor of the State in pursuance of certified bids furnished him for the purpose by the Secretary of the Interior. The Court holds that the lands so embraced had not been granted by Congress to the State to aid in the construction of the road, but were reserved from sale by law, and that the patents must be cancelled. The Secretary of the Interior having erred, his acts are void, for public officers can bind the government only within the scope of their lawful authority. After examining the original legislation involved in the case, it is said that what is known as the Thayer act can have no effect upon the case. It was passed for a single purpose only—to enable the company to relocate the road, and a false recital therein contained cannot turn the authority to change the route of a railroad into a grant of lands or a recognition of one. Especially is this so when the act expressly leaves the rights of the road to be determined by the previously existing legislation. Besides this the lands at the time were in process of being sold under a joint resolution of Congress, and it cannot be presumed that the Congress of 1871 intended to change the disposition of them made by the Congress of 1869. Convinced that the act of 1863 did not grant the lands, nor the Senate amendment bring into being any right which did not exist without it, the Court affirms the decree in favor of the government.

Mr. Justice Davies delivered the opinion; dissenting, Justices Field, Swayne and Strong.

No. 165. The Piedmont and Arlington Life Insurance Company v. Ashley W. Ewing, Admr., etc. In error to the Circuit Court of the United States for the Western District of Missouri. Miller, J., delivered the opinion of the court reversing the judgment of the Circuit Court with costs, and remanding the cause, with directions to award a new trial.

No. 194. Harvey Terry v. the Commercial Bank of Alabama. Appeal from the Circuit Court of the United States for the Southern District of Alabama. Miller, J., delivered the opinion of the court remanding the cause to the Circuit Court, with directions to modify the decree entered in this cause by the District Court of the United States for the Southern District of Alabama, in conformity with the opinion of this court. As so modified, it is hereby affirmed. Costs to be paid by appellee.

AN EX-SLAVE CLAIMS TITLE TO THE PROCEEDS OF COTTON.—PROOF OF FREEDOM.

In the case of Hall v. the United States, the court decide that the claimant, having been a slave in Mississippi at the time he claims the cotton was conveyed to him by a contract with one Roach, he was incapable of making a contract or of holding title, and that the proceeds rightfully belong to the personal representatives of Roach who was his master. It is also held that Hall was debarred from claiming that he was a free man, because he submitted to bondage and did not assert his freedom, as provided by the laws of the State. Swayne, J., delivered the opinion, affirming the judgment of the Court of Claims.

No. 189. Joseph Hobson and Jose M. Hurtado, v. Daniel W. Lord, In error to the Circuit Court of the United States for the Southern District of New York. Clifford, J., delivered the opinion, affirming the judgment of the Circuit Court in this cause, with costs and interest. Dissenting, Bradley, J.

No. 181. The steamship City of Washington etc. v. Peter B. Baillie et al. Appeal from the Circut Court of the United States for the Eastern District of New York. Clifford, J., delivered the opinion, affirming the decree of the said Circuit Court in this cause, with costs and interest.

No. 174. Jilson P. Harrington v. Esther R. Meyer, widow, etc. In error to the Supreme Court of the State of Louisiana. Clifford, J., delivered the opinion, affirming the judgment of the Supreme Court, With costs.

No. 653. M. V. Cochrane et al., v. H. A. Clarke, et al. Appeal from the Supreme Court of the District of Columbia. Waite, C. J., announced the decision of the court, dismissing the appeal with costs.

No. 693. Daniel Hand v. Thomas C. Dunn, Comptroller-General of the State of South Carolina. Waite, C. J., announced the decision, denying the motion to advance this cause.

No. 738. Erasmus D. Force v. Wm A. McVeigh. Waite, C. J., announced the decision of the court, denying the motion to dismiss this cause.

Waite, C. J., announced to the bar that no case will be called for argument after April 28th, and the court will adjourn for the term on Monday, the 8th day of May.

No. 806. Henry Gantz and A. R. Appleman v. James Kennedy. On motion of M. Blair, for plaintiffs, dismissed with costs.

Adjourned until Tuesday at 12 o'clock.

Tuesday, April 11.

On motion of Assistant Attorney-General Smith, Daniel C. Linscott, of Boston, Mass., was admitted.

On motion of Matt H. Carpenter, George W. Park, of Boston, Mass., was admitted.

On motion of A. J. Vanderpoel, Granville P. Hawes and Michael H. Cardozo, of New York, were admitted.

No. 952. The Ebenezer Orphan Institute Jesse Yount et al. Appeal from the Circuit of the Evangelical Association v. Court of the United States for the Southern District of Illinois. On motion of Matt H. Carpenter docketed and dismissed, with co ts.

No. 198. Gaino Whitfield v. the United States. The argument of this cause was continued by Solicitor-General Phillips for appellee, and concluded by P. Phillips for appellant.

No. 205. N. H. Hammond et al., v. the Mason and Hamlin Organ Company. Passed.

No. 206. The brig Belle, etc., v. The Pacific Mail Insurance Company. Dismissed with costs.

No. 207. Hiram Barney, collector, etc., plaintiff in error, v. William Watson et al. This cause was argued by Assistant Attorney-General Smith, for the plaintiff in error, and by J. H. Ashton for defendants.

No. 208. James O'Brien v. George M. Weld et al. This cause was argued by A. J. Vanderpoel for plaintiff, and by Mr. Granville P. Hawes for the defendants in error.

Adjourned until Wednesday at 12 o'clock.

SUPREME COURT OF TENNESSEE.

[*Head Notes from the Commercial and Legal Reporter.*]

James Stevenson, alias Childers, *v.* The State.

CRIMINAL LAW.—BURGLARY. — INDICTMENT.—The Legislature did not, by the act of 1875, making a petit larceny a misdemeanor, contemplate a change of the law of burglary; and an indictment charging the breaking, etc., with intent to commit a felony, to-wit, larceny, is Held sufficient.

———. ———. TWO COUNTS.—The defendant, without demurring or moving to quash, having been convicted only on the first count, cannot object that the indictment contained another count for a misdemeanor upon which he has been acquitted.

———. ———. DATE.—The indictment charging the offence to have been committed previous to the finding of the indictment, but by mistake of the draftsman charging an impossible date, the date may be rejected. The indictment is good.

Charles Goaler *v.* The State.

CRIMINAL LAW.— EVIDENCE.—Where the court, to show the animus of the prisoner, and to illustrate the merits of the plea of self-defense, admitted proof of an old feud, and the frequent and deadly threats of the prisoner to take the life of the deceased, Held, this was not error.

———. ———. CHARGE.—The prisoner being on trial for murder in the second degree, it was not error for the court to charge the jury as to every grade of homicide. It is perhaps safe to enlighten the jury as to all other grades of homicide, that they may the better comprehend the precise crime with which the prisoner is charged, provided it be accompanied with an admonition that he cannot be convicted of any higher grade than that upon which he is arraigned.

Imperial Fire Insurance Co. *v.* James R. Van.

APPEAL.—BOND.—A contract of fire insurance, in the ordinary form, and without a seal, not being a contract by the company to pay a fixed and definite amount of money, but to pay the actual estimated value of the property destroyed or injured, is not one of the instruments described in section 3162 of the Code, and an appeal by the company upon a bond for costs and damages was properly granted.

THE POWER OF MAYORS UNDER THE MAYOR'S ACT OF 1875.

We take the following report of the decision of Judge Cochrane, of the Peoria Circuit Court, construing what is known as the Mayor's bill, and defining the powers of mayors under it, from the Peoria *Transcript:*

The court has hitherto refrained from an exercise of curiosity in regard to the questions involved in the decision of this case, and from reading any comments upon the question in the public press. I differ from the views of counsel on both sides in some respects.

In the view I take of the law of 1875, known as the "Mayor's Bill," the first part of section one provides that the mayors of all cities in this State shall have power to appoint all officers whose election by the qualified voters is not provided for by law.

Next, I find that this law gives the mayor power to remove from such offices all persons filling them.

It is claimed by counsel for the relator that the mayor has only power to remove the officers whom he has appointed, and this is the construction placed by the relator's counsel upon this language in the "Mayor's Act:" "And the mayor shall also have power to remove any officer so appointed, whenever, in his opinion, the interests of the city require such removal, etc."

I think that the act itself simply means that during the year the mayor has a right to say that any appointee, for reasons which the interests of the city requires, shall no longer act as city attorney, asking the city council to approve his action, and, unless by a two-thirds majority, of course the former officer is not restored to office.

The statute itself gives the mayor the right to say who, during the interregnum, in order that the office may not be vacant, shall be the proper officer. "The mayor may appoint any suitable person to discharge the duties of the office, from which he shall have removed any officer, until his successor is appointed and qualified, or such officer restored to office in the manner aforesaid." That is, in order that the office may not be vacant, the mayor has the right to say that some suitable person shall exercise the duties of the office.

Now, the case presented by this information, with the pleas here, is not such a case as is contemplated strictly by the statute; it is simply whether the term of office of Mr. Kettelle, as city attorney, has expired by law.

The mayor comes into office, and whatever may be his reasons, I don't know—it is not set out, nor is it necessary that these pleas should set out, the reasons in the mind of the mayor for wanting Mr. Kettelle out of office, for that is a matter for the city council to act upon—but the term of office having expired by limit of law, the mayor has the right to say his office has expired, and the right to suggest the name of his appointee to the city council, and if the city council has refused to approve his appointment, the mayor has the undoubted right to recognize the office as vacant for the time being, otherwise Mr. Kettelle for instance, (I only use the name as an illustration), might remain in the office fifteen or twenty years, while the law provides that his term of office shall expire at the end of one year, unless he is re-appointed and gives new bonds; and it don't lie in the power of the city council, by a majority vote, or otherwise, to keep any person in an office in that way.

Waiving these constitutional questions I think they have been substantially passed upon by the Supreme court.

It may be, if the case is carried up and the Supreme court has its attention called to the particular provision of this act, it might review its decision in the matter, and pronounce this act of 1875 unconstitutional.

Now, all that is claimed by these pleas is, that the defendant in this matter, is simply acting as an appointee of the mayor for the time being, until a suitable appointment can be made and approved by the city council.

I think that the pleas are good in substance, while there may be more in them than is necessary; so the demurrer will be overruled.

SOME eight years ago a citizen of Massachussetts was put in prison to serve out a life sentence for arson. By the confession of a perjured witness his complete innocence was proven, and he was lately pardoned. Note the word, pardoned! Having lost eight years of his life, he petitioned the state for an allowance for time wasted. The committee on claims hold that he is to blame for not showing that he was innocent, and have decided that he cannot recover. What a reversal of the principles of law which deem a man innocent until he is proved guilty! The worst of it is the state cannot be sued, and there is no chance for the innocent criminal, unless the legislature chooses to reopen the matter. What a chance for a Charles Reade or an Edward Jenkins; if we only had one or both to scarify this old commonwealth, which is becoming so economical that it shrinks at no meanness. —*Arcadian.*

WHAT IS A PINT?—A recent report issued by the Government official whose duty it is to gauge and certify to the correctness of measures shows that a doubtful quantity is still preferred to a fixed one for the bottle known as a "pint." Why this should be so we (*Medical Examiner*) do not profess to understand, nor do we see the justice of allowing the seller of champagne and the vendor of sauce to make rather less than twelve ounces go to a pint, while the dispenser of medicine must give the full twenty ounces. We all have learned the old standard liquid measure, which says, "twenty ounces make one pint," and should be glad to know the real views of our learned *confrere*, Dr. Latham, who, in his latest edition of "Johnson's Dictionary," gives as the only definition of a pint, "Half a quart (in medicine twelve ounces liquid measure)."—*Public Opinion.*

The Legal Gazette says:

John D. Lewis, Esq., a colored citizen, a member of the Supreme Court of Massachusetts, and of the Supreme Court of Pennsylvania, has at last been admitted as a member of the several Courts of Common Pleas and the Orphans' Court of Philadelphia county. Some doubt was expressed by the judges as to whether the production of a certificate of admission to the bar of the Supreme Court of this State would entitle the holder to admission to their respective courts under the rules adopted for the admission of attorneys by the Courts of Common Pleas, Nos. 1, 2 and 4.

An exchange says:

"George Beedle shot at Sheriff Newton, in Afton, N. Y., the other day, but a law book in the sheriff's hands stopped the bullet after it had gone through fifty leaves. Law books are good for something after all."

THE ADJOURNMENT OF THE U. S. SUPREME COURT.—No case will be called for argument in the Supreme Court of the United States, this term, after April 28th, and the court will adjourn for the term, on Monday the 8th of May, as announced in the proceedings of that tribunal, published elsewhere in this issue.

HIGH ON RECEIVERS.—The *Southern Law Review* closes its review of "High on Receivers" by saying: "The typography of the book is most excellent; clear, handsome, and severely plain, it is all the most fastidious could desire. the dress of the book is the work of the CHICAGO LEGAL NEWS COMPANY, upon whose good taste and enterprise it reflects high credit. To both printer and publisher the profession are in this instance under special obligations." In behalf of the enterprising publishers, Messrs. Callaghan & Company, we thank our cotemporary for its deserved compliment; but for ourselves, we shall rejoice if our "works praise us."

CHICAGO LEGAL NEWS.

SATURDAY, APRIL 22, 1876.

The Courts.

UNITED STATES SUPREME COURT.

Nos. 880 and 633.—OCTOBER TERM, 1875.

No. 880.—JOHN HENDERSON and THOMAS HENDERSON, Appellants, *v.* WILLIAM H. WICKMAN, Mayor of the City of New York, and the COMMISSIONERS OF EMIGRATION.

Appeal from the Circuit Court of the United States for the Southern District of New York.

AND

No. 633.—THE COMMISSIONERS OF IMMIGRATION, Appellants, *v.* THE NORTH GERMAN LLOYD.

Appeal from the Circuit Court of the United States for the District of Louisiana.

TAX ON SHIP-OWNER FOR RIGHT TO LAND PASSENGERS—REGULATION OF COMMERCE—STATUTES OF NEW YORK AND LOUISIANA UNCONSTITUTIONAL AND VOID.

1. The case of the City of New York *v.* Miln, 11 Peters, 103, decided no more than that the requirement from the master of a vessel of a catalogue of his passengers landed in the city, rendered to the mayor on oath, with a correct description of their names, ages, occupations, places of birth, and of last legal settlement, was a police regulation within the power of the State to enact, and not inconsistent with the Constitution of the United States.

2. The result of the Passenger Cases, 7 How., 283, was to hold that a tax demanded of the master or owner of the vessel for every such passenger, was a regulation of commerce by the State, in conflict with the Constitution and laws of the United States, and, therefore, void.

3. These cases criticised, and the weight due to them as authority considered.

4. In whatever language a statute may be framed, its purpose and its constitutional validity must be determined by its natural and reasonable effect.

5. Hence, a statute which imposes a burdensome and almost impossible condition on the ship-master as a pre-requisite to his landing his passengers, with an alternative payment of a small sum of money for each one of them is, in fact, a tax on the ship-owner for the right to land such passengers, and in effect, on the passenger himself, since the ship-master makes him pay it in advance as part of his fare.

6. Such a statute of a State is a regulation of commerce, and when applied to passengers from foreign countries is a regulation of commerce with foreign nations.

7. It is no answer to the charge that such regulation of commerce by a State is forbidden by the Constitution, to say that it falls within the police power of the States, for to whatever class of legislative powers it may belong, it is prohibited to the States if granted exclusively to Congress by that instrument.

8. Though it be conceded that there is a class of legislation which may affect commerce, both with foreign nations and between the States, in regard to which the laws of the States may be valid in the absence of action under the authority of Congress on the same subjects, this can have no reference to matters which are, in their nature, national, or which admit of a uniform system or plan of regulation.

9. The statutes of New York and Louisiana, here under consideration, are intended to regulate commercial matters which are not only of national but of international concern, and which are also best regulated by one uniform rule, applicable alike to all the seaports of the United States. These statutes are, therefore, void, because legislation on the subjects which they cover is confided exclusively to Congress by the clause of the Constitution which gives to that body the "right to regulate commerce with foreign nations."

10. The constitutional objection to this tax on the passenger is not removed because the penalty for failure to pay does not accrue until twenty-four hours after he is landed. The penalty is incurred by the act of landing him without payment, and is, in fact, for the act of bringing him into the State.

11. This court does not, in this case, undertake to decide whether or not a State may, in the absence of all legislation by Congress on the same subject, pass a statute strictly limited to defending itself against paupers, convicted criminals, and others of that class, but is of opinion that to Congress rightfully and appropriately belongs the power of legislating on the whole subject.

Mr. Justice MILLER delivered the opinion of the court.

In the case of the City of New York *v.* Miln, reported 11 Peters, 103, the question of the constitutionality of a statute of the State, concerning passengers in vessels, coming to the port of New York, was considered by this court. It was an act passed February 11, 1824, consisting of several sections. The first section—the only one passed upon by the court—required the master of every ship or vessel arriving in the port of New York from any country out of the United States, or from any other State of the United States, to make report in writing, and on oath, within twenty-four hours after his arrival, to the mayor of the city, of the name, place of birth, last legal settlement, age, and occupation of every person brought as a passenger from any country out of the United States, or from any of the United States, into the port of New York, or into any of the United States, and of all persons landed from the ship or put on board, or suffered to go on board any other vessel during the voyage, with intent of proceeding to the city of New York. A penalty was prescribed of seventy-five dollars for each passenger not so reported, and for every person whose name, place of birth, last legal settlement, age, and occupation should be falsely reported.

The other sections required him to give bond on the demand of the mayor, to save harmless the city from all expense of support and maintenance of such passenger, or to return any passenger deemed liable to become a charge, to his last place of settlement, and required each passenger, not a citizen of the United States, to make report of himself to the mayor, stating his age, occupation, the name of the vessel in which he arrived, the place where he landed, and name of the commander of the vessel. We gather from the report of the case that the defendant, Miln, was sued for the penalties claimed for refusing to make the report required in the first section. A division of opinion was certified by the judges of the Circuit court on the question whether the act assumes to regulate commerce between the port of New York and foreign ports, and is unconstitutional and void.

This court, expressly limiting its decision to the first section of the act, held that it fell within the police powers of the States, and was not in conflict with the federal Constitution.

From this decision Mr. Justice Story dissented, and in his opinion stated that Chief Justice Marshall, who had died between the first and second arguments of the case, fully concurred with him in the view that the statute of New York was void, because it was a regulation of commerce forbidden to the States.

In the Passenger Cases, reported in 7 Howard, 283, the branch of the statute not passed upon in the preceding case came under consideration in this court. It was not the same statute, but was a law relating to the marine hospital on Staten Island. It authorized the health commissioner to demand, and if not paid to sue for and recover, from the master of every vessel arriving in the port of New York from a foreign port, one dollar and fifty cents for each cabin passenger, and one dollar for each steerage passenger, mate, sailor, or mariner, and from the master of each coasting vessel twenty-five cents for each person on board. These moneys were to be appropriated to the use of the hospital.

The defendant, Smith, who was sued for the sum of $295 for refusing to pay for 295 steerage passengers on board the British ship Henry Bliss, of which he was master, demurred to the declaration on the ground that the act was contrary to the Constitution of the United States and void. From a judgment against him, affirmed in the Court of Errors of the State of New York, he sued out a writ of error, on which the question was brought to this court.

It was here held, at the January term, 1849, that the statute was "repugnant to the Constitution and laws of the United States, and, therefore, void." — (7 Howard, 572.)

Immediately after this decision, the State of New York modified her statute on that subject, with a view, no doubt, to avoid the constitutional objection, and amendments and alterations have continued to be made up to the present time.

As the law now stands the master or owner of every vessel landing passengers from a foreign port, is bound to make a report similar to the one recited in the statute held to be valid in the case of New York *v.* Miln, and on this report the mayor is to endorse a demand upon the master or owner that he give a bond for every passenger landed in the city in the penal sum of $300, conditioned to indemnify the commissioners of emigration, and every county, city, and town in the State, against any expense for the relief or support of the person named in the bond, for four years thereafter. But the owner or consignee may commute for such bond, and be released from giving it, by paying, within twenty-four hours after the landing of the passengers, the sum of one dollar and fifty cents for each one of them. If neither the bond be given nor the sum paid within the twenty-four hours, a penalty of $500 is incurred, which is made a lien on the vessel, collectible by attachment at the suit of the commissioner of emigration.

Conceding the authority of the Passenger Cases, which will be more fully considered hereafter, it is argued that the change in the statute now relied upon, requiring primarily a bond for each passenger landed, as an indemnity against his becoming a future charge to the State or county; leaving it optional with the ship-owner to avoid this by paying a fixed sum for each passenger, takes it out of the principle of the case of Smith *v.* Turner—the Passenger Case from New York. It is said that the statute in that case was a direct tax on the passenger, since the act authorized the ship-master to collect it of him; and that on that ground alone was it held void; while in the present case, the requirement of the bond is but a suitable regulation, under the power of the State to protect its cities and towns from the expense of supporting persons who are paupers or diseased, or helpless women and children, coming from foreign countries.

In whatever language a statute may be framed, its purpose must be determined by its natural and reasonable effect; and if it is apparent that the object of this statute, as judged by that criterion, is to compel the owners of vessels to pay a sum of money for every passenger brought by them from a foreign shore, and landed at the port of New York, it is as much a tax on passengers if collected from them, or a tax on the vessel or owners for the exercise of the right of landing their passengers in that city, as was the statute held void in the Passenger Cases.

To require a heavy and almost impossible condition to the exercise of this right, with the alternative of the payment of a small sum of money, is in effect to demand payment of that sum. To suppose that a vessel which once a month lands from 300 to 1,000 passengers, or from 3,000 to 12,000 per annum, will give that many bonds of $300 with good sureties, with a covenant for four years against accident, disease, or poverty of the passenger named in such bond, is absurd, when this can be avoided by the payment of $1.50, collected of the passenger before he embarks on the vessel.

Such bonds would amount in many instances for every voyage to more than the value of the vessel. The liability on the bond would be, through a long lapse of time, contingent on circumstances which the bondsman could neither foresee nor control. The cost of preparing the bond and approving sureties, with the trouble incident to it in each case, is greater than the sum required to be paid as commutation. It is inevitable, under such a law, that the money would be paid for each passenger, or the statute resisted or evaded. It is a law in its purpose and effect imposing a tax on the owner of the vessel for the privilege of landing in New York passengers transported from foreign countries.

It is said that the purpose of the act is to protect the State against the consequences of the flood of pauperism immigrating from Europe and first landing in that city.

But it is a strange mode of doing this to tax every passenger alike who comes from abroad.

The man who brings with him important additions to the wealth of the country, who is perfectly free from disease, and the man who brings to aid the industry of the country a stout heart and a strong arm, is as much the subject of the tax as the diseased pauper who may become the object of the charity of the city in a week after he lands from the vessel.

No just rule can make the citizen of France landing from an English vessel on our shore, liable for the support of an English or Irish pauper who lands at the same time from the same vessel.

So far as the authority of the cases of New York *v.* Miln and the Passenger Cases can be received as conclusive, they decide that the requirement of a catalogue of passengers, with statements of their last residence, and other matters of that character, is a proper exercise of State authority, and that the requirement of the bond, or the alternative payment of money for each passenger, is void, because forbidden by the Constitution and laws of the United States. But the Passenger Cases (so called because a similar statute of the State of Massachusetts was the subject of consideration at the same term with that of New York) were decided by a bare majority of the court. Justices McLean, Wayne, Catron, McKinley, and Grier held both statutes void; while Chief Justice Taney and Justices Daniel, Nelson, and Woodbury held them valid. Each member of the court delivered a separate opinion, giving the reasons for his judgment, except Judge Nelson, none of them professing to be the authoritative opinion of the court. Nor is there to be found in the reasons given by the judges who constituted the majority, such harmony of views as would give that weight to the decision which it lacks by reason of the divided judgments of the members of the court. Under these circumstances, with three cases before us arising under statutes of three different States on the same subject, which have been discussed as though open in this court to all considerations bearing upon the question, we approach it with the hope of attaining a unanimity not found in the opinions of our predecessors.

As already indicated, the provisions of the Constitution of the United States on which the principal reliance is placed to make void the statute of New York, is that which gives to congress the power "to regulate commerce with foreign nations." As was said in United States *v.* Holliday, 3 Wall., 417, "commerce with foreign nations means commerce between citizens of The United States and citizens or subjects of foreign governments." It means trade and it means intercourse. It means commercial intercourse between nations and parts of nations in all its branches. It includes navigation, as the principal means by which foreign intercourse is effected. To regulate this trade and intercourse is to prescribe the rules by which it shall be conducted. "The mind," says the great Chief Justice, "can scarcely conceive a system for regulating commerce between nations which shall exclude all laws concerning navigation, which shall be silent on the admission of the vessels of one nation into the ports of another," and he might have added with equal force, which prescribed no terms for the admission of their cargo or their passengers.—(Gibbons *v.* Ogden, 9 Wheaton. 190.)

Since the delivery of the opinion in that case, which has become the accepted canon of construction of this clause of the Constitution, as far as it extends, the transportation of passengers from European ports to those of the United States has attained a magnitude and importance far beyond its proportions at that time to other branches of commerce. It has become a part of our commerce with foreign nations of vast interest to this country as well as to the immigrants who come among us to find a welcome and a home within our borders. In addition to the wealth which some of them bring, they bring still more largely the labor, which we need to till our soil, build our railroads, and develop the latent resources of the country in its minerals, its manufacturers, and its agriculture. Is the regulation of this great system a regulation of commerce? Can it be doubted that a law which prescribes the terms on which vessels shall engage in it is a law regulating this branch of commerce?

The transportation of a passenger from Liverpool to the city of New York is one voyage. It is not completed until the passenger is disembarked at the pier in the latter city. A law or a rule emanating from any lawful authority, which prescribes terms or conditions on which alone the vessel can discharge its passengers, is a regulation of commerce, and in case of vessels and passengers coming from foreign ports, is a regulation of commerce with foreign nations.

The accuracy of these definitions is scarcely denied by the advocates of the State statutes. But assuming that in the formation of our government certain powers necessary to the administration of their internal affairs are reserved to the States, and that among these powers are those for the preservation of good order by punishment of crime, of the health and comfort of the citizens, and their protection against pauperism, and against contagious and infectious diseases, and other matters of legislation of like character, they insist that the power here exercised falls within this class and belongs rightfully to the States.

This power, frequently referred to in

the decisions of this court, has been in general terms somewhat loosely called the police power. It is not necessary for the course of this discussion to attempt to define it more accurately than it has been defined already. It is not necessary, because whatever may be the nature and extent of that power, where not otherwise restricted, no definition of it, and no urgency for its use, can authorize a State to exercise it in regard to a subject-matter which has been confided exclusively to the discretion of Congress by the constitution.

Nothing is gained in the argument by calling it the police power. Very many statutes, when the authority on which their enactments rest is examined, may be referred to different sources of power, and supported equally well under any of them. A statute may at the same time be an exercise of the taxing power and of the power of eminent domain. A statute punishing counterfeiting may be for the protection of the private citizen against fraud, and a measure for the protection of the currency, and the safety of the government which issues it. It must occur very often that the shading which marks the line between one class of legislation and another is very nice, and not easily distinguishable.

But however difficult this may be, it is clear from the nature of our complex form of government that whenever the statute of a State invades the domain of legislation which belongs exclusively to the Congress of the United States, it is void, no difference under what class of powers it may fall, or how closely allied to powers conceded to belong to the States.

"It has been contended," says C. J. Marshall, "that if a law passed by a State, in the exercise of its acknowledged sovereignty, comes into conflict with a law passed by Congress in pursuance of the constitution, they affect the subject and each other like equal opposing powers. But the framers of our constitution foresaw this state of things, and provided for it by declaring the supremacy not only of itself, but of the laws made in pursuance thereof. The nullity of any act inconsistent with the constitution is produced by the declaration that the constitution is supreme." And where the federal government has acted, he says: "In every such case the act of Congress or the treaty is supreme; and the laws of the State, though enacted in the exercise of powers not controverted, must yield to it."—(9 Wheaton, 210.)

It is said, however, that under the decisions of this court, there is a kind of neutral ground, especially in that covered by the regulation of commerce, which may be occupied by the State, and its legislation be valid so long as it interferes with no act of Congress or treaty of the United States. Such a proposition is supported by the opinions of several of the judges in the Passenger Cases, by the decisions of this court in Cooly *v.* The Board of Wardens, 12 How., 299, and by the case of Crandall *v.* Nevada, 6 Wall., 35, and Gilman *v.* Philadelphia, 3 Wall., 713. But this doctrine has always been controverted in this court, and has seldom, if ever, been stated without dissent. These decisions, however, all agree that under the commerce clause of the constitution, or within its compass, there are powers which, from their nature, are exclusive in Congress; and in the case of Cooly *v.* The Board of Wardens, it was said that, "whatever subjects of this power are in their nature national, or admit of one uniform system or plan of regulation, may justly be said to be of such a nature as to require exclusive legislation by Congress." A regulation which imposes onerous, perhaps impossible conditions, on those engaged in active commerce with foreign nations, must of necessity be national in its character. It is more than this, for it may properly be called international. It belongs to that class of laws which concern the exterior relation of this whole nation with other nations and governments. If our government should make the restrictions of these burdens on commerce the subject of a treaty, there could be no doubt that such a treaty would fall within the power conferred on the President and Senate by the constitution. It is, in fact, in an eminent degree a subject which concerns our international relations, in regard to which foreign nations ought to be considered and their rights respected whether the rule be established by treaty or by legislation.

It is equally clear that the matter of these statutes may be, and ought to be, the subject of a uniform system or plan. The laws which govern the right to land passengers in the United States from other countries, ought to be the same in New York, Boston, New Orleans, and San Francisco. A striking evidence of the truth of this proposition is to be found in the similarity, almost identity, of the statutes of New York, of Louisiana, and California, now before us for consideration in these three cases.

It is apparent, therefore, that if there be a class of laws which may be valid when passed by the States, until the same ground is occupied by a treaty or an act of Congress, this statute is not of that class.

The argument has been pressed with some earnestness, that inasmuch as this statute does not come into operation until twenty-four hours after the passenger has landed, and has mingled with or has the right to mingle with the mass of the population, he is withdrawn from the influence of any laws which Congress might pass on the subject, and remitted to the laws of the State as its own citizens are. It might be a sufficient answer to say that this is a mere evasion of the protection which the foreigner has a right to expect from the federal government when he lands here a stranger, owing allegiance to another government, and looking to it for such protection as grows out of his relation to that government.

But the branch of the statute which we are considering is directed to and operates directly on the ship-owner. It holds him responsible for what he has done before the twenty-four hours commences. He is to give the bond or pay the money, because he *has* landed the passenger, and he is given twenty-four hours' time to do this before the penalty attaches. When he is sued for this penalty, it is not because the man has been here twenty-four hours, but because he brought him here and failed to give the bond or pay $1.50.

The effective operation of this law commences at the other end of the voyage. The master requires of the passenger, before he is admitted on board, as a part of the passage money, the sum which he knows he must pay for the privilege of landing him in New York. It is, as we have already said in effect, a tax on the passenger, which he pays for the right to make the voyage, a voyage only completed when he lands on the American shore. The case does not even require us to consider at what period after his arrival the passenger himself passes from the sole protection of the Constitution, laws, and treaties of the United States, and becomes subject to such laws as the State may rightfully pass, as was the case in regard to importations of merchandise in Brown *v.* Maryland, 12 Wheaton, 417, and in The License Cases, 5 How., 504.

It is too clear for argument that this demand of the owner of the vessel for a bond or money on account of every passenger landed by him from a foreign shore is, if valid, an obligation which he incurs by bringing the passenger here, and which is perfect the moment he leaves the vessel.

We are of opinion that this whole subject has been confided to Congress by the Constitution. That Congress can more appropriately and with more acceptance exercise it than any other body known to our law, State or national. That by providing a system of laws in these matters, applicable to all ports and to all vessels, a serious question, which has long been matter of contest and complaint, may be effectually and satisfactorily settled.

Whether, in the absence of such action, the States can, or how far they can, by appropriate legislation protect themselves against *actual* paupers, vagrants, criminals, and diseased persons arriving in their territory from foreign countries, we do not decide. The portions of the New York statute which concern persons who, on inspection, are found to belong to these classes, are not properly before us, because the relief sought is to the part of the statute applicable to all passengers alike, and is the only relief which can be given in this bill.

The decree of the Circuit court of New York, in the case of John and Thomas Henderson *v.* The Mayor of New York and the Commissioners of Emigration, is reversed, and the case remanded, with direction to enter a decree for an injunction, in accordance with this opinion.

The statute of Louisiana, which is involved in the case of The Commissioners of Immigration *v.* The North German Lloyd, is so very similar to, if not an exact copy of, that of New York as to need no separate consideration. In this case the relief sought was against exacting the bonds or paying the commutation money as to all passengers, which relief the Circuit court granted by an appropriate injunction, and the decree in that case is accordingly affirmed.

UNITED STATES SUPREME COURT.

No. 154—OCTOBER TERM, 1875.

THE REPUBLICAN RIVER BRIDGE COMPANY, Plaintiff in Error, *v.* THE KANSAS PACIFIC RAILWAY COMPANY.

In Error to the Supreme Court of the State of Kansas.

WHAT CAN BE RE-EXAMINED IN SUPREME COURT—LAND GRANT CONSTRUED.

1. WHAT CAN BE RE-EXAMINED.—That where a right is set up under an act of Congress, in a State court, any matter of law found in the record, decided by the highest court of the State, bearing on the right so set up under the act of Congress, can be re-examined in the Supreme Court.

2. MAY REVIEW ON BOTH THE LAW AND FACT.—That in chancery cases, or in any class of cases where all the evidence becomes a part of the record in the highest court of the State, the same record being brought into the Supreme Court of the United States, it can review the decision of the State court, both on the law and the fact, so far as may be necessary to determine the validity of the right set up under the act of Congress; but in cases where the facts are submitted to a jury, and are passed upon by the verdict in common law action, the Supreme Court has the same inability to review those facts, in a case coming from a State court, that it has in a case coming from a Circuit Court of the United States.

3. LAND GRANTS CONSTRUED.—The court construes the grant under which the defendant claims the land, and the grant under which the plaintiff also claims the land.—[ED. LEGAL NEWS.]

MILLER, J.

This is a writ of error to the Supreme Court of the State of Kansas. The contest in the State court concerned the title to real estate, both parties claiming under grants from Congress made at different times. In the District Court for the County of Shawnee, where the suit was originally brought, the parties submitted the case to the court without the intervention of a jury, and that court found a series of facts, fourteen in number, on which it declared the law to be for the defendant. This judgment was affirmed on error in the Supreme court of the State, which decision the present writ of error brings before us.

The finding by the District court was received by the Supreme court of the State as conclusive as to all facts in issue, and it is equally conclusive upon us. Where a right is set up under an act of Congress in a State court, any matter of law found in the record, decided by the highest court of the State, bearing on the right so set up under the act of Congress, can be re-examined here.

In chancery cases, or in any other class of cases where all the evidence becomes part of the record in the highest court of the State, the same record being brought here, this court can review the decision of that court on both the law and the fact, so far as may be necessary to determine the validity of the right set up under the act of Congress. But in cases where the facts are submitted to a jury and are passed upon by the verdict, in a common-law action, this court has the same inability to review those facts in a case coming from a State court, that it has in a case coming from the Circuit court of the United States.

This conclusiveness of the facts found, extends to the finding by a State court, to whom they have been submitted by waiving a jury, or to a referee, where they are so held by State laws, as well as to the verdict of a jury.—(Boggs *v.* The Merced Mining Co., 3 Wall.,—; Crary *v.* Devlin, of this term.)

Two propositions of law ruled by the State court were excepted to by plaintiff, the first of which gives construction to the grant under which defendant claims the land, and the other to the grant under which the plaintiff claims. The first is in the following language:

"That the joint resolution passed by Congress, approved July 26, 1866, was and must be construed as a grant by Congress to the defendant of the land in controversy, and that upon the issuance of the executive order of the President, dated July 19th, 1867, the legal title to said land vested in defendant, and relates back to the date of the passage of said joint resolution of July 26, 1866."

The joint resolution here referred to is as follows:

"Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That, subject to approval by the President, the right of way one hundred feet in width is hereby granted to the Union Pacific Railroad Company, and the companies constructing the branch roads connecting therewith, for the construction and operation of their roads over and upon all military reserves through which the same may pass; and the President is hereby authorized to set apart to the Union Pacific Railroad Company, eastern division, twenty acres of the Fort Riley military reservation for depot and other purposes in the bottom opposite 'Riley City.' Also fractional section 'one,' on the west side of said reservation, near Junction City, for the same purposes; and also to restore from time to time, to the public domain any portion of said military reserve over which the Union Pacific Railroad or any of its branches may pass, and which shall not be required for military purposes; provided, that the President shall not permit the location of any such railroad or the diminution of any such reserve in any manner so as to impair its usefulness for military purposes, so long as it shall be required therefor."

On the 19th day of July, 1867, the President, by a public proclamation, declared that by virtue of said resolution there is set apart to the Union Pacific Railroad Company, eastern division, (which was then the corporate name of the defendant), the twenty acres of the Fort Riley military reservation, and fractional section one, on west side of said reservation near Junction City, for a depot and other purposes, as designated on a map or survey accompanying the letter from the Secretary of the Interior, of February 15, 1867.

The first objection made here to the conclusion of law by the court, that the resolution and proclamation confer title to the land in controversy is, that the land of which defendant is in possession as fractional section one, is a part of the reservation, whereas the true construction of the joint resolution is, that it has reference to a fractional section one lying outside of the reservation and adjoining it on the west side.

No plat or survey, official or otherwise, accompanies this record to enable us to understand or decide this question in a satisfactory manner. Nor is this map or letter of the secretary in evidence. The circuit judge, among his findings of fact, states distinctly that the fractional section one referred to in the joint resolution, is *inside* of the reservation, and is the piece of land now in possession of the defendant, and claimed by plaintiff in this action. So far as the correctness of this finding depends, as it must largely depend, on surveys not produced to us, it is not open here to inquiry. And as it must from its very nature be a mixed question of law and fact, which would be concluded by the verdict of a jury, it must be equally conclusive here.

The law question being the construction of the words of the grant, and the fact being the manner in which the existing government surveys were made and numbered in reference to the fractional parts of section one.

Looking, however, to the manifest purpose of the joint resolution to make a grant of part of the military reservation, to the fact that neither the grant of the twenty acres, confessedly to be a part of that tract, nor of the fractional section one, were to be consummated until the President had determined that both could be given up without impairing the usefulness of the reservation for military purposes, we are of opinion that fractional section one on the west side of said reservation, meant such a section to be found in the reservation on its west side.

The next objection is that the grant does not purport to carry the fee, and as it was only a use or equitable right, Congress had the power to grant the fee as it did by the joint resolution of March 2, 1867, to plaintiff.

It is certainly true that the joint resolution of March 2 covers geographically the land in controversy, and so does the patent issued under it to plaintiff; and Frisbie *v.* Whitney, 9 Wall., 187, and the

Yosemite Valley case, 15 Id., 77, are relied on to show that Congress could grant the land to other parties while the title of defendant was thus inchoate.

But there are two answers to this: 1st. The title of the defendant, whatever it was, became absolute on the issuing of the President's proclamation, and had relation back to the date of the joint resolution under which it was made. It is, therefore, whatever its nature, an older title than that of plaintiff. It is not necessary here to decide whether it is a grant of the legal title, or only the grant of a use or easement; for in either case it entitles the defendant to the possession, of which it cannot be deprived by an action of ejectment. 2. The joint resolution under which plaintiff claims, contains a proviso, that nothing therein contained, shall be construed to interfere with any grant of any part of said land heretofore made by the United States. As no other grant has been shown of any part of this land, except the one under which the defendant claims, this proviso was no doubt intended to exempt it from plaintiff's grant; and if there had been half a dozen other previous grants, it would have excepted them all as well as this, from the operation of the joint resolution in which it is found.

In the first conclusion of law, finding the title under the joint resolution of 1866 and the proclamation of the President, to be in defendant, we find no error.

The other proposition to which plaintiff excepted, declares that plaintiff had title to all the land covered by the joint resolution of March 2, 1867, and by the patent, except that claimed by defendant under the joint resolution of July 26, 1866.

As this conclusion follows necessarily from what we have already said, it is unnecessary to notice it further.

The judgment of the Supreme Court of Kansas is accordingly affirmed.

UNITED STATES SUPREME COURT.

No. 478.—OCTOBER TERM, 1875.

CHY LUNG, Plaintiff in Error, *v.* J. H. FREEMAN, R. K. PIOTROWSKI, Commissioner of Immigration, and WITLIAM MCKIBBEN, Sheriff of the City and County of San Francisco, California.

In Error to the Supreme Court of the State of California.

THE CALIFORNIA STATUTE RELATING TO THE LANDING OF PASSENGERS, UNCONSTITUTIONAL.

1. The statute of California, which is the subject of consideration in this case, does not require a bond for every passenger, or commutation in money, as the statutes of New York and Louisiana do, but only for certain enumerated classes among which are "lewd and debauched women.'
2. But the features of the statute are such as to show very clearly that the purpose is to extort money from a large class of passengers, or to prevent their immigration to California altogether.
3. The statute also operates directlv on the passenger, for, unless the master or owner of the vessel gives an onerous bond for the future protection of the State against the support of the passenger, or pays such sum as the commissioner of immigration chooses to exact, he is not permitted to land from the vessel.
4. The powers which the commissioner is authorized to exercise under this statute, are such as to bring the United States into conflict with foreign nations, and which can only belong to the Federal government.
5. If the right of the States to pass statutes to protect themselves in regard to the criminal, the pauper, and the diseased foreigner landing within their borders, exists at all, it is limited to such laws as are absolutely necessary for that purpose, and this mere police regulation cannot extend so far as to prevent or obstruct other classes of persons from the right to hold personal and commercial intercourse with the people of the United States.
6. The statute of California, in this respect, extends far beyond the necessity in which the right is founded, if it exists at all, and invades the right of Congress to regulate commerce with foreign nations, and is, therefore, void.

MILLER, J.

While this case presents for our consideration the same class of State statutes considered in the cases just disposed of, it differs from them in two very important points.

These are, first: The plaintiff in error was a passenger on a vessel from China, being a subject of the Emperor of China, and is held a prisoner because the owner or master of the vessel who brought her over refused to give a bond in the sum of five hundred dollars in gold, conditioned to indemnify all the counties, towns, and cities of California against liability for her support or maintenance for two years.

Secondly, the statute of California, unlike those of New York and Louisiana, does not require a bond for *all* passengers landing from a foreign country, but only for classes of passengers specifically described, among which are "lewd and debauched women," to which class it is alleged, plaintiff belongs.

The plaintiff, with some twenty other women, on the arrival of the steamer Japan from China, was singled out by the commissioner of immigration, an officer of the State of California, as belonging to that class, and the master of the vessel required to give the bond prescribed by law, before he permitted them to land. This he refused to do, and detained them on board. They sued out a writ of *habeas corpus*, which, by regular proceedings resulted in their committal, by order of the Supreme Court of the State, to the custody of the sheriff of the county and city of San Francisco, to await the return of the Japan, which had left the port pending the progress of the case; the order being to remand them to that vessel on her return, to be removed from the State.

All of plaintiff's companions were released from the custody of the sheriff on a writ of *habeas corpus* issued by Mr. Justice Field of this court. But plaintiff by a writ of error brings the judgment of the Supreme Court of California to this court, as we suppose, for the purpose of testing the constitutionality of the act under which she is held a prisoner. We regret very much that while the Attorney General of the United States has deemed the matter of such importance as to argue it in person, there has been no argument in behalf of the State of California, the commissioner of immigration, or the sheriff of San Francisco, in support of the authority by which plaintiff is held a prisoner, nor have we been furnished even with a brief in support of the statute of that state.

It is a most extraordinary statute. It provides that the commissioner of immigration is "to satisfy himself whether or not any passenger who shall arrive in the state by vessels from any foreign port or place (who is not a citizen of the United States) is lunatic, idiotic, deaf, dumb, blind, crippled, or infirm, and is not accompanied by relatives who are able to support him, or is likely to become a public charge, or has been a pauper in any other country, or is from sickness or disease, existing either at the time of sailing from the port of departure or at the time of his arrival in the state, a public charge, or likely soon to become so, or is a convicted criminal, or a lewd or debauched woman;" and no such person shall be permitted to land from the vessel, unless the master, or owner, or consignee shall give a separate bond in each case, conditioned to save harmless, every county, city, and town of the state against any expense incurred for the relief, support, or care of such person for two years thereafter.

The commissioner is authorized to charge the sum of seventy-five cents for every examination of a passenger made by him, which sum he may collect of the master, owner, or consignee, or of the vessel by attachment. The bonds are to be prepared by the commissiouer and two sureties are required to each bond, and for preparing the bond the commissioner is allowed to charge and collect a fee of three dollars, and for each oath administered to a surety, concerning his sufficiency as such, he may charge one dollar. It is expressly provided that there shall be a separate bond for each passenger, that there shall be two sureties on each bond, and that the same sureties must not be on more than one bond, and they must in all cases be residents of the state.

If the ship-master or owner prefers, he may commute for these bonds by paying such a sum of money as the commissioner may in each case think proper to exact, and after retaining twenty per cent. of the commutation money for his services, the commissioner is required once a month to deposit the balance with the treasurer of the State. —(See chapter I., article VII., of the Political Code of California, as modified by section 70 of the amendments of 1873–4.)

It is hardly possible to conceive a statute more skilfully framed to place in the hands of a single man the power to prevent entirely vessels engaged in a foreign trade, say with China, from carrying passengers, or to compel them to submit to systematic extortion of the grossest kind.

The commissioner has but to go aboard a vessel filled with passengers ignorant of our language and our laws, and without trial, or hearing, or evidence, but from the external appearances of persons with whose former habits he is unfamiliar, he points with his finger to twenty, as in this case, or a hundred if he chooses, and says to the master, these are idiots, these are paupers, these are convicted criminals, and these are lewd women, and these others are debauched women. I have here an hundred blank forms of bonds printed. I require you to fill me up and sign each of these for $500 in gold, and that you furnish me two hundred different men, residents of this state, and of sufficient means, as sureties on these bonds. I charge you five dollars in each case for preparing the bond and swearing your sureties, and I charge you seventy-five cents each for examining these passengers, and all others you have on board. If you don't do this you are forbidden to land your passengers under a heavy penalty.

But I have the power to commute with you for all this for any sum I may choose to take in cash. I am open to an offer, but you must remember that twenty per cent. of all I can get out of you goes into my own pocket, and the remainder into the treasury of California.

If, as we have endeavored to show in the opinion in the preceding cases, we are at liberty to look to the effect of a statute for the test of its constitutionality, the argument need go no further.

But we have thus far only considered the effect of the statute on the owner of the vessel.

As regards the passengers, section 2,963 declares that consuls, ministers, agents, or other public functionaries of any foreign government, arriving in this State in their *official capacity*, are exempt from the provisions of this chapter.

All other passengers are subject to the order of the commissioner of immigration.

Individual foreigners, however distinguished at home for their social, their literary, or their political character, are helpless in the presence of this potent commissioner. Such a person may offer to furnish any amount of surety on his own bond, or deposit any sum of money, but the law of California takes no note of him. It is the master, owner, or consignee of the vessel alone whose bond can be accepted. And so a silly, an obstinate, or a wicked commissioner, may bring disgrace upon the whole country, the enmity of a powerful nation, or the loss of an equally powerful friend.

While the occurence of the hypothetical case just stated may be highly improbable, we venture the assertion that if citizens of our own government were treated by any foreign nation as subjects of the Emperor of China have been actually treated under this law, no administration could withstand the call for a demand on such government for redress.

Or, if this plaintiff and her twenty companions had been subjects of the Queen of Great Britain, can any one doubt that this matter would have been the subject of international inquiry, if not of a direct claim for redress? Upon whom would such a claim be made? Not upon the State of California, for by our Constitution she can hold no exteror relations with other nations. It would be made upon the government of the United States. If that government should get into a difficulty which would lead to war or to suspension of intercourse, would California alone suffer, or all the Union? If we should conclude that a pecuniary indemnity was proper as a satisfaction for the injury, would California pay it, or the federal government? If that government has forbidden the States to hold negotiations with any foreign nations, or to declare war, and has taken the whole subject of these relations upon herself, has the Constitution, which provides for this, done so foolish a thing as to leave it in the power of the States to pass laws whose enforcement renders the general government liable to just reclamations which it must answer, while it does not prohibit to the States the acts for which it is held responsible?

The Constitution of the United States is no such instrument. The passage of laws which concern the admission of citizens and snbjects of foreign nations to our shores belongs to Congress and not to the states. It has the power to regulate commerce with foreign nations; the responsibility for the character of those regulations and the manner of their execution belongs solely to the national government. If it be otherwise a singl State can at her pleasure embroil us in disastrous quarrels with other nations.

We are not called upon by this statute to decide for or against the right of a State, in the absence of legislation by Congress, to protect herself by necessary and proper laws against paupers and convicted criminals from abroad, nor to lay down the definite limit of such right, if it exist. Such a right can only arise from a vital necessity for its exercise, and cannot be carried beyond the scope of that necessity. When a State statute, limited to provisions necessary and appropriate to that object alone, shall in a proper controversy come before us, it will be time enough to decide that question. The statute of California goes so far beyond what is necessary or even appropriate for this purpose, as to be wholly without any sound definition of the right under which it is supposed to be justified. Its manifest purpose, as we have already said, is not to obtain indemnity, but money.

The amount to be taken is left in every case to the discretion of an officer, whose cupidity is stimulated by a reward of one-fifth of all he can obtain.

The money when paid does not go to any fund for the benefit of immigrants, but is paid into the general treasury of the State and devoted to the use of all her indigent citizens. The blind, or the deaf, or the dumb passenger is subject to contribution, whether he be a rich man or a pauper. The patriot seeking our shores, after an unsuccessful struggle against despotism in Europe or Asia, may be kept out because there his resistance has been adjudged a crime. The woman whose error has been repaired by a happy marriage and numerous children, and whose loving husband brings her with his wealth to a new home, may be told she must pay a round sum before she can land, because it is alleged that she was debauched by her husband before marriage. Whether a young woman's manners are such as to justify the commissioner in calling her lewd may be made to depend on the sum she will pay for the privilege of landing in San Francisco.

It is idle to pursue the criticism. In any view which we can take of this statute it is in conflict with the Constitution of the United States, and, therefore, void.

The judgment of the Supreme Court of California is reversed, and the case remanded to that court with directions to make an order discharging the prisoner from custody.

U. S. CIRCUIT COURT, DISTRICT OF LOUISIANA.

MARCH, 1876.

In Equity.

HENRY R. JACKSON *v.* THE VICKSBURG, SHREVEPORT AND TEXAS RAILROAD COMPANY et al.

STOLEN BONDS PAYABLE TO BEARER, WITH THE PLACE OF PAYMENT LEFT BLANK, ARE NOT NEGOTIABLE COMMERCIAL PAPER, AND ARE NOT BINDING ON THE COMPANY.

1. Bonds issued by a railroad company, payable to bearer, are not commercial paper, unless the amount of the bond is fixed and definite.
2. Bonds were issued by a railroad company, by each of which it promised to pay to bearer 225 pounds sterling, in London, or one thousand dollars either in New York or New Orleans, with interest at eight per cent. The interest coupons attached to the bonds, called for nine pounds sterling each, if payable in London, or forty dollars each if payable in New York or New Orleans. The face of the bond recited that the President of the company was authorized to fix by his indorsement, the place of payment of both principal and interest. On the back of the bonds was a printed indorsement, signed with the genuine signature of the President, but the place of payment of the bonds was left blank. While in this condition, the bonds were stolen, and were transferred to *bona fide* holders for value. *Held*,
(a.) That such holders were not authorized to fill the blank left in the indorsement.
(b.) That the bonds were not commercial paper, and were not binding on the company in the hands of *bona fide* holders for value.

This cause was heard upon exceptions filed to the report of the master.

The purpose of the bill was to bring about a sale of the road of the defendant company, to pay the bonds secured by a mortgage executed by the company.

A reference was made to the master to ascertain and report what bonds were *bona fide* issued by the Vicksburg, Shreveport and Texas Railroad Company, the names of the owners, and the amount due to the holders of the said bonds so issued.

The master reported seven hundred and fifty bonds of $1,000 each, as having been *bona fide* made and issued by the

company, and as secured by said mortgage.

The report then gives a list of two hundred and twenty-eight bonds of $1,000 each, which the master says were not *bona fide* issued by the railroad company, and are not secured by the said mortgage.

To this part of the report exceptions have been filed by several of the holders of the excluded bonds, on the ground that the master erred in reporting that said bonds were not secured by the mortgage. Upon these exceptions the case was heard.

Messrs, THOS. ALLEN CLARKE, THOS. L. BAYNE, Jos. P. HORNOR, for the exceptions.

Mr. JOHN A. CAMPBELL, contra.

WOODS, Circuit Judge.

The facts upon which the master relied for the basis of so much of his report as is excepted to, are as follows:

In April, 1864, during the late war carried on by the United States against the seceding States, the bonds in question were in the office of the railroad company, at Monroe, Louisiana. During the month just named, a raid was made upon Monroe by the naval forces of the United States, and at that time the office of the company was broken open, and these bonds carried off by persons connected with the expedition, without the consent or knowledge of any of the officers of the company. In short, the bonds were stolen from the office of the company. They were afterwards put in circulation, and bought by the holders at from fifteen to twenty cents on the dollar. The face of the bonds certified that the Vicksburg, Shreveport and Texas Railroad Company is indebted to John Ray, or bearer, for value received, in the sum of either two hundred and twenty-five pounds sterling, or one thousand dollars, lawful money of the United States of America, to wit: Two hundred and twenty-five pounds sterling, if the principal and interest are payable in London, and one thousand dollars, lawful money of the United States of America, if the principal and interest are payable in New York or New Orleans, which sum said company promises to pay to John Ray, or bearer, on the first day of September, A.D. 1877, and also to pay an interest thereon at the rate of eight per cent. per annum, on the first day of March and the first day of September of each and every year; * * * and the President of said company is authorized to fix by his indorsement, the place of payment of principal and interest, in conformity with the tenor of this obligation. The bonds were signed by the President and the treasurer, and bore the seal of the company.

Upon the back of each of the bonds in question, was an indorsement as follows: "I hereby agree that the within bonds and the interest coupons thereto attached, shall be payable in ——

"C. G. Young, President."

The coupons attached to said bonds declared that, "The Vicksburg, Shreveport & Texas Railroad Company will pay the bearer hereof (on a specified date) nine pounds sterling, if payable in London, or forty dollars, if payable in New York or New Orleans." Upon this state of facts, the question for solution is, whether the bonds are good in the hands of *bona fide* holders for value. If the bonds are negotiable, this inquiry must be answered in the affirmative.

Generally, bonds issued by a corporation and payable to bearer, have the qualities of negotiable instruments. Commissioners of Knox Co. *v.* Aspinwall, 21 How., 539; Woods *v.* Lawrence Co., 1 Black, 386; Mercer Co. *v.* Hackett, 1 Wall., 83.

But it is claimed that there are peculiarities about these stolen bonds which deprive them of their character as negotiable instruments. These are, that the amount for the payment of which the bond is given is uncertain. It is clear that the sum of two hundred and twenty five pounds, payable in London, with nine pounds interest payable every six months at the same place, is entirely different from one thousand dollars, payable in New York or New Orleans, with forty dollars interest, payable semi-annually at the same places. This uncertainty, unless cured, deprives the bonds of their character as negotiable interests. Story on Promissory Notes, §§ 20, 21; Story on Bills, § 42; Bayley on Bills, § 11; Parsons on Notes and Bills, § 37.

But it is claimed that the uncertainty is cured by the genuine signature of the President of the railroad company appended to the indorsement upon the bonds as above set forth. It is true that the indorsement leaves the place of payment blank, and so leaves the amount and interest of the bonds uncertain. But the argument is, that the President having signed the indorsement, and left the place of payment blank, the holder is authorized to fill the blank, and thus render the amount of the bond definite and certain, and that that is certain which can be made certain.

If the holder of the bill were authorized to fill this blank, doubtless the result claimed to flow from this fact would follow. But is the holder of these stolen bonds authorized to fill this blank in the indorsement? He is not expressly authorized, for the bond says that place of payment should be designated by the President. Can it be said when the President signed the indorsment and left the place of payment blank, he authorized any one who might steal the bonds or to whom the thief might sell them, to fill the blank? If any one was authorized by implied contract to fill the blank, it was some person to whom they had been issued by the company, or who had acquired them after such *bona fide* issue. There can be no implied authority to any one to fill the blank, unless the bonds were *bona fide* issued and delivered by the railroad company. To hold that the thief of the bond, or any one holding under him, had implied authority to perfect the bond, appears to me to be entirely untenable.

The uncertainty in the bond, as to amount of both principal and interest and place of payment, remains, notwithstanding the signature of the President to the indorsement; and this uncertainty deprives the bonds of the quality of negotiable instruments. The holders, though *bona fide* for value, are not protected by the rules which govern the transfer of commercial paper, and must hold the bonds subject to all the infirmities which attach to the title to them.

These views are sustained by the Court of Appeals of the State of New York, in a case arising upon some of these same stolen bonds, in which it was decided that a *bona fide* holder of the bonds was not authorized to fill the blank left by the President in the indorsement, and that he acquires and could convey no title to the bonds. Ledwick *v.* McKinn et al., 53 N. Y., 307.

The exceptions to the master's report must be overruled and the report confirmed.—*The Louisiana Law Journal.*

Through the kindness of MARK J. LEAMING, of the Jefferson City bar, we have received the following charge:

U. S. DISTICT COURT W. D. OF MO.

THE UNITED STATES *v.* SAMUEL L. HIGHLEYMAN.

EX. U. S. COLLECTOR—EXTORTION—GUILTY KNOWLEDGE.

1. The defendant was an ex-revenue collector; the charge was extortion, and the court dwells specially upon the guilty knowledge which the officer should have, in order to warrant a conviction on the charge of extortion; that by the use of the word knowingly, something more is meant than what is implied, in the legal presumption that every man must know the law.

2. SPECIAL TAX—WHEN NOT A DELINQUENT.—That a person who carries on business, requiring the payment of a special tax, without having paid the same, though violating the law, is not a delinquent within the meaning of the law, of whom, when he makes payment of his tax, mileage can be collected.—[ED. LEGAL NEWS.]

Charge of Judge KREKEL:

The indictment which you are considering, is drawn under section 3169 of the U. S. Statute, and provides that "every officer or agent appointed and acting under the authority of any revenue law of the U. S. * * * who knowingly demands other or greater sums than are authorized by law, or receives any fee, compensation or reward, except as by law prescribed * * * shall be punished, etc."

About the defendant having been a revenue officer when he collected the several amounts charged in the indictment as having been illegally collected by him, there is no dispute.

The language of the law is, who *knowingly* demands or receives any greater sum than he is entitled to by law. By the use of the word "knowingly" something more is meant than what is implied, in the legal presumption that every man must know the law. In order to find the defendant guilty of demanding or receiving greater sums than he was entitled to under the law, you should be satisfied that he *knew* he was violating the law, and the fact that he demanded or received the several amounts charged in the indictment, is not of itself sufficient to sustain the indictment.

You must arrive at his *knowledge* from the facts and circumstances, testified to in the case. The law does not authorize the collection of fines, penalties or cost, from a tax-payer, until he is delinquent. By a delinquent, is meant a tax-payer to whom notice has been given, and demand made of the tax due from him.

A person who carries on business requiring the payment of a special tax, without having paid the same, though violating the law, is not a delinquent within the meaning of the law, of whom, when he makes payment of his tax, mileage can be collected. If you shall be satisfied from the evidence, that the defendant, Highleyman, while proceeding through his collection district, either by accident, or on inquiry, learned that the persons named in the indictment were doing business without having paid the special tax required by law, and he collected of them, or undertook, upon payment of the tax, to procure for them their stamps, he was not entitled by law to charge them mileage, and any amount demanded and received by him was illegal. In order to ascertain whether the defendant knew such collections to be illegal, you will carefully consider all said and done by him at the time, as well as afterwards, regarding the collections. The law requires all deputy collectors who collect under distraint warrants, to return such warrants with the amounts collected thereon, including all costs, fines and penalties, to the collector. If you shall find from the evidence either that the defendant had no distraint-warrant at the time of making the collections, or that he failed to return the distraint warrant to the collector as required by law, this is evidence which may be considered by you, in arriving at the *knowledge* defendant had of the nature of the collection made by him. You will, however, make up your verdict from the whole evidence in the case. You are the judges of the credibility of the witnesses, and it is with you to give what weight you will, to the testimony of every witness. You must be satisfied, without a reasonable doubt of the defendant's guilt. If you have such a doubt arising upon the facts and circumstances testified to in the case, you should acquit. Your duty is to find upon each count of the indictment, guilty or not guilty, except the first, which has been dismissed.

After an absence of about two hours, the jury returned a verdict of guilty on one count, there being four in the indictment.

J. S. BOTSFORD, U. S. Dist. Atty., M. T. C. WILLIAMS, Asst. Att., for the Gov't.

HORACE B. JOHNSON, GEORE G. VEST, and M. J. LEAMING, for defendant.

We are under obligations to NORMAN C. WARNER, of the Rockford bar, for the following opinion:

SUPREME COURT OF ILLINOIS.

OPINION FILED JANUARY 21, 1876.

WILLIAM W. HOLCOMB *v.* THE PEOPLE ex rel. HARRIET L. TUTTLE.

Appeal from Winnebago.

BASTARDY—APPEALS FROM COUNTY COURT—ACTS RELATING TO, CONSTRUED.

Opinion by WALKER, J.

A motion was entered in this court to dismiss the appeal, upon the grounds that an appeal did not lie from the County to the Circuit Court, and the case of Peake *v.* The People (unreported), is refered to in support of the motion. That motion having been reserved to the final consideration of the case, we have considered and decided the motion as preliminary to the examination of the errors assigned on the record. In Peake's case, *supra*, it was held that by the County Court Act of 1872, an appeal was given to the Circuit court in bastardy cases. But the right of appeal is given from the County to the Circuit courts by the act of 1874. The 187th section of that act (R. S., 344), declares that appeals may be taken from the final orders, judgments and decrees of the County courts to the Circuit courts, etc., in all matters, except as prohibited in the next section.

The 188th section allows appeals and writs of error to be prosecuted to this court from judgments, etc., for taxes and assessments, and orders for the sale of lands by administrators, etc. The language of the 187th section is certainly broad enough to embrace a bastardy case, and the 188th section is too narrow to exclude it. As the law was amended and now stands we have no hesitation in saying that the appeal may be taken to the Circuit court, and a trial *de novo* be there had.

The trial was had in the County court after the act of 1874 went into effect, and the practice in the case thereafter was regulated by the latter act, which was in force when the trial was had. The act of 1874 does not require cases then pending to be tried under the act of 1872, but by its own force it wiped out and abrogated it and supplied its place. Nor did the parties acquire a vested right to the rules of practice or modes of procedure prescribed by the act of 1872. They were liable to be rightfully amended, altered or repealed, and others substituted in their stead.

The remainder of the opinion, relating mainly to questions of fact, is omitted. —ED. LEGAL NEWS.

N. C. WARNER, for relator.

WHAT CONTRACTS ARE AGAINST PUBLIC POLICY.—The Supreme Court of Missouri, in delivering an opinion last week in a case which involved the question whether a contract was void as against public policy, said:

We see nothing contrary to the public policy in the contract set out in the petition, and think it is clearly one which the court must enforce.

What constitutes public policy is not perhaps exactly determinable; it is indefinite in its nature, changing with the habits, wants and opinions of society. Forestalling, regranting and engrossing were prohibited by statute in England three hundred years ago, and were considered to be against public policy so late as the time of Blackstone. They are now the great basis of profits—are not only practiced every day, but are recognized as the very life of trade, and without them it may be said that commerce, as known amongst us, would be at an end. To buy merchandise on its way to market, to buy provisions in any market and sell them again in the same market, or within four miles of the place, or to buy up provisions in large quantities for the purpose of selling them again, were statutory offenses in England in the middle of the last century, and were recognized as offenses at common law long after the repeal of the statute. It is quite safe to consider that they would not now be held to be against public policy.

Contracts in total restraint of trade or of marriage against the prohibitions of statutes, to infringe a copy-right, to defraud the government or third parties, to oppress third parties, or prevent the due course of justice, or induce a violation of public duty, that tend to encourage unlawful or immoral acts, or that are founded on trading with an enemy, are all against public policy and void. And probably this is a complete enumeration of the several classes to which contracts against public policy may be reduced. Undoubtedly the courts will give no countenance to an action founded on a contract which comes fairly under any one of these heads. But we utterly fail to see that the contract set forth in the petition can be brought under any one of them. It is urged that it is a combination against the public to keep up prices, but it seems very clear that it is nothing of the kind. A custom of offering a *bonus* to certain organizations to hold festivals in this private park, or in that, must, one would think, have a tendency to enhance the price of admission to the entertainment. An agreement to be no longer a party to such a system of unfair competition, strikes us as being eminently in the interest of good morals, fair and free trade, and honest rivalry in business. If dry goods houses in a certain town should agree to employ no drummers for trade, or hotel keepers to employ no runners, the contract would be much of the same character, and we can see nothing illegal about it.

B. CALLAGHAN of the well known law publishing house of Callaghan & Co., has been appointed collector for the Town of South Chicago.

CHICAGO LEGAL NEWS.

Lex vincit.

MYRA BRADWELL, Editor.

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We call attention to the following opinions, reported at length in this issue:

Tax on Ship Owner for Right to Land Passengers — Regulation of Commerce — Statutes of New York and Louisiana Unconstitutional and Void. — The opinion of the Supreme Court of the United States by Miller, J., holding, that the statutes of New York and Louisiana, imposing a tax upon ship owners as a pre-requisite to their landing their passengers under consideration, are intended to regulate commercial matters which are not only of national but of international concern, and which are also best regulated by one uniform rule, applicable alike to all the sea ports of the United States. That these statutes are, therefore, void, because legislation on the subjects which they cover is confided exclusively to congress by the clause of the constitution which gives to that body "the right to regulate commerce with foreign nations." That the constitutional objection to this tax on the passenger is not removed, because the penalty for failure to pay does not accrue until twenty-four hours after he is landed. The penalty is incured by the act of landing him without payment, and is, in fact, for the act of bringing him into the State. The court does not in this case, undertake to decide whether or not a State may, in the absence of all regulation by congress on the same subject, be strictly limited to defending itself against paupers, convicted criminals, and others of that class, but is of opinion that to congress rightfully and appropriately belongs the power of legislating on the whole subject. This is an unusually long opinion, but on account of its great importance and its general interest we give it entire.

What Questions can be Reviewed in the Federal Supreme Court.—The opinion of the Supreme court of the United States, by Miller, J., holding that where a right is set up under an act of Congress in a State court, any matter of law found in the record decided by the highest court of a State, bearing on the right so set up under the act of Congress, can be re-examined in the Federal Supreme court. The court construes the grant under which the defendant claims the land, also the grant under which the plaintiff claims the land.

The Statute of California Relating to the Landing of Passengers Unconstitutional.— The opinion of the Supreme court of the United States by Miller, J., holding that the statutes of California, which requires the master or owner of a vessel to give a bond before he is permitted to land certain passengers for the future protection of the State against the support of such passengers, or to pay such sum as the commissioner of immigration chooses to exact, is unconstitutional, and the powers which the commissioner is authorized to exercise under this statute, are such as to bring the United States into conflict with foreign nations, and which can only belong to the Federal government; that if the right of the States to pass statutes to protect themselves in regard to the criminal, the pauper, and the diseased foreignor, landing within their borders exist at all, it is limited to such laws as are absolutely necessary for that purpose, and this mere police regulation cannot extend so far as to prevent or obstruct other classes of persons from the right to hold personal and commercial intercourse with the people of the United States; that the statute under consideration in this respect extends far beyond the necessity in which the right is founded, if it exists at all, and invaded the right of Congress to regulate commerce with foreign nations, and is therefore void.

Stolen Bonds Payable to Bearer.— The opinion of the United States Circuit Court for the district of Louisiana, by Woods, J., holding that stolen bonds payable to bearer, with the place of payment left blank, are not negotiable commercial paper, and are not binding on the railroad company that issues them.

U. S. Collector—Extortion—Guilty Knowledge. — The charge of Judge Krekel, of the United States District Court for the western district of Missouri, in a case where an ex-deputy collector was indicted for extortion, the court dwells specially upon the guilty knowledge which the officer should have in order to warrant a conviction on the charge of extortion, and holds that by the use of the word "knowingly," something more is meant than is implied, in the legal presumption that every man must know the law. This ruling of the learned judge is in accordance with good sound reason. Congress, in using the word "knowingly," certainly meant that a person, before he could be convicted under this statute, should have done some act, or omitted to do some act, which he knew was a violation of the law.

Bastardy. — Appeal from County Court.—The opinion of the Supreme Court of Illinois, by Walker, J., in a bastardy case, as to the right of appeal from the County court, and construing the various statutes relating thereto.

Champerty.—The opinion of the Supreme Court of Missouri, by Bakewell, J., stating what is champerty as defined by the English authorities, stating that such decisions are not now applicable to Missouri, refusing to follow the opinion of the Supreme Court of Illinois in Thompson *v.* Reynolds, reported in 7 Chicago Legal News, 188, holding a champertous contract void, and the opinions of the Supreme Courts of Indiana and of Kentucky to the same effect; and holding that a contract made between attorney and client, that the attorney shall prosecute a suit for the recovery of real or personal property, the attorney to receive a portion of the property recovered, as full compensation for his services, is not void in Missouri, and that in Missouri the law places the lawyer, the doctor, the preacher and the school-master on the same footing of common right, as to the recovery of compensation. This is a very able and exhaustive opinion, but we think the rule laid down by the Supreme Court of Illinois is in accordance with the English authorities, sustained by the wisdom of ages and best calculated not to promote litigation. It is evident that the legislature of this State so regarded it, for after the opinion was published, that body, by a very large majority, refused to change the law so as to make it in this State lawful for a lawyer to take a suit on shares, as a farmer can a farm. We do not believe in this trading in lawsuits. This is an unusually interesting opinion to the profession.

NOTES TO RECENT CASES.

THE HOMESTEAD RIGHT OF A WIDOW AS AGAINST HEIRS.

The construction of the homestead law of 1873 was lately before the Circuit Court of Henry county, in a proceeding for partition, wherein the widow claims dower in all her deceased husband's real estate, and, in addition thereto, her right of homestead, and a decree was entered according to her claim, by Pleasants, Judge.

It will be remembered that all the homestead statutes previous to that of 1872, exempted the homestead to the widow only as against sales for the payment of debts. The acts of 1872 and 1873 exempts them also "from the law of descent and devise." Sections 1 and 2 of the act of 1873, and §§ 36, 37 of the dower act, also § 44 as amended by act of 1875, p. 75, were cited.

COURT OF CLAIMS—RULE OF EVIDENCE.

The Supreme Court of the United States, in the case of Moore *v.* The United States, 22 *Int. Rev. Rec.*, 106, held that the Court of Claims, in which the court tries both fact and law, cannot adopt its own rules of evidence, but must be governed by the rules of the common law, unless Congress has otherwise enacted, or some special reason demands a different rule.

MALICE PROSECUTION.

In Sax *v.* Laws et al., 1 *Cinn. Law Bulletin*, 78, the Superior Court of Cincinnati held that an action cannot be maintained for damages for the malicious institution and prosecution of a civil suit, without cause, such suit being unaccompanied by an arrest of the defendant or the seizure of his property.

SHIPPING A CORPSE, AND RETURNING THE CASKET.

The District Court of Hamilton county, in the Am. Ex. Co. *v.* Eply, 1 *Cinn. Law Bulletin*, 77, held that the consignee of goods has the right to open the package and examine its contents, to ascertain whether they were such as were ordered by him, before he was bound to accept the package; that a consignor sending a casket containing a corpse has no lien on the corpse for the price of the casket; that to give him such a lien would be against public policy.

Recent Publications.

A Practical Treatise on Criminal Law, and Procedure in Criminal Cases, before Justices of the Peace and in Courts of Record in the State of Illinois, with full Directions and Forms for every Criminal Case. By Ira M. Moore, author of "Moore's Civil Justice." Chicago: Callaghan and Company. 1876.

Always upon the appearance of a new law book the profession desire to know its size and the subjects upon which it treats, and whether it is carefully and skillfully written. The profession always admire a fine appearing book, but they after all care more for the matter it contains than they do for its appearance. This volume contains 821 pages. It is divided into five chapters, as follows: Chapter 1 treats of Crimes in General; 2, Proceedings in Criminal Cases before Justices of the Peace; 3, Proceedings in Cases which may be tried before Justices of the Peace; 4, Specific Offenses; 5, Proceedings in the Circuit Court in Criminal Cases. These chapters are again appropriately divided into sections, devoted to branches of the general subjects treated of in the chapters.

It is wrong to suppose that this is a work intended only for justices of the peace. It states the law and gives the forms in criminal matters in the State for both courts of record and justices of the peace. There are many forms in this volume that cannot be found elsewhere; and so far as we have been able to examine them they appear to be well drawn, and just the forms needed in such a work. Much labor has been expended by Mr. Moore in the preparing of this volume.

The Notes occupy about one-third of it, and contain references to the authorities cited to support the law as stated in the text. These notes will save the criminal lawyer in this State a great amount of labor in searching for authorities. That portion devoted to the indictment, and giving forms of indictment, will be exceedingly useful in practice. The indictment drawn by our old friend Carlos Haven, under which William Jackson was tried, convicted and hung, is here given in full. Various forms of pleas and affidavits for continuances will be found useful in the haste of criminal practice. The closing portion of the work is devoted to the bill of exceptions and the manner of getting a criminal case into the Supreme court for review. Mr. Moore says the object of the book is, first, to furnish sheriffs and constables a full and complete guide in criminal cases, and, secondly, to furnish to the members of the profession and to the courts a concise statement of the law now in force relating to crimes and to the procedure for their punishment. The new constitution and the revised statutes of 1874, which so seriously changed the criminal law of the State, made it absolutely necessary for a volume embracing these changes, and bringing the decisions of the courts upon criminal law down to the present time. Mr. Moore, by the honest hard work bestowed on this volume, deserves the patronage of the profession.

On Poisons in Relation to Medical Jurisprudence and Medicine. By Alfred Swaine Taylor, M.D., F.R.S., Fellow of the Royal College of Physicians, and Lecturer on Medical Jurisprudence in Guy's Hospital. *Tradidur Dies Die.* Third American from the third and thoroughly revised English edition. With 104 Illustrations. Philadelphia: Henry C. Lea. 1875. Sold by Jansen, McClurg & Co., booksellers, Chicago.

Few men have done more for medical jurisprudence than Dr. Taylor. His works are always thorough and practical. The volume before us is the third American from the third English edition of his work on poisons. The former editions are too well known to both the legal and medical professions to require any extended notice in these columns. The author says the present volume is based on the two previous editions; but that the complete revision, rendered necessary by time, has converted it into a new work; that it is offered as a manual for the use of students and practitioners in law and medicine. The author has omitted a description of those poisonous substances which have not hitherto given rise to investigations before legal tribunals. A number of illustrations have been introduced. Some chapters have been omitted, some divided and others added, to make the work keep pace with the changes in medical science and the adjudications of the courts.

SUPREME COURT OF MISSOURI.

OPINION FILED IN APRIL, 1876.

BASIL DUKE et al. *v.* ASA HARPER et al.

Appeal from the Circuit Court of St. Louis County.

CHAMPERTY—MAINTENANCE—THE LAW IN MISSOURI, ILLINOIS AND OTHER STATES.

1. MAINTENANCE.—The court states what is maintenance.
2. CHAMPERTY.—The court states what is champerty, and does not follow the decision of the Supreme Court of Illinois in Thompson *v.* Reynolds, reported in 7 CHICAGO LEGAL NEWS, 188, holding a champertous contract void; nor the opinions of the Supreme Court of Indiana and Kentucky, to the same effect.
3. A CHAMPERTOUS CONTRACT IN MISSOURI.—That a contract made between attorney and client that the attorney shall prosecute a suit for the recovery of real or personal property, the attorney to receive a portion of the property recovered, as full compensation for his services, is not void in Missouri. Here, in Missouri, the law places the lawyer, the doctor, the preacher and the schoolmaster on the same footing of common right, as to the recovery of compensation.—[ED. LEGAL NEWS.]

The court, by Judge BAKEWELL, after stating the facts in the case, proceeds as follows:

This record presents but one question for our determination—it is this: Whether a contract made between attorney and client, that the attorney shall prosecute a suit for the recovery of real or personal property, the attorney to receive a portion of the property recovered, as full compensation for his services, is void in Missouri, even though there is no agreement that the attorney shall pay costs or furnish any money toward the expenses of the suit or the proceedings instituted with a view to the recovery of the property in dispute.

If this contract is void, it is void for champerty. It seems necessary to determine, therefore, what is champerty, and if this contract comes within the definition of the offense, then to decide whether a champertous contract is void in this State.

Maintenance is an officious intermeddling in a suit that no way belongs to one by assisting either party with money, or otherwise, to prosecute or defend. It is said to be an offense against good morals, in that it keeps alive strife, and perverts the remedial powers of the law into an engine of oppression.

Coke makes champerty a subdivision of maintenance, and says it is "to maintain to have part of the land, or anything out of the land, or part of the debt, or other thing in plea or suit, and then is called *cambi partia*," (campi partitio) "or maintenance." [Co. Litt. 368 *b*.]

Hawkins follows Coke, [Hawk. P. C.] and if this definition is to be accepted as exact, there can be no question that the contract before us is champertous.

But the definition of Coke is not followed by later writers.

Champerty, says Blackstone, "is a species of maintenance, being a bargain with a plaintiff or defendant *campum partire*, if they prevail at law, whereupon the champertor is to carry on the party's suit at his own expense." This definition is adopted by Chitty [Cont. 676]. The law dictionaries, Tomlin's, Jacob's, Wharton and Bonner, all make the carrying on the suit at the expense of the champertor of the essence of the offense. And the first English statute on the subject (33 Edw.) defines champertors as those who move pleas or suits, or cause them to be moved, either by their own procurement or by others, and sue them at their proper costs to have part of the land in variance or part of the gain.

If these later definitions are accurate, the contract sued on is not champertous, and plaintiffs could maintain their suit.

Little help in arriving at an accurate definition of the offense is to be had from the decided cases, as the decisions are conflicting.

Champerty was an offense by common law and also by various statutes in the reign of Edward I., Edward III., and Henry VIII. The weight of authority would seem to be in favor of the view that the offense is complete if the contract be to receive a part of the thing to be recovered only when the contracting party is to aid the suitor by paying costs and expenses of the suit. But in view of the great authority of the definition of the offense by Coke it cannot be positively determined that a contract is clearly not champertous, merely because the attorney does not agree to pay the costs.

The question next to be determined is, whether a champertous contract be void in Missouri.

By the act of the 19th of January, 1816, the Spanish law was abolished in Missouri, and the common law of England adopted in its place. That statute provides that "The common law of England, and all statutes and acts of Parliament made prior to the 4th year of James I., and which are of a general nature, not local to that kingdom, which common law and statutes are not repugnant to, or inconsistent with, the constitution of the United States, or the statute law in force for the time being, shall be the rule of action and decision in this State, any law, custom, or usage to the contrary notwithstanding." [2 Wag., 866, § 1.]

Now there can be no question that in the fourth year of James I., champerty was a criminal offence in England, and that then, and until a very recent period, at least, a champertous contract was held, and would probably now be held, to be void in that country; but it is also true that at the same period, and even down to our own days, wager of battle and wager of law were methods of trial upon which the defendant in a suit of right, and in some other forms of action, might insist in England. It is not pretended that they were introduced into Missouri with the common law, and we must determine whether the statute just recited, makes the English law as to champerty of effect in this State.

By adopting as well the common law as such English laws as are of general nature, not local to that kingdom, the people of this State recognized and adopted, as one entire system, so far as applicable to our situation and government, a vast and comprehensive body of laws, consisting of infinite particulars applicable to a great empire, and which wisdom and prudence, both legislative and judicial, are constantly modifying and adapting to our varying circumstances.

Because champerty was a highly penal offence, both at common law and by statute, in the reign of James I., we do not think that it conclusively follows that champerty is an offence in Missouri today. The evil of buying of titles and pretended rights of persons not in possession, alleged as the mischief provided against by the laws against champerty, could hardly be considered a mischief or wrong in an unsettled country where few owners would be likely to occupy even the premises they actually had, or might readily acquire.

The generic offence of maintenance, of which champerty is a species, rests mainly on a series of statutes ending with 32 Henry VIII. It was, however, also punishable by fine and imprisonment at common law, and subjected the offender to a suit for damages.

The reasons for the ancient doctrine on the subject are admitted even now in England to have mainly ceased, and the courts treat the old learning on the subject with great disfavor. In Masters *v.* Miller, [4 T. R., 320] Butler, J., says: "It is curious, and not altogether useless, to see how the doctrine of maintenance has, from time to time, been received at Westminster hall. At one time, not only he who laid out money to assist another in his cause, but he that by his friendship or interest saved him an expense which he would otherwise be put to, was guilty of maintenance. Nay, if he officiously gave evidence, it was maintenance; so that he must have had a subpœna or suppress the truth. That such doctrine, repugnant to every honest feeling of the human heart, should soon be laid aside must be expected. Accordingly a variety of exceptions were soon made."

The rule of common law which prohibited the assignment of a cause in action was a breach of the law of maintenance. Coke expressly says so, and lays down the reasons as identical with those against champerty. [Co. Litt., 114 *a*.] But this was long ago so explained away as to remain at most only an objection to the form of action; and in this state the technical rule of the common law is utterly swept away in this regard, in a manner which manifests that liability to the principles of the law of champerty and maintenance which is so general in our sister States.

In 1798 a statute was enacted in New York against maintenance. In 1830 the revisors, in their report to the legislature, say, "It is proposed to abolish the law of maintenance and to qualify that of champerty." Accordingly the old law of maintenance was included in the general repealing act, and Chancellor Walworth speaks of the "absurd doctrines of maintenance that grew out of the necessities of a semi-barbarous age, being swept away in the general revision, having been virtually abrogated long before that time."

It was long ago held in Pennsylvania [Stoever *v.* Whitman, 6 Binney], Chief Justice Tilghman delivering the opinion of the court, in 1814, that it is no objection to a conveyance of land that the grantor is out of possession. "It may be affirmed with certainty," says that learned judge, "that the law on that subject as held there in England was never adopted. From the equality of conditions of persons in this country there was no danger of maintenance from the interference of powerful individuals."

It has been recently held in Missouri that an agreement between attorney and client that the attorney shall be paid by receiving part of the land recovered, is not void in that State [Allard *v.* Lannrende, 29 Wis.], and the court very truly says that the old common law rules as to champerty have been necessarily qualified or restricted by judicial decisions or otherwise; that agreements for a fee contingent on success are neither immoral, disreputable nor illegal; and that a contract that the attorney shall receive a certain percentage, measured on the amount recovered, which is undoubtedly good, cannot be on principle distinguished from an agreement to receive a percentage from the amount recovered itself, which has been held to be champertous and void. The court holds, however, that, under the authorities, the contract before it would have been bad, had the attorneys agreed to pay the expense of the action.

In Georgia it is held that 32 Hen., 8-9, is not law in that State. [Cain *v.* Monroe, 23 Geo].

In California it is held that champerty is not an offence; and champerty will not avail a contract. [Matthenson *v.* Fitch., 22 Cal]. This decision has been recently affirmed.

In Massachusetts the old doctrine is adhered to, but not with favor. [5 Pick., 548].

In New Hampshire and Iowa [5 N. H. 181; 3 Iowa, 482,] champerty does not avail a contract. The offence is unknown.

In Connecticut it is that the reasons which made a law against champerty and maintenance salutary or necessary in England do not exist here, certainly not to the same extent. [Richardson *v.* Rowland, 40 Conn., 1873].

Vermont, Delaware and Tennessee discard the rule. [28 Vermont, Danforth *v.* Streeter; Bayard *v.* McLane, 3 Harrington; Sherley *v.* Riggs, 11 Humph].

In Texas it is declared that the laws against champerty are not to be regarded as part of the common law in that State. The court says that the laws adapted to a kingdom with a strong landed aristocracy are wholly unfitted for a country where we have lands for the millions; and adds that, if a lawyer helps his client to recover lands from the possession of another and takes part of the land for his fee, it is no breach of the ethics of the professional or of the moral law. (Bentinck *v.* Franklin, 38 Texas, 1873).

In Virginia it is said that the question of champerty, or a savor of champerty, is wholly out of the way in discussing the validity of a contract. (Major *v.* Gibson, 1 Patton & Heath, 84.)

Chief Justice Parker, in giving the opinion of the court in Thurston *v.* Percival (1 Peck), says that "it sometimes is useful and convenient where one has a just demand which he is not able from poverty to enforce, that a more fortunate friend should assist him and wait for his compensation until the suit is determined, and be paid out of the fruits of it." And Mr. Justice Grier, in giving the opinion of the Supreme Court of the United States in Roberts *v.* Cook, (20 How., 467), says that the ancient English doctrines respecting champerty and maintenance have not found favor in the United States, and that the enforcement of the law here would not always, perhaps not generally, promote justice.

No such contract has yet been declared void in our State, and we see no necessity for introducing the doctrine now. The state of society amongst us does not require it. The tendency of legislation and of judicial decisions is, we think, against it. Clients may be safely left to the protection of the courts, who will relieve against extortion or unfair dealing should a proper case arise. Public policy requires no other protection. Analogies from the Roman law, which regarded compensation to the advocate as a mere *honorarium* or gratuity, or from the old common law, which regarded it in a similar light, are out of place in a practical age. According to English law, the physician can recover a fee, the surgeon can not; the attorney is legally entitled to compensation, but the barrister's services must be paid in advance, because they are a mere gratuity. With us, the laborer is worthy of his hire, and the universal practice and the rule of law places the lawyer, the doctor, the preacher and the schoolmaster on the same footing of common right as to the recovery of compensation.

The whole doctrine of maintenance and champerty is a relic of a state of things long since passed away. During the Crusades, when land-holders were absent from home, dishonest men who had iniquitously asserted claims to the lands of absent owners, frequently, on the return of the proprietor, assigned their pretended claims to some powerful neighbor, that by the weight and influence of his name the right cause might be faced down; and it was to put an end to such wrongs that the statutes against maintenance and champerty were framed in affirmance of the common law. But there is no such mischief to be apprehended in our days, and the reason of the law would seem to have ceased. Contracts illegal at common law as being contrary to public policy, are such as injuriously affect or subvert the public interest. *Ex turpi contractu actio non oritur*. But we see nothing contrary to the welfare of society and the administration of justice in upholding a contract between attorney and client that the attorney shall be paid out of the thing recovered. On the contrary, many a poor man with a just claim would find himself unable to prosecute his rights, could he make no arrangement to pay his advocate out of the proceeds of the suit. Such contracts have been of constant occurrence throughout this state, and if they are immoral or illegal, there are perhaps few attorneys in active practice amongst us who have not been habitual violators of the law.

The Supreme court of Illinois has recently decided a champertous contract void. It is true that the contract considered by the court in that case (Thompson *v.* Reynolds 7, Chicago Legal News, 188,) different from the one at bar in that it provided that all expenses of litigation should be borne by the attorneys, and it was therefore champertous according to Blackstone's definition, while the contract before us was not. But the views expressed in Illinois are irreconcilable with those upon which this opinion is based. The same may be said of the case of Scohey *v.* Ross, [13 Indiana] and of other decisions in Kentucky and elsewhere. It is because of the conflict of authority on the subject that we have gone somewhat more at length into the question than was perhaps necessary; though not more so than the importance of the principles involved seem to demand.

We are of opinion that the Circuit court erred in sustaining the demurrer to the petition of plaintiff, and the judgment of the Circuit court is reversed and the cause remanded to be proceeded with in accordance with this opinion. The other judges concur.

RIGHTS OF SETTLER UNDER DONATION ACT OF OREGON.

The following are the head notes to the opinion of DEADY, J., of the U. S. District Court of Oregon, rendered on the 27th of March, in Wythe *v.* Haskell:

A settler under the Donation Act of Oregon acquires title to his donation from the passage of the act or the date of his settlement; and the patent which issues to him upon the performance of the conditions upon which the grant was made, is only record evidence of the existence of such title, or of the facts out of which it arose.

Under said act the Surveyor General had authority to partition the donation

of a married settler, in equal parts as to quantity, between him and his wife at any point of the compass he might deem expedient; but his action in this particular, under § 1 of the act of July 4, 1836 (5 Stat. 107), was subject to the supervision of the Commissioner of the General Land Office.

When the Surveyor General issued a certificate to a settler under the Donation Act, the Commissioner of the General Land office was required to issue a patent thereon and in conformity therewith, unless he found some valid objection thereto; and if said objection was found it could not be disposed of, by issuing a patent so far contrary to the certificate, but the certificate should have been returned to the local office for correction, and the patent issued thereon.

A certificate and patent thereon, issued under said act, are parts of the same transaction or procedure and may be read together, for the purpose of correcting or explaining the patent, and where there is an absolute contradiction between them the certificate must prevail.

On July 28, 1853, the Surveyor General issued a certificate to William H. Willson and Chloe A., his wife, for donation 44, including the site of the town of Salem, assigning therein "the north ½ parallel with the south line of the claim, to Chloe A. Willson, and the south ½ to William H. Willson," upon which certificate, on February 4, 1862, a patent was issued, giving to said William H., "the south half" of said donation, and to said Chloe A., "the north half" thereof: *Held*, That the certificate and patent taken together showed that the partition line of the donation was a line running 70 degrees, 21 minutes east, and parallel with the southern boundary of the tract, and not a due east and west one.

THE TAXATION OF MORTGAGES.

If there is any one subject more than an other that is now agitating the minds of the American people it is that of taxation. How shall the people and property be taxed so as to make the burden of supporting the government—state, national and municipal—equal. We say burden, for it is a serious burden in these times, when whatever is required for the people costs three times its value, to say nothing of the corruption and dishonesty of so many of our officers, which go to increase the amount of taxation. one man is taxed four times what he is worth, and upon property he never owned, while his neighbor who is worth more is allowed to escape entirely. The revenue law of this state and the way it is administered, is driving millions of capital from our state every year, and preventing the formation of manufacturing companies which would add materially to the wealth, population and prosperity of our State. The following article upon the taxation of mortgages in the *N. Y. Independent* of this week expresses our views so well upon this subject that we give it entire:

The Supreme Court of California recently rendered an important decision in reference to the taxation of mortgages. The case before the Court was that of The People *v*, The Hibernia Savings and Loan Society. All the judges gave concurring opinions. The constitution of the state, (Article XI., Section 13), provides as follows:

"Taxation shall be equal and uniform throughout the state. All property in this state shall be taxed in proportion to its value to be ascertained as directed by law; but assessors and collectors of town, county, and state taxes, shall be elected by the qualified electors of the district, county, or town in which the property taxed for state, county, or town purposes is situated."

Judge McKinstry concludes his deliverance in the case by saying: "I am of opinion that 'credits' are not 'property' subject to taxation within the meaning of the section of the constitution above quoted." He understands by the term "property," as used in the constitution, *actual* wealth, and not mere choses in action or legal evidences of debt obligations. He says: "Supposing—what would thus be possible in theory—that the necessities of government required a tax of 100 per cent. on all values, or, what would be the result of such a tax, an appropriation of all the property in the state. It is plain that the state would receive no benefit from evidences of debt due by some of her citizens to others, and payable out of the tangible property which the state had already taken." He further says: "But if a debtor is found to be the owner of $1,000, and is assessed for that sum, and his creditor is found to be the owner of his note for $1,000, and is assessed for a like sum, and if the day after the visit of the assessor to the creditor the debtor shall pay his note, it is clear that the same value has been twice taxed, since the debtor has parted with his money, and received only that which is certainly not taxable property in his hands, and which can never afterward be assessed. When the debtor pays his debt he does not abstract or destroy any portion of the taxable property of the state. The aggregate of values remains the same."

So also Chief Justice Wallace says: "Mere credits are a false quantity in ascertaining the sum of wealth which is subject to taxation as property, and in so far as that sum is attempted to be increased by the addition of those credits, property taxation, based thereon, is not only merely fanciful, but necessarily the unconstiutional imposition of an additional tax upon a portion of the property already once taxed." He further says: "The taxation thus imposed nominally upon credits, having resulted in the double taxation of the money, the additional tax must, of course, be paid by some one. And here all human experience, as well as the settled theories of finance, concur that it is not the lender who pays, but the borrower. The borrower is the consumer. The interest which he pays to the lender is the prime cost of the delay for which he has contracted. If the government, by the imposition of additional taxes, increase the cost, the borrower, being the consumer, must pay it."

All the judges agreed in holding that, under the constitution of California, mortgages are not taxable in that State, placing their judgment on the two-fold ground that they were simply "credits," and not actual property, and that to tax them involved double taxation of the same property. If this is good law in California, then it ought to be good law in other States. Nearly all the States lay down the principle in their respective constitutions that taxation shall be equal and uniform, and that all property shall be taxed in proportion to its value, to be ascertained as directed by law; and if this principle excludes mortgage taxation in California, then it ought to have the same effect in other States, unless the California judges have erred in their decision.

Judge Cooley, in his "Treatise on the Law of Taxation" (pp. 150, 151) says: "There is also sometimes what seems to be a double taxation of the same property to two individuals, as where the purchaser of property on credit is taxed on its full value, while the seller is taxed to the same amount on the debt. How this would operate may be readily perceived by supposing the extreme case that *all* the property in a town is sold on credit; in which case, if the property is taxed to the purchasers and the debts to the sellers, it is manifest that the town taxes twice as much wealth as lies within its borders." This is a forcible illustation of what actually occurs in mortgage taxation, and, indeed, all taxation of credit claims. More property is taxed than really exists. If A builds a house which, including the lot, is valued at $5,000, and for the purpose of building it places a mortgage of $4,000 on the property, and then is taxed on $5,000, and B is also taxed on the mortgage for $4,000 lent by him to A and secured in this way, then a tax is levied on $9,000, when there is really but $5,000 worth of property. A, the borrower, and B, the lender, pay the tax in the first instance; but, ordinarily, B, in the terms of the loan, will manage to place the whole burden upon A, as the condition of making the loan to him. The borrower in the end, and not the lender, pays the tax. Mortgage taxation increases the difficulty of borrowing and imposes upon the borrower a heavier burden than he would otherwise have to bear. It is no benefit, but a positive damage, to the borrowing class.

LETTERS SENT BY POST.

It seems difficult at first sight to reconcile the decision in Taylor *v.* Jones, (34 L. T. Rep. N. S. 131) with that in Evans *v.* Nicholson (2) (32 Id., 778.) In the former case the defendant posted a letter containing an order for goods at a post office within the jurisdiction of the Lord Mayor's Court of London, addressed to, and received by, the plaintiff without the jurisdiction, and it was held by the Common Pleas Division that the letter must be taken to speak from the place where it was posted. So far, so good. But in Evans *v.* Nicholson, the converse case arose. There the defendant posted a letter containing such an admission of indebtedness as amounted to an account stated at a post office without the jurisdiction of the Lord Mayor's Court, addressed to, and received by, the plaintiff within the jurisdiction, and it was held by the Court of Common Pleas that the letter must be taken to speak from the place where it was received. We think, therefore, that we are not altogether unjustified in saying that *prima facie* that court appears in some sort impliedly to reject the proposition laid down in one of his comedies by Oliver Goldsmith, that a man's hat must either be on his head or off it, and rather to maintain with another distinguished Irishman that there are exceptions to every rule, and that as a bird may be in two places at the same time, so a letter may be taken to speak as well from the place where it is posted as from the place where it is received. The court, however, has ingeniously got rid of this seeming contradiction by endowing a letter in its course through the post with the faculty of continuous speech, from the time of posting to the time of delivery. We should have thought that the present was hardly a time for the introduction of legal fictions, but upon this occasion we are not disposed to be hypercritical, inasmuch as we are unfeignedly glad to see that by means of this judicial subtlety the jurisdiction of the Lord Mayor's Court has, in two opposed instances, been maintained by those who have sometimes been thought to be rather unduly prejudiced against it.

Irrespective of this, we find something in the more recent of the two cases mentioned above, which we take to be well worthy of notice, and we cannot refrain from repeating in connection with Taylor *v.* Jones what we have on a previous occasion alluded to in connection with Evans *v.* Nicholson, (*ante*, p. 192). Our readers may remember that we then pointed out that in that case no notice had been taken of the fact that Dunlop *v.* Higgins, (1 H. of L. Cas., 381), and its cognate cases, had been the subject of severe criticism in the British and American Telegraph Company *v.* Colson, (L. Rep. 6 Ex., 108). The same curious omission occurs in Taylor *v.* Jones, and we may, perhaps, be permitted to avail ourselves of the opportunity thus presented of continuing here the remarks previously offered by us on the subject of the effect of sending a letter by post.

In The British and American Telegraph Company *v.* Colson, the Court of Exchequer, after stating that the decision in Dunlop *v.* Higgins might be justified on the peculiar facts of that case, substantially held that where a letter is put into the post a *presumptio juris* only arises that it will reach its destination, which may be rebutted by proof to the contrary, it having been previously thought that Dunlop *v.* Higgins was an authority for maintaining that the presumption was one *juris et de jure*, and that consequently, when a letter is duly posted the contents of it will be binding on the party to whom it is addressed, notwithstanding that it may have been delayed in reaching, or have entirely failed to reach its destination. This, as it appears to us, most rational decision, has, however, failed to secure the approbation of our text-book writers: (see Addison on Contracts, 17; Chitty on Contracts, 12; Smith on Contracts, 150; Broom's Common Law, 308), who seem to think that its authority has been shaken if not destroyed by the subsequent decisions in Harris' case, (L. Rep. 7 Ch., 587), and Wall's case, (L. Rep. 15 Eq., 18) to which we shall therefore proceed, without running the risk of repetition, as in our previous observations space would not permit us to do more than barely allude to them.

Wall's case may be briefly dismissed. It was there held, that the bare unsupported statement of Wall alone was not sufficient to prove that a letter which had been posted to him had not been received by him. The decision turned on a question of evidence, and obviously contains nothing inconsistent with The British and American Telegraph Company *v.* Colson. But it will be said that Sir R. Malins in the course of his judgment expressed disapproval of that case. He certainly did so in a qualified manner, but it must be remembered that on a previous occasion in Townshend's case (L. Rep. 13 Eq., 148, 153), he had expressed approval of it, and as a matter of fact it is clear, from his language in Wall's case, (sup. 24, 25), that his change of opinion is only owing to what we conceive to be a slight misapprehension of certain *dicta* of the Lords Justices in Harris' case. He says: "When Townshend's case was before me, and the case of the British and American Telegraph Company *v.* Colson was cited, finding that the court there had decided the point that the letter was not binding unless received, I adopted that view. I thought there seemed to be considerable doubt, and I appear to have said: 'It seems to be the law, and I think not unreasonably.' But I have thought more of it since then, and my attention has been drawn to what the Lords Justices said in Harris' case, who, although they did not overrule the decision of the court of Exchequer, may be very fairly said to have thrown cold water upon it, for neither of the Lords Justices expressed any approbation of it; and although I did say in Townshend's case, 'It seems to be settled, and not unreasonably,' upon further consideration I do not think it is so reasonably settled." The only question that remains then is, May Harris' case "be very fairly said to have thrown cold water upon" The British and American Telegraph Company *v.* Colson? With great submission to the opinion of the learned Vice-Chancellor, we think not. In that case a letter of application for shares in a company was put into the post and duly received by the directors. One hundred shares were allotted, and the secretary of the company put into the post a letter addressed to the applicant, informing him of this. The letter was duly received by the applicant, but before he received it, and without waiting the due course of the post, he had dispatched a letter declining to accept any shares. This completely differs the case from the one in the Exchequer, and accordingly it was held that the contract was completed when the letter announcing the allotment was put into the post, Lord Justice James in his judgment expressly saying: "The British and American Telegraph Co. *v.* Colson established a distinction which does not apply to this case at all. The court there held that though the posting of the letter, if the letter arrives, is a complete contract, yet if from any cause the letter never arrives at all, then there is a difference." (L. Rep. 7 Ch., 592); and Lord Justice Mellish, though he declined the superfluous task of reconciling The British and American Telegraph Company *v.* Colson with Dunlop *v.* Higgins, stating that he saw no reason to disagree with the former case, "because although the contract is complete at the time when the letter accepting the offer is posted, yet it may be subject to a condition subsequent, that if the letter does not arrive in due course of post, then the parties may act on the assumption that the offer has not been accepted. That, however, is not the case before us; the letter did arrive in due time, and the question is, whether, under that state of circumstances, the parties are bound by the contract." (Ib., 597). "This," says Mr. Pollock, in his recent work on Contracts, (16), "must probably be taken as the best expression of the existing law that can be arrived at."

The result of what has been said, then, is, that putting Wall's case aside, so far from Harris' case having shaken the decision in the Exchequer, it appears rather to have confirmed and strengthened it, and that being so it would, we think, be well if that decision were more fully recognized as an authority by text-book writers, for it is very possibly owing to their strictures that the attention of the courts is not called to it upon occasions when, as in Evans *v.* Nicholson, and Taylor *v.* Jones, (see also Dickinson *v.* Dodds, 34 L. T. Rep., N. S. 19), its citation would naturally have appeared inevitable. No-

thing can be more calculated to confuse both the law student and the practitioner than to find what would doubtless strike him as a well considered and rational decision, apparently treated as a dead letter in his books and in the law reports, unless it has been clearly overruled by a later authority, which is certainly not the case with The British and American Telegraph Co. *v.* Colson.—*The London Law Times.*

LVI. NEW HAMPSHIRE REPORTS.

We are under obligations to Hon. JOHN M. SHIRLEY, official reporter, for advance sheets of the LVI. Volume of New Hampshire Reports, from which we take the following head-notes:

PROMISSORY NOTE — FRAUDULENT ALTERATION.

Gerrish v. *Glines*, p. 9.

Where a negotiable promissory note was made payable upon a condition, and the condition was written below the note on the same piece of paper—*Held*, that the notes and condition were parts of a single entire contract, and that the fraudulent removal of the condition, by tearing the paper, was such a material alteration as rendered the note void in the hands of a *bona fide* holder.

HIGHWAY—NEGLIGENCE.

Cofran v. *Sanbornton*, p. 12.

A highway being encumbered with snow, under such circumstances that the town was not in fault, a person who held the office of surveyor of the district, undertook to assist the plaintiff over the incumbrance, and, by reason of his want of ordinary care, the plaintiff's horse was injured. *Held*, that these facts did not tend to show any liability of the town.

LAYING OUT HIGHWAYS—NOTICE.

Knox v. *Epsom*, p. 14.

Persons interested in the question of the laying out of a new highway, but not entitled by statute to notice of the petition, cannot object to the sufficiency of the notice to a town entitled by law to notice.

CHANGE OF COURTS—SERVICE OF WRITS—PRACTICE.

Jenkins v. *Sherburne*. p. 17.

A writ was issued from the Supreme judicial court, dated May 25, 1874, and near that time the defendant's property was attached. Said writ was made returnable to the Supreme judicial court at the October term, 1874. By an act approved July 10, 1874, and which took effect August 18, 1874, the Supreme judicial court was abolished, and its jurisdiction and trial terms conferred upon the Circuit court. *Held*, that a summons issued from the Circuit court and returnable at the October term of said court, dated Sept. 15, 1874, and tested in the name of the Chief Justice of the Circuit Court, and seasonably served upon the defendant, was in the form prescribed by law.

PROMISSORY NOTES — FRAUD — INNOCENT HOLDERS.

Matthews v. *Crosby*, p. 21.

A made his promissory note, expressed to be for value received, whereby he promised to pay B, or bearer, forty dollars profits with interest, one year from date. As to A, the note was entirely without consideration, and was obtained from him by fraud. The plaintiff subsequently became the innocent, *bona fide* purchaser thereof before maturity. *Held*, that the instrument in the hands of the plaintiff was a valid, negotiable promissory note, and might be recovered; that the word "profits," as to the plaintiff, did not express or suggest a contingency or uncertainty, but an absolute existing fund as the consideration of the promise, and on account of which the money was to be paid; and that the word, as inserted in the note, was not such an apparent defect or infirmity as to put the plaintiff upon inquiry.

POLICE JUSTICE OF MANCHESTER—CONSTRUCTION OF STATUTES—COMPENSATION FOR SERVICES—SALARY—FEES AND COSTS—CASE OVERRULED.

Upton v. *Manchester*, p. 54.

The charter of the dity of Manchester provided that all costs in criminal proceedings, which were not paid to the judge of the police court by respondents, should be made up, taxed, "paid and satisfied in like manner as provided by law in cases of justices of the peace." The effect of this was, to allow the judge of the police court to recover of the city, and to retain to his own use, those costs, in addition to his annual salary. Gen. Stats., ch. 250, sec. 13. Subsequent amendatory acts prescribe the salary of said judge, which is declared to be "in full compensation for all services performed by him in behalf of said city, * * and for all fees in actions for which the city would otherwise be responsible." *Held*, the police justice is not entitled to recover of the city fees in cases prosecuted by the city, in which city officers were complainants, and in which no costs were paid by the respondents.

Manchester *v.* Potter, 30 N. H., 409, overruled.

UNITED STATES SUPREME COURT.

PROCEEDINGS OF.

Thursday, April 13, 1876.

On motion of W. R. Steele, Edward C. Kehr. of St. Louis, Mo., was admitted.

On motion of T. D. Lincoln, William C. Wilson, of LaFayette, Ind., was admitted to practice.

No. 212. Thomas Sherlock et al. v. Charles Alling, administrator, etc. The argument of this cause was contined by T. D. Lincoln for plaintiffs, and by C. A. Korubly for defendant, and concluded by T. D. Lincoln for plaintiffs.

No. 78. (assigned). Charles R. Tyng et al. v. Moses H. Grinnell. This cause was argued by Assistant Attorney-General Smith for defendant, and submitted by C. Donohue for plaintiffs.

No. 210. Edward H. Wilson and Samuel V. Niles, executors, et al., v. the Cairo and Fulton Railroad Company. This cause was submitted on printed argument by U. M. Rose for appellants.

Adjourned until Monday at 12 o'clock.

Monday, April 17.

No. 170. James B. Pace v. Rush Burgess, collector and etc. In error to the Circuit Court of the United States for the Eastern District of Virginia. Bradley, J., delivered the opinion, affirming the judgment of the Circuit Court in this cause with costs.

No. 184. John Montgomery Jr., assignee and etc., v. The Bucyrus Machine Works. In error to the Circuit Court of the United States for the Western District of Missouri. Davis, J., delivered the opinion, affirming the judgment of the Circuit Court in this cause, with costs.

THE ILLINOIS TAX CASES.

No. 701. Henry B. Miller, collector, and etc., v. Morris K. Jessup et al. No. 702. Isaac Taylor, collector, and etc., et al., v. James F. Secor and William Tracey. No. 703. Herman Leib, H. B. Miller, collector and etc., et al., v. Henry P. Kidder and Daniel O. Stone. Appeal from the Circuit Court of the United States for the Northern District of Illinois. Miller, J., delivered the opinion of the court, reversing the decree of the Circuit Court, with costs, and remanding the cause, with directions to dissolve the injunctions and dismissed the bill.

The court holds that the theory of the system of railroad taxation, established by the act of the State of Illinois in 1872, the operations of which the court below enjoined, is manifestly to treat the railroad tracks, rolling-stock, franchise and capital as a unit for taxation, and to distribute the assessed value of this unit according to the length of the road, in each county, city and town, bears to the whole length of the road, and that such a system is entirely within the authority of the State to create. After an elaborate examination of the objections made to the law, the court says that the question being upon the validity of the State law as affected by the State Constitution, it is together with the question of the construction of the statute altogether within the State jurisdiction, and that the decisions of the State courts in such cases are to be accepted as the rule of decision in the Federal courts, and as the State court has already decided the same question, involving the same consideration urged here, the judgment would be reversed for that reason, independent of any other decrees.

The cases were conducted solely by Attorney-General Edsall for the State. He has followed them and fought the railroads, and everybody else who have attempted to prevent the State from collecting its revenue, no matter how unjust such revenue laws were, believing it was his duty to enforce them.

No. 186. Robert A. Phillips v. Charles W. Payne. In Error to the Supreme Court of the District of Columbia. Swayne, J., delivered the opinion, affirming the judgment of the Supreme Court in this cause, with costs.

No. 196. Sarah C. Savage, executrix, v. The United States. Appeal from the Court of Claims. Clifford, J., delivered the opinion, affirming the judgment of the Court of Claims.

No. 151. G. DeRosset Lamar, executor and etc., v. Albert G. Browne et al., special agent and etc. In error to Circuit Court of the United States for the District of Massachusetts. Waite, C. J., delivered the opinion, affirming the judgment of the Circuit Court with costs. Dissenting, Field, J.

No. 210. E. H. Wilson and S.V. Niles, executors, and etc., et al. v. The Cairo & Fulton Railroad Co. Appeal from the Circuit Court of the United States for the Eastern District of Arkansas. Waite, C. J., announced the decision of the court, affirming the decree of the Circuit Court, with costs and interests.

No. 900. Michael McStay et al. v. Jos. S. Friedman. The motion to dismiss this cause was submitted on printed arguments, by A. A. Sargent in support of the same. Leave granted plaintiffs to file brief in opposition to motion.

No. 211. Frederick Roberts et al. v. The propeller Galatea, etc. The argument of this cause was commenced by R. D. Benedict for appellants.

Adjourned until Tuesday at 12 o clock.

Tuesday, April 18.

On motion of G. L. Fort, Geo. S. Eldridge, of Ottawa, Ill. was admitted.

On motion of A. H. Jackson, E. St. Julien Cox, of St. Peter, Minn., was admitted.

No. 211. Frederick Roberts et al. v. The propeller Galatea and etc. The argument of this cause was continued by R. D. Benedict for appellants, and Wm. M. Evarts for appellee, and concluded by R. D. Benedict for appellant.

No. 195. (in place of No. 212). Jacob Magee and Henry Hall v. the Manhatten Life Ins. Co. This cause was argued by P. Phillips for plaintiffs, and by J. D. McPherson for defendants.

Adjourned until Wednesday at 12 o'clock.

THE SOUTH TOWN ELECTION.

No political excitement has ever been so great in this city as that over the fraud committed in the election of the South Town. Thousands met at the exposition building with the expressed intention of hanging those who committed the fraud. It was claimed that the vault in which the ballots were placed for safe keeping, before being counted, was entered at midnight, one of the boxes opened, a large number of tickets extracted and others substituted in their place so as to entirely change the result of the election; in fact when the votes came to be counted there was some fourteen hundred more names on the poll books than tickets in the boxes, which showed conclusively that somebody had been guilty of fraud. After the counting of the ballots and the declaring of the result, the town board, consisting of the justices of the peace, the town clerk and supervisor, fortified by the opinion of some of the best lawyers at the Chicago bar, that they had the power, called a special meeting, heard evidence of the fraud, found that there had been a failure to elect and declared the offices vacant and filled the vacancies by appointment. Justices Haines and Meech dissented from the opinion of a majority of the board, being of the opinion that the board in the case made had no power to appoint. The question of power is one that is not free from all doubt. If there was a vacancy in fact either from failure to elect, death or other cause, there could be no question that the board would have the right to fill the vacancy by appointment, but when there has been an election and the judges have counted the votes and the certificates of election have been made out and the result declared altogether, another question is presented, in such a case can the board hear evidence of the fraud and find that a vacancy exists, or must the case be first brought before the court having jurisdiction conferred upon it by statute, to try contested election cases. Suppose a proceeding was instituted by the Republicans who claim to have been elected, in a court of competent jurisdiction, and it should appear by the evidence of the man who stuffed the ballot box, and others, that they actually received a majority of all the votes cast at the election and the court should so find, what would become of the officers appointed by the town board? The officers appointed are all of them men of ability and unquestioned integrity, the only wonder is that any of them would accept a town office. It could only be done at a great sacrifice to themselves for the purpose of serving the public.

NEGOTIABILITY OF BILL OF LADING—STATUTE OF LOUISIANA.

The Supreme Court of Pa., in Henry *v.* the Philadelphia W. Co., 1 Louisiana *Law Journal*, 112, where a statute of Louisiana provided that the endorsement of a bill of lading by the holder carried the right of property in the goods specified in the bill to the transferee, so far as to give validity to any pledge, lien or transfer to the transferee, and that such bill of lading should be negotiable by endorsement in blank or specially, in the same manner and to the same extent as bills of exchange or promissory notes. A shipped certain goods, took a bill of lading, and was in actual possession of them by delivery from the factors. Held, under these circumstances, and by operation of the statute, A stood in a position to transfer the property in the goods to a *bona fide* pledgee for value, and without notice.

LAW DEFINED.—The word "law" is used in our language (says Sir Edward Creasy) in many various senses. It sometimes means a mere habit or tendency; and sometimes it merely expresses the general uniform sequences of phenomena which we observe in external nature. Dismissing these and other metaphorical usages of the term, and dealing only with the word "law" as it applies to man, to his rights and duties, we find one great line of distinction between the modes in which the term is employed. In one class of meanings, "law" comprises general doctrines of right and wrong, and of man's general duties towards his Creator and towards his neighbor; whereas in another class of meanings "law" is narrowed towards the precise sense of a definite imperative rule of conduct prescribed by a political superior, who has the power and the will to enforce by practical means the observance of such rule. "Law" in the first and ampler sense may be called "Moral Law"; in its narrower and stricter sense it is generally called "Positive Law."

THE RIGHT OF PROPERTY IN THE WEDDING RING.—At the Sheffield County court on the 30th ult., the judge (Mr. T. Ellison) gave judgment in a case which involved the question of a wife's control over a wedding ring. The wife died at her mother's house, and shortly before her death gave her her wedding ring. The husband now claimed the value of it as a set off against a claim brought against him for his wife's board and lodging. In giving judgment his honor said a wedding ring came under a class of articles which the wife had separately and independently of her husband, and she had power to keep them, but she had no power to give them away or to leave them from her husband. On the contrary the husband had power to give them away even during her life. In this case the wife had no power to give away the ring, and his judgment must be accordingly.

CHICAGO LEGAL NEWS.

SATURDAY, APRIL 29, 1876.

The Courts.

UNITED STATES SUPREME COURT

Nos. 702, 701 and 703.—OCTOBER TERM, 1875.

No. 702.—ISAAC TAYLOR, Collector of Peoria County, et al., Appellants,
v.
JAMES F. SECOR and WILLIAM TRACY.

No. 701.—HENRY B. MILLER, Collector of Cook County, Illinois, et al., Appellants,
v.
MORRIS K. JESSUP et al.

No. 703.—HERMAN LIEB, Clerk, and HENRY B. MILLER, Collector of Cook County, et al., Appellants,
v.
HENRY P. KIDDER and DANIEL O. STONE.

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

1. While this court does not lay down any absolute rule limiting the powers of a court of equity in restraining the collection of taxes, it declares that it is essential that every case be brought within some of the recognized rules of equity jurisdiction, and that neither illegality or irregularity in the proceedings, nor error or mistake in the valuation, nor the hardship or injustice of the law, provided it be constitutional, nor any grievance which can be remedied by a suit at law, either before or after the payment of the tax, will authorize an injunction against its collection.

2. This rule is founded on the principle that the levy of taxes is a legislative and not a judicial function, and the court can neither make or cause to be made a new assessment, if the one complained of be erroneous, and also in the necessity that the taxes, without which the state could not exist, should be regularly and promptly paid into its treasury.

3. *Quere:* Whether the same rigid rule against equitable relief would apply to taxes levied solely by municipal corporations for corporate purposes as that here applied to State taxes? Probably not.

4. No injunction, preliminary or final, can be granted to stay collection of taxes, until it is shown that all the taxes conceded to be due, or which the court can see ought to be paid, or which can be shown to be due by affidavits, has been paid or tendered without demanding a receipt in full.

5. While the Constitution of Illinois requires a taxation, in general, to be uniform and equal, it declares, in express terms, that a large class of persons engaged in special pursuits, among whom are persons or corporations owning franchises and privileges, may be taxed as the legislature shall determine, by a general law, *uniform as to the class upon which it operates*, and under this provision a statute is not unconstitutional which prescribes a different rule of taxation for railroads from that for individuals.

6. Nor does it violate any provision of the Constitution of the United States.

7. The capital stock, franchises, and all the real and personal property of corporations are justly liable to taxation, and a rule which ascertains the value of all this by ascertaining the cash value of the funded debt and of the shares of the capital stock as the basis of assessment, is probably as fair as any other.

8. Deducting this from the assessed value of all the tangible real and personal property which is also taxed, leaves the real value of the capital stock and franchise as subject to taxation as justly as any other mode, all modes being more or less imperfect.

9. It is neither in conflict with the Constitution of Illinois, nor inequitable, that the entire taxable property of the railroad company should be ascertained by the State Board of Equalization, and the State, county and city taxes should be collected within each municipality on this assessment, in the proportion which the length of the road within such municipality bears to the whole length of the road within the State.

10. The action of the Board of Equalization in increasing the assessed value of the property of a railroad company or an individual, above the return made to the board, does not require a notice to the party to make it valid, and the courts can not substitute their judgment as to such valuation for that of the board.

11. The Supreme Court of the State of Illinois having decided that the law complained of in these cases is valid under her Constitution, and having construed the statute, this court adopts the decision of that court on the statute as a rule to be followed in the Federal courts.

Mr. Justice MILLER delivered the opinion of the court.

The three cases whose titles stand at the head of this opinion, are all appeals from decrees of the Circuit Court for the Northern District of Illinois, enjoining the appellants from the collection of taxes assessed by the proper officers of the State of Illinois against three several railroad companies, organized under the laws of that State, and doing business in it. The plaintiffs in the first named of the above suits, are mortgagees of the Toledo, Peoria, and Warsaw Railroad Company. In the other two cases the complainants are stockholders of the respective companies whose interests they represent, namely, the Chicago and Alton Railroad Company in No. 701, and the Chicago, Burlington and Quincy Railroad Company, in No. 703.

The act of the legislature of Illinois of March 30, 1872, under which the taxes complained of were assessed, makes special provisions for the taxation of railroads and other corporations, the main feature of which is the purpose of leaving to each county, city and town, the power of assessing for taxation what is properly local in the same manner that other similar property is taxed in that municipality, and at the same time to subject to like taxation on some fair basis that which is not in its nature so clearly local, but which, by reason of its being appurtenant or incident to the railroad, should pay its share to the state, to all the counties, towns and cities, through which any part of the road runs. The theory of the system is manifestly to treat the railroad track, its rolling stock, its franchise, and its capital as a unit for taxation, and to distribute the assessed value of this unit according as the length of the road in each county, city and town, bears to the whole length of the road.

It provides, therefore, for three separate valuations:

1. Of the real estate in each county, city and town, which is not a part of the track and right of way, and of the personal property, such as tools, implements, etc., which remain permanently at that locality. These are valued by the local assessor and taxed by the local authorities in precisely the same manner that other real and personal property are assessed and taxed.

2. The railroad track, including the right of way, the grading and superstructure, and such depots, buildings, and other improvements as are on it, and all the rolling stock and other personal property not local.

The entire value of this, owned by any company in the state, is ascertained by a report made by the proper officer of the railroad company, submitted to a State Board of Equalization, which fixes this value finally, and each county, city, and town taxes, the company on so much of this assessment as the length of the track within that locality bears to the whole length of the track assessed by the board.

These two subjects of assessment are by the statute called the tangible property of the company.

It is obvious, however, that while a fair assessment under these two descriptions of property will include all the visible or tangible property of the corporation, it may or may not include all its wealth. There may be other property of a class not visible or tangible which ought to respond to taxation, and which the state has a right to subject to taxation. Thus it may occur, as in fact is claimed by one of these companies, that, being insolvent, and its earnings not being sufficient to pay anything beyond its necessary expenses for operating the road and its repairs, that this tangible property represents more than the real wealth of the company and its property. While on the other hand another one of these companies is so rich that, after paying its expenses and interest on a large amount of debt, it declares large dividends, and this interest and these dividends, when looked to in reference to what is called the tangible property, show that there is here another element of wealth which ought to pay its share of the taxes.

3. This element the State of Illinois calls the value of the franchise and capital stock of the corporation. The value of the right to use this tangible property for purposes of gain. And this constitutes the third valuation, which is likewise to be made by the board of equalization, and which, when thus ascertained, is subjected to the taxation of the state, and the counties, towns, and cities, by the same rule that the value of the roadbed is, namely, according to the length of the track in each taxing locality. The word capital stock, as here used, does not mean the shares of the stock, but the aggregate capital of the company. This is obvious from the proviso to the fourth paragraph of section three of the revenue law. As this paragraph lies at the basis of these controversies, it is here given verbatim:

"The capital stock of all companies and associations now or hereafter created under the laws of this state, shall be so valued by the State board of equalization as to ascertain and determine, respectively, the fair cash value of such capital stock, including the franchise, over and above the assessed value of the tangible property of such company or association. Said board shall adopt such rules and principles for ascertaining the fair cash value of such capital stock as to it may seem equitable and just; and such rules and principles, when so adopted, if not inconsistent with this act, shall be as binding and of the same effect as if contained in this act—subject, however, to such change, alteration, or amendment as may be found, from time to time, to be necessary, by said board: *Provided*, That in all cases where the tangible property or capital stock of any company or association is assessed under this act, the shares of capital stock of any such company or association shall not be assessed or taxed in this State. This clause shall not apply to the capital stock or shares of capital stock of banks organized under the general banking laws of this State."

That the franchise, capital stock, business, and profits of all corporations are liable to taxation in the place where they do business, and by the State which creates them, admits of no dispute at this day. "Nothing can be more certain in legal decisions," says this court in Society for Savings *v.* Coite, 6 Wall., 607, "than that the privileges and franchises of a private corporation, and all trades and avocations by which the citizens acquire a livelihood, may be taxed by a State for the support of a State government."—(State Freight Tax Case, 15 Wall., 232: State Tax on Gross Receipts, 15 Wall. 284.) But it has been a desideratum, perhaps not yet fully attained, to find a method of taxing this species of property which will be at the same time just to the owners of it, equal and fair in its relations to taxes or other property, and which will enforce the just contribution that such property should pay for the benefits which, more than property generally, it receives at the hands of government.

The tax on the deposits of savings banks, in Savings Bank *v.* Coite, was held to be of this class by the court, the tax on freight, in the Freight Tax Cases, and the tax on gross receipts, in the other cases by the State of Pennsylvania, are all attempts at arriving at the desired result in the best mode.

The statute of Illinois and the rule adopted by the board of equalization, under the power conferred by the clause we have just recited, may not be the wisest mode of doing complete justice in this difficult matter, but we confess we have on the whole seen no scheme which is better calculated to effect the purpose, so far as railroad corporations are concerned, of taxing at once all their property and of making the tax just and equal in its relation to other taxable property of the State.

The rule adopted by the board is as follows:

"*First.* The market or fair cash value of the shares of capital stock, and the market or fair cash value of the debt (excluding from such debt the indebtedness for current expenses) shall be combined or added together; and the aggregate amount so ascertained shall be taken and held to be the fair cash value of the capital stock, including the franchise, respectively, of such companies and associations.

"*Second.* From the aggregate amount ascertained as aforesaid, there shall be deducted the aggregate amount of the equalized or assessed valuation of all the tangible property, respectively, of such companies and associations, (such equalized or assessed valuation being taken, in each case, as the same may be determined by the equalization or assessment of property by this board,) and the amount remaining, in each case, if any, shall be taken and held to be the amount and fair cash value of the capital stock, including the franchise, which this board is required by law to assess, respectively, against companies and associations now or hereafter created under the laws of this State."

It may be assumed for all practical purposes, and it is perhaps absolutely true, that every railroad company in Illinois has a bonded indebtedness secured by one or more mortgages. The parties who deal in such bonds are generally keen and farsighted men, and most careful in their investments. Hence the value which these securities hold in market if one of the surest criterias, as far as it goes, of the value of the road as a security for the payment of those bonds.

These mortgages are, however, liens on the road, and, taking precedence of the shares of the stockholder, they may or may not extinguish the value of his shares. They must in any event affect that value to the exact amount of the aggregate debts. For all that goes to pay that debt and its interest diminishes *pro tanto* the dividend of the shareholder and the value of his share.

It is, therefore, obvious that when you have ascertained the current cash value of the whole funded debt, and the current cash value of the entire number of shares, you have by the action of those who above all others can best estimate it, ascertained the true value of the road, all its property, its capital stock, and its franchises, for these are all represented by the value of its bonded debt and of the shares of its capital stock.

This would of itself be, perhaps, the fairest basis of taxation for the State at large, if all railroads were solvent and paid the interest promptly on their funded debt. But this has never been the case in Illinois, and it is doubtful if this happy state of affairs is likely to prevail soon in that or any other State of the Union. If taxes were assessable alone on the value of the capital stock and franchises of the corporation, cases might be found where these were worth nothing, and such companies would pay no tax even for their real estate and personal property. And this is precisely the main argument of counsel for the Toledo, Peoria and Warsaw Railroad Company in opposition to the law and to the rule of the board of equalization. But individuals do not escape taxation on their real and personal property because they are insolvent. In several of the States many men in effect pay tax on their lots or lands, and on the mortgage which covers it and exceeds it in value, and on a large amount of personal property, while the mortgage debt exceeds in amount all that they are worth in the world. No State has ventured to establish the principle of permitting its visible, tangible property to escape taxation, relying solely on a tax imposed on the individual on the basis of his estimated wealth in excess of his debts.

The system adopted by the statute of Illinois, and the rule of the board of equalization, preserve this principle of taxing all the tangible property at its value, and taxing the capital stock and franchise at their value, if there be any after deducting the value of the tangible property. The case of Toledo, Peoria, and Warsaw Company, as we have said, is used as an illustration of the inequality which this rule works, and which counsel say is forbidden by the constitution of the State, thus rendering the tax assessed against it void. That company is insolvent and in the hands of a receiver. It is unable to pay any interest on its bonds. Its capital stock is of no value. But the board of equalization assessed the capital stock and franchise at $2,003,415, and its tangible property at $2,629,367, thus assessing a property which pays but little, if anything, beyond its running expenses, at the sum of $4,632,782.

This sounds plausible, but it is nothing more. Concede for the present that the capital stock is sunk and is of no value—concede that the funded debt of the company has at present no market value, or is unsalable, there remains what is valued or worth over $2,600,000 of real and personal property, which, like all other property of individuals or corporations, ought to pay its proportion of the public burdens. There also remains the value of the franchise, which is not destroyed by the circumstance that the road does not pay interest on its debt. Does anybody believe that this debt is of no value—that the holders of it attach no value to this franchise? Are they willing to give up the right to operate the road, to receive freights and fares, to endeavor to make it pay something more than the mere value of the personal property of the track, the depots, the grounds, the rolling stock, and other tangible property? Is it supposed by anyone that they intend or will ever sell these separately or apart from the right to use them as a railroad? Why do not the bondholders sell all these things under their mortgage at auction as a man would sell town lots and household furniture, and horses and carriages? The reason is too clear to escape observation. It is because in the case of the railroad there is attached to all

this property and goes with it a privilege, a right to use it through the whole extent of the richest counties of Illinois, in transporting persons and property, in a manner which adds immensely to its value when considered as so much iron, so much land, and so much personal property. By virtue of this privilege or franchise, this is all aggregated into a unit, well adapted to make money by its use in that way, with a chartered right to use it for that purpose.

It is this *franchise* which the legislature of Illinois intended to tax, which it had a right to tax, and in taxing it committed no injustice, if it was fairly assessed, though the corporation which holds it may be so utterly bankrupt that it must necessarily pass from it into other hands. In those hands, disembarrassed of its overweight of debt, who shall say that it is not worth $2,000,000, and who shall say that such is not the real value now of this franchise?

We shall presently consider the extent to which a court of justice can enter upon the consideration of this question: but we take occasion here to say that in the view we have taken of the matter there is no sufficient evidence in these cases to show that if the rule adopted by the board be just, that it has been unfairly applied to any of these roads, except in the single case of a mistake in the amount of the bonds of the Chicago, Burlington and Quincy Railroad Company—a mistake induced by the report of that company's officer to the State auditor.

Another objection to the system of taxation by the State is, that the rolling stock, capital stock and franchise are personal property, and that this, with all other personal property, has a local situs at the principal place of business of the corporation, and can be taxed by no other county, city or town, but the one where it is so situated.

This objection is based upon the general rule of law that personal property, as to its *situs*, follows the domicile of its owner. It may be doubted very reasonably whether such a rule can be applied to a railroad corporation, as between the different localities embraced by its line of road. But, after all, the rule is merely the law of the State which recognizes it, and when it is called into operation as to property located in one State and owned by a resident of another, it is a rule of comity in the former State rather than an absolute principle in all cases.—(Green *v.* Van Buskirk, 5 Wall., 312.) Like all other laws of a State, it is, therefore, subject to legislative repeal, modification, or limitation, and when the legislature of Illinois declared that it should not prevail in assessing personal property of railroad companies for taxation, it simply exercised an ordinary function of legislation. Whether allowing the rule to stand as to taxation of individuals, and changing it as to railroads or other corporations, it violated any rule of uniformity prescribed by the constitution of the State, we will consider when we come to the constitutional objections to the statute.

It is further objected that the railroad track, capital stock and franchise is not assessed in each county where it lies according to its value there, but according to an aggregate value of the whole, in which each county, city and town collects taxes according to the length of the track within its limits.

This, it is said, works injustice both to the counties and to the companies. To the counties and cities, by depriving them of the benefit of this value as a basis of local taxation. To the company, by subjecting its track and franchises, on the basis of this general value, to the taxation of the counties and towns, varying, as they do, in rate, without the benefit of the rule of assessment which prevails in those counties in the valuation of other and similar property. But, as we have already said, a railroad must be regarded for many, indeed for most purposes, as a unit. The track of the road is but one track from one end of it to the other, and, except in its use as one track, is of little value. In this track, as a whole, each county through which it passes has an interest much more important than it has in the limited part of it lying within its boundary. Destroy, by any means, a few miles of this track within an interior county, so as to cut off the connection between the two parts thus separated, and if it could not be repaired or replaced, its effect upon the value of the remainder of the road is out of all proportion to the mere local value of the part of it destroyed. A similar effect on the value of the interior of the road would follow the destruction of that end of the road lying in Chicago, or some other place where its largest traffic centers. It may well be doubted whether any better mode of determining the value of that portion of the track within any one county has been devised than to ascertain the value of the whole road, and apportion the value within the county by its relative length to the whole.

There are other objections urged by counsel against the equity and fairness of the Illinois mode of assessing and taxing railroad companies as a system. But we cannot notice them all. Those above commented on are the most important.

There is, however, an objection urged to the conduct of the board of equalization, resting on the action of the board in these particular cases, in which they are charged with a gross violation of the law to the prejudice of the corporations, which we will consider.

The statute requires the proper officers of the railroad companies to furnish to the State auditor a schedule of the various elements already mentioned as necessary in applying the statutory rule of valuation. It is charged that the board of equalization increased the estimates of value so reported to the auditor, without notice to the companies, and without sufficient evidence that it ought to be done, and it is strenuously urged upon us that for want of this notice the whole assessment of the property and levy of taxes is void.

It is hard to believe that such a proposition can be seriously made. If the increased valuation of property by the board without notice is void as to the railroad companies, it must be equally void as to every other owner of property in the State, when the value assessed upon it by the local assessor has been increased by the board of equalization. How much tax would thus be rendered void it is impossible to say. The main function of this board is to equalize these assessments over the whole State. If they find that a county has had its property assessed too high in reference to the general standard, they may reduce its valuation; if it has been fixed too low they raise it to that standard. When they raise it in any county, they necessarily raise it on the property of every individual who owns any in that county. Must each one of them have notice and a separate hearing? If a railroad company is by law entitled to such notice, surely every individual is equally entitled to it. Yet if this be so, the expense of giving notice, the delay of hearing each individual, would render the exercise of the main function of this board impossible. The very moment you come to apply to the individual the right claimed by the corporation in this case, its absurdity is apparent. Nor is there any hardship in the matter. This board has its time of sitting fixed by law. Its sessions are not secret. No obstruction exists to the appearance of any one before it to assert a right, or resent a wrong, and in the business of assessing taxes, this is all that can be reasonably asked.

As we do not know on what evidence the board acted in regard to these railroads, or whether they did not act on knowledge which they possessed themselves, and as all valuation of property is more or less matter of opinion, we see no reason why the opinion of this court, or of the Circuit court, should be better, or should be substituted for that of the board, whose opinion the law has declared to be the one to govern in the matter.

It is said that the statute of Illinois is void, because it violates the principles of uniformity, and taxes corporations in a manner different from that which governs taxation of individuals.

The sections of the constitution relied on in support of this proposition, are sections one and ten of article nine, which are as follows:

§ 1. "The general assembly shall provide such revenue as may be needful by levying a tax by valuation, so that every person and corporation shall pay a tax in proportion to the value of his, her, or its property; such value to be ascertained by some person or persons, to be elected or appointed in such manner as the general assembly shall direct, and not otherwise; but the general assembly shall have power to tax peddlers, auctioneers, brokers, hawkers, merchants, commission merchants, showmen, jugglers, innkeepers, grocery-keepers, liquor dealers, toll bridges, ferries, insurance, telegraph and express interests or business, venders of patents, and persons or corporations owing or using franchises and privileges, in such manner as it shall, from time to time, direct by general law, uniform as to the class upon which it operates."

§ 10. "The general assembly shall not impose taxes upon municipal corporations, or the inhabitants or property thereof, for corporate purposes, but shall require that all the taxable property within the limits of municipal corporations shall be taxed for the payment of debts contracted under authority of law, such taxes to be uniform in respect to persons and property within the jurisdiction of the body imposing the same."

As regards this latter section there is no claim that *the rate* of taxation levied by any municipal corporation, on the assessed value of railroad property within its limits, is greater than on other property.

Nor is it asserted that the valuation of that part of the property which the statute regards as strictly local, namely, real estate not a part of the track, and tools and implements used exclusively within the locality, has been assessed on any other principle than that which is applied to the property of individuals.

But the contention is that the rule of treating the road, its rolling stock and franchises as a unit, and assessing it as a whole, on which each municipality levies its taxes according to the length of the road within its limits, violates the principles of this section. We have already discussed this question, and are of opinion that taxes assessed by that rule on the railroad property by the municipality are uniform when the rate of taxation is the same on the assessment thus ascertained that it is on other property.

This court has expressly held in two cases, where the road of a corporation ran through different States, that a tax upon the income or franchise of the road was properly apportioned by taking the whole income or value of the franchise, and the length of the road within each State, as the basis of taxation.—(The Delaware Railroad Tax Case, 18 Wall., 208; Erie R. R. Co. *v.* Pennsylvania, 21 Wall., 492.)

As to section one, we need not inquire very closely whether the mode adopted by the statute and the rules of the board of equalization produces a valuation for railroad companies different from that of individuals, though, as we have already said, it does not appear to us to produce any inequality to the prejudice of the companies. But we need not pursue that inquiry very closely, because the latter part of the section in express terms authorizes the legislature to "tax persons and corporations owning or using franchises, in such manner as it shall from time to time direct, by general law," and the only restriction on the power, as applied to this class, is that it shall be "uniform as to the class upon which it operates."

There can be no doubt that all the classes named in this clause, including peddlers, showmen, innkeepers, ferries, express, insurance, and telegraph companies, are taken out of the general rule of uniformity prescribed by the first clause, and the only limitation as to them is that of uniformity as to the class upon which the law shall operate. That is, innkeepers may be taxed by one, ferries by another, railroads by another, provided that the rule as to innkeepers be uniform as to all innkeepers, the rule as to ferries uniform as to all ferries, and the rule as to railroad companies be uniform as to all railroad companies. As we have seen no evidence that the rule by which railroad property is taxed is not uniform in its action on all the railroad companies of Illinois, we can perceive no opposition to the constitution of the State in that rule.

But suppose it were otherwise; perfect equality and perfect uniformity of taxation as regards individuals or corporations, or the different classes of property subject to taxation is a dream unrealized. It must be admitted that the system which most nearly attains this is the best. But the most complete system which can be devised must, when we consider the immense variety of subjects which it necessarily embraces, be imperfect. And when we come to its application to the property of all the citizens, and of those who are not citizens, in all the localities of a large State like Illinois, the application being made by men whose judgments and opinions must vary as they are affected by all the circumstances brought to bear upon each individual, the result must inevitably partake largely of the imperfection of human nature and of the evidence on which human judgment is founded.—(Tappan *v.* Merchants' National Bank, 19 Wall., 504; Weber *v.* Renhard, 73 Penn. State R., 373; Commonwealth *v.* Savings Bank, 5 Allen, 247; Allen *v.* Drew, 44 Vermont, 174.)

But let us suppose that the complaints made in these cases against the taxes were well founded; that the mode adopted by the board of equalization to ascertain the value of the franchise and capital stock is not the best mode; that it produces unequal and unjust results in some cases; that the same is true of the mode of ascertaining the basis of assessment for the taxation of municipalities; that the board of equalization increased the entire assessment on each company without sufficient evidence;—in short, let us suppose that in these and many other respects the proceedings were faulty and illegal. Does it follow that in every such case a court of equity will restrain the collection of the tax by injunction, or will enjoin the collection of the whole tax when it is obvious that in justice a large part of it should be paid, and if not paid, that the complainant escapes taxation altogether?

We propose to consider these questions for a moment, because the immense weight of taxation rendered necessary by the debts of the United States, of the several States, and of the counties, cities, and towns, has resulted very naturally in a resort to every possible expedient to evade its force.

It has been repeatedly decided that neither the mere illegality of the tax complained of, nor its injustice nor irregularity, of themselves give the right to an injunction in a court of equity.—(Mooers *v.* Smedley, 6 Johns. Chy., 27; Dodd *v.* Hartford, 26 Conn., 239; Green *v.* Munford, 5 Rhode Island, 478; Messert *v.* Supervisors of Columbia, 50 Barbour, 190; Dow *v.* Chicago, 11 Wall., 108; Hannewinkle *v.* Georgetown, 15 Wall., 548.)

The government of the United States has provided, both in the customs and in the internal revenue, a complete system of corrective justice in regard to all taxes imposed by the general government, which in both branches is founded upon the idea of appeals within the executive departments. If the party aggrieved does not obtain satisfaction in this mode, there are provisions for recovering the tax after it has been paid, by suit against the collecting officer. But there is no place in this system for an application to a court of justice until after the money is paid.

That there might be no misunderstanding of the universality of this principle, it was expressly enacted, in 1867, that "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court." (Revised Statutes, § 3,224.) And though this was intended to apply alone to taxes levied by the United States, it shows the sense of Congress of the evils to be feared if courts of justice could, *in any case*, interfere with the process of collecting the taxes on which the government depends for its continued existence. It is a wise policy. It is founded in the simple philosophy derived from the experience of ages, that the payment of of taxes has to be enforced by summary and stringent means against a reluctant and often adverse sentiment, and to do this successfully other instrumentalities and other modes of procedure are necessary than those which belong to courts of justice. (See Cheatham *v.* Norvell, decided at this term; Nickoll *v.* United States, 7 Wall., 122; Dow *v.* Chicago, 11 Wall., 108.)

In this latter case this court, after commenting upon the necessary reliance of the State governments upon the prompt collection of the taxes for their support and maintenance, and the ill consequences of interference with their proceedings in that matter, says: "No court of equity will, therefore, allow its injunction to issue to restrain their

action, except where it may be necessary to protect the citizen whose property is taxed, and he has no adequate remedy by the ordinary processes of the law. It must appear that the inforcement of the tax would lead to a multiplicity of suits or produce irreparable injury, or when the property is real estate, throw a cloud upon the title of complainant before the aid of a court of equity can be invoked." So, in the case of Hannewinkle *v.* Georgetown, the court says: "It has been the settled law of this country for a great many years, that an injunction bill to restrain the collection of a tax on the sole ground of the illegality of the tax cannot be maintained. There must be an allegation of fraud, that it creates a cloud upon the title, that there is apprehension of a multiplicity of suits, or some cause presenting a case of equity jurisdiction." (15 Wall., 548.) We do not propose to lay down in these cases any absolute limitation of the powers of a court of equity in restraining the collection of illegal taxes, but we may say that in addition to illegality, hardship, or irregularity, the case must be brought within some of the recognized foundations of equitable jurisdiction, and that mere errors or mistakes in valuation, or hardship or injustice of the law, or any grievance which can be remedied by a suit at law, either before or after payment of taxes, will not justify a court of equity to interpose by injunction to stay collection of a tax. One of the reasons why a court should not thus interfere, as it would in any transaction between individuals, is that it has no power to apportion the tax or to make a new assessment, or to direct another to be made by the proper officers of the State. These officers and the manner in which they shall exercise their functions are wholly beyond the power of the court when so acting. The levy of taxes is not a judicial function. Its exercise, by the constitutions of all the States and by the theory of our English origin, is exclusively legislative. (Heine *v.* The Levee Commissioners, 19 Wall., 660.)

A court of equity is, therefore, hampered in the exercise of its jurisdiction by the necessity of enjoining the tax complained of in whole or in part, without any power of doing complete justice by making, or causing to be made, a new assessment on any principle it may decide to be the right one. In this manner it may, by enjoining the levy complained of, enable the complainant to escape wholly the tax for the period of time complained of, though it be obvious that he ought to pay a tax if imposed in the proper manner.

These reasons and the weight of authority by which they are supported must always incline the court to require a clear case for equitable relief before it will sustain an injunction against the collection of a tax, which is part of the revenue of a State. Whether the same rigid rule should be applied to taxes levied by counties, towns and cities we need not here inquire, but there is both reason and authority for holding that the control of the courts, in the exercise of power over private property by these corporations is more necessary, and is unaccompanied by many of the evils that belong to it when affecting the revenue of the State. (High on Injunctions, § 369, and cases there cited.) The assessments in the cases before us, of which complaint is made, are all made by the State board of equalization, and though the taxes are collected by the county authorities, a large part of them go to make up the revenue of the State.

In the examination which we have made of these cases, we do not find any of the matters complained of to come within the rule which we have laid down as justifying the interposition of a court of equity. There is no fraud proved, if alleged. There is no violation of the constitution, either in the statute or in its administration by the board of equalization. No property is taxed that is not legally liable to taxation, nor is the rule of uniformity prescribed by the constitution violated. If there is an excessive estimate of the value of the franchise or capital stock, or both, it is by an error of judgment in the officers to whose judgment the law confided that matter, and it does not lie with the court to substitute its own judgment for that of the tribunal expressly created for that purpose.

But there is another principle of equitable jurisprudence which forbids in these cases the interference of a court of chancery in favor of complainants. It is that universal rule which requires that he who seeks equity at the hands of the court must first do equity.

The defendants in all these cases are the clerks and treasurers of the counties—the clerk who makes out the tax list, and the treasurer who collects the taxes. These taxes are both the State and county taxes. It is clear from the statements of the bills, and from what we have already said, that there must be in every county mentioned a considerable amount of real estate and personal property coming within the character of local tangible property, and subjected to taxation on precisely the same principles, and no other, that all other personal and real estate within the county is taxed. It is equally clear that the road-bed within each county is liable to be taxed at the same rate that other property is taxed. Why have not complainants paid this tax? In reference to the latter, it is said that they resist the rule by which the value of their road-bed in each county is ascertained, and therefore resist the tax. But surely it should pay tax by some rule. If the rule adopted gives too large a valuation in some counties, it must be too small in others. What right have they to resist the tax in the latter case? And in the former, is the whole tax void because the assessment is too large? Should they pay nothing, and escape wholly, because they have been assessed too high? These questions answer themselves. Before complainants seek the aid of the court to be relieved of the excessive tax, they should pay what is due. Before they ask equitable relief, they should do that justice which is necessary to enable the court to hear them.

It is a profitable thing for corporations or individuals whose taxes are very large to obtain a preliminary injunction as to all their taxes, contest the case through several years' litigation, and when in the end it is found that but a small part of the tax should be permanently enjoined, submit to pay the balance. This is not equity. It is in direct violation of the first principles of equity jurisdiction. It is not sufficient to say in the bill that they are ready and willing to pay whatever may be found due. They must first pay what is conceded to be due, or what can be seen to be due on the face of the bill, or be shown by affidavits, whether conceded or not, before the preliminary injunction should be granted. The State is not to be thus tied up as to that of which there is no contest, by lumping it with that which is really contested. If the proper officer refuses to receive a part of the tax, it must be tendered, and tendered without the condition annexed of a receipt in full for all the taxes assessed.

We are satisfied that an observance of this principle would prevent the larger part of the suits for restraining collection of taxes which now come into the courts. We lay it down with unanimity as a rule to govern the courts of the United States in their action in such cases. (Cooly on Taxation, 537; Palmer *v.* Napoleon, 16 Michigan, 176; Hersey *v.* Supervisors, 16 Wisconsin, 185; Roseberry *v.* Huff, 27 Ind., 12; Frazier *v.* Liebom, 16 Ohio State, 614; Parmely and others *v.* The Railroad Companies, 3 Dillon, 19.)

But if for no other reason, we should reverse the decrees of the Circuit court in these cases because the same questions, involving the same considerations urged upon us here, have been decided by the Supreme court of the State of Illinois in a manner which leads to the reversal of these. The cases referred to are those of Samuel R. Porter, County Treasurer, and John W. Cook, County Clerk *v.* Rockford, Rock Island and St. Louis Railroad Company, decided at the January term, 1874, and the subsequent case of The Chicago, Burlington and Quincy R. R. Co. *v.* J. J. Cole and another, decided in June, 1875. In these two cases all the points arising in the present cases were presented to the court and decided adversely to the railroad companies. These questions all grew out of the validity and the construction of the tax law involved in the present cases, and out of the same action of the board of equalization. The validity of the statute is not seriously questioned here on the ground of any conflict with the constitution of the United States. If any such claim be set up, it is sufficient to say it is without foundation. As the whole matter, then, concerns the validity of a State law as affected by the constitution of the State, that question, and the other one of the true construction of that statute, belong to the class of questions in regard to which this court still holds, with some few exceptions, that the decisions of the State courts are to be accepted as the rule of decisions for the federal courts.

It is, nevertheless, a satisfaction that our judgment concurs with that of the State court and leads us to the same conclusions.

The decrees in all these cases are reversed. The cases are remanded to the Circuit court, with directions to dissolve the injunction granted in each case and to dismiss the bills.

It was said on the argument, and seems to be conceded, that in the case of The Chicago, Burlington and Quincy R. R. Co. an agreement existed that the mistake of the board of equalization in assessing the company on bonds of its leased roads might be corrected in this suit. No such agreement is on file here and we cannot act on it. But when the case is returned to the Circuit, of course such decree can be rendered in that regard as counsel may agree on. A similar remark applies to what the brief of the attorney-general of the State admits to be an error to the prejudice of the Chicago and Alton Company.

For plaintiff in error.

J. K. EDSALL for the State.

LYMAN TRUMBELL for Peoria county.

For The Chicago & Alton R. R. Co., C. BECKWITH and O. JACKSON.

For The C. B. & Q. R. R. Co., WIRT DEXTER and O. H. BROWNING.

For The T. P. & W. R., INGERSOLL & PUTERBAUGH.

UNITED STATES SUPREME COURT.

No. 153—OCTOBER TERM, 1875.

THE BOARD OF THE COUNTY COMMISSIONERS OF THE COUNTY OF LARAMIE, Appellants,
v.
THE BOARD OF THE COUNTY COMMISSIONERS OF THE COUNTY OF ALBANY, and the BOARD OF THE COUNTY COMMISSIONERS OF THE COUNTY OF CARBON.

Appeal from the Supreme Court of the Territory of Wyoming.

POWER OF LEGISLATURE TO DIVIDE COUNTIES, CITIES AND TOWNS—RULE AS TO DIVISION OF PROPERTY.

1. That unless the Constitution otherwise provides, the legislature has the authority to amend the charter of a municipal corporation, enlarge or diminish its powers, extend or limit its boundaries, divide the same into two or more, consolidate two or more into one, overrule its action whenever it is deemed unwise, impolitic, or unjust, and even abolish the municipality altogether, in the legislative discretion.

2. PROPERTY RIGHTS UPON DIVISION.—That rules upon the subject of the division of the property, may be prescribed by the legislature; but if they omit to make any provision in that regard, the presumption must be that they did not consider that any legislation in that particular case was necessary. Where the legislature does not prescribe any such regulations, the rule is that the old corporation owns all the public property within her new limits, and is responsible for all debts contracted by her before the act of separation was passed. Old debts, she must pay without any claim for contribution, and the new subdivision has no claim to any portion of the public property, except what falls within her boundaries and to all that the old corporation has no claim.—[ED. LEGAL NEWS.]

Mr. Justice CLIFFORD delivered the opinion of the court.

Counties, cities and towns are municipal corporations, created by the authority of the legislature, and they derive all their powers from the source of their creation, except where the constitution of the State otherwise provides. Beyond doubt they are in general made bodies politic and corporate, and are usually invested with certain subordinate legislative powers, to facilitate the due administration of their own internal affairs, and to promote the general welfare of the municipality. They have no inherent jurisdiction to make laws, or to adopt governmental regulations, nor can they exercise any other powers in that regard than such as are expressly or impliedly derived from their charters, or other statutes of the State.

Trusts of great moment, it must be admitted, are confided to such municipalities, and in turn they are required to perform many important duties, as evidenced by the terms of their respective charters. Authority to effect such objects is conferred by the legislature, but it is settled law that the legislature in granting it, does not divest itself of any power over the inhabitants of the district, which it possessed before the charter was granted. Unless the constitution otherwise provides, the legislature still has authority to amend the charter of such a corporation, enlarge or diminish its powers, extend or limit its boundaries, divide the same into two or more, consolidate two or more into one, overrule its action whenever it is deemed unwise, impolitic, or unjust, and even abolish the municipality altogether, in the legislative discretion. (Cooley on Const. (2d ed.), 192.)

Sufficient appears to show that the complainant county was first organized under the act of the third of January, 1868, passed by the legislature of the Territory of Dakota, which repealed the prior act to create and establish that county. When organized, the county was still a part of the territory, and embraced within its territorial limits all the territory now comprising the counties of Laramie, Albany and Carbon, in the Territory of Wyoming, an area of three and one-half degrees from east to west, and four degrees from north to south. Very heavy expenses, it seems, were incurred by the county during that year and prior thereto, greatly in excess of their current means, as more fully explained in the bill of complaint, which increased the indebtedness to the sum of twenty-eight thousand dollars. Other liabilities, it is alleged, were also incurred by the authorities of the county, during that period, which augmented their indebtedness to the sum of forty thousand dollars in the aggregate.

Pending these embarrassments, the charge is that the legislature of the territory passed two acts on the same day, to wit, December 16, 1868, creating the counties of Albany and Carbon, out of the western portion of the territory of the complainant county, reducing the area of that county more than two-thirds; that by the said acts, creating said new counties, fully two-thirds of the wealth and taxable property previously existing in the old county were withdrawn from its jurisdiction, and its limits were reduced to less than one-third of its former size, without any provision being made in either of said acts that the new counties, or either of them, should assume any proportion of the debt and liabilities which had been incurred for the welfare of the whole, before these acts were passed.

Payment of the outstanding debt having been made by the complainant county, the present suit was instituted in her behalf to compel the new counties to contribute their just proportion towards such indebtedness. Attempt is made to show that an equitable cause of action exists in the case, by referring to the several improvements made in that part of the territory included in the new counties, before they were incorporated, and by referring to the great value of the property withdrawn from taxation in the old county, and included within the limits of the newly created counties.

Process was served and the respondents appeared and filed separate demurrers to the bill of complaint. Hearing was had in the district court of the territory, where the suit was commenced, and the court entered a decree sustaining the demurrers and dismissing the bill of complaint. Immediate appeal was taken by the complainant to the Supreme court of the territory, where the parties having been again heard, the Supreme court entered a decree affirming the decree of the district court, and the present appeal is prosecuted by the complainant.

Two errors are assigned, as follows: (1) That the Supreme court erred in affirming the decree of the district court sustaining the demurrers of the respondents to the bill of complaint. (2) That the Supreme court erred in rendering judgment for the respondents.

Corporations of the kind are properly denominated public corporations, for the reason that they are but parts of the machinery employed in carrying on the affairs of the State, and it is well settled law that the charters under which such corporations are created may be changed, modified, or repealed, as the exigencies of the public service or the public welfare may demand. (2 Kent Com., 12th ed., 305; Angel & Ames on Corp., 10th ed., sec. 31; McKim *v.* Odom, 3 Bland, 407; St. Louis *v.* Allen, 13 Missouri, 400; The Schools *v.* Tatman, 13 Ill., 27; Yarmouth *v.* Skillings, 45 Me., 141.)

Such corporations are composed of all the inhabitants of the territory included in the political organization, and the

attribute of individuality is conferred on the entire mass of such residents, and it may be modified or taken away, at the mere will of the legislature, according to its own views of public convenience and without any necessity for the consent of those composing the body politic. (1 Greenl. Ev., 12th ed., sec. 331.)

Corporate rights and privileges are usually possessed by such corporations, and it is equally true that they are subject to legal obligations and duties, and that they are under the entire control of the legislature, from which all their powers are derived. Sixty-five years before the decree under review was rendered, a case was presented to the Supreme court of Massachusetts, sitting in Maine, which involved the same principle as that which arises in the case before the court. Learned counsel were employed on both sides, and Parsons was chief justice of the court, and delivered the opinion. First, he adverted to the rights and privileges, obligations and duties of a town, and then proceeded to say: "If a part of its territory and inhabitants are separated from it, by annexation to another or by the erection of a new corporation, the former corporation still retains all its property, powers, rights, and privileges, and remains subject to all its obligations and duties, unless some new provision should be made by the act authorizing the separation." (Windham *v.* Portland, 4 Mass., 389.)

Decisions to the same effect have been made since that time in nearly all the states of the Union, where such municipal subdivisions are known, until the reported cases have become quite too numerous for citation; nor are such citations necessary, as they are all one way, showing that the principle in this country is one of universal application. Concede its correctness, and it follows that the old town, unless the legislature otherwise provides, continues to be seized of all its lands, held in a proprietary right, and continues to be the sole owner of all its personal property, and is entitled to all its rights of action, and is bound by all its contracts, and is subject to all the duties and obligations it owed before the act was passed effecting the separation.

Suppose that is so, as applied to towns, still it is suggested that the same rule ought not to be applied to counties, but it is so obvious that the suggestion is without merit that it seems unnecessary to give it any extended examination.—(County of Richland *v.* County of Lawrence, 12 Illinois, 8.)

Public duties are required of counties as well as of towns, as a part of the machinery of the State, and in order that they may be able to perform those duties, they are vested with certain corporate powers, but their functions are wholly of a public nature, and they are at all times as much subject to the will of the legislature as incorporated towns, as appears by the best text-writers upon the subject, and the great weight of judicial authority.

Institutions of the kind, whether called counties or towns, are the auxiliaries of the State, in the important business of municipal rule, and cannot have the least pretension to sustain their privileges or their existence upon anything like a contract between them and the legislature of the State, because there is not and cannot be any reciprocity of stipulation, and their objects and duties are utter incompatible with everything of the nature of compact. Instead of that, the constant practice is to divide large counties and towns and to consolidate small ones, to meet the wishes of the residents, or to promote the public interests, as understood by those who control the action of the legislature. Opposition is sometimes manifested, but it is everywhere acknowledged that the legislature possesses the power to divide counties and towns at their pleasure, and to apportion the common property and the common burdens, in such manner as to them may seem reasonable and equitable.—(School Society *v.* School Society, 14 Conn., 469; Bridge Co. *v.* East Hartford, 16 Conn., 172; Hamshire *v.* Franklin, 16 Mass., 76; North Hemstead *v.* Hemstead, 2 Wend., 109; Montpelier *v.* East Montpelier, 29 Vt., 20; Sill *v.* Corning, 15 N. Y., 197; People *v.* Draper, 15 Id., 549; Waring *v.* Mayor, 24 Ala., 701; Mayor *v.* The State, 15 Md., 376; Ashby *v.* Wellington, 8 Pick., 524; Baptist So. *v.* Candia, 2 N. H., 20; Denton *v.* Jackson, 2 John. Ch. R., 320.)

Political subdivisions of the kind are always subject to the general laws of the State, and the Supreme court of Connecticut decided that the legislature of that State have immemorially exercised the power of dividing towns at their pleasure, and upon such division to apportion the common property and the common burdens as to them shall seem reasonable and equitable.—(Granby *v.* Thurston, 23 Conn., 419; Yarmouth *v.* Skillings, 45 Me., 142; Langworthy *v.* Dubuque, 16 Iowa, 273; Justices' Opinion, 6 Cush., 577.)

Such corporations are the mere creatures of the legislative will, and inasmuch as all their powers are derived from that source, it follows that those powers may be enlarged, modified, or diminished at any time, without their consent, or even without notice. They are but subdivisions of the State, deriving even their existence from the legislature. Their officers are nothing more than local agents of the State, and their powers may be revoked or enlarged and their acts may be set aside or confirmed at the pleasure of the paramount authority, so long as private rights are not thereby violated.—(Russel *v.* Reed, 27 Penn. St., 170.)

Civil and geographical divisions of the State into counties, townships, and cities, said Thompson, Ch. J., had its origin in the necessities and convenience of the people, but this does not withdraw these municipal divisions from the supervision and control by the State, in matters of internal government. Proof of that is found in the fact that the legislature often exercises the power to exempt property liable to taxation, and in many other instances imposes taxes on what was before exempt, or increases the antecedent burdens in that behalf. It changes county sites, and orders new roads to be opened and new bridges to be built at the expense of the counties, and no one, it is supposed, disputes the exercise of such powers by the legislature.—(Burns *v.* Clarion County, 62 Penn. St., 425; People *v.* Pinkney, 32 N. Y., 393; St. Louis *v.* Russell, 9 Missouri, 507.)

Old towns may be divided, or a new town may be formed from parts of two or more existing towns, and the legislature, if they see fit, may apportion the common property and the common burdens, even to the extent of providing that a certain portion of the property of the old town shall be transferred to the new corporation.—(Bristol *v.* New Chester, 3 N. H., 521.)

In dividing towns, the legislature may settle the terms and conditions on which the division shall be made. It may enlarge or diminish their territorial liabilities, and may extend or abridge their privileges, and may impose new liabilities. Towns, says Richardson, Ch. J., are public corporations, created for purposes purely public, empowered to hold property and invested with many functions and faculties to enable them to answer the purposes of their creation.

There must, in the nature of things, be reserved, by necessary implication in the creation of such corporations, a power to modify them in such manner as to meet the public exigencies. Alterations of the kind are often required by public convenience and necessity, and we have the authority of that learned judge for saying that it has been the constant usage, in all that section of the Union, to enlarge or curtail the power of towns, and to divide their territory, and make new towns whenever the convenience of the public requires that such a change should be made.

Half a century ago, when that decision was made, the authority of the legislature to make such a division of a municipal corporation was deemed to be without doubt, and the same court decided that the power to divide the property of a municipal corporation is necessarily incident to the power to divide its territory and to create the new corporation—(Darlington *v.* Mayor, 31 N. Y., 195. Clinton *v.* Railroad, 24 Iowa, 475. Layton *v.* New Orleans, 12 La. An., 516).

Cases doubtless arise where injustice is done by annexing part of one municipal corporation to another, or by the division of such a corporation and the creation of a new one, or by the consolidation of two or more such corporations into one of larger size. Examples illustrative of these suggestions may easily be imagined: (1) Consolidation will work injustice where one of the corporations is largely in debt and the other owes nothing, as the residents in the non-indebted municipality must necessarily submit to increased burdens in consequence of the indebtedness of their associates. (2) Like consequences follow where the change consists in annexing a part of one municipal corporation to another, in case the corporation to which those set off are annexed is greatly more in debt than the corporation from which they were set off.

Hardships may also be suffered by the corporations from which a portion of its inhabitants, with their estates, may be set off, in case the corporation is largely in debt, as the taxes of those who remain must necessarily be increased in proportion as the polls and estates within the municipality are diminished. Even greater injustice may arise in cases where the legislature finds it necessary to circumscribe the jurisdiction of a county or town, by dividing their territory and creating new counties or towns out of the territory withdrawn from their former boundaries.

Legislative acts of the kind operate differently under different circumstances. Instances may be given where the hardship is much the greatest towards the new municipality, as where the great body of the property and improvements are left within the new boundaries of the old corporation. Other cases are well known where the hardship is much greater towards the old corporation, as where the newly created subdivision embraces within its boundaries all the public buildings and most of the public improvements and the most valuable lands. Circumstances of the kind, with many others not mentioned, show beyond doubt that such changes in the subdivision of a state often present matters for adjustment involving questions of great delicacy and difficulty.

Allusion was made to this subject by the Supreme Court of New Hampshire, in the case to which reference has already been made.—(3 N. H., 534.) Speaking of the power to divide towns, the court in that case say, that the power in that regard is strictly legislative, and that the power to prescribe the rule by which a division of the property of the old town shall be divided is incident to the power to divide the territory, and is *in its nature purely legislative.* No general rule can be prescribed by which an equal and just decision in such cases can be made. Such a division, say the court in that case, must be founded upon the circumstances of each particular case, and in that view the court here entirely concurs.—(Powers *v.* Commissioners of Wood County, 8 Ohio St., 290. Shelby County *v.* Railroad, 5 Bush., 228. Olney *v.* Harvey, 50 Ill., 455.)

Regulation upon the subject may be prescribed by the legislature, but if they omit to make any provision in that regard, the presumption must be that they did not consider that any legislation in the particular case was necessary. Where the legislature does not prescribe any such regulations, the rule is that the old corporation owns all the public property within her new limits and is responsible for all debts contracted by her before the act of separation was passed. Old debts she must pay without any claim for contribution, and the new subdivision has no claim to any portion of the public property except what falls within her boundaries, and to all that the old corporation has no claim.—(North Hemstead *v.* Hemstead, 2 Wend., 134. Dillon on M. Corp., sec., 128. Wade *v.* Richmond, 18 Gratt., 583. Higginbotham *v.* Com., 25 Id., 633.)

Tested by these considerations it is clear that there is no error in the record.

Decree affirmed.

SUPREME COURT OF TENNESSEE.

NASHVILLE, MARCH 11, 1876.

JERRY STOKES *v.* THE STATE.

MURDER.—EVIDENCE.—FOOTPRINTS.—Where the State brought a pan of mud into the court and placed it immediately in front of the jury, and proved by a witness that the mud was about as soft as the mud in the branch where he saw the track, and the prisoner was then called on by the Attorney-General to put his foot in the mud; *Held*, that the bringing in of the pan of mud and the request of the Attorney-General were improper, and should not have been permitted by the court.

———. ———. WITHDRAWING ILLEGAL TESTIMONY.—The practice of permitting incompetent and illegal testimony to be placed before the jury, and afterwards, at the close of the case, withdrawing it and telling the jury not to be influenced thereby, is deprecated. Such testimony should be promptly rejected, and not permitted to go to the jury at all.—[ED. COM. AND LEGAL REPORTER.]

LEA, Special J., delivered the opinion of the court.

The prisoner was indicted for the murder of Mrs. Housen, in the Criminal court of Davidson. He was tried, convicted of murder in the second degree, and sentenced to twenty years in the penitentiary. Mrs. Housen was taken from her house at night and carried some distance and hung to what the witnesses term a "hog pole." Near the place where she was hung a track was found in the mud, in a branch, made by a bare foot. The inference from all the surrounding circumstances is, that the person who made that track was one of the parties who were engaged in the murder. And upon an examination of the record, we are satisfied that the jury, in part, based their conviction upon the belief that the track found in the mud, in the branch near where Mrs. Housen was hung, was made by the prisoner. The question, then, whether the track was made by the prisoner, was of very great importance in the investigation.

Upon the trial of this cause, the bill of exceptions shows that "the State brought in a pan of mud and placed it immediately in front of the jury, and then asked the witness if the mud in the pan was about as soft as the mud in the branch where he saw the track. Witness said it was. (To all of which defendant objected, and the same was overruled.) The attorney-general then called upon the defendant to put his foot in the mud." Upon objection the court told the defendant he could put his foot in the mud if he wanted to, but he would not force him to do so.

Subsequently another witness was asked "if he saw the pan of mud setting then before the jury. He said he did, and he was asked if he saw any track in it. He said he saw none. (To all of which defendant objected.) Here the attorney-general again called upon the defendant to put his foot in the mud."

Because of this action of the attorney-general, and the assent of the court thereto, this cause is reversed and remanded. In the presence of the jury the prisoner is asked to make evidence against himself. The court should not have permitted the pan of mud to have been brought before the jury and the defendant asked to put his foot in it. We are satisfied the jury was improperly influenced thereby. And it is no sufficient answer that the judge afterwards told the jury that the refusal to put his foot in the mud was not to be taken as evidence against him. The bringing in of the pan of mud, and the request of the attorney-general, was improper and should not have been permitted by the court. We greatly deprecate the practice into which some Circuit judges have fallen, of permitting incompetent and illegal testimony to be placed before the jury and afterwards, at the close of the case, withdrawing it and telling the jury not to be influenced thereby. Such testimony should be promptly rejected and not permitted to go to the jury at all; for jurors with minds untrained to legal investigations and discriminations are sometimes likely to be influenced thereby, although such incompetent evidence may be afterwards withdrawn. And while we will not reverse because of the admission of incompetent evidence afterwards withdrawn, unless we are satisfied the jury was influenced thereby, yet the correct practice is to reject such evidence at once, and not permit it to go to the jury.

In this case, as before stated, we are satisfied that the action of the attorney-general in bringing the pan of mud into court and requesting the defendant to put his foot in it, had an influence upon the jury prejudicial to the prisoner. Although we might be satisfied of the prisoner's guilt, yet it is our duty to see that he has a *fair* and *impartial* trial, and this he *must* have, though costs may accumulate and punishment be long delayed.

On the 15th ult., the veteran Judge Cyrus Tolman died at his residence near Kane, in the 83d year of his age. Judge Tolman settled in Greene county in 1820, and was president of the Jersey county and vice-president of the Greene county old settlers' societies at the time of his death.

CHICAGO LEGAL NEWS.

Lex vincit.

MYRA BRADWELL, Editor.

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We call attention to the following opinions, reported at length in this issue:

Restraining the Collection of a Tax.—The Rule at to the Taxation of Capital Stock.—Franchises and the Real and Personal Estate of Corporations.—The opinion of the Supreme Court of the United States, by Miller, J., as to when a court of equity will enjoin the collection of a tax, and stating the rule for the taxation of the capital stock, franchises, and the real estate and personal property of corporations. This opinion is of the greatest importance to the people of the State and the railroad companies. The decision of the Federal court below is reversed, and the rule adopted by the Supreme Court of this State, in this class of cases, followed by the Supreme Court of the United States. Judge Miller, in delivering the opinion, says, it is a satisfaction that our judgment concurs with that of the State court, and leads us to the same conclusions in this case. Attorney-General Edsall, single-handed, represented the State, and succeeded in reversing the judgment of the court below, although he was opposed by a number of the ablest attorneys in the State.

Power of Legislature to divide Counties—Property—Rights.—The opinion of the Supreme Court of the United States, by Clifford, J., as to the power of the legislature over a county, city or town, and its right to divide such corporations, and the rule governing the ownership of property and the payment of debts upon such division.

Murder—Evidence—Foot-prints.—The opinion of the Supreme Court of Tennessee by Lea, Special J., in a trial for murder, where a pan of mud was brought into court and placed in front of the jury, and it was proved by a witness that the mud was about as soft as the mud in the branch where he saw the track, and the prisoner was then called upon by the Attorney-General to put his foot in the mud. *Held*, That the bringing in of the pan of mud and the request of the Attorney-General were improper, and should not have been permitted by the court. This is unquestionably a sound opinion. No human being should ever be placed in a position in a capital case that he is compelled to make evidence against himself or else have the jury, from his refusal so to do, infer his guilt and find accordingly. This ruling is in accordance with the ruling of the Supreme Court of this State in the case of Jumpertz *v.* The People, tried for murdering a woman, reported 21 Ill., 375. Experiments were tried before the jury for the purpose of illustrating whether the deceased could have committed suicide by hanging upon a screw or hook inserted in a door; and the door so experimented upon was exhibited to the jury during the recess of the court. Chief Justice Caton, who delivered the opinion, says we cannot approve of the exhibition to the jury during the recess of the court, of the door, screws, hooks, etc., or the experiments made with them in the presence of the jury during the trial. We will not say that in no case can experiments be made in the presence of the jury for the purpose of illustrating the points in controversy. Such a proceeding, to say the least, is uncommon, and should be permitted with great caution.

County Bonds in aid of Railroads—Effect of Constitution of 1870.—The opinion of the Supreme Court of the United States by Strong, J., holding where a county was authorized by a special act of the legislature passed in 1869, to subscribe to the stock of a railroad and issue its bonds, and such county subscribed or agreed to subscribe to such stock in December, 1869, before the adoption of the Constitution of 1870, prohibiting such subscription, that whether the contract was a subscription or an agreement to subscribe, it was not annulled or impaired by the prohibitions of the new constitution; that although the new constitution abrogated the authority of the Board of Supervisors to make a subscription for railroad stock, still, contracts made under the power while it existed, were valid contracts, and the obligations assumed by the county continued after the power to enter into such contracts was withdrawn; that under the facts in this case, the county could not be permitted to set up that the subscription was not made until after the adoption of the constitution of 1870.

Validity of City Certificates—Constitutional—Limit of City Indebtedness.—The opinion of the Circuit Court of this county, by McAllister, J., holding that the corporation of the city of Chicago cannot become indebted beyond the limit named in the Constitution; that to borrow money and give an absolute undertaking to pay the same, is to "become indebted" within the meaning of the clause of the charter and of the Constitution in question, whether such loan be for one month or twenty years; and even though it might be the intention and purpose to apply the money so borrowed to pay current expenses; that the corporation having already reached the prescribed limit of indebtedness, it would be within the prohibition of the law to add to that indebtedness, by borrowing money and giving an absolute undertaking or obligation to repay it; that when an appropriation has been made for the ordinary current expenses and the tax levied to meet them, neither the incurring of such expenses, nor the anticipating of such revenues to discharge them, will constitute a debt within the meaning of the prohibition in question; and it is upon the principle that when the appropriation and tax levy are made, these means are to be regarded as being already in the treasury, and may be anticipated by orders or certificates specifically payable out of the proper fund, to meet the ordinary current expenses. This case did not involve the validity of certificates heretofore issued. This ruling of the learned judge, that when an appropriation for current expenses has been made, and a tax levied to meet them, orders drawn in anticipation of the collection of such tax and made specifically payable out of the same when collected, are not within the constitutional prohibition, and are valid, is undoubtedly correct. But this is as far as the letter and spirit of the Constitution will allow the corporation to go. It does not increase the debt of the city a single dollar, for if the tax is not collected, the city has nothing to pay. But once allow the city to consider the tax as paid when the appropriation is made, and the tax levied so that certificates may be issued payable out of the general funds of the city, instead of making them payable specifically out of the tax when collected, and the constitutional limitation is disregarded, and the debt of the city may be increased to almost any amount. If this can be done, and the tax for a given year is two millions of dollars, and the city having incurred indebtedness to the full extent of the constitutional five per centum, should issue certificates of indebtedness not payable specifically out of the tax when collected, but out of the city treasury, and only one million of dollars of the tax for that year is collected, the indebtedness of the city would be increased one million of dollars, and that clause of the Constitution which provides that "No municipal corporation shall be allowed to become indebted, in any manner, or for any purpose, to an amount, including existing indebtedness, in the aggregate exceeding five per centum on the value of the taxable property therein, to be ascertained by the last assessment for State and county taxes, previous to the incurring such indebtedness," would be violated. This provision of the Constitution is too plain to need any construction. If a city has incurred indebtedness to the full extent of the constitutional five per centum, and certificates of indebtedness are issued in excess of this amount, not made payable out of a particular fund, they are issued in defiance of this provision of the Constitution.

NOTES TO RECENT CASES.

ALTERATION OF NOTE AFTER INDORSEMENT.

The Supreme Court of Missouri *held*, in the Iron Mountain Bank *v.* Armstrong et al., 3 *Cent. Law Journal* 251, that the liability of an indorser on a note, altered after indorsement, depends on the state of the note when purchased by the holder. If a blank has been so negligently filled as to easily allow an alteration or addition, without any means of detection by a prudent person, the indorser is liable.

THE MISSOURI STOCK LAW UNCONSTITUTIONAL—DELEGATING LAW-MAKING POWER.

The Supreme Court of Missouri *held*, in Lambert *v.* Lidwell, 3 *Cent. Law J.*, 253 that the legislature cannot propose a law and submit it to the people to pass or reject it, by a general vote; that that would be legislation by the people; but a law may be passed which is complete in itself, to take effect upon the happening of an event; that the Missouri Stock-Law is in contravention of the Constitution, and void.

BANKRUPTCY—ATTACHING CREDITOR—NUMBER AND VALUE OF CREDITORS.

Held, by the United States District Court for the District of Kansas, 3 *Cent. Law J.*, *In re* Scrafford, that an attaching creditor may intervene and oppose an adjudication in bankruptcy, and may show that the requisite number and amount of creditors have not joined in the proceedings; that in determining whether the required number and amount of creditors have joined, creditors who have obtained attachments on the respondent's property should not be excluded on that account.

BANKRUPTCY—CUSTOM OF TRADE.

The English Court of Appeal, in *ex parte* Powell, 34 L. T. R. N. S., 224, held, where a custom of trade is relied on to take goods out of the order or disposition of a bankrupt, the custom must be proved to have existed so long, and to have been so extensively acted upon, that the ordinary creditors of the bankrupt in his trade may be reasonably presumed to have known it; that the Court of Bankruptcy will take judicial notice of a custom which has been frequently proved in other cases, although it is not strictly proved in the case before the court.

ASSIGNMENT IN FRAUD OF CREDITORS.

The Court of Queen's Bench, in the case of Taylor *v.* Bowers, 34 L. T. R. N. S., 263, held, where money is advanced or goods delivered for an illegal purpose, the person advancing the money or delivering the goods, may repudiate the illegal purpose at any time before it has been carried out, and recover back his money or goods. In this case, the plaintiff assigned goods to A, in order to defraud his creditors. The defendant was a party to the scheme. No settlement was made with the plaintiff's creditors. A, without plaintiff's sanction, assigned the goods to the defendant. Plaintiff demanded the goods back, and sued in trover, and the court held that he was entitled to recover.

WILL—RAILWAY SHARES AND STOCKS.

The English House of Lords, in Morrice *v.* Aylmer, 34 L. T. R. N. S., 218, held, on appeal from the Court of Chancery in England, that a bequest of railway shares will pass railway stocks.

Champerty—A Mistake.—By a mistake of our St. Louis correspondent, the opinion in the case of Harper *v.* Duke et al., involving the validity of a contract, which, under the common and statute law of England, would have been void for champerty, published last week, was reported as an opinion of the Supreme Court of the State of Missouri. The decision was made by the Court of Appeals of that State—a court established under the new Constitution of that State, having appellate jurisdiction from Circuit Courts of the counties of Lincoln, Warren, St. Charles, and St. Louis. In all cases of a civil nature, involving more than twenty-five hundred dollars, and in many others, an appeal may be taken to the Supreme Court of the State. The question passed upon by the Court of Appeals, may not, therefore, be regarded as the settled law of the State. The Supreme Court, when it comes before them, may take the same view of the law as the Supreme Court of Illinois.

The Hon. Charles F. Cady has been appointed Judge of the St. Louis County Court of Criminal Correction, to hold until January 1, 1879.

Public Protection.—Some two years ago Colonel Henderson, the Chief Commissioner of Police for the metropolis, established "fixed points" at which constables were to be found within prescribed hours. The system has been found to work admirably in the prevention of violent assaults, with respect to which it was established. The Commissioner of Police has, within the last day or two, extended the "fixed points" arrangement to some of the most dangerous places in the metropolis after nightfall. Appended to the notice is the following instruction:—"In the event of any person springing a rattle, or persistently ringing a bell in the street or in an area, the police will at once proceed to the spot and render assistance." It is well known that since the establishment by Colonel Henderson of the "fixed points" system there has been a marked decrease in the number of violent assaults on the person committed in the metropolis at night.—*Public Opinion.*

Our thanks are due to the law firm of CULLOM, SCHOLES & MATHER, of Springfield, for the following opinion:

UNITED STATES SUPREME COURT.

No. 532.—OCTOBER TERM, 1875.

In Error to the Circuit Court of the United States for the Southern District of Illinois.

THE COUNTY OF MOULTRIE, Plaintiff in Error,
v.
THE ROCKINGHAM TEN-CENTS SAVINGS BANK.

SUBSCRIPTION OF COUNTY TO R. R. STOCK —EFFECT OF CONSTITUTION OF 1870 ON AGREEMENT TO SUBSCRIBE.

1. In this case, the county, before the new Constitution, by the act of 1869, had ample power to subscribe and issue its bonds in aid of the railroad. The court finds that what the county did before the adoption of the Constitution of 1870, constituted a subscription; but if the court could not have reached this conclusion, it would have made no difference, for the action of the board was, at least, an undertaking to subscribe, and this was assented to by the railroad company, and no matter whether the contract was a subscription or an agreement to subscribe, it was not annulled or impaired by the prohibitions of the new Constitution. The delivery of the bonds was no more than a performance of the contract.

2. EFFECT OF CONSTITUTION OF 1870 ON POWER OF BOARD.—The constitutional provision abrogated the authority of the board of supervisors to make a subscription for railroad stock; but contracts made under the power, while it was in existence, were valid contracts, and the obligations assumed by them continued after the power to enter into such contracts was withdrawn. The operation of the Constitution was only prospective.

3. CANNOT SET UP THAT SUBSCRIPTION WAS MADE AFTER 1870.—After the recitals in the record, and having assured a purchaser that their subscription was made in December, 1869, when they had power to make it, it would be tolerating a fraud to permit the county to set up, when called upon for payment, that it was not made until after July 2, 1870, when their authority had expired.—[ED. LEGAL NEWS.]

Mr. Justice STRONG delivered the opinion of the court.

This case differs very materially from the case of The Town of Concord *v.* The Portsmouth Savings Bank, No. 43 of this term. In that, we held that the bonds were void because the legislative authority to issue them as a donation to the railroad company had been annulled by the Constitution of the State, before the donation was made. In the present case, the authority exercised was given to the county by the act of March 26, 1869, incorporating the railroad company. The tenth section of the act was as follows: "The board of supervisors of Moultrie county are hereby authorized to subscribe to the capital stock of said company, to an amount not exceeding eighty thousand dollars, and to issue the bonds of the county therefor, bearing interest at a rate not exceeding ten per cent. per annum, said bonds to be issued in such denominations, and to mature at such times as the board of supervisors may determine, provided that the same shall not be issued until the said road shall be opened for traffic between the city of Decatur and the town of Sullivan aforesaid." No approving popular vote was required.

It is not to be doubted that this section gave to the county complete authority to make a subscription to the capital stock of the company. The power was fettered by no conditions or limitations, except as to the amount which might be subscribed, but the payment of the subscription was directed to be postponed until the railroad should be opened. And, of course, as a greater power includes every constituent part of it, the legislative act empowered the board of supervisors to agree to subscribe preparatory to an actual subscription. The power thus granted was never revoked, unless it was by the new constitution of the State, which did not take effect prior to July 2, 1870. Whatever was done in pursuance of the power before that time, if anything was, could not be affected by the constitution, subsequently adopted. Subscriptions, or contracts to subscribe, made in pursuance of it before it was abrogated, remained binding, for a constitution can no more impair the obligation of a contract than ordinary legislation can. It must be conceded that had no subscription been made, or engagement to subscribe entered into before the new constitution took effect, none could have been made after. But the special finding of facts shows that one was made in 1869. On the 16th of December of that year, the board of supervisors met and informally resolved to subscribe $80,000.00 to the capital stock of the railroad company, and the resolution was referred to a lawyer, to put in form before being recorded on the records of the board. They were accordingly prepared from minutes furnished by the chairman of the board, and entered by the clerk upon the records, as of the date of the December meeting of the board, and duly attested. This must have been done prior to the first Tuesday in March, 1870. The record, as it appears under date of December 14, 1869, is as follows:

"And it is further ordered by the board of supervisors of Moultrie county that, under and by virtue of the authority conferred upon said board, by an act approved March 26th, A.D. 1869, entitled 'An act to incorporate the Decatur, Sullivan and Mattoon Railroad Company,' the county of Moultrie subscribed to the capital stock of the Decatur, Sulvan and Mattoon Railroad the sum of eighty thousand dollars, to aid in the construction of a railroad by said company, in pursuance of their charter.

"And be it further ordered by the board of supervisors aforesaid that, when said railroad shall be 'open for traffic,' between the city of Decatur and the town of Sullivan aforesaid, there be issued eighty thousand dollars of the bonds of said county, in denominations of not less than five hundred dollars, payable to said company, drawing interest, to be paid annually, at the rate of eight per cent. per annum; the principal to be due and payable ten years after date, or sooner at the option of the county; and that said bonds be delivered to said railroad company in full payment of the subscription of said county so made as aforesaid."

It is true there was no further order of this board to enter the resolutions of record, but it was the clerk's duty to make the entry. The substance of them had been adopted. They required no further action except to put them in form. No further action appears to have been contemplated. They remain of record still, and the board has never taken any action to correct the record. On the contrary it has been recognized by subsequent action. At the December meeting of 1872, a special committee was appointed to examine the records of subscriptions of railroad donations and report. The committee did report on the 25th day of December, 1872, that the subscription of $80,000.00 under the act of the general assembly of March 26, 1869, to aid in the construction of the Decatur, Sullivan and Mattoon Railroad, was in accordance with law. Under this action of the board, and the report of the committee, the bonds were delivered. It is impossible, therefore, to doubt that the resolutions adopted in December, 1869, as recorded, must be treated as the action of the board at that time. And, if so, they amounted to a subscription to the stock of the company, and created an obligation for the payment of the subscription in county bonds. It is true no subscription was made *on the books* of the railroad company until July, 1871, when one was made by Mr. Titus, chairman of the board, without any express authority, and then made for the purpose of enabling him to vote at an election. But a subscription on the books of the company was unnecessary, for that which amounted to a subscription had been made in December, 1869. The authorized body of a municipal corporation may bind it by an ordinance, which, in favor of private persons interested therein, may, if so intended, operate as a contract, or they may bind it by a resolution, or by vote clothe its officers with power to act for it. The former was the clear intention in this case. The board clothed no officer with power to act for it. The resolution to subscribe was its own act; its immediate subscription.—(Western Saving Fund Society *v.* The City of Philadelphia, 31 Penn. St., 174; Sacramento *v.* Kirk, 7 Cal., 419; Logansport *v* Blakemore, 17 Ind., 318.) In The Justices of Clarke County Court *v.* The Paris, Winchester, and Kentucky River Turnpike Company, 11 Ben. Monroe, 143, it was ruled that an order of the county court, by which it was said that the court subscribed, on behalf of Clarke county, for fifty shares of stock in the Turnpike company, if concurred in by a competent majority of the magistrates, was itself a subscription, and bound the county. There was no subscription on the books of the company, but the court of appeals said "we cannot, therefore, regard this order as a mere offer or pledge to subscribe the fifty shares in this particular road, but as actually taking, and in substance and legal effect subscribing for that number of shares. So in Nugent *v.* The Supervisors of Putnam County, 19 Wall., 241, it was said that to constitute a subscription by a county to stock in a railroad company, it is not necessary that there be an act of manual subscribing on the books of the company. These cases lead directly to the conclusion that the action of the board of supervisors in December, 1869, was in substance and in legal effect a subscription.

And if this conclusion could not be reached, it would make but little difference to the present case, for it could not be doubted that the action of the board was at least an undertaking to subscribe, and this was assented to or accepted by the railroad company. The resolutions were entered of record by the clerk and president of the railroad company, and the company made an appropriation of the bonds to be received in payment for the subscription, by a contract made on the 15th of April, 1870. In either aspect of the case, therefore, there was an authorized contract existing between the county and the railroad company when the new constitution came into operation. No matter whether the contract was a subscription or an agreement to subscribe, it was not annulled or impaired by the prohibitions of the constitution. The delivery of the bonds was no more than performance of the contract. For these reasons it is in vain to appeal to the decisions made in Aspinwall *v.* The County of Davies, 22 Howard, 364, and The Town of Concord *v.* The Savings Bank, decided at this term. In neither of those cases was there any contract made before the authority to make one was annulled. We do not assert that the constitutional provision did not abrogate the authority of the board of supervisors to make a subscription for railroad stock. On the contrary, we think it did. But we hold that contracts made under the power while it was in existence were valid contracts, and that the obligations assumed by them continued after the power to enter into such contracts was withdrawn. The operation of the constitution was only prospective. Indeed, it is expressly ordained in its schedule that "all rights, actions, prosecutions, claims, and contracts of the State, individuals, or bodies corporate shall continue to be as valid as if this constitution had not been adopted." It is hardly necessary to say that under the act of the general assembly, the authority to make a subscription was coupled with an authority and a duty to issue county bonds for the sum subscribed. No action of the board was needed after the subscription was made.

This disposes of the only material question in the case. There is, however, another consideration that is worthy of notice. The findings of the court are that the plaintiff below is a purchaser of the bonds for a valuable consideration, having purchased them before their maturity and without notice of any defence. They were executed by the president of the board of supervisors and the county clerk. They recite that they are issued by the county of Moultrie, "in pursuance of the subscription of the sum of eighty thousand dollars to the capital stock of the Decatur, Sullivan and Mattoon Railroad Company, made by the board of supervisors of said county of Moultrie, in December, A. D. 1869, in conformity to the provisions of an act of the General Assembly of the State of Illinois, approved Mar. 26, A. D. 1869."

Now, if it be supposed that the purchaser of bonds with such recitals was bound to look further and inquire what was the authority for the issue, where was he to look? Had he looked to the act of the general assembly of March 26, 1869, he would have found plenary authority for a stock subscription and for the issue of bonds in payment thereof. If he was bound to know that the constitutional provision terminated that authority after July 2, 1870, he knew that any subscription made before that time continued binding notwithstanding the constitution, and that bonds issued in payment of it were, therefore, lawful. If, then, he had inquired whether a subscription had been made before July 2, 1870, at the only place where inquiry should have been made, namely, at the records of the board, he would have found an order to subscribe, equivalent to a subscription made, in December, 1869, corresponding with the assertions of the recitals, and declared by them to have been a subscription. He could have made inquiry nowheres else with any prospect of learning the truth. Every step he could have taken assured him that the recitals were true. How, then, can the county be permitted to set up against a *bona fide* holder of the bonds, that the authority to make a subscription with all its legitimate consequences had expired before the subscription was made, in the face of the recitals and of the county records? Whether it had expired was a matter of fact, not of law, and it was peculiarly, if not exclusively, within the knowledge of the board of supervisors. After having assured a purchaser that their subscription was made in December, 1869, when they had power to make it, it would be tolerating a fraud to permit the county to set up, when called upon for payment, that it was not made until after July 2, 1870, when their authority expired.

It is unnecessary to say more. Some matters which we have not noticed were assigned as errors, but they were not mentioned in the argument; and, in our opinion, they exhibit no error in the court below.

The judgment is affirmed.

CULLOM, SCHOLES & MATHER, for defendants in error.

JOHN R. EDEN and HENRY & PENWELL, for plaintiff in error.

CIRCUIT COURT COOK CO., ILL.

OPINION, APRIL 27, 1876.

PRINDEVILLE, et al. *v.* COMTROLLER HAYES.

THE CONSTITUTIONAL LIMITATION OF CITY INDEBTEDNESS—THE RIGHT OF THE CITY TO ISSUE CERTIFICATES OF INDEBTEDNESS IN EXCESS OF THE LIMITATION, CONSIDERED—MAY ANTICIPATE THE COLLECTION OF A TAX BY ISSUING CERTIFICATES SPECIALLY PAYABLE OUT OF SUCH TAX.

1. CONSTITUTIONAL LIMITATION.—That the corporation can not become indebted beyond the limit named in the Constitution; that to borrow money and give an absolute undertaking to repay the same, is to become indebted within the meaning of the clause of the charter and the Constitution in question, whether such loan be for one month or twenty years; and even though it might be the intention and purpose to apply the money so borrowed, to pay current expenses, etc.

2. THE CORPORATION HAVING REACHED THE PRESCRIBED LIMIT, ETC.—That the corporation having already reached the prescribed limit of indebtedness, it would be within the prohibition of the law to add to that indebtedness, by borrowing money and giving an absolute undertaking or obligation to repay it.

3. ANTICIPATING THE REVENUE.—That when an appropriation has been made for the ordinary current expenses, and the tax levied to meet them, neither the incurring of such expenses nor the anticipating of such revenues to discharge them, will constitute a debt within the meaning of the prohibition in question. And it is upon the principle that when the appropriation and tax levy are made, these means are to be regarded as being already in the treasury, and may be anticipated by orders or certificates specially payable out of the proper fund, to meet the ordinary current expenses.

4. CERTIFICATES HERETOFORE ISSUED.—That this case does not involve the validity of certificates heretofore issued.—[ED. LEGAL NEWS.]

Opinion of the court by MCALLISTER, J.

It appears by the facts alleged in relator's petition and admitted by the respondent, that, tested by the last assessment made for State and county taxes, the city of Chicago is already indebted in an amount at least equal, if not in excess of the sum of 5 per centum of the value of taxable property therein. The amount of the claim set out in the petition, to pay which the relators counsel urge that the city has the right to borrow the money, is upward of $20,000. Counsel base the power to borrow such sum, upon the act of 1865, amendatory of the former, charter of Chicago, and a further act amendatory of the latter (passed in 1869) and upon an ordinance of the common council, approved April 3, 1875, before the city became incorporated under the general law of 1872. By the act of 1865, it is provided: "To provide for monthly or any other payment which shall have been authorized by the common council and required to be made at any time, the comptroller may, with the sanction of the mayor and finance committee, borrow the necessary money for a time not longer than the 1st of February thereafter." By the act of 1869 it was provided that "The mayor and comptroller may make temporary loans to pay special assessments against city property when due, and may make all temporary loans now provided for, falling due on the 1st day of June of each year."

The first section of the ordinance of April 30, 1875, embodies the same provision in substance as the two statutes referred to. The second section enlarges the power conferred by the acts of 1865 and 1869. It reads: "If for any cause the city has heretofore or shall hereafter

fail to collect any tax on the general tax warrant of said city, in any year, or in case the receipt of the revenues of said city shall fall short of the amounts appropriated by the common council, the mayor and comptroller shall be, and are hereby, authorized, with the sanction of the finance committee, to borrow a sufficient amount of money to meet any such deficiency, for any length of time not exceeding the close of the next municipal year, and to issue and negotiate bonds or certificates of indebtedness therefor, which said amount shall be provided for in the annual appropriation bill of the municipal year next succeeding such loan."

It is a legal proposition as well settled and supported by authority as any of which I have any knowledge, that the charter or statute by which a municipal corporation is created, constitutes organic law, and such corporation can possess or exercise only such rights and powers as are expressly granted to it, or as are necessary to carry into effect the rights and powers so granted, regard being had to the object of the grant. In Trustees *v.* McConnell, 12 Illinois, 138, the court say: "That a corporation, which is a mere creature of the law, can only exercise such powers as are conferred upon it by the act of incorporation is a well settled doctrine."

In Town of Petersburg *v.* Metzaka, 21, Ill., 205, it says: "The powers of all corporations are limited by the grants in their charters, and cannot extend beyond them."

Again in Caldwell *v.* The City of Alton, 33, Ill., 416: "It is a principle everywhere recognized that a corporation, public or private, possesses, and can exercise no other powers than those specifically conferred by the act creating it, or such as are incidental or necessary to carry into effect the purposes for which it was created." (Dillon on Municipal Corporations, section 55, and cases in note.)

The law is stated by that cautious and reliable author thus: "Of every municipal corporation, the charter or statute by which it is created is the organic act. Neither the corporation nor its officers can do any act, or make any contract, or incur any liability, not authorized thereby. All acts beyond the scope of the powers granted are void. *Much less can any power be exercised or act done which is forbidden by statute.*" (Dillon on Municipal Corporations, section 55.) And the doctrine of the text is supported by numerous cases cited in the note to that section. An instance of the rigid application by the Supreme court of this State of the doctrine of the last clause above quoted will be found in the case of the President and Trustees of Lockport *v.* Gaylord, 61 Ill., 276. There the trustees ordered the street commissioner to repair or, rather, open Seventh street. He proceeded to do so, and in the execution of the work borrowed from the plaintiff and used for the purpose several hundred dollars. Upon the report of the commissioner the trustees ordered the clerk to issue to plaintiff orders on the treasury for the amounts borrowed. That being done, suit was brought to recover the amounts, and the plaintiff recovered in the Circuit court, and the defendant appealed to the Supreme court.

The charter of the village contained this provision:

"The said trustees shall have no power to borrow money or issue any evidence of indebtedness at any time for any amount above what is already provided for by taxes levied or other certain sources of revenue, unless specially authorized so to do by a vote of the majority of the legal voters of the corporation." It appeared that no such vote had been taken, and that the amounts borrowed were above what was provided for by taxes levied or other certain sources. The opinion of the court was delivered by Mr. Justice Sheldon. The court said: "It is contented that in this transaction the trustees borrowed money; that orders issued on the treasury are an evidence of indebtedness, and that as the conditions under the foregoing provisions of the charter on which these things might be done, did not exist, there can be no recovery in the suits. We incline to regard this position as well taken. By the provision in question the legislature seem to have undertaken to protect the citizens of the village against the disastrous consequences which have elsewhere resulted from the reckless and improvident financial management of municipal officers. It is much easier to make public improvements on credits than with ready money; to throw the expense of them upon others who are to come after them, than to pay for them at the time. The credit system tempts to the making of lavish and unnecessary expenditures. The contrary one leads to the making of such only as are needful and judicious, and tends to secure economy in making them. * * * We regard the transaction in question as essentially a borrowing of money to the trustees, and that to sanction it would be to allow a plain evasion of the charter. We deem it our duty to give effect to this provision of the charter and secure to the citizens of the village the protection intended and not fritter away the provision by construction. We hold, then, that the transaction with the appellee was unauthorized and void as within the direct prohibition of the charter."

With these doctrines in view, and they are authoritative upon this court, let us now examine the material. Provisions of the charter under which the city of Chicago is organized, and constitutes its organic law.

Section 62, of the act of 1872 (R. S. 1874, p. 218), is as follows: "The city council in cities and the president, etc., in villages shall have the following powers:

"5. To borrow money on the credit of the comptroller for corporate purposes, and shall issue bonds therefor in such amounts, and form, and in such condition as it shall prescribe, *but it shall not become indebted in any manner or for any purpose* to an amount, *including existing indebtedness*, in the aggregate to exceed five per centum on the value of the taxable property therein to be ascertained by the last assessment for state and county taxes previous to the incurring such indebtedness." Now the question is this: The city already being indebted in an amount which, when tested by the last assessment of property therein for state and county taxes, is conceded to be equal to five per cent. on the value of such property so ascertained; under these circumstances, can the comptroller, with the consent of the mayor and finance committee, go into the money market and, under the acts of 1865, 1869, and the ordinance referred to, borrow the sum stated in the petition, which is upward of $20,000, upon an absolute undertaking or obligation to repay it? It was earnestly insisted by counsel in argument that by construction this prohibitory clause of the charter could be held to apply to only permanent or long loans, and it therefore left the authority to make temporary loans as provided for in the previous statutes untouched. It would seem that the matter of temporary loans did not escape the attention of the legislature, as is apparent from the provisions of the 90th section of the act of 1872, (R. S., p. 227.) Temporary loans are here authorized in two specific cases only. One, to pay for improvements, the necessity for which had arisen after the annual appropriation bill, by reason of some casualty or accident happening after such appropriation is made. The other, to pay any judgment obtained against the corporation. In each case the time of the loan is to expire by the end of the next fiscal year. Now it might be argued this provision is directly repugnant to the acts of 1865 and 1869. However this may be, and even conceding that those former statutes are not repugnant to the provisions of the 90th section just referred to, still, under the prohibition of section 62, the power conferred by such former statutes could be exercised only in case the corporation of Chicago had not become indebted up to the prescribed limit. These former statutes, if in force, must be regarded as modified to that extent by the present charter of the city. But it cannot be disputed that the constitution is the fundamental law. Section 12 of article 9 contains the following: "No county, *city*, township, school district, or other municipal corporation shall be allowed to become indebted *in any manner or for any purpose* to an amount including existing indebtedness, in the aggregate exceeding five per centum on the value of the taxable property therein, to be ascertained by the last assessment for state and county taxes previous to the incurring such indebtedness."

Now, if, when the city has already become indebted up to the prescribed limit, when ascertained as prescribed in this provision, as is admitted in this case, the going into the market and borrowing the sum in addition required to pay the claim set out in the petition and giving an absolute undertaking to repay the money borrowed would constitute a debt within the meaning of that clause, then it is clearly unquestionably prohibited by it, and the legislature was powerless to authorize it to be done by any act continuing in force, either the amendatory act or the ordinance. The ordinance was passed in April, 1875. If the legislature could not then have passed an act authorizing it, much less could it delegate the authority to a municipal corporation. It is the duty of the courts to so construe the words of the constitution as to give effect to the intent of the people in adopting it. The framers of the constitution and the people who adopted it must be understood to have employed words in their natural sense and to have understood what they meant, and the doctrine is firmly established, that when the words employed when taken in their ordinary natural signification, and the order of their grammatical arrangement given them by the framers, embody a definite meaning which is apparent upon the face of the instrument, then that meaning is the only one the courts are at liberty to say was intended to be conveyed, and there is no room for construction. That which the words declare is the meaning of the instrument, and neither courts nor legislatures have a right to add to or take away from that meaning. These rules have been fully recognized by the Supreme court of this State, and are supported by other and higher authority in this country. (Hills *v.* Chicago, 60 Ill., 86; City of Beardstown et al. *v.* City of Virginia et al., 76 Ill., 34, and cases cited.)

In People *v.* Maynard, 14 Ill., 421, the court said: "When the said constitution took effect, any provision of a former law which was inconsistent with it became as much unconstitutional as if the law had been subsequently passed. A law cannot be in force in the State, no matter when passed, which contravenes the provision of the constitution of the State."

This principle has been recognized by the Supreme court in numerous cases since the new constitution of 1870.

The language employed in the prohibitory clause of section 12, article 19, above referred to, is clear and unambiguous, leaving no question open to a construction or judicial determination but the question whether a given transaction by the corporation amounts to "becoming indebted" within the meaning of the clause. As to that question, the words used seem to exclude all distinction between a permanent and what is called a temporary loan.

The language is that "No city, etc., shall be allowed to become indebted in any manner or for any purpose to an amount," etc. Nothing could be clearer than that these words forbid all distinction between a temporary and permanent loan, if the latter in form and substance constitute a debt, and I have not the least hesitation in holding, and I do so in the light of the decisions of the Supreme court of this State, which bind my judicial action as a member of a subordinate court, that to borrow money, and give an absolute undertaking to repay the same, is to "become indebted," within the meaning of the clause of the charter and constitution in question, whether such loan be for one month or 20 years, and even though it might be the intention and purpose to apply the money so borrowed to pay current expenses, like those accruing for cleaning and repairing streets and alleys, as in this case, and out of the revenues of the present year appropriated to that purpose. Such a loan is not in any legal sense an anticipation of such revenues, because it involves the creation of a liability wholly independent of them. But authorities have been cited, and I feel and recognize their force, to the effect that, as respects the ordinary current expenses of the corporation, if there have been an appropriation and tax-levy to meet them, such expenses, when so provided for, are not to be considered as debts within the prohibition of the clause either in the charter or constitution. The transactions covering the fiscal year are to be regarded as entire transactions, and when the appropriation and tax-levy are made, the moneys provided to meet such current expenses are, in legal contemplation, to be regarded as already in the treasury and no debt accrued. This doctrine is fully supported by the following authorities: Grant *v.* City of Davenport, 36 Iowa, 301, where the constitutional provision is the same as ours; People *v.* Pachecho, 27 Cal., 175; State *v.* Medberry, 7 Ohio State R., 536; Reynolds *v.* Shreveport, 13 La, Annual R., 426. "If a municipal corporation," says Dillon, "has means in its treasury to meet its indebtedness, the issue of warrants to an amount larger than 5 per cent. of its taxable property is not a violation of the section of the State constitution which provides that no municipal corporation shall be allowed to become indebted in any manner or for any purpose to any amount exceeding 5 per cent. of the taxable property within the corporation." "In such case it would not become indebted within the meaning of the constitutional clause." (Dillon on Municipal Corporations, section 88, and cases referred to in note 2.) The principle of these cases justifies the conclusion that there is no legal objection to the anticipation of the revenues so provided for by giving warrants specifically payable out of the revenues appropriated to the purpose out of which the claim arises, or to borrow money on warrants or certificates specifically payable as above stated.

In such cases the only liability the corporation would incur would be that of an implied undertaking to exercise due diligence to collect the taxes. (White *v.* Snell, 5 Pickering R., 425 S. C. G., Id 16, and recognized in Chicago *v.* The People ex rel. 56 Ill. 333.) Such a collateral or incidental liability could in no sense be considered as a debt or the incurring it, or as becoming indebted within the meaning of the law in question.

To this extent the authorities cited by relator's counsel go. But as I understand these cases, they none of them pass upon this question—whether the borrowing money and giving an absolute undertaking to repay it, though with the actual intention of applying the appropriate revenues to that purpose, would not constitute a debt within the meaning of the prohibition in question. And so far as they sanction the anticipation of the revenues are to be regarded as already in the treasury.

At the time of the demand upon the respondent and filing the petition in this case, there had in no legal sense been any tax levied. An appropriation bill is one thing, a tax-levy quite another. The levy of the tax is made by an appropriate ordinance of the city council. So far as this case shows, it has not been done. I cannot perceive how the principle of the cases cited can apply where no tax levy has been made, unless it be upon the theory that the transactions of the fiscal year are to be regarded as an entirety, as above suggested. The doctrine that the taxes levied are for the purpose of the ordinary expenses to which they are appropriated to be regarded as already in the treasury is measurably fictitious, and I cannot see how any such presumption can arise before they are actually levied.' It is not perceived how any inconvenience can arise from this view, as the levy consists only in the passage of the proper ordinance and certifying the matter to the county clerk, which may be done at any time after the appropriation is made. On the whole case I am of opinion that the corporation having already reached the prescribed limit of indebtedness, it would be within the prohibition of the law to add to that indebtedness by borrowing money and giving an absolute undertaking of obligation to repay it. I am further of the opinion that when an appropriation has been made for the ordinary current expenses, and the tax levied to meet them, neither the incurring of such expenses nor the anticipation of such revenues to discharge them will constitute a debt within the meaning of the prohibition in question, and it is upon the principle that when the appropriation and tax levy are made, these means are to be regarded as being already in the treasury, and may be anticipated by order for certificates specifically payable out of the proper fund to meet the ordinary current expenses. This mode seems to me free from legal objection; the orders, warrants, or cer-

tificates, so payable would be available, for they place the holder in a better position than even a judgment; as in the former case the holder need but present them, in the latter he might have to apply for a mandamus to compel a levy.

It is a misunderstanding to suppose that this case involves the validity of certificates heretofore issued. No such question is involved, and its determination would be whether the power to borrow money which is effectual before constitutional limit is reached absolutely ceases as to innocent holders the moment that limit is reached, as if it never had been granted. This question is nice and difficult, and so far as I know has never been directly decided.

Courts will be likely to so decide it as that such a prohibition shall not operate as a snare to innocent holders. But in this case the only question is as to the power and legal duty to borrow money under the circumstances as disclosed. I am inclined to deny the mandamus solely on the ground that no tax levy had been made, and the writ is accordingly denied.

UNITED STATES SUPREME COURT.

PROCEEDINGS OF.

Wednesday, April 19, 1876.

On motion of Albert Ritchie, Spotswood Garland, of Baltimore, Maryland, was admitted.

No. 213. The New York Life Insurance Company v. Henrietta Hendren. This cause was argued by E. O. Hinkley for plaintiff, and by Albert Ritchie for defendant.

No. 215. Joseph Reckendorfer v. Eberhardt Faber. The argument of this cause was commenced by Edmund Wetmore for appellant.

Adjourned until Thursday at 12 o'clock.

Thursday, April 20.

No. 215. Joseph Reckendorfer v. Eberhardt Faber. The argument of this cause was continued by Edmund Wetmore for the appellant, and by John S. Washburn and George Gifford for appellee, and by Charles F. Blake for appellant.

Adjourned until Friday at 12 o'clock.

Friday, April 21.

On motion of Matt H. Carpenter, James Mason of Cleveland, Ohio, and J. W. Gordon, of Indianapolis, Ind., were admitted.

No. 379. Owen L. Rosenkrans v. the American Buttonhole, Overseaming and Sewing Machine Company. On motion of Matt H. Carpenter on behalf of counsel, dismissed per stipulation on file.

No. 215. Joseph Reckendorfer v. Eberhardt Faber. The argument of this cause was concluded by C. F. Blake for the appellant.

No. 205. (assigned), Andrew H. Hammond et al. v. The Mason and Hamlin Organ Company. This cause was argued by B. E. Valentine for appellants, and by H. B. Betts for appellee.

No. 216. James P. Carroll et al. v. Joshua and Thomas Green. The argument of this cause was commenced by W. W. Boyce, for appellants.

Adjourned until Monday at 12 o'clock.

Monday, April 24.

On motion of S. U. Pinny, N. R. Graham, of Chicago, Ill., was admitted.

On motion of J. H. Ashton, Hunn Hanson, of Philadelphia, Pa., was admitted.

No. 208. James O'Brien v. George M. Weld, et al. In Error to the Supreme Court of the State of New York. Hunt, J., delivered the opinion of the court, reversing the judgment of the Supreme Court, with costs, and remanding the cause for further proceedings, in conformity with the opinion of this court.

No. 209. Benjamin F. Butler v. Alex. A. and William Thomson. In error to the Circuit Court of the United States for the Southern District of New York. Hunt, J., delivered the opinion, reversing the judgment of the Circuit court with costs, and remanding the cause with direction to award a new trial.

No. 646. Henry M. Rector v. The United States; No. 602. John C. Hale v. The United States; No. 772. William H. Gaines and wife et al., v. The United States: No. 893. John H. Russell v. The United States. Appeals from the Court of Claims. Bradley, J., delivered the opinion, affirming the judgment of the Court of Claims.

No. 169. John Doe ex dem., S. Oaksmith et al., v. Horace S. Johnson. In error to the Supreme Court of the District of Columbia. Field, J., delivered the opinion, affirming the judgment of the Supreme Court in this cause, with costs.

No. 136. John Garsed v. William A. Beall et al. Appeal from the Circuit Court of the United States for the Southern District of Georgia. Clifford, J., delivered the opinion, affirming the decree of the Circuit Court, with costs.

No. 193. First National Bank of Charlotte v. National Exchange Bank of Baltimore. In error to the Court of Appeals of the State of Maryland. Waite, C. J., delivered the opinion, affirming the judgment of the Court of Appeals, with costs.

No. 6. Joseph A. Walker v. Charles A. Sauvinet. In error to the Supreme Court of the State of Louisiana. Waite, C. J., delivered the opinion, affirming the judgment of the Supreme Court with costs. Dissenting, Clifford and Field, JJ.

No. 958. County of Pickens v. Richmond and Danville Railroad Company; No. 959. County of Pickens v. Bank of Commerce of Richmond. In error to the Circuit Court of the United States for the Southern District of South Carolina. Waite, C. J., announced the decision, dismissing the writs of error in these causes for the want of jurisdiction.

No. 804. Angelina Amory v. Samuel B. and John Amory, executors. The motion to reinstate this cause was argued by J. M. Gilbert in support of the same, and by S. U. Pinney in opposition thereto.

No. 870. H. J. Anthony et al., commissioners, v The Bank of Commerce of Richmond. The motion to dismiss this cause was submitted on printed arguments by James Lowndes in support, and W. M. Boyce in opposition thereto. Mr. Boyce also submitted motion to amend the record in this cause.

No. 937. (Advanced.) Selucius Garfield v. The United States. This cause was submitted on printed arguments by E. C. Ingersoll, and B. Rice for appellant, and Assistant Attorney-General Smith for appellees.

No. 216. James P. Carroll, et al., v. Joshua and Thomas Green. This cause was further argued by James Lowndes for appellant, and submitted on printed arguments by D. T. Corbin for appellees.

No. 907. The United States v. George P. Ross. This cause was argued by Assistant Attorney-General Smith for appellants, and submitted on printed arguments by George Tayler for appellee.

Adjourned until Tuesday, at 12 o'clock.

Tuesday, April 25.

On motion of A. T. Akerman, Henry Jackson, of Atlanta, Ga., was admitted.

No. 908. The United States v. John B. Raymond, assignee; No. 911. the United States v. Thomas Kidd; No. 912. the United States v. James J. Cowan, administrator; No. 913. the United States v. J. B. Brabston; No. 914. the United States, appellants, v. Charlotte Spear; No. 915. the United States v. E. K. McLean; No. 916. the United States v. J. Reese Cook; No. 917. the United States v. Ellen D. Batchelor; No. 918. the United States v George Hawkins; No. 919. the United States v. James J. Cowan administrator; No. 921. the United States v. Robert G. Johnson; No. 922. The United States v. William F. Smith; No. 924. the United States v. Hannah Bodenheim, executrix. These causes were argued by Assistant Attorney-General Smith and Solicitor General Phillips for appellants, and by Joseph Casey for appellees, in cases Nos. 908, 911, 912, 913, 914. 915, 916, 918, 919, and by H. S. Foot for appellees, in Nos: 908, 921, and 922.

Adjourned until Wednesday at 12 o'clock.

Recent Publications.

A TREATISE ON THE LIMITATIONS OF ACTIONS AT LAW AND SUITS IN EQUITY AND ADMIRALTY; with an Appendix containing the American and English Statutes of Limitations. By I. K. Angell. Sixth edition; Revised and greatly enlarged, by John Wilder May, author of "Treatise on the Law of Insurance." Boston: Little, Brown & Company. 1876. Sold by Callaghan & Company, Law Booksellers, Chicago.

The first edition of Angell on Limitations, appeared just thirty years ago this month, and the work has been a leading text-book on the subject ever since, and is well known to the American and English bar. Mr. May, in his editions of Mr. Angell's work, has added very much to the value of the work; brought the law down to date, and cited the principal and leading opinions of the courts upon the subjects treated in the text. The present dress of this well-known text-book is in the best style of those celebrated printers, John Wilson & Son, of Cambridge.

THE BENCH AND BAR OF THE SOUTH AND SOUTHWEST: By Henry S. Foote. St. Louis: Soule, Thomas & Wentworth, 1876.

Mr. Foote is peculiarly fitted to write a book of reminiscences of the bench and bar of the South and Southwest. He has had a long and intimate acquaintance with the leading judges and lawyers of the South and Southwest, having been admitted to the Virginia bar in 1823, and been in public life ever since, either as a lawyer, senator, governor, or politician. Governor Foote possesses a retentive memory, a racy and vigorous style, and a command of language, which has enabled him to give the leading traits of character of the distinguished lawyers and judges of the South and Southwest, for the past two generations, so vividly that the men he describes seem to be before us, and again upon the active stage of life. We commend the practice of preserving and publishing the personal reminiscences of the leading members of the bar. This book will be of peculiar interest to the older members of the profession, as it will bring fresh to their minds the recollection of many of the friends of their youth who have long since passed away. To the young lawyer it will show the leading characteristics of the men who have led the bar during the past generation. Upon receipt of $2.25, the publishers will send this volume by mail, postage paid.

CRIME IN NEW YORK.—The catalogue of crimes shows that since January 1, 1870, there have been committed within the city limits 281 homicides; that seven of the murderers were executed, and 24 were sentenced to imprisonment for life In 1870, including the Nathan murder, there were 41 homicides; in 1871 there were 42, and of the whole lot only one, Foster, the car-hook murderer, had his neck twisted out of joint. In 1872 there were 55 murders and not one execution. In 1873 there were 53 homicides and of the list only one murderer, Nixon, the bill-poster, was executed. In 1874 there were 39 men, women and children slain by violent hands and not one case of judicial hanging. In 1875 there were 49 homicides and three executions, the three negroes who killed the pedler. Of all this whole catalogue of murderers one-third escaped without a trial of any kind

THE SUMMER VACATION.

Considerable dissatisfaction has existed among the bar of this city, for several years past, with the arrangements made by the various courts for the summer vacation, the times fixed by the different courts not being identical. The terms of the Superior and of the Circuit Court beginning respectively, on the first and third Mondays of each month, the vacations in these two courts have always begun and ended with reference to these dates. Thus, the vacation of the Circuit Court has usually extended from the third Monday in July to the third Monday in September, while that of the Superior Court has extended from the first Monday in August to the first Monday in October. The term of the Supreme Court at Ottawa beginning on the second Tuesday in September, the vacation has thus been practically limited to the month of August; at least, to all lawyers having business in the Supreme Court.

The whole subject was discussed at the last regular meeting of the Bar Association, when it was resolved that committees be appointed to wait upon the judges of the State and Federal Courts for the purpose of having the vacations made uniform in point of time, in these various courts. Messrs. Robert Hervey, J. S. Norton and G. W. Smith, were designated as the committee to confer with the Federal Judges, and W. C. Goudy, J. L. High, and W. H. King with the Judges of the State Courts. These committees were also instructed to request the judges to grant a vacation of three months, if possible; but if only two months could be obtained, that July and August be fixed as those months. A conference was held between these committees and the various judges, at the rooms of Judge Blodgett, on Saturday, the 22d inst., at 2 o'clock, P. M. There were present Judge Blodgett, representing the United States Courts, Judges Farwell, Rogers, Booth, Williams and McAllister of the Circuit Court, and Judges Jameson and Moore, of the Superior Court. After a full interchange of views by the judges and the representatives of the Bar Association, the following resolutions were unanimously adopted by the judges present:

Resolved, By the Judges of the Circuit, Superior courts, and Federal courts held in Cook county, that there shall be no compulsory call of their calendars, for trial or compulsory hearing of any matter except default and necessary business at chambers, from the first day in July, until the first Monday in September in each year.

Resolved, That during the month of September of each year, there be a call of the calendar of such courts as make up a calendar for trial; but whenever the court is satisfied that the counsel of either party in a case called for trial during that month, is actually engaged in the trial of a case in the Supreme court, or in making necessary preparations therefor, such case shall be passed until the cause of such passing shall have ceased to exist.

It will thus be seen that the bar obtained the months of July and August as the vacation months, and that they are free from compulsory attendance upon the courts in this city, while engaged in the preparation and trial of causes at the September term of the Supreme Court. The judges, however, will doubtless sit during the month of July, for the hearing of submitted cases, where both parties are ready for hearing, especially in the Chancery courts. The arrangement proposed seems to give entire satisfaction, both to judges and lawyers.

AMENDMENTS TO THE LAW — CONTRACTS UNDER SEAL.— At the meeting of the Chicago Bar Association, on April 1st, it was ordered that the following resolution, which was referred to the Committee on Amendment of the Law, be printed, and a copy sent to each member of the Association.

Resolved, That this Association respectfully recommends the enactment of the following bill by the next General Assembly of the State of Illinois:

A bill for an act relating to the execution and effect of contracts in writing.

SECTION 1. That the distinctions between contracts in writing bearing the seal of the person to be bound thereby, and contracts executed in all other respects with like formalities, are hereby abolished; that the addition of a private seal to an instrument in writing shall not affect its character in any respect; that all contracts in writing, signed by the party to be bound, or for him by his duly authorized agent or attorney, shall import a consideration; that the want or failure in whole or in part of the consideration of a contract in writing may be shown as a defense, total or partial, as the case may be, except as to negotiable paper, transferred in good faith and for a valuable consideration before maturity.

CHICAGO LEGAL NEWS.

SATURDAY, MAY 6, 1876.

The Courts.

THROUGH the kindness of JOHN I. DAVENPORT, clerk of the court, we have received the following opinion of HUNT, J., and of JOHNSON, J.:

U. S. CIRCUIT COURT, S. DISTRICT OF NEW YORK.

DION BOUCICAULT *v.* JOSHUA HART.

In Equity.

THE COPYRIGHT LAWS CONSTRUED—WHAT NECESSARY TO SECURE A COPYRIGHT—WHAT PROPERTY IN WORKS AT COMMON LAW.

1. WHO ENTITLED TO COPYRIGHT. — That no person is entitled to a copyright unless he shall file the title-page with the librarian, and within ten days from the publication thereof, deposit in the mail two copies of such copyright book.

2. FAILURE.—If he fails in either of these requirements, he can not have his copyright.

3. MUST BE PUBLISHED WITHIN A REASONABLE TIME.—That in order to secure a copyright of a book or dramatic composition, the work must be published within a reasonable time after the filing of the title-page, and two copies be delivered to the librarian.

4. RIGHTS AT COMMON LAW.—That, at common law, an author has, until publication, a property in his literary work, capable of being held and transmitted, and in the exclusive possession and enjoyment he and his assignees will be protected. That the representation of a play on the stage, is not such a publication or dedication to the public as will authorize others to print and publish it, without the author's permission; that the author has no exclusive right to multiply copies, or control the subsequent issues. This latter is the creature of the U. S. Statutes.

5. COMMON LAW RIGHT.—That the common law right of the complainant to a protection in the performance of his play, constitutes a good cause of action; but by reason of the parties being citizens of the same State, the U. S. Court has no jurisdiction to enforce the same.—ED. LEGAL NEWS.]

HUNT, J. The facts as alleged in the bill, are as follows: The complainant, Dion Boucicault, a citizen of the United States, and a resident of the State of New York, before October 26th, 1873, composed and wrote a dramatic composition called the "Shaughraun," of which he is sole proprietor. On the 26th of October, 1874, he mailed to the Librarian of Congress a printed copy of the title of this play, and received from the said librarian the usual certificate, setting forth the said filing of the title of said dramatic composition, "the right whereof he (said Boucicault) claims as author and proprietor, in conformity with the laws of the United States respecting copyrights." He complied in all respects with all the provisions of the Revised Statutes of the United States as to copyrights.

On the 24th of November, 1874, Boucicault caused said play to be performed before persons licensed by him to witness the same at Wallack's Theatre, for the especial benefit of said Boucicault, and such performances have continued there for his benefit and profit, and said drama has never been performed otherwise or elsewhere with his consent.

Boucicault never printed said play for circulation or publication or sale, and the play is still in manuscript, and has never been published, circulated or sold or copied, or used, in any way, with the permission of Boucicault, unless in the said performance of said play at Wallack's Theatre, for Boucicault's benefit.

The defendant, Hart, is owner of a theatre on Broadway, called the Theatre Comique.

He possessed himself, surreptitiously, without the consent of Boucicault, of the manuscript of the "Shaughraun," thus made himself acquainted with its contents, and printed and published the manuscript, or a material part thereof, under the name of the "Skibbeah," a play which professed to be "arranged" by one G. L. Stout.

This play has twelve scenes, and eight of them are copied from Boucicault's play of the "Shaughraun."

Defendant has printed and published said "Skibbeah," and publicly announced his intention to sell copies of the same, containing these eight scenes of Boucicault's play, without the license or consent of Boucicault.

Defendant Hart did also, on the 26th of January, 1875, and continuously since then, up to the granting of an injunction in this suit, publicly represent this "Skibbeah" at his Theatre Comique on Broadway.

Boucicault, at that time, remonstrated with the defendant, in writing, against his representing this play.

The "Skibbeah," as far as these eight scenes are concerned, is merely a copy of Boucicault's "Shaughraun."

It is in plot, situation, stage business, language, costumes, scenery, incidents and series and sequence of events, identical with Boucicault's play of the "Shaughraun."

The four scenes which are not taken from the "Shaughraun," are taken from a play, of which one Reeve is author, called "Pyke O'Callaghan," and these four scenes are merely introductory and accessory to the other eight scenes, which contain the material part of the said "Skibbeah," and are a mere copy of Boucicault's "Shaughraun."

The bill prays for an injunction, restraining the defendant from performing and representing the said play, or from printing or publishing any copy of the same, and for other relief.

To this bill the defendant demurs upon the following grounds, viz:

For that it appears on the face of the bill that the said drama called "Shaughraun," has been for a greater period than ten days prior to the commencement of this suit publicly performed, and caused to be publicly performed, by the complainant, upon the stage of a theatre; and it does not appear by said amended bill that two printed copies of said drama, or any copies thereof, were filed in the office of the Librarian of Congress, or sent by mail to said Librarian of Congress, at Washington, District of Columbia, within ten days after the public performance thereof, or at any other time.

And for that it is alleged in said amended bill that the complainant has never published, or caused to be published, the said drama called "Shaughraun."

And for that it does not appear by said amended bill that the complainant has ever given any notice that he has complied with the requirements of the Acts of Congress respecting copyrights.

And for that it does not appear by said amended bill that the complainant has ever given any notice that the said drama is secured by copyright.

It is admitted by these pleadings that the plaintiff is the author of the literary work in question. It is also admitted, that the defendant without the consent and against the remonstrance of the complainant, made use of said work for his own benefit, by performing the same at his theatre, and by printing and publishing copies thereof. The defendant insists that in so doing he has violated no law of the land—in other words, that the complainant has not taken the measures necessary to secure to himself the exclusive right to the performance or the publication of the drama called the "Shaughraun."

The complainant relies upon the deposit of a printed copy of the title with the Librarian of Congress, as the act upon which the grant of copyright depends, and having performed the act, insists that his copyright is complete. The defendant takes the position that no copies of the work being filed with the Librarian, there is no right to sue, and that to entitle an author to copyright, the author must deposit the book, as well as the title, with the Librarian.

This is the first question to be considered.

There is no common law of copyright which can affect this case. Wheaton *v.* Peters, 8 Peters, 657.

The rights of the complainant to a copyright, if any he has, are conferred by the Constitution and the Statutes of the United States. It is there that we must look for them, and unless there found, they do not exist.

If conditions are imposed by Statute, as preliminary to the existence of such rights, their performance must be shown. All the conditions clearly imposed by Congress are important, and their performance is essential to a perfect title. Wheaton *v.* Peters, *supra.*

The Constitution, in section eight, article one, gives to Congress power "to promote the progress of science and useful arts, by securing, for limited times, to authors and inventors, the exclusive right to their respective writings and discoveries."

The first Act of Congress upon this subject was passed May 31st, 1790; U. S. Stat., 1 vol., p. 124. The first section of that act secured to the author the sole right of printing, publishing, and vending his map, chart, or book, for the term of fourteen years "from the recording the title thereof in the clerk's office, as hereinafter directed."

The third section provided, that "no person shall be entitled to the benefit of this act, where such book has been already published, unless he shall first deposit, and, in all other cases, unless he shall before publication deposit, a printed copy of the title in the clerk's office," etc. "And such author shall, within two months, cause a copy of such record to be published in one or more newspapers, printed in the United States, for the space of four weeks."

The fourth section required, that, within six months after the publishing thereof, a copy of the book should be delivered to the Secretary of State, to be preserved in his office.

The sixth section provided, "that any person who shall print or publish any manuscript without the consent of the author," etc., shall be liable to damages.

By a statute passed in 1802 (U. S. Stat., Vol. II., p. 171), it was enacted, that, in addition to the above requisites, the author should give information by causing a copy of the required record to be inserted in the pages of the book, next to the title.

This act of 1802 was repealed, and the copyright acts were amended, in 1831. Laws of 1831, ch. 10, 4 Stat. at Large, 436.

Section 4 of that act provided, that no person should be entitled to the benefit of the act unless he should, before publication, deposit a printed copy of the title of book, etc., with the clerk of the District court where the author resided. It also provided, that the author or proprietor of such book, etc., should, within three months from the publication of said book, etc., deliver a copy of the same to the clerk.

The 5th section of that act provided, that no person should be entitled to the benefit of the act, unless he should give information of copyright being secured, by causing to be inserted, in each copy of each edition published, the words "Entered according to Act of Congress," etc.

In July, 1870, Congress passed an act to revise, consolidate and amend the statutes respecting patents and copyrights (16 Stat., 212.)

By § 90 of that act, it was provided, "that no person shall be entitled to a copyright, unless he shall, before publication, deposit in the mail a printed copy of the title of the book, or other article, or a description of the painting, drawing etc., for which he desires a copyright, addressed to the Librarian of Congress, and, within ten days from the publication thereof, deposit in the mail two copies of such copyright book or other article, to be addressed to the said Librarian of Congress, as hereafter to be provided."

The librarian is then directed to make a record of the name of such copyright book in words specifically furnished, and to give a copy of the same to the proprietor.

By § 93, the proprietor of every copyright book is required to mail to the Librarian of Congress, within ten days after its publication, two complete printed copies thereof, and a copy of every subsequent edition.

Section 97 enacts that no person shall maintain an action for the infringement of his copyright, unless he shall insert a notice thereof on the title page, or immediately following.

The various acts mentioned, have been referred to to show, to some extent, the history and previous condition of the law on the subject under consideration.

They are all superseded by the Revised Statutes of the United States, a work undertaken by authority of a statute passed June 27, 1866, and taking effect on the 1st day of December, 1873 (§5,595).

Those statutes provide as follows:

Section 4,952 provides that the author of any book, map, dramatic composition, etc., on complying with the provisions of the chapter, shall have the sole liberty of publishing and printing the same, and, in the case of a dramatic composition, of publicly representing the same.

Section 4,953 provides that copyright shall be granted for the term of twenty-eight years from the time of recording the title thereof in the manner thereinafter directed.

Section 4,956 provides that no person shall be entitled to a copyright, unless he shall, before publication, mail to the Librarian of Congress a printed copy of the title of the book and other article, etc., of which he desires copyright, nor unless within ten days from publication, he mails two copies of the copyright book or other article to the librarian.

Section 4,957 provides that immediately on receipt of the printed copy of the title of the copyright book or other article, the librarian is forthwith to record the same; and that he shall give a copy of the same when required.

Section 4,959 requires the delivery to the Librarian of Congress of two copies of the book within ten days after publication.

Section 4,960 provides that the proprietor of a copyright book or other article, failing to mail printed copies of the book, etc., is to pay a penalty of twenty-five dollars.

Section 4,964, referring to books, provides that if any person, after the recording of the title of any book, shall, without the consent of the proprietor of the copyright first had in writing, print or publish any copy of said book, he shall forfeit the copy and be liable to an action.

Section 4,965 makes a similar provision as to maps, charts, etc., and protects them from the time of the recording of the title.

Section 4,966 provides that any person publicly performing any dramatic composition for which a copyright has been obtained shall be liable to damages.

Section 4,967 provides that any person who shall print or publish any manuscript without the consent of the author, who is a resident of the United States, shall be liable for all damages occasioned by such publication.

In applying these statutes to the question before us, viz: whether a copyright becomes a perfected right upon the filing of the title of the book or composition with the librarian, or whether a deposit of the book is also necessary to complete that right, two points are apparent. The first is, that the letter of the law does not, in any of the statutes cited, former or present, require the book to be filed to confer a copyright. Under all of the statutes referred to, from that of 1790 to the Revised Statutes, the words of the law refer to filing the title page, and not to the deposit of the book. The second suggestion is, that it seems to be assumed throughout all of the statutes that a copy of the book will, and must, within a short time after filing the title page, be filed with the Librarian of Congress.

Of this idea, § 4,956 of the Revised Statutes affords an illustration. It had been enacted in the previous sections that a copyright should be secured to authors, designers and composers, and, in this section, a definition is given, in a negative form, of the persons entitled to the benefit of the law. "No person shall be entitled to a copyright unless he shall, before publication, deliver or deposit with the Librarian of Congress, * * * a printed copy of the title of the book, etc., nor unless he shall, also, within ten days from the publication thereof, deliver to the librarian two copies of the book, etc." Any person shall be entitled to copyright, who, before publication, first, shall deliver to the librarian a printed copy of the title of the book, and second, shall within ten days after the publication thereof, deliver to the librarian two copies of the same. The book may not be printed or published when the title page is filed, and some right (inchoate, perhaps) seems intended to be secured as of that date, although an actual printing or publication is not then made. But the expression "before publication," is based upon the idea that a printing or publishing will soon occur. This is put into clear meaning by the next clause of the section, that the author shall not be entitled to copyright "unless within ten days from the publication," he shall deliver two copies to the librarian. This means that the author is required to publish his work, and after he has so published it, and within ten days, he shall deliver two copies to the librarian. It is not a fair interpretation of this section to hold, that the filing of the title entitles to a copyright fully and absolutely, and that this may be defeated by a publication and failure to de-

liver two copies, but, as long as there is no publication, although it continue indefinitely, there is no lapse of the right.

This construction is not permitted, either by that idea which secures benefits to the author or inventor, upon the theory that the public is to be benefited, as well as himself, by his works, or by the principle pervading all this branch of the laws of patents, trade-marks, and copyrights, that an author or inventor must put his claim into the form of a well-defined specification, work or composition, and so place it upon record that he can not alter it to suit circumstances, and so that other authors and inventors may know precisely what it is that has been written or invented. The idea that an inventor may secure a patent for an invention of which he should not be required to file a specification, would not be tolerated. He may file preliminary or precautionary papers until his invention shall be completed, he may amend his specifications, and he may obtain reissues. It was never heard, however, that he could conceal the particulars of his invention, and by filing a general statement of a discovery or improvement, cut off the rights and claims of others. The principle I conceive to be the same in regard to a copyright, and I hold that, to secure a copyright of a book or dramatic composition, the work must be published within a reasonable time after the filing of the title page, and two copies be delivered to the librarian.

These two acts are, by the statute, made necessary to be performed, and we can no more take it upon ourselves to say that the latter is not an indispensable requisite to a copyright, than we can say it of the former.

In examining the rights of parties under the statutes of 1790 and of 1802, the court held in Wheaton *v.* Peters, (8 Peters, 663), that, to secure a copyright, all the requisites of the statute must be complied with. "The acts required," say the court, "to be done by an author to secure his right, are in the order in which they must naturally transpire. First, the title of the book is to be deposited with the clerk, and the record he makes must be inserted in the first or second page, then the public notice in the newspapers is to be given, and, within six months after the publication of the book, a copy must be deposited in the Department of State. A right undoubtedly accrues on the record being made with the clerk and the printing of it as required, but what is the nature of that right? Is it perfect? If so, the two other requisites are wholly useless. * * * But we are told they are unimportant acts. If they are indeed wholly unimportant, Congress acted unwisely in requiring them to be done. But, whether they are important or not is for the court to determine, not the legislature. * * * They are acts which the law requires to be done, and may this court dispense with their performance? * * * The notice could not be published until after the entry with the clerk, nor could the book be deposited with the Secretary of State until it was published. But these are acts which are not less important than those which are required to be done previously. They form a part of the title, and, until they are performed, the title is not perfect. The deposit of the book in the Department of State may be important to identify it at any future period, should the copyright be contested, or an unfounded claim of authorship asserted."

The language of the Revised Statutes is stronger than that of the act of 1870. By the latter act (16 U. S. Stat., 212) it is provided, that no person should be entitled to copyright unless he should file the title page with the librarian, "and, within ten days from the publication thereof, deposit in the mail two copies of such copyright book," etc.

In the Revised Statutes, two negatives are distinctly specified, and, in either case, the defect is fatal. He must file his title page—if he fails in this, he fails in all—but he cannot then have his copyright, "unless he shall also" deliver two copies within ten days from publication. In addition to the first, he must also perform the second requirement. See the opinion of Sawyer, C. J., in Parkinson *v.* La Salle, 21 Int. Rev. Rec., p. 163; Euer *v.* Coxe, 4 Wash. C. C. R., 490; Baker *v.* Taylor, 2 Blatchford, 83.

In this case, the title page was filed on the 26th of October, 1874. The bill, verified in February, 1875, does not allege any publication of the work, or any delivery of copies, or any reason why the same has not been done.

The complainant also insists that this action can be sustained by virtue of section 4,966 of the Revised Statutes. That section provides, that any person publicly performing any dramatic composition for which a copyright has been obtained, without the consent of the proprietor, shall be liable in damages, as therein stated. If no copyright has been obtained by the complainant for this composition, there has been no violation of a right secured by this action, and he takes nothing under this claim.

By the act of August 18, 1856 (11 U. S. Stat., 138), it was enacted, that the granting of a copyright to the author of a dramatic composition should be deemed to confer upon him the sole right to perform and represent the same on any stage, during the period for which the copyright was obtained. The same power is found in section 101 of the statutes of 1870 (16 Stat., p. 214.) Like the exclusive right to print, the exclusive right to perform, so far as these statutes are concerned, is dependent upon the existence of a copyright.

The bill alleges, also, that the defendant has, without the consent of the complainant, printed and published eight scenes of his play, and has publicly announced his intention to sell copies of the same. This proceeding is in violation of section 4,967 of the Revised Statutes, which provides, that every person who shall print or publish any manuscript without the consent of the author, if such author is a citizen of the United States, or resident therein, shall be liable to the author for all damages occasioned by such injury. The demurrer admits this publication, and the defendant must be restrained from printing or publishing the play.

The defendant seeks to avoid the effect of this allegation, by the statement, that the bill does not aver that such publication took place after the recording of the title of the complainant's play. This averment is not expressly made, but it must be taken to be the fact, upon the pleadings. It is averred, that the complainant composed and wrote the play previously to November 14th, 1874, that in October he filed a copy of the title page, and the librarian recorded the same in the proper book kept for that purpose; that, on the 14th of November, he caused the same to be performed at Wallack's Theatre; that he never has printed the play for circulation, and that the defendant, by means unknown to him, has obtained a knowledge of the contents of the manuscript, and, without his consent, has printed the same. The fair meaning of this is, that this action of the defendant took place after the title of the play had been deposited and recorded.

In dealing with this case I have given no effect to the general allegation of the bill, that the "complainant has complied in all respects with the requirements of the Revised Statutes" that were necessary to enable him to copyright his composition. A demurrer admits allegations of fact only, not allegations or inferences of law. That the allegation in question is not one of fact is well illustrated by this case. Does the allegation include an averment that the complainant has deposited with the librarian printed copies of his work as well as of his title page? If such deposit is a requirement of the statute, it does include it. If it is not, it does not include it. We are thus directed at once to the solution of a question of law instead of a point of fact. Instead of averring that he has deposited a copy of his title page, and also two copies of the body of the book, the bill alleges that the complainant has deposited a copy of his title page, and that he has never published his work, and was, therefore, not required by the statute to deposit copies of the work. This is the legal effect of the averment.

I am also of the opinion that there has never been a publication by the complainant of this work, within the meaning of the statute. The work has not been printed by the author, nor has it been abandoned or dedicated to the public. The author has permitted and procured its representation for his own benefit, and through his selected channels. This does not amount to a publication within the statute, or a dedication to the use of the public. Coleman *v.* Walker, 5 T. R., 245; DeWitt *v.* Palmer, 2 Sweeny, 547, S. C.; 47 N. Y. R., 536; Bartlett *v.* Chilton, 4 McLean, 400; Robert *v.* Megley, 23 Monthly Law Journal, 396; Ib., 660.

The English decision (Boucicault *v.* Delafield), cited to the contrary, is based upon the peculiar language of the English statute and is not an authority in this case.

I am of the opinion, however, that the defendant has violated the complainant's common law right of ownership in his dramatic composition. The copyright law is intended to preserve to the complainant his exclusive right to multiply copies, to publish, and, in my judgment, only attaches perfectly where a publication is made. The ownership, however, and the right of an author to retain and use his dramatic works for his personal benefit without publication, is a common law right. It is recognized and defined by the statutes cited, but it exists independently of the statute.

In Palmer *v.* DeWitt (2 Sweeny R., 547), the court says: "Whatever may have been the conflict of judicial opinion upon the effect of copyright laws upon the common law rights, it has never been disputed that by common law an author has, until publication, a property in his literary work, capable of being held and transmitted, and in the exclusive possession and enjoyment of which he and his assignees will be protected.

In the opinion of Monell, J., in that case, all the authorities are collected and presented.

The same case is reported in 47 N. Y., 536. It is there held that the representation of a play on the stage is not such a publication or dedication to the public as authorizes others to print and publish it without the author's permission. The manuscript and the author's right are still within the protection of the law. The common law rights of authors to their literary productions as they existed at common law, are now recognized. The author has the exclusive right to the first publication of his work, but no exclusive right to multiply copies or control the subsequent issues. This latter right is the creation of the statute of the United States.

Boucicault *v.* Fox, 5 Blatchford, 97; same *v.* Wood, 16 Am. Law Reg., 550.

Assuming this to be so, the difficulty arises that this court has no power to administer common law relief in a suit between citizens of the same State. The courts of the State are the proper, and, usually, the exclusive tribunals for the performance of that duty. The United States have jurisdiction of common law questions when the controversy is between citizens of different States. When the controversy is between citizens of the same State, its jurisdiction is limited to questions arising upon or under the laws or authority of the United States.

The result of my examination is, that the portions of the bill based upon alleged violations of the statute respecting copyright, cannot be sustained; and that the portions thereof based upon the alleged violation of § 4,967 of the Revised Statutes are well laid, and the cause of action therein set forth is a good one; and that the common law right of the complainant to a protection in the performance of his play constitutes a good cause of action, but by reason of the parties being citizens of the same State, this court has no jurisdiction to enforce the same.

The demurrer, must, therefore, be overruled, and the defendant is allowed to answer within thirty days after service of a copy of the order overruling the demurrer.

RICHARD O'GORMAN, for the plaintiff.
AMBROSE H. PURDY, for the defendant.

U. S. CIRCUIT COURT, S. D. NEW YORK.

CARILLO ET AL. *v.* SHOOK ET AL.

COPYRIGHT—THE WORK MUST BE PUBLISHED WITHIN A REASONABLE TIME AFTER FILING THE TITLE PAGE.

JOHNSON, Cir. J.

In the case of Boucicault vs. Hart, Mr. Justice Hunt in June, 1875, decided that to secure a copyright of a book or a dramatic composition, the work must be published within a reasonable time after the filing of the title page, and that two copies must then be delivered to the Librarian of Congress, as required by law. Upon this application for a preliminary injunction, it is fitting that, without further inquiry or examination on my part, this decision should be followed as the law of this circuit, and I must accordingly deny the motion.

(A copy) JOHN I. DAVENPORT, Clerk.

A. S. SULLIVAN, for Comp.
DITTENHOEFFER, for Deft.

U. S. DISTICT COURT W. D. OF MICHIGAN.

OPINION, APRIL, 1876.

THE GLOBE INSURANCE CO., of Chicago,
v.
THE CLEVELAND INSURANCE CO.

BANKRUPTCY — EFFECT OF GENERAL ASSIGNMENT—ACT OF BANKRUPTCY.

1. That a general assignment is an act of bankruptcy.
2. That a voluntary assignment cannot defeat the operations of the bankrupt law.—[ED. LEGAL NEWS.]

EMMONS, J.—Upon this writ of error, if there are any facts which prevent a decision upon the abstract question of law which we discuss from being a complete disposition of the case, they have not been called to our attention. The sole question for our determination is, whether the general assignment for the benefit of all creditors equally made by the Cleveland Insurance Company, is an act of bankruptcy and void under the statute.

For a number of years the anomalous condition has existed of a special local rule in the Sixth Circuit, in reference to general assignments under the bankrupt law, which pertains in no other part of the Union. In deference to an opinion expressed by Justice Swayne soon after the enactment of the law, in a case where the point did not arise, the District and Circuit Judges, in conflict with their own opinions, have refused to interfere with such conveyances. A letter from our brother Swayne desired us to decide the question as we deemed right, that it might be ultimately settled by the Supreme Court. A recent judgment by that tribunal, Mayer et al., assignee, etc., *v.* Hellman et al., October term, 1875. (8 CHICAGO LEGAL NEWS, 177), refers to, but expressly waives an expression of opinion upon the point. That tribunal is not accustomed thus to treat questions it deems too plain for discussion. In these circumstances, having been unable to change the views which we have always entertained upon this subject, as well under the law of 1841 as the present statute, we have deemed it proper to accompany the judgment which we render with a somewhat full statement of the reasons upon which we rest it. The very efficient aid which the learned counsel for the Globe Insurance Company have rendered us, enable us to do so with more fullness than otherwise would have been possible.

The following are a portion only of the cases which have been decided by the Circuit and District courts, declaring a general assignment void under the act of 1867. We do not take pains to exhaust the references upon this subject: 1, N. B. R., 558; in re Langley, was an assignment which had been recorded under the laws of Ohio five days before the bankrupt law came into operation. It is treated by the court like an ordinary general assignment. Judge Leavitt, erroneously, we think, holding that the statute had a retro-active effect, decided that a general assignment for the equal benefit of creditors was void, because it transferred the property to a different course of administration, and gave the appointment of the trustee to the debtor instead of to the creditors. He refers to Deacon on Bankruptcy, pages 72 and 73; Griffith on Bankruptcy, pages 107, 119, 120, to show that such had always been the interpretation of the English statutes, and to the American judgments which had given a like construction to the law of 1841.

We hereafter notice the judgment of Justice Swayne reversing this decision. 3 B. R., quarto 127, in re Goldschmidt, Judge Blatchford holds a general assignment an act of bankruptcy, and as grounds for refusing a discharge. 3 N. B. R., 24 in re Randall & Sunderland, Judge Deady makes precisely the same ruling. It does not detract from the effect of these judgments upon the principal point that other tribunals have not deduced the same consequences from

such an act of bankruptcy. Judge Cadwalader in 3 N. B. R., 258, in re Pierce & Holbrook, rules the principal point in the same way, although he thought it was not such a fraud as prevented a discharge. Hardy, Blake & Co. vs. Bininger & Co., 4 N. B. R., 262, was a petition in review before Judge Woodruff.

An insolvent firm had procured in chancery a transfer of all their property to a receiver. This was held an act of bankruptcy, because it defeated the operation of the act by transferring the property to a different course of administration. The learned judge says it is immaterial that the citizen may select a better and more economical mode than that pointed out by the bankrupt law; and, after enumerating many of the leading features of the latter in reference to the settlement of claims, the investigation of frauds and the punishment of wrongs, the declaration of dividends and other features, says: None of these are secured by a transfer made by the bankrupt himself, whether fraudulent or not; it is enough "that it defeats the operation of the act" to avoid it.

In re Smith, 3 N. B. R., p. 377, Jugde Hall had previously ruled that a general assignment was an act of bankruptcy, resting his judgment upon reasons nearly identical with those of Judge Woodruff. These and other similar rulings in the Second Circuit show how differently the judges there considered the decision of Judge Nelson in Sedgwick *v.* Place, 1 B. R., 204, from the interpretation which has been given it when cited to sustain a contrary ruling. They do not refer to it as bearing upon the question. 10 N. B. R., 181, in re the Union Pacific Railroad Company, at pages 181 and 182, contains an intelligent statement of the English doctrine which has uniformly held a general assignment to be an act of bankruptcy, and adds an opinion that our law should receive the same interpretation. Judge Lowell thinks the creditors and not the bankrupts should have the power of selecting the trustee. 12 N. B. R., p. 538, in re Mendelsohn, Judge Hillyer, in holding an assignment void because it created a preference, says that the weight of authority is in favor of the invalidity of even a fair general assignment for the benefit of creditors. See 3 N. B. R., p. 518, in re Spicer & Peckham *v* Ward & Trow; 1 Dillon, 439, in re. Burt, Justice Miller, sitting with Circuit Judge Dillon, deciding a case upon review, held that a general assignment was an act of bankruptcy. The point was fully raised. 8 Philadelphia, Barnes *v.* Retter, in an elaborate judgment, which goes over the English and American history of this question and ably considering it upon principle and authority, holds that a general assignment for the equal benefit of creditors is *per se* an act of bankruptcy. The judgment is drawn up by Judge Cadwalader and concurred in by Circuit Judge McKennan. We recur to it again more fully in connection with our statement of the English law.

Opposed to these concurring judgments directly upon the point is that of Justice Swayne, in Langley *v.* Perry 2 N. B. R., 596; and his dictum in Farran *v.* Crawford, 17 Law Register (note). We are not aware of any other judgment under the law of 1867, so holding. There are a few dicta. We repeat only criticisms frequently made when it is said the point did not arise in Langley *v.* Perry. The assignment was made before the bankrupt law was in operation, and the latter could have no effect upon it. That it could not will hardly be doubted, but it has been frequently ruled. Day *v.* Bardwell, 97 Mass., 248; Chamberlain *v.* Perkins, 51, N. H., 336, 37 Cal., 208. This is familiar law, and would have been overlooked by the learned justice but for the accident that the District court had ruled the point and the rectitude of its judgment in that regard was not discussed or questioned in the Circuit court. The report of the judgment is very meager and is manifestly imperfect. We infer from what little we have of it that the argument turned mainly upon the question of fraud under the statute of Elizabeth and at common law. In Farran *v.* Crawford his Honor expressly says the point does not arise, and he remarks only, that he supposes the judgment in Langley *v.* Perry to be right. The opinion of Judge Nelson is elsewhere shown not to be opposed to our present ruling. 11 N. B. R., 185, in re Marter. Judge Brown of the Eastern District of Michigan, saying that he withheld an expression of his own opinion, followed that of Justice Swayne in re Langley, as have all the judges in this Circuit since it was rendered up to the present time. He refers to the judgment of Judge Hall, in re Wells, 1, N. B. R., 171, as in accord with that of Judge Swayne. Judge Hall decided only that, as the intent to delay creditors was denied upon the record and no issue was taken upon that intent, he was precluded by the averments from going into the question at all. He expressly disclaims a decision upon the question before us, whether a general assignment is or is not an act of bankruptcy. That he did not intend to decide as our brother Brown supposes is entirely clear from his able judgment deciding this point as we now rule it in 3 N. B. R., p. 377, re Smith, cited ante. A reference is also made to a like opinion by Judge Treat, of Missouri. In the report no opinion is given. It is simply said such a judgement has been rendered. That this is not the law administered in that district appears from the concurring judgments of Justice Miller, of the Supreme court, and Judge Dillon, already referred to.

Upon mere authority, therefore, being released from the obligation of following the precedent in our own circuit, this review shows we have no choice of judgment. Justice Miller, in a case where the point arose, and the entire body of Circuit and District Judges, in the Circuit and District courts, have followed the uniform decisions in England and in this country from the earliest periods of the bankrupt law, and have decided with entire unanimity, that a general assignment for the equal benefit of creditors, and all similar transfers procured by operation of law, are acts of bankruptcy and a fraud upon the act.

Under the law of 1841, several decisions of this precise question were made. During the administration of that law, when at the bar, we had occasion to examine it. Few doctrines were more generally acquiesced in at that time than that general assignments for the benefit of creditors, had become unlawful. Every lawyer of large practice will be enabled to say that the practice was abandoned throughout the country. The local judgments were then less frequently reported than now, or they would have been as numerous in the books as they are under the law of 1867. We are quite confident there are others, but our want of time enables us now to refer only to the two cases following, which ruled the precise point upon a general assignment. As we soon notice, however, the identical principle is involved in all those numerous judgments under both acts which hold similar assignments under local statutes to be acts of bankruptcy. When they are considered it will abundantly appear that the act of 1841 was interpreted as we construe the present law. In 3 McLean, 202, McLean *v.* Johnson, the precise point was presented under the law of 1841, and the assignment was declared to be a fraud upon the act, and the assigned property was directed to be delivered up to the assignee in bankruptcy. That act contained no clause providing that transfers should be void which defeated the operation of the act, like our present law; but it was held to be so by implication, in conformity to the English precedents. McLean *v.* Meline, 3 McLean, 199, involves the same questions and was decided in the same way.

The cases already referred to in terms involving a general assignment, are by no means all which pointedly and directly decide this very matter. All the numerous cases which have held that State insolvent laws are suspended by the enactment of a National bankrupt law, necessarily involves this identical principle. There is not a scintilla of difference distinguishing one class of judgments from the other. It is but an immaterial accident that in the one what is prohibited by the bankrupt law is effectuated by a voluntary general assignment, and in the other that a similar transfer is made in conformity with the State law. Such statutory conveyances are not held void as against the policy of the bankrupt act *because of the State enactment*, but on account of what those statutes authorize to be done. Sturgis *v.* Crowninshield, 4 Wheat., 122; Ogden *v.* Saunders, 12 Wheat., 213, and Cook *v.* Moffat, 5 How., 308, and the long list of Federal and State concurring judgments abundantly show that State legislation is authorized until Congress acts, and that such legislation is suspended so far only as it comes in conflict with Federal legislation. In determining whether it does so come in conflict, the very question asked in this case has to be answered. Is the matter which is authorized in conflict with the general policy and the mode of its execution provided by the National law? If the State statute authorized a transfer of all a debtor's property for equal distribution among his creditors, in the language of many of the cases, "acting upon the same persons and property," a transfer under it is void; not because the distribution is different, or because the proceedings are less plenary, but for the sole reason that a different tribunal is selected than that provided by Congress. The reasons given by the most learned judges who have discussed this subject are so strikingly like those found in the British decisions declaring general assignments void as against the English bankrupt law, that, were they interchanged, the opinions would be equally sustained. The remark is equally true of the American rulings, where a general assignment has been called in question. When, therefore it is decided that a State insolvent law is suspended because it takes the property of a bankrupt from the control of the National courts, a decision has been made which not only completely covers and declares void a general assignment, but goes very far beyond the doctrines necessary for its invalidity. They demand only that a different tribunal shall be sought, and for a much greater reason is an assignment void which not only seeks such other tribunal, but chooses the trustee by the uncontrolled election of the debtor, and practically avoids all the guards which the provisions of the statute are intended to throw around the rights of creditors.

In referring to the judgments deciding what proceedings are in conflict with the bankrupt law when authorized by State enactments, it is manifest we are not at all concerned with the differences in opinion between those judges who think the State provision is wholly suspended, and those who think proceedings under them are good until called in question by an assignee in bankruptcy. All are unanimous in declaring that transfers under them are void when questioned in that mode. It is this consistent feature in them all to which we point as determining the question now before us.

It would lead to most unwarrantable prolixity were we to analyze and reproduce the provisions of the various State statutes, for the purpose of showing by their particulars that all of them, with slightly varying forms, simply take the estate of the debtor, transfer it to trustees, convert it into money and distribute the proceeds among the creditors. They all do substantially, but in a better and more protective form, what a general assignment does; and we repeat, it is for this reason only they are adjudged to be in conflict with the bankrupt law. A perusal of the judgments we cite under this head will show that the reasons upon which they rest are literally and substantially precisely those which in England and this country sustain like decisions in reference to the invalidity of general assignments. It should be noticed particularly that no distinction whatever is made between those local systems which do and those which do not discharge the debt itself. It is the custody and appropriation of the assets which constitutes the wrong, 38 Conn., 80, Maltbie *v.* Hotchkiss, was a contest between an assignee under a State law and a levying creditor. The court reaffirms its judgment in Hawkins' appeal, 34 Conn., 548, that the State proceeding is good until some right is asserted under an adjudication in bankruptcy. But in reconciling its judgment with just relations to the Federal judiciary, the court by Carpenter, J., in a thoroughly argued opinion, shows that a general assignment for the equal benefit of all creditors, either with or without a local statute, is void under the bankrupt law, and that if an assignee claims the property from the State tribunal it would necessarily be transferred to him. This learned court identify the two cases of a statutory and a general assignment, holding both to be equally void. This case shows how grossly the case of Hawkins' appeal is misunderstood by those courts which have cited it as sustaining the validity of a general assignment against the bankrupt law. As construed by the court which pronounced it, it said no more than that the assignment would be upheld until questioned by proceedings in the national court. 9 N. B. R., 50, re Reynolds, is among the most intelligent discussions of the subject that we find in the more recent decisions. It reviews the leading cases and holds that a State insolvent law which appropriates all a debtor's property and distributes the proceeds ratably amongst his creditors, although it does not discharge the debtor, is wholly suspended by the enactment of a bankrupt law. It was said the State law took the entire assets from the court of bankruptcy and deprived the creditor of the protection which the Federal law was intended to secure.

The following cases upon this subject arose under the bankrupt law of 1841. 9 Meto, 16, Griswold *v.* Pratt, in deciding that the State law is *ipso facto* suspended without any proceedings in bankruptcy by the enactment of the bankrupt law of 1841, held that the two laws could not act upon the same person and the same property contemporaneously; and as the State law could not act without being subject to be defeated at any time, it ought not to be enforced at all. 2 Story, C. C., 322, ex parte Eames, says that Sturgis *v.* Crownishield, 4 Wheat.; Ogden *v.* Sanders, 12 Wheat., established the doctrine that the enactment of a bankrupt law suspended all State insolvent laws as to future cases, where the administration of the latter acted upon the same persons and property, thus divesting the jurisdiction of the federal and giving it to the State tribunals. And see 19 La., 497; 5 Rob., 27, 15 La., Ann., 602; 3 N. B. R., p. 435, applied the same principal to an insolvent corporation being wound up under the local law. 1 N. B. R., 86, Commonwealth *v.* Ohara, District Court of Pennsylvania; 2 N. B. R., 629; Martin *v.* Berry, California Supreme Court; 2 N. B. R., 485; Supreme Court of Maryland; 4 N. B. R., 569, Cassard *v.* Croner, Supreme Court of Maryland. The 37 Cal., 208, Martin *v.* Berry, is a very full consideration of this subject; 30 Md., 128, Van Nostrand *v.* Carr; 21 La. Ann, 446, Barker *v.* Rogers, 71 Penn. St., 362; Cassard *v.* Croner, 4 N. B. R., 569; re Stubbs, 4 N. B. R., 376; Reed *v.* Taylor, 4 N. B. R., 710. Nothing is gained in argument by further analysis of this numerous class of adjudications. They all depend upon a like reason, and that is substantially and literally applicable to the case of a general assignment irrespective of a State statute.

There is nothing in conflict with these decisions worthy of citation or criticism.

The entire body of the law in reference to State legislation upon general subjects, cognizance of which is given to Congress, is equally forcible to show that a general assignment is void as against the bankrupt law. When the inquiry is made whether a State regulation is in conflict with federal enactments regulating commerce, the militia, establishing a currency, or any other subject of national control, it is answered by the precise mode of inquiry and investigation demanded in this instance. The degree of conflict tolerated in those instances, and that which is held to be inconsistent and void, afford precedents for decision here. Were this a novel question, and need arose to go beyond adjudications of the precise thing, an argument equally demonstrative would be deduced from the facts and literal reasoning in Brown *v.* State of Maryland, 12 Wheat., 419; Wynne *v.* Wright, 1 Dev. and Bat. (N. C.), 19; McCulloch *v.* Maryland, 4 Wheat., 316; Gilman *v.* Philadelphia, 3 Wal., 713, and the numerous other judgments of this class. They all go upon the ground that when Congress has regulated a subject, a State shall not regulate the same subject. And we add, much less can a citizen of his own volition so regulate the same matter as to take himself and estate without the operation of federal law.

The course of English adjudication upon the successive bankrupt laws of that country, the language of the British statutes and of our own, which have adopted them, constitute an argument against the validity of a general assignment for the equal benefit of creditors, which we should be unable to resist were the question wholly novel and uninfluenced by any adjudication in this

country. 8 Philadelphia, Rep., 133, Barnes vs. Retter, is so full and satisfactory a history of English legislation and decision upon the subject that we omit the somewhat extended analysis of British statutes and judgments which we had prepared. The following is a brief condensation of its able argument with, in some instances, a slightly more full quotation of statutory provisions. The assignment was made under the law of Pennsylvania, and although its peculiar provisions are considered for the purpose of showing their antagonism with the bankrupt law, it is expressly said, as it is quite manifest upon principle, they are no more so than the general course of administration under an assignment to a trustee uncontrolled by statutory regulations. Judge Cadwallader shows that, from the time of James I, down to 1867, when our present law was enacted, there had been no substantial change in British legislation upon this subject. The act of James, unlike our own, contained no clause invalidating transfers which defeated the operation of the bankrupt law, but was simply a provision that if any trader should "make or cause to be made any fraudulent grant or conveyance of his lands, goods, etc., to the intent or whereby his creditors shall or may be defeated or delayed for the recovery of their just and true debts," he shall be deemed a bankrupt. This was farther simplified in 1825 by an enactment that if a trader should make "any fraudulent grant or conveyance of any of his lands, tenements, goods or chattels" * * "with intent to defeat or delay his creditors" he shall be deemed to have thereby committed an act of bankruptcy. It is shown that under these provisions it has been uniformly by numerous judgments held that a general assignment for the benefit of all creditors equally was an act of bankruptcy; upon the ground that such transfers were fraudulent, not at common law or under the 13 of Elizabeth, but because they defeated the rights of creditors secured by the bankrupt law to the choice of a trustee, to the summary jurisdiction of the court, and to the ample control which the law intended to give them over the estate of their insolvent debtor.

The familiar rule is invoked, that where a law is adopted from a neighboring State or country, which has received a judicial reading, the presumption of law is that its interpretation is also included; and the rule is said to be applicable with great force to so long and often repeated a construction of a succession of statutes adopted by Congress. And what is of still more significance, attention is called to the fact that Congress did not leave the adoption of this rule to an implication of law, but by express enactment adopted nearly the words of the British decisions, by adding in the law of 1867 that a transfer of property should be an act of bankruptcy, not only where it was fraudulent and to delay creditors, but if it was "to *defeat the operation of the act.*" This "defeating the operation of the act" and "this putting the assets in a different course of administration," and this "transferring them to another tribunal," are the reasons given in the English judgments, why a general assignment is fraudulent. The following citations, here noted in the order in which they occur in this careful opinion, have all been re-examined; and we can say with confidence they fully sustain the conclusive argument, a mere outline of which we have suggested: 9 East., 487, 1 Crompton, M. & R., 779, 780; 3 Co., 80, b Twynes case; ex parte Bailey, 3 DeGex, Mc. N. & G., 534; Smith *v.* Carman, Ex. ch. 2 El. & Bl., 35: 16 Ves. 148, 17 Ves., 197; 1 Atkyn, 91; Ib., 88; Kettle *v.* Hammond; Coote B. L., 111; Cowp., 123; 8 D. & E., 140; 4 East., 200; Christian I., 188, second edition; Stewart *v.* Moody, 1 Crompton, M. & R., 777; 2 Burr, 828, Wilson *v.* Day.

The learned judge successfully shows that the judgments of Justice Swayne in Langley *v.* Perry and Farrand *v.* Crawford, and that of Justice Nelson in 1 B. R., p. 204, Sedgwick *v.* Place, do not necessarily decide this point.

1 De G. Fisher & Jones, 289, ex parte Alsop, 1859. Upon appeal Lord Justice Turner for the court said: That under the several bankrupt laws anterior to 1859 it was well established that a general assignment for the benefit of creditors equally was an act of bankruptcy; and that the only question left to be discussed was whether the act of that year had changed the law, and proceeded to show that it had not.

In 1 Burr, 467, Worsley et al. *v.* De Mattos, upon motion for a new trial in an issue out of chancery to ascertain whether an assignment was an act of bankruptcy, Lord Mansfield held it to be such upon two distinct grounds; first, because there were features in it which made it void at common law and under the statute of Elizabeth; and second, because it gave the debtor the choice of trustee, and took the assets to another tribunal. And in 3, M. & S., 374, Pickstock *v.* Lyster. Le Blanc, J., holding that a general assignment was good at common law, takes pains to say that the bankrupt law was not in question, as no proceedings had been taken under it. This distinction between a conveyance void under the statute of frauds, and one illegal because at war with the policy of the bankrupt law, is common to nearly all the British judgments. These two are referred to for the purpose only of showing how distinctly it is taken.

The following are but part of the older English judgments additional to those cited in 8 Philadelphia, reaffirming, in varying circumstances, the principle that an assignment of all a debtor's property whereby its conversion into money and its distribution among his creditors is given over to a trustee of his own selection, is an act of bankruptcy and void under the statute. Lindon *v.* Sharp, 7 Scott, N. R., 745. Hassels *v.* Simpson, 1 Doug., 89; Butcher *v.* Easto, 1 Doug., 295; Porter *v.* Walker, 1 Man, & G., 686; Ex. p. Bland re Murgatroyd De G. M. & G., 757. The elementary books are equally full. Eden on Bankruptcy, 28; Roche & Hazlett, 375, et seq.

The force in this country of these English adjudications must not be weakened by the supposition that any latitude of construction is indulged in these not applicable in our own tribunals. It is as familiar law in England as here, that all acts of bankruptcy must be expressly declared by statute. See Dutton *v.* Morrison 17, Ves., 193; Ex. p. Mayor 19. Ves. 542, and Roche & Hazlett's Law and Practice in Bankruptcy, edition of 1873. When, therefore, it is held that a general assignment is void, it is a determination that it comes within the express provision of the statute declaring that conveyances to hinder or delay creditors shall be void.

When the following very recent judgment was rendered the doctrine which it reannounces had become a part of English statutory law. It is referred to only as an authoritative exposition of the past history of this question there. L. R. 7, Ch. App., 302, in re Wood. The question was whether the transfer of all a man's property to secure a past debt was an act of bankruptcy. Mellish, Lord Justice, in arguing that the statute of 1869 had not altered the law in that respect, goes over the old principles and enumerating what had been well established, at page 306, says: "There were various conveyances which the court held to be fraudulent. A conveyance which was void under the statute of 13 Elizabeth was one; so was a conveyanee of a man's whole property for the benefit of all his creditors." After stating other instances he adds that in all of them "the law assumed that such acts were of necessity done with intent to defeat or delay creditors."

In view of this long and uninterrupted judicial reading, where our own re-enactment has in such unambiguous terms used language which plainly includes it by inhibiting conveyances "*which defeat the operation of the act,*" it may well be asked with emphasis, why shall not the American law be construed like the English, from which it was taken? Why shall not the familiar rule be applied, that where a judicially construed law is adopted the construction is approbated by implication. We can imagine no condition where the following language of the Supreme Court of the United States is more applicable. They say where English statutes are adopted, "the known and settled construction of those statutes has been considered as silently incorporated into the acts." 2 Peters 2, Pennock *v.* Dialogue. and see 5 Pet., 263; 5 Ohio, 74; 1 Ks., 226; 4 Ks., 353; 3 Ill., 288; 13 Ill., 17; 19 Ill., 151; 21 Vt., 256; 41 Mo., 453; 21 Wis., 274. This rule is one upon which the lawyer and the citizen has the right to rely; because in ninety-nine cases in the one hundred, it is followed by courts. We understand it to be among the well-settled canons of construction which will not, without pressing reason, be departed from. It is not, of course, constraining and so obligatory as to be yielded to in instances where the home interpretation has become dissatisfactory, and productive of manifest evils. There are some such instances. But if anything were needed to complete and clinch the argument in favor of its application in this instance, it is found in the fact that, in the revision of the British law in 1869, the entire satisfaction of English judges and statesmen with the judicial interpretation which we have followed in this opinion is testified by inserting in the law an express provision making it an act of bankruptcy "that the debtor has in England or elsewhere made a conveyance or assignment of his property to a trustee or trustees for the benefit of his creditors generally." This, then, is no accidental or hasty interpretation, calling for dissent and review by our courts. It embodies the results of hundreds of years of experience, with commercial conditions strikingly like our own, and with a people whose modes of action and sense of justice are so kindred as to make their well-matured and long-administered rules of civil conduct the very highest evidence of their substantial fitness here.

To our mind one of the leading arguments against the validity of a general assignment grows out of the criminal features of the bankrupt law. They are pointedly referred to by Judge Woodruff in Hardy et al. *v.* Blake et al., by Judge Hall in re Smith, expressly and in more general form in other judgments. These crimes cannot be punished at all without an adjudication in bankruptcy against the offender. This is quite plain, and was so ruled in 4 N. B. R., 113, United States *v.* Prescott. If a general assignment is good against the bankrupt law, then every debtor clearly subject to criminal punishment would transfer his entire property to an assignee, thus leaving nothing to pay the expenses of proceedings in bankruptcy. It is certain creditors already sufficiently injured would not, without any hope of reimbursement incur the expense of an adjudication, simply for the purposes of punishment. It would seem that an act so protective of a criminal debtor, and throwing such impediments in the way of prosecution under the Federal law, must be considered in conflict with it.

The power to pass a bankrupt law is specifically given. But little argument would have been needed to have deduced it from the power to regulate commerce between the States in all instances of inter-State trade. Our active industry and the great interests of trade, our bills of exchange, the transit of our grain crop, and the productions of our mines, absolutely refuse to obey the behests of any class of politicians and stop at State lines. We do not believe there is a State in the Union, commercial centers in which have not far more intimate relations with similar points in other States than in their own. Not one bankruptcy in fifty finds all the creditors in a single district. The subject to be regulated is one essentially national. Commerce in a most compendious sense is not more so. Owing to the imperfections of the present law the general argument which this department of the subject ought to enable us to put forth is somewhat wanting. But even the present system, with its protections against preferences, the choice of a trustee, the distant proof of debts without the personal appearances of witnesses, the extraordinary efficiency in examining into past and preventing contemplated frauds, the summary examination of debtors and the full examination of his books, securities and correspondence, all of which pass to the assignee in bankruptcy, the criminal jurisdiction, dependent wholly upon an adjudication, and the other safeguards intended to protect the mutual rights of creditors and debtor, when contrasted with that old chronic instrumentality of fraud and delay known as a general assignment for the benefit of creditors, is so additionally protective as to dominate the latter by the mere force of its superiority and increased beneficence. A debtor, the fallacy of whose apparent prosperity is known only to himself, having transferred to members of his own family a large portion of his estate, may by one of these assignments, selecting his own trustee, render it morally certain that his fraud will never be successfully examined. The creditors, divided by distance, unknown to each other and without concert of action, are seldom willing individually to incur the enormous expense of such litigation. The mode of probing the fraud by bill in equity is cumbersome and even awkward. The history of the law's administration shows that more such transactions are set aside in a single year under the Bankrupt law than in ten by the old modes. The most frequent objection to the national law comes from those practitioners who advise the local debtor, and are, therefore, either interested against its efficiency, or, for want of familiarity with the practice under it and that of the distant tribunals in which it is enforced, have no share in the profits of its administration. If it is long enough continued to become well understood throughout the country, and means are provided still farther to carry into localities the performance of duties now executed at a few places only, an American bankrupt law will become as necessary a part of our civilization and commerce as is that of England to her people and that of every civilized commercial country in Europe to their respective subjects.

After much professional experience under previous laws, and judicial familiarity with the administration of this one, we believe the Bankrupt Law had far better be repealed than have it established that it is at the option of every debtor in the United States to determine whether he will or not submit himself and his assets to the control which the statute intends to give his creditors over them. Inevitably, he first knows of his own insolvency. In every instance, therefore, he has the power of selection. When that selection is once made, such is the embarrassment by citizens of other States growing out of the doctrine of parties in transferring causes from the State to the Federal courts that in a vast majority of instances the debtor may compel his widespread creditors in the distant commercial centers where he has incurred his debts, to come to the county courts of the State for the settlement of those important questions for the trial of which the Bankrupt Law secures a different tribunal. It is no disrespect to these local courts to call attention to the universality with which citizens of other States prefer a tribunal removed from the local influences which so naturally interfere with complete impartiality. They prefer a jury from the whole district instead of the narrow vicinage in which the liberality of their debtor, by which their property has been squandered, has rendered himself personally popular. Every one of the great leading reasons which underlie the Federal jurisdiction between citizens of different States in all cases, and those which led to the conferring upon Congress of this bankrupt power at the outset for the regulation of this eminently national subject, forbid an interpretation of the present statute which would enable an attorney of the most common intelligence utterly to defeat every practical benefit intended to be secured by its adoption.

SUPREME COURT OF INDIANA.

APPROPRIATING LAND FOR USE OF RAILROAD —PRACTICE—WHAT FACTS MAY BE CONSIDERED IN ASSESSING DAMAGES.

4143. The Baltimore, P. & C. Railroad Company *v.* Lansing, Porter C. C. Affirmed. Opinion by Buskirk, J.

Statement: This was a proceeding under 1 G. & H., 50 9-10, to condemn land of the appellee.

Held, 1. That to make available as error in this court, the rejection of testimony sought to be introduced, it should appear what facts were proposed to be proved, and the ground of objection to the evidence. (Rawles *v.* The State, at present term; 48 Ind., 152; 30 Ind., 257; 29 Ind., 195.)

Held, 2. That it is well settled in this State that damages may be given in a case like this, for cutting fields into inconvenient shapes, destroying the conveniences and advantages of water for stock to a portion of the farm, and rendering an additional amount of fencing necessary to a safe and proper use thereof. (29 Ind., 536; 41 Ind., 263; do., 479; 49 Ind., 493.

5208. Briggs *v.* Chapman, Marion S. C. Dismissed by agreement.

CHICAGO LEGAL NEWS.

Lex binit.

MYRA BRADWELL, Editor.

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We call attention to the following opinions, reported at length in this issue:

The Copyright Laws Construed—Who Entitled to Copyright.—The opinion of the United States Circuit Court for the Southern District of New York, by Hunt, J., holding, under the Revised Statutes of the United States, an author, to obtain a copyright, must file the title-page of his work with the Librarian of Congress, and within ten days from the publication thereof, deposit in the mail two copies of the copyright book; that if he fails in either of these requirements, he cannot have his copyright. It is also held that the work must be published within a reasonable time after the filing of the title-page. The court states the common law right of an author to protection.

Copyright Publication.—The opinion of the Circuit Court of the Southern District of New York, by Johnson, J. following the opinion of Judge Hunt, also published in this issue, holding that in order for an author to obtain a copyright, his work must be published within a reasonable time after the filing of the title page with the Librarian. We commend this opinion of Judge Johnson. He states the point, that it has been decided by Judge Hunt that that opinion is binding upon him, and renders judgment accordingly. The whole opinion occupies less than half a page of legal cap. We wish we had more such judges; they would make less work for themselves and less for the bar. The great evils attending the administration of justice at the present day are long opinions, long speeches and long briefs.

Bankruptcy—Effect of Voluntary Assignment.—The opinion of the United States Circuit court for the western district of Michigan, by Emmons, J., holding that the making of a general assignment is an act of bankruptcy, and that a voluntary assignment cannot defeat the operations of the bankrupt law. The precise question involved in this case has never been decided by the Supreme Court of the United States. The learned Circuit Judge has cited all the adjudications of the lower courts upon the question. It is to be hoped this case will be taken to the Supreme Court of the United States and the question be finally settled. In settling questions arising under the bankrupt law, the Supreme court has been much more conservative than the lower courts.

The Liability of a Bank to whom Commercial Paper is Sent—A Second Bank collecting the Paper is not Liable to the Owner of the Paper.—The opinion of the United States Circuit court for the northern district of Illinois by Hopkins, J., holding under the late opinions of the Supreme court of the United States that when an owner of commercial paper sends it to and it is accepted by a bank for collection, whether payable at the place where such bank is located or elsewhere, in the absence of any contract to the contrary, there is an implied agreement with such bank arising from the acceptance of the employment, that it will perform all the acts necessary for the collection, and if not paid, of charging the parties thereto. It is not regarded as the appointment of the bank, as the attorney of the owner of the paper authorized to select other agents suitable and competent for the purpose of collecting the note, but, on the contrary, "its position is that of an independent contractor, and that the instruments employed by such bank in the business contemplated, are its agents and not the agents of the owner of the note," that its duty is not discharged when it selects suitable agents to perform the duty entrusted to it; that the owner of the paper is not to look at the responsibility of the agents entrusted by the bank with his collection; that the bank to which he commits the paper is alone responsible to him for the performance of all acts necessary to secure his rights, including the payment of the money when collected, and that the liability to pay over attaches as soon as the money is paid either to it or a sub-agent selected by such bank to collect for it. Judge Hopkins admits in this opinion that he is forced to the decision given by the recent opinion of the Supreme court of the United States cited by him. We are glad to note that fact, for we are satisfied that if he had felt himself free to decide the case upon principle, he never would have rendered the judgment entered in this case. If this opinion is the law of the federal courts, then every bank that sends a note out for a customer in the regular course of business, for collection to another bank, becomes an insurer of the solvency of the bank to which it is sent, no matter how careful it may have been in the selecting of such bank. Under this rule the most prudent and solvent banks may be ruined in panic-y times by sending notes to other banks to collect for their customers. This is a dangerous decision for bankers. It is to be hoped the Supreme court of the United States will put a different construction on their recent decision which Judge Hopkins felt compelled to follow.

House of Representatives—Witness Contempt.—The opinion of the Supreme Court of the District of Columbia, by Cartter, C. J., holding, that since the adoption of the Revised Statutes, and the repeal of the former laws relating to the punishment of a witness by the House, for contempt of the House, in refusing to testify, when the House adjudges the witness in contempt, its power to punish terminates, and it can only certify the fact of such contempt to the Supreme Court of the District of Columbia, as provided by the recent statute. Under this decision, a witness, if he wishes can defy Congress, and defeat any investigation into fraud and corruption, if the evidence is solely within his knowledge or power, simply by refusing to speak, and Congress has no way of punishing him for his contumacy.

The Supreme Court of Illinois.—The next term of the Supreme Court of this State will commence at Mt. Vernon, on the first Tuesday of June. The official term of Judge Walker will expire during the coming term of court. He has performed his official duties so satisfactorily to the people and the bar, that he will undoubtedly be re-elected without serious opposition.

Recent Publications.

Reports of Cases in the Superior Court of Judicature of New Hampshire. John M. Shirley, State Reporter. Volume LV. Concord: Published by Josiah B. Sanborn. 1876. Sold by E. B. Myers, Law Bookseller, Chicago.

The mechanical execution of this volume is somewhat better than some of its predecessors, from which we infer that Mr. Shirley has been looking closer after his printer. This volume commences with the opinions delivered in December, 1874, and ends with those delivered in August, 1875. We have, by the kindness of Mr. Shirley, given our readers quite full notes to the opinions in this volume before its appearance. Those wishing the full opinions can now obtain them by sending for this volume. The most interesting portion of the volume is a characteristic reporter's note, by Mr. Shirley. From it we learn that a law was passed in 1815, requiring every practising attorney in the Supreme Judicial Court to pay annually to the clerk of the court, within the first quarter of every year, five dollars, and the clerk to pay the same to the person "who is reporter for the time being," which should be in full compensation of all the services performed by the reporter. Judge Smith was the first reporter of the State, being appointed soon after the passage of the act of 1815. No evidence that he was appointed or took the required oath can be found in the State House, and it can only be proved by the newspapers of the day. It would seem that there were some Grangers in New Hampshire in 1815, or the legislature would not have compelled the lawyers to pay the salary of the reporter.

A Treatise on the Law of Negotiable Instruments, including Bills of Exchange, Promissory Notes, Negotiable Bonds and Coupons, Checks, Bank Notes, Certificates of Deposit, Certificates of Stock, Bills of Credit, Bills of Lading, Guaranties, Letters of Credit, and Circular Notes. By John W. Daniel of the Lynchburg (Va.) Bar. In two Volumes. Vol. I. New York: Baker, Voorhis & Co., Publishers, 66 Nassau Street. 1876. Sold by E. B. Myers, Law Book Publishers, Chicago. Price, $13.00.

The above work comprises two volumes and contains about fifteen hundred pages. The handsome manner in which it is presented, entitles the publishers to the thanks of the profession. These volumes are divided into six books, as follows: Book I. The Making of the Instrument. II. Who may be Parties. III. The Negotiation of the Instrument. IV. Protest and Notice; and Excuses for want of Presentment, Protest and Notice. V. Action on Negotiable Instruments; and Defenses, Discharges, and Damages. VI. Varieties of Negotiable Instruments other than Bills and Notes.

These books are again divided into fifty-six chapters. The recent editions of old works upon the various branches of the law upon negotiable instruments, are little more than reprints of works prepared many years ago, and cannot be expected to state correctly what the law is to-day, relating to negotiable instruments, which is ever changing to accommodate itself to the wants and necessities of commerce. When Judge Story wrote on negotiable instruments, he did not deem it advisable to embrace the whole subject in a single treatise, but devoted one treatise to notes, another to bills, etc., and, as a consequence, there was much in one that was a mere repetition of what was in another. The present is an effort to embrace in one treatise a classification of all negotiable instruments, with an exposition of the law touching each variety of them. Mr. Daniel says this is the first effort to accomplish this object. Within a few years, the transactions in municipal bonds and coupon bonds and notes have become immense, and a large portion of the surplus wealth of the country has been invested in these instruments, and, as a consequence, this branch of the law has not only grown in importance, but the cases making the law regulating the transfer and liability on such instruments has greatly increased in number. The text of Mr. Daniel is written in a pleasing style, is clear, and his meaning easily understood by the reader. The notes to the cases cited are numerous, but are not brought down to as late a date as they ought to have been. In our examination, we noticed several very important recent cases were omitted. We regard the work as one that will be exceedingly useful to the profession, and one that should be consulted on all questions relating to negotiable instruments. The liability of a bank receiving notes for collection, for the acts of its bank correspondent, being the question involved in Judge Hopkins' opinion, published in this issue, is fully discussed in volume one of this work, from pages 250 to 259, and the conflicting opinions upon the question cited. Mr. Daniel believes the doctrine, as announced by the Supreme Court of the United States, to be correct, although at the time of writing his work, he had not seen the opinion upon which Judge Hopkins mainly relies.

Reports of Admiralty and Revenue Cases, argued and determined in the Circuit and District Courts of the United States, for the Western Lake and River Districts. By Henry B. Brown, District Judge, Eastern District of Michigan. Vol. I. New York: Baker, Voorhis & Co., Publishers, 66 Nassau street. 1876. Sold by Callaghan & Co., Law Book Publishers, Chicago. Price $7.50.

This volume is designed by the reporter as a continuation of the series commenced by Mr. Newberry, and is devoted exclusively to cases arising upon the Western Lakes and Rivers.

We have often thought it strange that some enterprising publisher had not continued the series of Mr. Newberry. We suppose it may be accounted for on the ground that few lawyers, comparatively speaking, devoted much time to admiralty practice, and consequently the sale for such a series must be limited. It is very appropriate that Judge Brown shold have undertaken the work. He is a gentleman of culture and liberal education, of much experience in admiralty law, and is the successor of Judge Longyear, one of the ablest of the admiralty judges whose opinions are reported in this series. The volume before us contains the more important admiralty decisions rendered in the sixth circuit during the last eighteen years. Judge Brown says that the accidents of compilation have limited it to cases arising in the two Districts of Michigan and the Northern District of Ohio; but subsequent volumes, if published, will probably include cases from other districts; that this volume, without formal dedication to that effect, is intended as a tribute of respect to the memory of Judge Longyear. The judges, whose opinions are reported in this volume, are McLean, Swayne, Emmons, Wilkins, Wilson, Withey, Longyear, Sherman and Brown. Judge Brown has performed his duties as reporter with skill and great accuracy. The mechanical execution of the volume reflects credit upon the publishers.

WE are under obligations to the law firm of DENT & BLACK, of this city, for the following opinion:

U. S. C. COURT, N. D. OF ILL.

ALBERT G. HYDE et al.,
v.
THE FIRST NATIONAL BANK OF LACON.

THE LIABILITY OF A BANK TO WHOM COMMERCIAL PAPER IS SENT FOR COLLECTTION—A SECOND BANK RECEIVING THE PAPER FROM THE FIRST AND COLLECTING THE MONEY ON IT, IS NOT LIABLE TO THE OWNER OF THE PAPER.

1. That the law, as now settled by the Supreme Court of the United States, is as follows: That when an owner of commercial paper sends it to, and it is accepted by a bank for collection, whether payable at the place where such bank is located or elsewhere, in the absence of any contract to the contrary, there is an implied agreement with such bank, arising from the acceptance of the employment, that it will perform all the acts necessary for the collection, and if not paid, of charging the parties thereto. It is not regarded as the appointment of the bank, as the attorney of the owner of the paper, authorized to select other agents suitable and competent for the purpose of collecting the note; but, on the contrary, "its position is that of an independent contractor, and that the instruments employed by such bank in the business contemplated, are its agents and not the agents of the owner of the note;" that its duty is not discharged when it selects suitable agents to perform the duty entrusted to it; that the owner of the paper is not to look to the responsibility of the agents intrusted by the bank with his collection; that the bank to which he commits the paper is alone responsible to him for the performance of all acts necessary to secure his rights, including the payment of the money when collected, and that the liability to pay over attaches as soon as the money is paid, either to it or a sub agent, selected by such bank to collect for it.

2. In this case, the money was collected by the defendant bank, before the Cook County Bank, to which the owner sent the paper, failed, and was by the defendant placed to the credit of that bank, the day before its failure, so that the Cook County Bank's liability to the plaintiff for the money attached before the failure, which brings the case, in the judgment of the court, within the doctrine of Hoover, assignee, *v.* Wiese, 8 CHICAGO LEGAL NEWS, 193.—[ED. LEGAL NEWS.]

HOPKINS, J.

This action was brought to recover of defendant, a certain sum of money, charged to have been collected by defendant for plaintiffs, of John Hutchins. Plea, general issue. It was tried, by stipulation, by court.

The evidence showed that John Hutchins, of Lacon, in this State, gave his note to the plaintiffs, residents of New York city, for $407.63, on the 15th day of September, 1874, payable in four months, at the First National Bank of Lacon, the defendant. The plaintiffs indorsed the note to the order of A. Hest, Esq., cashier, for collection for their own account. Hest then indorsed it to the defendant for collection for Cook County National Bank. Mr. Hest was the cashier of the Cook County National Bank, and sent the note in letter to defendant, on the 11th day of January, 1875, with instructions "to collect and credit." The defendants kept an account with the Cook County Bank, and then had a considerable sum in that bank. The note was paid to defendant on the 18th of January, 1875, and credited to the Cook County Bank, as other collections in the usual course of business. The defendant remitted, on that day, to the Cook County Bank, more money than this collection amounted to, and had at that time, a large balance due it from that bank.

The Cook County bank failed on the 19th January, but the defendants had no knowledge of its failure or embarrassment until about noon on the 19th.

The testimony also showed that custom between that bank and defendant, and also between the other Chicago banks and their country correspondents, was to make collections of notes sent there for that purpose, and credit the proceeds to the bank transmitting them. That no account was kept with any other person of such paper sent for collection, and that this custom prevailed as well when the paper was indorsed to the bank sending for collection on account of their own, as when indorsed generally, and accounts of all such transactions, in all cases, were kept in the same way.

These are the substantial facts, and the law applicable as now settled by the Supreme Court of the United States, may be stated as follows: that when an owner of commercial paper sends it to, and it is accepted by, a bank for collection, whether payable at the place where such bank is located, or elsewhere, in the absence of any contract to the contrary, there is an implied agreement with such bank arising from the acceptance of the employment, that it will perform all the acts necessary for the collection, and if not paid, of charging the parties thereto. It is not regarded as the appointment of the bank as the attorney of the owner of the paper, authorized to select other agents suitable and competent for the purpose of collecting the note, but on the contrary "its position is that of an independent contractor, and that the instruments employed by such bank in the business contemplated, are its agents and not the agents of the owner of the note." That its duty is not discharged when it selects responsible agents to perform the duty entrusted to it. That the owner of the paper is not to look to the responsibility of the agents entrusted by the bank with his collections. That the bank to which he commits the paper is alone answerable to him for the performance of all acts necessary to secure his rights, including the payment of the money when collected. 47 N. Y., Ayrault *v.* Pacific Bank, 570. And that the liability to pay over attaches as soon as the money is paid, either to it, or a sub-agent selected by said bank to collect for it.

This being so, it follows that the owner is to look to his immediate contractor, and has no remedy against the under contractor or agent employed by the bank. That such agents or contractors have no privity of control with the owner and are not liable to him, but are only liable to the party immediately employing them. In short, that the sub-agent employed by the bank owes no duty to the party who deposited the paper for collection with his principal, and hence is not responsible to him for any damages. This, I understand to be the effect and meaning of the late decision of the Supreme Court of the United States in the case of Hoover, Assignee, *v.* Wiese, 8 Ch. L. N., 193.

Although prior to that decision I had considered the weight of authority was in favor of the owner's having a right of action against the party who actually collected the money upon the note, a secondary agent, unless he had paid it before notice of the owner's claim, or had made advancement upon the paper to the party from whom he received it in such a way as to enable him to hold the proceeds on the ground that he was a *bona fide* holder of the paper for value.

But this decision, by declaring that a secondary agent is not liable at all to the owner, completely overthrows the theory upon which such supposed liability was based, and excludes the consideration of tha question of the rights of such agent, as against his immediate principal, and renders immaterial the question as to whether he knew the bank employing him was the owner of the paper or not, for not being answerable to the owner in any case, without some arrangement changing the implied contract, arising from the said employment to collect, it is unimportant to the owner to inquire what right such agent may have against his employers.

In the case of McBride *v.* The Farmers Bank, 26 N. Y., 450, a recovery was had against the seconday agent, which, at first, seems to be in conflict with the earlier New York cases cited, and followed in the opinion of the U. S. Supreme Court above mentioned. But on examining that case carefully, it appears that the bank gave an order to the owner of the paper, or its agent, for the notes, before the payment of the notes, and that he demanded them of the agent before payment, and that the failure of the bank was *before* payment, which distinguishes it from the case cited, and from this also; for here the money was collected by the defendant before the Cook County Bank failed, and was by this defendant passed to the credit of that bank, the day before the failure, so that the Cook County Bank's liability to the plaintiff for the money attached before its failure, which brings the case, in my judgment, clearly within the doctrine of Hoover, assignee, *v.* Wiese, supra.

It is difficult to reconcile this decision with that of Dickenson *v.* Waron, 47 N. Y., 439, and Sweeney *v.* Eaton, 1 Wallace, 166. But it is not for me to reconcile these cases; the case of Hoover *v.* Weise being the latest expression on that subject, it must be regarded as the law, by this court.

The defendant is, therefore, entitled to a judgment.

TENNEYS, FLOWER & ABERCROMBIE, for plaintiffs.

DENT & BLACK, for defendant.

SUPREME COURT, DISTRICT OF COLUMBIA.

BEFORE CHIEF JUSTICE CARTTER, SITTING IN CHAMBERS.

No. 11,314—*Criminal Docket.*

In the Matter of HALLET KILBOURNE'S Petition for the Writ of *Habeas Corpus.*

POWER OF THE NATIONAL HOUSE OF REPRESENTATIVES TO PUNISH FOR CONTEMPT.

1. That since the adoption of the Revised Statutes and the repeal of the former laws relating to the punishment of a witness by the House, for contempt of the House in refusing to testify, when the House adjudges the witness in contempt, its power to punish terminates, and it can only certify the fact, through its proper officers, to the Supreme Court of the District, as provided by the statute.—[ED. LEGAL NEWS.]

The relator, Hallet Kilbourne, presents his petition under oath, stating therein that he is unlawfully imprisoned in the common jail of the District of Columbia by John G. Thompson, Sergeant-at-arms of the House of Representatives of the United States Congress, under an order of said House, and asking that the writ of *habeas corpus* shall issue to said Sergeant-at-Arms, commanding him to bring the relator before the court, to the end that the cause of his detention may be inquired into; and if found to be illegal, that he may be discharged from custody.

The writ is duly issued and served upon the Sergeant-at-Arms, who responds thereto by bringing the relator before the court, and makes a full and formal return of the causes for which he is held in custody.

The respondent states at length the history of the case leading to the arrest and confinement of the relator, the substance of which statement, in brief, is as follows:

The House of Representatives, being duly organized, was in lawful session on the 24th of January, 1876, and on that day resolved to appoint a special committee to inquire into the nature and history of a certain matter known as the "Real Estate Pool," in the District of Columbia, and the character of a settlement alleged to have been made by the trustee in bankruptcy of the estate of Jay Cooke & Co., with said real estate pool, the government being a creditor and interested in the assets of said bankrupt firm.

Such committee was duly empowered to send for persons and papers, and directed to report the result of their investigation to the House.

The committee subsequently appointed, commenced its inquiry, and, to that end, caused a *subpœna duces tecum* to be issued and served upon the relator, commanding him to appear before it to testify, and to bring with him certain deeds, books, maps, and other papers relating to certain described lots and squares of ground in said district.

The relator appeared in obedience to the subpœna, and testified in answer to certain questions, but on being asked whether he had brought the papers and documents referred to in the subpœna, answered in the negative. He was asked further, if he was willing to produce them, and he again answered in the negative.

He was then asked if he refused to produce them in response to the subpœna, and he answered in the affirmative, claiming that his papers related to his private business; and that like every private citizen not accused of violating law, he had the right to be protected in his papers.

The relator further declined to answer certain other questions asked him, as to the place of residence and the names of the persons who were members of said real estate pool, besides the firm of Jay Cooke & Co.

From this refusal of the relator so to answer questions, and produce papers, the committee reported the matter to the House, and that body ordered a warrant to issue for the arrest of the relator, and to bring him before the House to show cause why he should not be punished for contempt.

In obedience to this warrant, the relator was brought to the bar of the House, where the Speaker asked him the same questions which he had refused to answer before the committee; and on his again refusing to answer the questions, or to produce the papers, he was adjudged to be in contempt of the House, and was ordered into custody of the respondent, to be kept in his custody in the common jail of the District of Columbia, until he should purge himself of the contempt, by signifying his willingness to obey the *subpœna*. That in pursuance of this order of the House, a warrant was duly issued to respondent, and in obedience thereto he arrested, and now detains the relator.

To this return to the writ of *habeas corpus*, the relator makes reply, in which he states that on the 17th of March, 1876, the Speaker of the House of Representatives sent his certificate to the U. S. attorney for the District of Columbia, stating therein the fact of the *subpœna*, and the refusal of the relator to obey the same, or to answer the questions put to him touching the matter under investigation; that the district attorney had presented said certificate to the grand jury; and that an indictment had been found against the relator, on which a bench-warrant had duly issued to the marshal of said district, and had been returned unexecuted, the respondent herein declining to surrender the relator to the marshal.

That the indictment charges the relator with having committed the same offense and contempt mentioned and described in the return of the respondent herein; and that said indictment is still depending in said court.

Whereupon he prays that he may be admitted to bail to appear and answer said indictment, and on giving such bail, discharged from custody.

It is claimed by counsel for relator, that the question, whether the House has power to punish for contempt generally, need not be inquired into in the present case, as the facts are so fully set out in the return and reply thereto, as to make this a special matter, so that the only subject for inquiry here is, has the House jurisdiction to punish the particular contempt described in this case?

It is admitted by counsel that the power to punish for contempt does exist in the House, to the extent, at least, of self-preservation; to protect its own being; and that this power is an implied power, which, it is urged, must not be carried beyond its necessity.

It is claimed, that both houses of Congress, being thus protected in their sessions by this implied power to punish for contempt, can then, by legislative enactment, provide methods and tribunals for the punishment of offenders, and for the better protection of themselves, than by this undefined and implied power; and that, having so combined and passed a law, as the act of 1857, (R. S., p. 17), wherein the certain offenses therein described is to become a misdemeanor, and is to be punished in a certain manner, to wit: by indictment and trial in the District of Columbia, then that that particular offense, of refusing to testify, or to bring papers in obedience to the order of either house, can be no longer punished under the implied power vested in the House where the contempt is committed, but must be certified to the grand jury of said district in obedience to said law, there to be tried as any other criminal offense, by a jury. It is further claimed that this particular contempt, having been declared by said statute to be a misdemeanor, cannot be punished by the House under its implied power, and again by the court under the express authority of the statute, for that would be in violation of the constitutional provision that no person shall be twice put in jeopardy for the same offense.

It is claimed by counsel for respondent, that the implied power to punish for contempt, is granted to the House of Representatives by the Constitution, as clearly as though it had been expressed in words; and that being so granted, it must remain where the Constitution places it.

Consequently, that no legislation can annul, divest, or delegate that power to any other branch of the government.

That if a law was passed expressly forbidding the exercise of this power by either House of Congress, such law would be absolutely void.

That then the House, having this constitutional authority, has in respect thereto all the attributes of a court; and having exercised the power, as in this case, its action is a judicial act, and its judgment cannot be reviewed, revised or questioned by any other tribunal.

That having passed to judgment, the imprisonment, as in this case, follows as due process of law; being the execution of a judgment duly rendered by a com-

petent tribunal, having jurisdiction of the subject matter.

That the statute of 1857 was not intended to, and does not divest the House of this power; but only adds an additional penalty to the offense, and makes it a crime against society at large.

That therefore, the punishment by the House is for the offense committed against its own person; and that by the court under the power of the statute, for the offense against society.

That while the act is *one*, the offenses are *two;* and that therefore the punishment is not double.

That the offense against the House is not within the meaning of the word as used in the section of the Constitution, which provides that no person shall be subject for the same offense, to be twice put in jeopardy of life or limb.

That whether the matter under investigation by the House, when the contempt was committed, though claimed to be for proper legislative purposes, was strictly within the scope of its jurisdiction as a legislative body or not, cannot now be the subject of inquiry; that that was a question for the house to decide, and not for the witness; and that the contempt was equally an offense against the House in either case.

That in a trial by the House for contempt, the matter of jurisdiction is the contempt itself, and not the matter on trial when the contempt was committed.

That if the matter under investigation by the House has color of law for its support, and is not sheer usurpation of authority, and an act of violence, then the courts are powerless to interfere with its judgment for contempt committed by a witness during the progress of such investigation.

That the imprisonment of the relator, while it is in the nature of a punishment for the offense, it is also for the more important purpose of compelling him to testify; and in this view, is remediable in its nature, and can be terminated by the relator himself, on his signifying a willingness to testify, and to produce his papers. That while he can thus liberate himself from the restraint imposed by the House, at any moment, by thus purging himself of the contempt, he has no power to relieve himself from punishment under the statute, for his offense against the public; and that this shows conclusively that *two* offenses have been committed in the *one* act.

Opinion by CARTTER, C. J.

The consideration of this case, in the light of authority and the able and exhaustive argument of counsel, with such reflection as I have been able to bring to the aid of judgment, has reduced the questions involved in it to the inquiry, whether the House of Representatives possessed jurisdiction for punishment over the person of the relator?

If the House of Representative had jurisdiction in the subject-matter of the investigation, and that jurisdiction was not terminated by the judgment for contempt, the jurisdiction was exclusive of the power of the writ; and it is not within the province of the law, or law tribunal, to inquire into, or question it.

On the other hand, if the House did not possess constitutional power to make the investigation; or if that power, in punishment of the relator had exhausted itself with the judgment for contempt, the rights secured to the relator and every other citizen by virtue of the writ supervene, and the jurisdiction and power of the law tribunals charged with the duty to give the writ effect, obtain.

It may be regarded, in the light of unvarying authority that punishment for contempt within the limitations of the jurisdiction of the house, whether the house is to be considered as a court or not, is conclusive of judgment, and may not be inquired into by writ of *habeas corpus* or otherwise. It is a right inherent in the jurisdiction of the tribunal, essential to its integrity and preservation, and inviolate from the interference of jurisdiction disconnected with the tribunal exercising it.

This predicate of judgment leads me first to the inquiry, whether the power of the house to inflict the punishment involved in its order, had been transferred by law to the adjudications of the courts?

The first effort of congress to regulate the subject of punishment for contempt by law, transpired Jan. 24, 1857, (and is found on page 155 of the 11 volume of the statutes at large,) in an act entitled, "an act more effectually to enforce the attendance of witnesses on the summons of either House or Congress, and to compel them to discover testimony."

The second section of this act relates to the protection of the witness from prosecution for testimony so given; and the first and third sections are as follows:

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled.* That any person summoned as a witness by the authority of either house of Congress, to give testimony or to produce papers upon any matter before either House, or any committee of either house of Congress, who shall wilfully make default, or who, appearing, shall refuse to answer any question pertinent to the matter of inquiry in consideration before the house or committee by which he shall be examined, shall, in addition to the pains and penalties now existing, be liable to indictment as and for a misdemeanor, in any court of the United States having jurisdiction thereof, and on conviction, shall pay a fine not exceeding one thousand dollars, and not less than one hundred dollars, and suffer imprisonment in the common jail not less than one month nor more than twelve months."

"Sec. 3. *And be it further enacted,* that when a witness shall fail to testify, as provided in the previous sections of this act, and the facts shall be reported to the House, it shall be the duty of the speaker of the House or the president of the senate to certify the fact under the seal of the House or senate to the district attorney for the District of Columbia, whose duty it shall be to bring the matter before the grand jury for their action."

Again, on the 24th day of January, 1862, by an act, entitled, "An act amending the provisions of the second section of the act of January twenty-fourth, eighteen hundred and fifty-seven, enforcing the attendance of witnesses before committees of either house of Congress." 12 Stat. Large, 333.

This amendment is not material to the matter under consideration, further than as a legislative recognition of the other sections of the statute then existing.

This is the history and terms of the action of Congress up to the act of June 22, 1874, entitled:

"An act to revise and consolidate the statutes of the United States in force on the first day of December, *Anno Domini*, one thousand eight hundred and seventy-three." The last expression of legislation, and the present law.

Sections 102 and 104 of this act, are as follows:

"Sec. 102. Every person who, having been summoned as a witness by the authority of either house of Congress, to give testimony or to produce papers upon any matter under inquiry before either house, or any committee of either house of Congress, wilfully makes default, or who, having appeared, refuses to answer any question pertinent to the question under inquiry, shall be deemed guilty of a misdemeanor, punishable by a fine of not more than one thousand dollars nor less than one hundred dollars, and imprisonment in a common jail for not less than one month nor more than twelve months."

"Sec. 104. Whenever a witness, summoned as mentioned in section one hundred and two, fails to testify, and the facts are reported to either house, the president of the senate or the speaker of the house, as the case may be, shall certify the fact under the seal of the senate or house, to the district attorney for the District of Columbia, whose duty it shall be to bring the matter before the grand jury for their action."

The first and natural inquiry in the light of this legislation is the question, why was it enacted in the form and substance that we find it?

Ordinarily, to a legal tribunal charged with the administration of the law, where the law is unobscured and its language definite, it is sufficient and conclusive that it is written by the law maker; but inasmuch as the constitutionality and purpose of these statutes have been controverted in the argument, it may not be out of place to inquire why they were passed.

My reflection has no difficulty in finding apt and ample reasons for the interposition of the statute.

The antecedent condition of the power was latent, undefined and unpublished. Common justice to the citizen required that it should be defined and made known.

Again, it is a truth well known to the constitutional student of the history of this government, that a large and intelligent portion of its statesmen has denied, early and late, the implied power of either House of Congress to inflict any punishment.

These appear to me ample reasons for this legislation.

These statutes have further significance. By reference to the statutes of 1857, it will be seen that Congress contemplated additional penalties to the penalties that inhered in the power of the respective houses, and so expressed it in the words, "*in addition to the pains and penalties now existing.*" The present statute, for some reason in the wisdom of Congress, rejected the language commanding additional punishment, leaving the penalty of the last amended statute as the sole punishment for the offense.

This last statute stands unembarrassed, not only as an expression of the legislative will, but as a legislative interpretation of Congressional power to inflict double punishment.

It provides in express terms that the offense shall constitute a misdemeanor, and shall be punished by fine and imprisonment through process of indictment and trial by jury.

To avoid the force of its plain mandate, it is objected,

First. That if it is substitutional of the right of the house also to punish, it is unconstitutional; that it is not in the power of the united branches of the national legislature to supersede by law the authority residing in either branch to inflict the punishment; that either branch of Congress inherits its power from the constitution; and that it is inalienable, although alienation is concurred in by the entire law making power.

This proposition invites me, sitting as a judge at chambers, to pronounce unconstitutional the solemn legislation of congress, in deference to a latent power residing in the House, at the request of the House of Representatives which pronounced its judgment of its constitutionality by uniting in the passage of it.

If reasoning inclined me to the conclusion urged, I should hesitate long before resolving it into judgment; but it does not. The act does not imply the abnegation of power on the part of the House or of the Senate to inflict punishment for contempt; but on the contrary, recognizes that power, and exercises it in denominating the offense a misdemeanor and punishing it as such.

Again it is urged, that the penalty of this law is cumulative of the punishment and not substitutional of the law and punishment that resided in the House before its passage.

The first answer to this position is that there is nothing in the language of the statute or its nature indicating that the penalty imposed by it is to operate as an addition to any penalty that might be inflicted by the House for the same offense. If there was any such purpose, it is more than doubtful whether the Constitution would permit it to be exercised.

The second clause of the 5th amendment to the Constitution is this:

"Nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb."

It has been attempted to justify this matter by the authority that double punishment may be inflicted where the act involves two offenses; as in the case of committing a contempt in the process of committing a crime; and in the case of committing, in the same act an offense against two sovereignties. While this is true, it constitutes no aid to judgment here, inasmuch as here the sovereignty is the same, and the offense is the same, and that is, *contempt.*

The offense against the House and the offense involved in the prosecution of the indictment, being the same, a double punishment cannot wait upon it under the Constitution.

That the offense is conclusively *one* is made certain by all the documentary evidence in the case.

We find the offense first described in the record of the proceedings of the committee where it occurred as follows:

"Q. State whether you have in your possession now and have brought to the committee room, the papers, documents, memoranda, etc., referred to in the *subpœna duces tecum* served upon you?

A. I have not.

Q. State whether you are prepared to produce them at this sitting of the committee?

A. I am not prepared to produce them to-day.

Q. State whether you are willing to produce them now, or at any future sitting of this committee?

A. As at present advised, I am not prepared.

Q. You refuse to produce them before the committee in response to this subpœna?

A. Yes sir. I would like to state the reasons therefor, etc."

This describes that part of the offense which consisted of the refusal to produce the papers. The refusal to answer questions is described as follows:

"Q. How many members of the pool were there before you became a member? I believe you have in fact answered.

A. Five gentlemen besides Jay Cooke & Co., put in $5,000 apiece.

Q. Will you state where each of these five members reside?

A. I do not know that I could do that. Mr. Chairman, if you will indulge me, I respectfully decline to give any testimony as it relates to these individuals.

Q. Do you decline to state where they reside?

A. I do not know that I could, I could upon reflection probably.

By the Chairman.

Q. Would you refuse to state if you knew? We want to know whether that is one of the questions you decline to answer.

A. I decline to answer except upon consultation with my counsel.

By Mr. New:

Q. For the present you decline to state, even if you were certain as to the locality, where they do reside?

A. Yes sir: I respectfully decline to state anything in relation to individuals who did business with us except upon consultation with my counsel.

Q. Will you please state their names?

A. That I beg to include in the same answer."

The offense, then, is made up of two things—the refusal to produce the papers, and the refusal to give the place of residence, and the names of the five members of the real estate pool.

This offense is again described in the same words, in the report of the committee to the House; in the proceedings of the House when the relator was brought to the bar of the House to show cause; in the certificate of the speaker to the district attorney; and in the indictment presented by the grand jury.

In fact it is consented on all sides that the offense is one; one act, one fact.

But it is urged, although one offense, it meets its several punishments in the several forums for distinct purposes; that the relator is punished in the courts in the penalty of transgression, in the House, to make him testify. In one place to visit him with the penalty for what he has done or refused to do; in the other place to compel him to do.

This proposition avows the doctrine that in addition to penalties and punishments for contempt, the House has the power to coerce the recusant witness to testify. This power as distinguishable from penalty is not given by the Constitution, in express terms, either to courts or legislators; nor is it to be derived from the spirit of the Constitution, or found in the genius of our institutions, or the spirit of our people.

It is so obnoxious to the common law as administered, universally in the courts of the country, that they will not even permit confession of guilt under duress.

If by coercion is meant merely the influence that penalty furnishes to pursuade the party to testify, coercion enters into the law provided for the punishment, and Congress has already provided for it by law. It is urged again, that if the power of the House of Representatives is resolved into this law for the punishment of contempts, it renders the House helpless in the way of enforcing compliance with its orders to testify.

If this be so, the reply is, that Congress is the law making power of the country; and if the law that they have instituted is inadequate to the end, they have the power to make it severer. Or if no law will supply the place of the inherent and undefined authority of

either house, they have the power to repeal it, and re-possesses themselves of the undefined authority displaced or defined by this statute.

The power of punishment under the statute, is not in extinguishment of the constitutional right of punishment for contempt, but in definition and expression of it.

A repeal of the expression and limitation of the exercise of the power, leaves the subject where the statute found it.

With the judgment of the House in contempt, its power to punish terminated, and the punishment prescribed by law supervened; in pursuance of the authority and command of the law, the speaker certified the offense to the district attorney; and the grand jury found an indictment against the relator, which brings his body within the jurisdiction of the court charged with trying the offense stated; to which tribunal I feel it my duty to deliver him for trial.

I cannot dismiss the subject without noticing the fact that the chief labor and learning expended in the argument before me with great ability, has been devoted to the enlightment of questions not brought into my decision; arguments illustrative of the power, or want of power, to institute the investigation; the obligation of the citizen to bear testimony in such investigation; whether the question belongs to the House of Representatives or the courts; and whether the relator was bound to uncover the history of his private business as a contribution to the investigation.

The conclusion which I have reached as to the office of the statute, renders it unnecessary, if not improper to determine these questions now. They enter into the issue of the guilt or innocence of the relator under the indictment, and should be passed upon by the tribunal trying that issue.

UNITED STATES SUPREME COURT.

PROCEEDINGS OF.

Wednesday, April 26, 1876.

On motion of Clinton Rice, T. B. Dalton, of West Point, Miss., was admitted.

On motion of E. G. Lapham, Nathaniel C. Moak, of Albany, N. Y., was admitted.

No. 217. The New York Life Insurance Company v. William C. Statham et al.; No. 218. The New York Life Insurance Company v. Charlotte Seyms. These causes were argued by Matt H. Carpenter and J. A. Garfield for appellants, and Clinton Rice for appellee, in No. 217, and Joseph Casey for defendant in No. 218.

Adjourned until Thursday at 12 o'clock.

Thursday, April 27.

On motion of George F. Edmunds, O. H. Irish, of Nebraska City, Neb., was admitted.

On motion of A. Chester, J. J. Scribner, of Modesto, Cal., was admitted.

No. 961. Theodore LeRoy v. Jose Antonio Chabola et al. In error to the Circuit Court of the United States for the District of California. On motion of John Selden, docketed and dismissed with costs.

No. 962. John Forsythe et al. v. Mark Kimball, assignee, etc. In error to the Circuit Court of the United States for the Northern District of Illinois. On motion of T. H. N. McPherson, docketed and dismissed with costs.

No. 219. The steam ferryboat America et al. v. The Camden and Amboy Railroad Transportation Company. This cause was argued by B. D. Silliman for appellants, and W. R. Beebe for appellees.

No. 221. The City of St. Louis v. The United States. The argument was commenced by M. Blair for appellant.

Adjourned until Friday at 12 o'clock.

Friday, April 28.

On motion of George H. Williams, Charles L. Easton, of Chicago, Ill., was admitted.

On motion of F. Carroll Brewster, D. B. Meany of Philadelphia, Pa., was admitted.

No. 965. Thomas R. Mills, Jr., administrator, etc., v. Levi H. B. Scott. In error to the Circuit Court of the United States for the Southern District of Georgia. On motion of A. T. Ackerman docketed and dismissed with costs.

No. 221. The City of St. Louis v. The United States. The argument was continued by M. Blair for appellant, and by Solicitor-General Phillips for appellees, and concluded by M. Blair for appellant.

No. 222. The Franklin Fire Insurance Company v. James L. Vaughan. This cause was argued by Albert Pike for the defendants, and submitted on printed argument by U. M. Rose for plaintiff.

No. 223. William Shuey, executor, etc. v. The United States. This cause was argued by D. B. Meany and F. Carroll Brewster for appellant, and by Assistant Attorney-General Smith for appellee.

No. 102. Jane F. Haywood et al. v. Charles Dewey, assignee, etc. On motion of E. B. Smith, in behalf of S. F. Phillips for defendant, reversed with costs and remanded, etc.

Adjourned until Monday at 12 o'clock.

As per announcement of WAITE, C. J., published in the LEGAL NEWS of April 15th, no case has been called for argument since the 28th of April, and the court will adjourn for the term, on Monday next, May 8th.

Attorneys have commenced printing their abstracts and briefs for the June term of the Supreme Court of this State, which commences on the first Tuesday of next month.

RE-INSURANCE.

The law relating to re-insurance in England has been of a singularly changeful character. Until the year 1746 it was perfectly lawful for any one who had underwritten a policy of insurance to re-insure the risk which he had undertaken. In that year, however, the statute 19 Geo. 2, c. 37, was passed, by which, among other restrictions, re-insurances were prohibited unless the insurer became insolvent or a bankrupt, or died, in which case his representatives were permitted to insure the amount which had already been insured. This act was passed with the intention of hindering gambling re-insurances, which were then in vogue, and which were caused by the same spirit which induced the various commercial bubbles of that period. But it is clear that it met with little approval from those honorably engaged in commercial undertakings, for we find that it is complained of by Nicholas Magens, a London merchant who wrote a treatise upon insurance soon after this statute became law. But this restriction was removed in 1864 by a clause in a stamp act, (27 & 28 Vict., c. 56), and from this date a re-insurance has been a perfectly valid mercantile contract. But until quite recently no case upon this subject is found in the reports, and therefore the decision in Mackenzie *v.* Whitworth, (33 L. T. Rep. N. S., 655), which was lately given by the Court of Appeal, should not be passed by without comment. The action was originally tried at Liverpool, and the facts were exceedingly few and simple. The plaintiff, an insurance broker, effected the insurance for "£5,000 upon cotton," on behalf of the United States' Lloyd's and individual underwriters of New York, who had already insured the goods to the amount of £80,000. The fact that this transaction was a reinsurance was not disclosed to the second underwriters, the defendants, hence arose the first point, that there had been a concealment of a material fact, and consequently that the policy was void The jury, however, found that this was not a concealment of a material fact, and consequently this important point did not arise before the Court of Appeal. But this tribunal had to decide whether the description in the policy "on goods" was such a description of the subject-matter of the insurance as to cover the risk actually insured. This question was answered in the affirmative.

It is perfectly certain that it is preposterous to forbid re-insurance, but it seems equally advantageous that the fact that the second underwriters are about to reinsure should be communicated to them, and that the subject-matter of the insurance should be more definitely and more accurately defined. If this course were adopted, it would in the first place prevent litigation, because if the previous insurance is not disclosed, although in this particular instance its non-disclosure was not considered material, yet it may be surrounded with circumstances which would make it so, and moreover a London or a Newcastle jury might hold a different opinion from a similar body in Liverpool. Again, to disclose the nature of the transaction would be no sort of injury to honorable and upright underwriters, who from perfectly honest circumstances might be desirous of running less risk than they had originally intended. Not to disclose the character of the affair, to place the subject matter in such vague terms in a policy, is to open a door to fraudulent transactions most difficult to detect and most undesirable in their consequences. No doubt there was to some extent a policy in respect of goods, because if goods were lost, the original underwriters would be liable on the policy, but the actual subject-matter of the second insurance was the risk or the liability to pay which the first underwriters had incurred by entering into the original policy. That this position is correct, is shown by the very clear statement of Emerigon. "The risks," he says, (vol. 1, p. 252), "which the assurer has undertaken, form, as between himself and the reassurer, the subject-matter (*matiere*) of the re-assurance, which is a new contract totally distinct from the first, which, however, remains in full force." There may be, and probaoly are, very many underwriters who would hesitate and perhaps refuse to enter into a policy which was a reinsurance without much more detailed inquiries than they would consider necessary in an original contract. For the very nature of an underwriter's business makes it improbable that he will enter into a re-insurance unless under very exceptional circumstances. It is the duty of the assured to communicate to the underwriter any fact which would induce him either not to enter into the contract or enter into it on different terms. As Lord Mansfield observed, in the celebrated case of Carter *v.* Boehm, "Men argue differently, but it seems difficult to say that the mind of an underwriter would not be affected by the fact that he was about to enter into a re-insurance, not into an original contract." A plausible argument on the other side is, that if the original subject-matter is known to the second underwriter, he can obtain full information upon the subject, but it is obvious that he will require much more detailed information in cases of a re-insurance than in cases of an original contract, because in most cases a broker effects the contract, whichever it may be. Therefore it is, we think, to be regretted that re-insurance, after being for so many years restricted in a way quite unnecessary, and quite contrary to the practice of America and the Continental States, should, by the case under discussion, have been suddenly developed to a most unnecessary and undesirable extent, and have been placed under far less restriction, than exist either in European or American laws, especially at a time when the legislature is desirous of putting an end to any means which enable fraudulent persons to avail themselves of the law for their personal benefit.—London *Law Times.*

THE RAILROAD TAX DECISION.

The following circular letter which has been addressed to county authorities by Attorney General Edsall, we take from the Springfield *Journal* of May 3:

STATE OF ILLINOIS,
ATTORNEY GENERAL'S OFFICE,

To the several County Boards and County Collectors of Illinois:

Pursuant to the course of proceeding indicated in the circular addressed to you from this office, dated September 27, 1875, the appeals prosecuted from the Circuit Court of the United States for the Northern District of Illinois to the Supreme Court of the United States, in the railroad cases, have been urged to a final, as well as successful issue.

As you have been apprised through the public press, the decrees of the Circuit Court have been reversed, with directions that the injunctions be dissolved and the bills dismissed.

To answer a general inquiry as to what steps are now to be taken in order that the collection of the taxes may be proceeded with, I have to say, that as soon as I can procure an official copy of the opinion of the United States Supreme Court, and the proper mandates from that Court to the United States Circuit Court, I shall take proceedings to dissolve the injunctions in the various pending cases, as well as in those from which appeals were prosecuted. This will probably be accomplished within the next three or four weeks.

The decision of the Supreme Court is of such character, that I have no doubt that the United States Circuit Courts will dissolve the injunctions heretofore granted in this class of cases; and the County Collectors will then have power to proceed with the collection of the taxes.

I am very respectfully,
JAMES K. EDSALL,
Attorney General.

We published the opinion referred to in the above letter on the 29th of April, and have had an official copy in our possession since the 26th of April.

The name of Judge Davis, of the U. S. Supreme Court, is among those who are prominently mentioned for President. Should he be nominated, his reputation for honesty and capability, and the State pride of Illinois voters, might have the effect not only to give him the vote of the State, but to carry with him the whole State ticket.

We call attention to the double-column advertisement of the law publishing-house of Callaghan & Co., on the last page of this issue.

CHICAGO LEGAL NEWS.

SATURDAY, MAY 13, 1876.

The Courts.

UNITED STATES SUPREME COURT.

No. 401—OCTOBER TERM, 1875.

LEAVENWORTH, LAWRENCE and GALVESTON RAILROAD COMPANY, Appellant,
v.
THE UNITED STATES.

Appeal from the Circuit Court of the United States for the District of Kansas.

CONSTRUCTION TO BE GIVEN TO GRANTS OF LANDS BY CONGRESS TO AID RAILROADS —THE OSAGE CEDED LANDS — EFFECT OF LAND GRANT ON INDIAN RESERVATION.

1. LAND GRANTS.—The court states the rule for construing land grants.

2. TITLE VESTED.—That the words, "there be and is hereby granted," vest a present title in the State of Kansas, though a survey and a location are necessary to give precision to it, and attach it to any particular tract. After the location of the road the grant becomes certain, and, by relation, has the same effect upon the selected parcels as if they had been specially named at the date of the act. In other words, the grant was afloat until the line of the road should be definitely fixed.

3. THE OSAGE LANDS.—That Congress did not intend that this grant should reach the Osage lands, further than to allow the company to construct its line of road through them.

4. RIGHTS OF THE INDIANS.—That the Indians are acknowledged to have the unquestionable right of the lands they occupy, until that right shall be extinguished by a voluntary cession to the government, and this right of occupancy is as sacred as the title of the United States to the fee.

5. INTENTION OF CONGRESS AS TO THE OSAGE LANDS.—That this perpetual right of occupancy, with the correlative obligation of the government to enforce it, negatives the idea that Congress, even in the absence of any positive stipulation to protect the Indians, intended to grant their lands to a railroad company, either absolutely or *cum onere*. For all practical purposes, the Osages owned the lands, as the actual right of possession. The only thing they deemed of value was secured to them by the treaty of June 2, 1825, until they should elect to surrender it to the United States. In the free exercise of their choice, they might occupy their lands forever; and whatever changed this condition, or interfered with it, violated the guarantees under which they had lived since that date.—[ED. LEGAL NEWS.]

Mr. Justice DAVIS delivered the opinion of the court.

This suit was brought by the United States to vacate certain patents issued to the appellant for portions of the Osage ceded lands, so called, in Kansas. These patents were properly issued by the governor of the State, conformably to "certified lists" furnished him by the Secretary of the Interior, if the lands embraced in the "lists" had been granted by Congress to the State to aid in the construction of the appellant's railroad. But the United States contend that the lands were not so granted. If such be the fact, it follows necessarily that the patents should be annulled, for public officers can bind the government only within the scope of their lawful authority. This court said, in The United States *v.* Stone, (2 Wallace, 525,) "that patents are sometimes issued unadvisedly, or by mistake, where the officer has no authority in law to grant them, or where another party should have received the patent; in such case the law will pronounce them void." The cancellation of a patent is, however, a judicial act, and whatever may have been formerly the prevailing doctrine, it is now settled that a court of equity is better adapted to that purpose than a court of law, and that the United States by its instrumentality, can, if thereto entitled, obtain relief. (U. S. *v.* Stone, supra.)

The act of Congress of March 3, 1863, (12 Stat., 772,) is the starting point in this controversy. Upon it, and the treaty with the Osage tribe of Indians, proclaimed January 21, 1867, the appellant rests its claim of title to the lands covered by the patents. It is, therefore, of primary importance to ascertain the scope and meaning of that act. The parties differ radically in their interpretation of it.

The United States maintain that it does not dispose of the Osage lands, and that it was not intended to do so. On the contrary, the appellant insists that the grant did not operate upon any particular lands until the line of its road was located, when it took effect upon these lands, as the Osage title had been then extinguished, and they had become in the proper sense of the term, public lands. This difference would seem to imply obscurity in the act, but be this as it may, the rules which govern in the interpretation of legislative grants are so well settled by this court that they hardly need be re-asserted. They apply as well to grants of lands to States to aid in building railroads, as to grants of special privileges to private corporations. In both cases the legislature, prompted by the supposed wants of the public, confers on others the means of securing an object which it is desirous of promoting, but is unwilling directly to undertake.

The main question in The Dubuque and Pacific Railroad Company *v.* Litchfield (23 Howard, 66) was whether a grant to the Territory of Iowa, to aid in the improvement of the navigation of the Des Moines river, extended to lands above the Raccoon fork, or was confined to those below it. The court, in deciding it, say: "All grants of this description are strictly construed against the grantee; nothing passes but what is conveyed in clear and explicit language; and as the rights here claimed are derived entirely from the act of Congress, the donation stands on the same footing of a grant by the public to a private company, the terms of which must be plainly expressed in the statute, and, if not thus expressed, they cannot be implied." This grant, like that to Iowa, was made for the purpose of aiding a work of internal improvement, and does not extend beyond the meaning and intent expressed in it. It should be neither enlarged by ingenious reasoning, nor diminished by strained construction. The construction must be reasonable, and such as will give effect to the intention of Congress. This is to be ascertained from the terms employed, the situation of the parties, and the nature of the grant. If these terms are plain and unambiguous, there can be no difficulty in interpreting the act, but if they admit of different meanings—the one of extension, and the other of limitation—they must be accepted in the sense most favorable to the grantor. And if a right be asserted against the government, it must be so clearly defined that there can be no question of the purpose of Congress to confer it. In other words, what is not given expressly, or by necessary implication, is withheld. (Dubuque and Pacific Railroad Company *v.* Litchfield, supra; Rice *v.* Railroad Co., 1 Black, 380; Charles River Bridge *v.* Warren Bridge, 11 Peters, 120.) Applying these rules to this controversy, there does not seem to be any difficulty in deciding it. Whatever is included in the exception is excluded from the grant, and it, therefore, becomes important to ascertain what was excepted in order to determine what was granted. But if there was no exception, and the proviso was omitted, the language used in the body of the act cannot be construed to include the Osage lands.

It creates a present interest, and does not indicate a purpose to give in future. "There be and is hereby granted" are words of absolute donation and import a grant in *præsenti*. This court has held that they can have no other meaning, and the land department, on this interpretation of them, has uniformly administered all previous similar grants.—(R. R. Co. *v.* Smith, 9 Wallace, 95; Schulenberg *v.* Harriman, 21 Id., 60; 1 Lester, 513; 8 Opinions, 257; 11 Id., 47.) They vest a present title in the State of Kansas, though a survey and a location are necessary to give precision to it, and attach it to any particular tract. After the location of the road, the grant becomes certain, and by relation has the same effect upon the selected parcels as if they had been specifically named at the date of the act. In other words, the grant was a float until the line of the road should be definitely fixed. But did Congress intend that it should reach the Osage lands? It is in general terms which neither include or exclude any particular lands. It is of every alternate section designated by odd numbers, within certain defined limits, but without the consent of the Indians there can be no entry on their reservation for the purpose of surveying it. Only the public lands owned absolutely by the United States are subject to survey and division into sections, and to these lands this grant is applicable. It embraces such as could be sold and enjoyed, and not those which the Indians, pursuant to treaty stipulations, were left free to occupy.—(Rice *v.* Railroad Co., 1 Black, 358.) Since the land system was inaugurated, it has been the settled policy of the government to sell the public lands at a small cost to individuals, and for the last twenty-five years to grant them to States in large tracts to aid in various works of internal improvement. But these grants have always been recognized as attaching only to so much of the public domain as was subject to sale or other disposal, although the roads of many subsidized companies pass through Indian reservations.

And such grants could be treated in no other way, for Congress cannot be supposed to have thereby intended to include lands previously appropriated to another purpose, unless there be an express declaration to that effect. A special exception of them was not necessary, because the policy which dictated the grants confined them to lands which Congress could rightfully bestow, without disturbing existing relations, and producing vexatious conflicts. The legislation which reserved them for any purpose excluded them from disposal in the manner that the public lands are usually disposed of, and this act discloses no intention to change the long-continued practice with respect to lands set apart for the use of the government or of the Indians. As the attempted transfer of any part of an Indian reservation, secured by treaty, would also involve a gross breach of the public faith, the presumption is conclusive that Congress never meant to grant it.

"A thing which is within the letter of the statute is not within the statute unless it be within the intention of the makers."—(1 Bacon Abr., 247.) The treaty of 1825 secured to the Osages the possession and use of their lands "so long as they may choose to occupy the same," and this treaty was only the substitute for one of an earlier date with equal guarantees.

As long ago as The Cherokee Nation *v.* Georgia (5 Peters, 1) this court said that "the Indians are acknowledged to have the unquestionable right to the lands they occupy until that right shall be extinguished by a voluntary cession to the government," and recently (U. S. *v.* Cook, 19 Wallace, 591-3) this right of occupancy has been held to be as sacred as the title of the United States to the fee. Unless the Indians were deprived of the power of alienation, it is easy to see that they could not peaceably enjoy their possessions with a superior race constantly encroaching on their frontier. With the ultimate fee vested in the United States, coupled with the sole right to buy that right in case the Indians were willing to sell, they were safe against intrusion if the government discharged its duty to a dependent people. And this it has indicated a willingness to do, for in 1834 an act was passed (4 Stats., 729, sec. 11) prohibiting, with heavy penalties, a settlement on the lands of an Indian tribe, or even an attempt to survey them. This perpetual right of occupancy, with the correlative obligation of the government to enforce it, negatives the idea that Congress, even in the absence of any positive stipulation to protect the Indians, intended to grant their lands to a railroad company, either absolutely or *cum onere*. For all practical purposes, the Osages owned the lands, as the actual right of possession, the only thing they deemed of value, was secured to them by the treaty of June 2, 1825, until they should elect to surrender it to the United States. In the free exercise of their choice they might occupy their lands forever, and whatever changed this condition, or interfered with it, violated the guarantees under which they had lived since that date. The United States have frequently extinguished the Indian title to make room for civilized men, the pioneers of the wilderness, but they never engaged in advance to do it, nor was constraint, in theory at least, placed upon the Indians to bring about their acts of cession. This grant, however, if it took effect on the Osage lands, carried with it the obligation to extinguish the Indian right. This will be conceded, if a complete title to them were granted, but it is equally true, if only the fee subject to that right passed to the grantee. It would be idle to grant what could be of no avail, unless something be done which the grantee is forbidden to do, but which the grantor has power to accomplish. And this applies with peculiar force to a grant like this, intended to be of immediate practical benefit to the grantee. The lands were expected to be used in the construction of the road as it progressed, but no one would buy them, or even loan money upon them, so long as the Indian right of occupancy attached to them. The grantee was not at liberty to negotiate with the Indians at all, but the United States might by treaty put an end to that right. As Congress cannot be supposed to do a vain thing, the present grant of the fee would be an assurance to the grantee that the full title should be eventually enjoyed. This would be in effect a transfer of the possessory right of the Indians before acquiring it—a poor way of observing the treaty of 1825. How could they treat on an equality with the United States under such circumstances? They would be constrained to sell, as the United States were obliged to buy. Although it might appear that the sale was voluntary, it would, in fact, be compulsory. Will the court, in the absence of words of unmistakable import, presume that Congress intended to do an act so injurious to the Indians? The statute does not evince such a purpose, and yet it is not difficult to express it. If Congress really meant that this grant should take effect in the Osage country, on the surrender of the Indian title, it would have so declared. It is true the route of the road, as defined by the act, passed through that country, but many other roads, aided by similar grants, ran through Indian reservations, and in no case, before this, has land, included in them, been recognized as falling within any grant, whether the Indian right was extinguished before or after the definite location of the road. And if Congress intended this grant to have a different effect, it would at least have provided an adequate indemnity to the Osages for their surrender of that right, and sanctioned a delay in locating the road until their consent should be declared. Instead of this, the act leaves them unprotected, and contemplates that the road shall be finished as soon as practicable. This is inconsistent with a purpose to subject their land to this grant, for they had not proposed to relinquish their possession, nor had the president encouraged them to do so. In the face of this, it is hard to believe that Congress meant to hold out inducements to the company to delay fixing the route of their road, until a contingency had happened which the act did not contemplate. Besides the improbability that Congress would offer a premium for delay, in making a railroad, it was bound by every consideration affecting the condition of the Indians to retain their lands within its own control. But it is said that the general appropriation bill for the Indians became a law the same day as the act under consideration, and that it authorized the president to enter into negotiations with the Kansas Indians for the extinction of their title and their removal from the State. This is true, but it does not prove that Congress, in making this grant, had in view the extinction of the title for the benefit of the grantee, or for any other purpose. If Congress contemplated at that time any such thing, it would have spoken directly, as it did in the Pacific railroad act, and not in an indirect way near the end of one of the general appropriation bills. The Congress that made this grant made one eight months before to aid in the construction of a railroad from the Missouri river to the Pacific ocean, and of other roads connecting therewith, in which it agreed to extinguish as rapidly as possible the Indian title for the benefit of the companies. It was necessary to do this because the roads ran through territory occupied by tribes of wild Indians; but this road passed through a reservation, secured by treaty, and occupied by Indians at least partially civilized. To subject it to grant was wrong, and as no mention was made of it in the act, there is no reason to suppose that Congress, in making the grant, contemplated the extinction of the Indian title at all. Besides, the provision in the appropriation act did not look to the extinction of this title for railroad purposes. The avowed object was to remove the Indians from the State to the Indian territory south of it. If any ulterior hidden purpose was to be thereby subserved, Congress is not responsible for it, nor can it affect this case. The language used is to be taken as expressing the intention of Congress, and the large inference attempted to be drawn from it is not authorized. It does not follow, because Congress was willing to open negotiations with the Indians for the

purpose of removing them, that it also contemplated obtaining their title in order to subject it to this grant. The policy of removal—a favorite one with the government, and always promoted by it—looked to the extinguishment of the Indian title for the general good, and not for the special benefit of any particular interest. It might well be that the same Congress which made this grant, should, in another act, sanction a negotiation with a view to removing them as a disturbing element from Kansas, and to procuring their lands for settlement. But the two laws have no necessary connection with each other, because they happened to be approved on the third of March. The laws approved by the president that day occupy one hundred pages of the 12th volume of the statutes.

We are not without authority that the general words of this grant do not include an Indian reservation. In Wilcox *v.* Jackson, (13 Peters, 498,) the president, by proclamation, had ordered the sale of certain lands, without excepting therefrom a military reservation included within their boundaries. The proclamation was based on an act of Congress supposed to authorize the sale of these lands, but the court held that the act did not apply to the case, and then say: "We go further and say, that whenever a tract of land shall have been once legally appropriated to any purpose, from that moment the land thus appropriated becomes severed from the mass of public lands, and that no subsequent law, proclamation, or sale would be construed to embrace or operate upon it, although no reservation were made of it." It may be said that it was not necessary for the court in deciding the case to pass upon this question, but, however this may be, the principle asserted is sound and reasonable, and we adopt it as a rule of construction. And the Supreme courts of Wisconsin and Texas, in cases where the point was necessarily involved, have also adopted it. — (State *v.* Delesdenier, 7 Texas, 76; Spaulding *v.* Martin, 11 Wisconsin, 274.) It applies with more force to Indian than to military reservations. The latter are the absolute property of the government. In an Indian reservation other rights are vested. Congress cannot be supposed to grant them by a subsequent law, general in its terms. Specific language, leaving no room for doubt as to the legislative will, is required for such a purpose.

But this case does not rest alone on the general words of description in the act, for the Osage lands are expressly excepted from the grant by force of the following proviso: "That any and all lands heretofore reserved to the United States, by any act of Congress, or in any other manner by competent authority, for the purpose of aiding in any object of internal improvement, *or for any other purpose whatsoever*, be, and the same are hereby, reserved to the United States from the operation of this act, except so far as it may be found necessary to locate the routes of said road and branches through such reserved lands; in which case the right of way only shall be granted, subject to the approval of the President of the United States." In construing a public grant, as we have seen, the intention of the grantor, gathered from the whole and every part of it, must prevail. No rule requires a proviso to be construed differently from the grant itself. Both are to be construed alike; but if, on examination, there are doubts about that intention, or the extent of the grant, the government is to receive the benefit of them. This proviso, however, has no doubtful meaning. Attached in substantially the same form to all railroad land grants since 1850, it was employed to make plainer the purpose of Congress to exclude from their operation lands which, by reason of prior appropriation, ought to be withheld. They were not in a condition to be granted, and for this reason were excepted from the category of lands to be donated to a state to aid it in building railroads. And it would be strange, indeed, in a land-grant act, if Congress meant to give away property which a just and wise policy had devoted to other uses. There were lands in Indian occupancy along the lines of many of the projected roads, and to such alone could the proviso to this particular grant apply, for there were no military reservations which the railroad of the appellant could penetrate.

That lands dedicated to the use of the Indians should, upon every principle of natural right, be carefully guarded by the government and saved from a possible grant, is a proposition which will command universal assent. And what ought to be done, has been done. The proviso was not necessary to do it, but it serves to fix more definitely what is granted by what is excepted. All lands which had been "heretofore reserved," that is, reserved before the passage of the act, by competent authority, for any purpose, are excepted by the proviso. This language is broad and comprehensive. It unquestionably covers the Osage lands. They had been reserved by treaty before the act of 1863 was passed. It is said, however, that having been reserved, not "to the United States," but to the Osages, they are, therefore, not included within the terms of the proviso. This position is inadmissible. It would leave the proviso without effect, as there is nothing but Indian reservations on which it can act. And that it was intended to apply to them is evident enough, because all the reservations through which this road was to pass were Indian. This fact was recognized, and the right of way granted through them, subject to the approval of the President. There was no mode of obtaining that right except through his negotiations with the Indians, and he secured it in season for the operations of the company. Besides, there were no other lands over which he could exercise any authority to obtain that right. And why grant it by words vesting its immediate enjoyment, unless it was contemplated that the roads would be constructed during the existence of the reservations? But the verbal criticism, that the Osage lands were not, within the meaning of this proviso, reserved "to the United States," is unsound. The treaty, the joint work of the United States and the Indians, reserved them as much to one as the other of the contracting parties. Both were interested therein and had title thereto. In one sense, the lands were reserved to the Indians, but in another and broader sense, to the United States, for the use of the Indians.

Every tract set apart for some special use is reserved to the government, to enable it to enforce that use. And there is no difference, in this respect, whether it be appropriated for Indian occupancy or for other purposes. There is an equal obligation resting on the government to see that neither class of reservations is diverted from the uses to which it was assigned. Out of a vast tract of land ceded by the Osages, a certain portion was retained for their occupancy and exclusive use, so long as they chose to possess it. The government covenanted with them that they should not be disturbed, except with their voluntary consent, first obtained, and a grant of these lands would be such a manifest breach of this covenant, that Congress, in order to leave no room for doubt, specially excepted them by means of the proviso. A construction which would limit it to lands set apart for military posts and the like, and deny its application to lands appropriated for Indian occupation, is more subtle than sound. This proviso, or rather one couched in the same language, has been the subject of consideration by this court, and has received a liberal, instead of the technical and narrow construction claimed for it by the appellant. Wolcott *v.* Des Moines Navigation Co., 5 Wallace, 681, was a controversy concerning the effect of two grants. The latter, it was conceded, covered the lands in dispute, unless excluded by the proviso. The court, in construing it, held that they were excluded, although they had not been reserved "to the United States." They had been, in fact, granted by the United States to the State of Iowa. This decision was re-ffirmed in Williams *v.* Baker, 17 Id., 144.

The scope and effect of the act of 1863 cannot, in our opinion, be mistaken. The different parts harmonize with each other, and present as an entirety, in clear light, the scheme proposed by Congress to aid the State of Kansas. She needed railroads to develop her resources, and Congress was willing to aid her to build them, so far as a grant of a part of the national domain, in a condition at the time to be sold or granted, could accomplish the object. A grant was accordingly made of alternate sections of the public lands, within ten miles on each side of the contemplated roads, but they could not be identified until the lines of the roads were established on the ground. In the early days of the land-grant system, lands supposed to be affected by a grant were, as soon as it was made, if not in advance of it, withdrawn from market. But experience proved that this proceeding retarded the settlement of the country, and the practice was, at the date of this act, not to withdraw them until the road was actually located. In this way the ordinary working of the land system was not disturbed. Private entries, pre-emption and homestead settlements, and reservations for special uses, continued within the supposed limits of the grant, the same as if it had not been made. But they ceased when the routes of the roads were definitely fixed, and if it then appeared that a part of the lands within those limits had been either sold at private entry, taken up by pre-emptors, or reserved by the United States, an equivalent was provided. The companies were allowed to select, under the direction of the Secretary of the Interior, in lieu of the lands disposed of in either of these ways, an equal number of odd sections from the public lands nearest to the granted sections, and within twenty miles of the line of the road. Having thus granted lands in place and by way of indemnity, Congress deemed it wise to declare, what the act already implied, that lands otherwise appropriated when the act was passed, were not subject to it.

The grant itself was *in præsenti*, and covered all the odd sections which should appear, on the location of the road, to have been within the grant when it was made. The right to them did not depend on such location, but attached at once on the making of the grant. It is true they could not be identified until the lines of the road were marked out on the ground, but as soon as this was done it was easy to find out what lands were granted. And if the company did not obtain all the lands within the original limits, by reason of the power of sale or reservation retained by the United States, they were to be compensated by an equal amount of substituted lands. These could not be selected within those limits on any contingency, and the attempt to give this effect to the indemnity clause receives no support, either in the scheme of the act, or in anything that has been urged by counsel. It would be strange, indeed, if Congress, without saying so, intended the clause to perform the office of making a new grant within the ten-mile limits, or enlarging the one already made. This would imply that Congress meant to buy out the Indian title for the benefit of the companies, and thus defeat the policy of the act of 1837, (5 Stats., 135), which contemplates the sale of all Indian lands ceded to the government. It would imply, also, that Congress meant that the companies, instead of building the roads as soon as practicable, should profit by delay. Surely these implications cannot be indulged in such a grant, unless its language leaves no other alternative. Instead of this, the words employed show clearly that the only purpose of that clause is to give lands outside of the ten-mile limits for those lost inside by the action of the government in keeping the land offices open between the date of the granting act and the location of the road. This construction gives effect to every part of the act, and makes each part consistent with the other. But even if the clause were susceptible of a different and more extended meaning, it is still subject to, and limited by, the proviso, which operates at once, and excludes from the grant all lands then reserved, and not simply those found to be reserved when the lines of the road were definitely fixed. This contingency had been provided for, in the clause, and if the proviso did not take effect until this time, it would be wholly unnecessary. And if the Osage lands are within the terms of the proviso, as we hold they are, then they are absolutely and unconditionally excepted from the grant, and it makes no difference whether or not they have since that time become a part of the public lands of the country.

But the appellant claims that the lands in question were subjected to this grant by virtue of the Senate amendment to the Osage treaty, made in 1865, and ratified in 1867. If this amendment has the effect attributed to it, it was certainly proposed on grounds entirely foreign to the treaty, and inconsistent with its purposes. Neither party to it contemplated the advancement of private interests. The United States had not made an absolute or contingent grant of the lands, and there was, manifestly, no reason why the Osages should bestow a gratuity on the appellant. But the treaty itself, as originally framed, is a disclaimer by them of such an intention. Whatever they did give was limited to persons from whom they had received valuable services, and they so stated expressly. Confessed poverty, and the desire to improve their condition, as their annuities had ceased, induced them to negotiate the treaty. They had more land than they needed, but were without money. And the United States, in pursuance of a long-settled policy, were solicitous to lessen the territory of the Indians whenever suitable opportunity offered, in order to open their lands to settlement. Induced by these considerations, the parties concluded a treaty, which was submitted to the Senate for its approval. By the first article the Osages ceded to the United States a large and valuable part of their possessions on certain conditions to be performed by the United States. They were required to survey and sell it on the most advantageous terms for cash, in conformity with the system then in operation for surveying and selling the public lands, with the modification that neither pre-emption claims nor homestead settlements were to be recognized. And the proceeds of these sales, after deducting enough to repay large advances, and expenses, were to be placed in the treasury to the credit of the "civilization fund," for the benefit of the Indian tribes throughout the country.

The fund arising from the sale of the lands ceded by the second article was for the exclusive benefit of the Osages, but the relation of the United States to the property in each case is the same. And it can make no difference that the trust in one is specifically declared, and in the other is to be ascertained from the general scope of the language. It is an elementary principle that no particular form of words is necessary to create a trust. In neither case is the government a beneficiary. In both the money is to be applied to promote the well-being of the Indians, an object which it has been the favorite policy of Congress to promote.

Neither of the contracting parties contemplated that any part of the lands was to be used to aid in building a railroad. And it is manifest that the treaty cannot be carried into effect, nor the trusts in connection with it executed, if the appellant takes any of the lands. As the act of 1863 does not grant them, nor the treaty in its original shape, the inquiry presents itself, what effect upon the question has the amendment inserted in the first article after the word "laws."

The provision on this subject, with the amendment in brackets, reads as follows: "Said lands shall be surveyed and sold under the direction of the Secretary of the Interior, on the most advantageous terms for cash, as public lands are surveyed and sold under existing laws, [including any act granting lands to the State of Kansas in aid of the construction of a railroad through said lands,] but no pre-emption claim or homestead settlement shall be recognized." Interpreted by the literal meaning and gramatical construction of the words, this amendment relates to the survey and sale of the lands, and cannot be extended further. This interpretation would relieve the case of all difficulty, and it was doubtless given to the amendment by the Indians when they accepted it. But obscure as it is, and indefinite as is its meaning, it was intended to do more than specify other laws to be observed in surveying and selling the lands. But whatever purpose it was meant to serve, it obviously does not, *proprio vigore*, make a grant. To do this, apt words must be introduced, but treaties, like statutes, must rest on the words used—"nothing adding thereto, nothing diminishing." In Rex *v.* Barrel (12 Ad. & Ellis, 468), Patteson, J., said: "I see the necessity of not importing into statutes words which are not found there. Such a mode of interpretation only gives occasion to endless difficulty." And courts have always treated the subject the same way when asked to supply words in order to give a statute a particular meaning which it would not bear without them. (Rex *v.* Poor Law Com'rs, 6 Ad. & Ellis, 7;

Everett *v.* Wells, 2 Scott. N. C., 531; Green *v.* Wood, 7 Q. B., 178).

It is urged that the amendment, if it does not make a grant, recognizes one already made. It does not say so, and we cannot suppose that the Senate intended that the Indians, by accepting it, should recognize a grant that had no existence. Information was, doubtless, communicated to that body that there were grants covering some of the ceded lands, which might interfere with the absolute disposal of them required by the treaty. If there were such grants, it was obviously proper that the treaty should be so modified as not to conflict with rights vested under them. But the Senate left that question to be decided by the proper tribunal, and it declared in substance and effect, that if such grants had been made by existing laws, they should be respected in the disposition of the lands. On this interpretation the amendment is consistent with the treaty. But if that given to it by the appellant be correct, the treaty is practically defeated. If no such grant had been made, lands would be taken from the Indians and appropriated to building railroads, without the consent of either Congress or the Indians, for no one can fail to see that interested outside parties, having access to these ignorant persons, would explain the amendment as a harmless thing. In negotiating the treaty neither the Executive Department nor the Indians supposed that any grant attached to the lands, for, as we have seen, all of them were to be sold, and the proceeds invested. Did the Senate, with this treaty before them, intend to charge the lands in question with a grant, whether it had really been made or not? If they did, they would not have suffered the treaty to remain in its present shape, but would have altered it to conform to so radical a change in its essential provisions. They would at once have excepted the lands covered by the grant, and not directed them to be sold. Why sell *all* the lands, if the status of a part of them is fixed absolutely by the amendment? In such a case, justice to the companies required that they should have the lands granted to them. The United States should, also, to this extent, be relieved of their trust. But if the words of the amendment were only intended to operate in the contingency that a grant had been made, there was no occasion to alter the treaty further than to say, as it now substantially does say, that the companies, if entitled to the lands, should have them. No exception could justly be taken to such a provision. It preserved vested rights, but did not create new ones. It did not solve the problem whether or not a grant had been made, but it did decide that the companies should get the land if there was a previous grant therefor, and that their rights, if any they had, should not be defeated or embarrassed by reason of the general terms of the treaty. It is argued that the Indians are not injured by a grant of a portion of their lands, as an enhanced value would be given to the rest, by the construction of a railroad through them. This is taking for granted what may or may not be true, for it does not necessarily follow that if the grant was allowed, the lands would bring more than without it. Besides, the Indians cannot be despoiled of any part of their inheritance upon such a fallacious pretense, and they choose to have *all* their lands sold. To this the United States assented by positive stipulation. We do not think that it was the intention of the amendment to annul that stipulation or to construe statutes upon which the claim of the appellant depends. Its office was to protect rights that might exist, independently of the treaty, but not to assert that any such right had been conferred.

The Thayer Act, as it is called, is invoked, but it can have no effect upon this case. It was passed for the sole purpose of enabling the company to relocate its road, and a false recital in it cannot turn the authority thereby given into a grant of land or a recognition of one. Especially is this so, when it expressly leaves the rights of the appellant to be determined by previous legislation. Besides this, these lands at the time were selling under a joint resolution, and it cannot be presumed that the Congress of 1871 intended to change the disposition of them, directed by the Congress of 1869.

It is urged that parties have loaned money on the faith that the lands in question were covered by the grant.

This is a subject of regret, as is always the case when a title, on the strength of which money has been advanced, fails, but it is to be hoped that the security taken upon the other property of the company will prove to be sufficient to satisfy the claims of the holders of its bonds. But whether this be so or not, it is hardly necessary to say that the title to the land is not strengthened by giving a mortgage upon it; nor can the fact that a mortgage has been given, throw any light upon the title of the mortgagor.

Upon the fullest consideration we have been able to bestow upon this case, we are clearly of the opinion that the decree below should be affirmed; and it is so ordered.

UNITED STATES SUPREME COURT

OCTOBER TERM, 1875.

Appeal from the Court of Claims.

ENOCH TOTTEN, Administrator, Appellant,
v.
THE UNITED STATES.

AN ACTION CAN NOT BE MAINTAINED AGAINST THE GOVERNMENT IN THE COURT OF CLAIMS UPON A CONTRACT FOR SECRET SERVICES DURING THE WAR, MADE BETWEEN THE PRESIDENT AND THE CLAIMANT.

Mr. Justice FIELD delivered the opinion of the court.

This case comes before us on appeal from the Court of Claims. The action was brought to recover compensation for services alleged to have been rendered by the claimant's intestate, William A. Lloyd, under a contract with President Lincoln, made in July, 1861, by which he was to proceed south and ascertain the number of troops stationed at different points in the insurrectionary states, procure plans of forts and fortifications, and gain such other information as might be beneficial to the government of the United States, and report the facts to the President; for which services he was to be paid two hundred dollars a month.

The Court of Claims finds that Lloyd proceeded, under the contract, within the rebel lines and remained there during the entire period of the war, collecting, and from time to time transmitting, information to the President, and that upon the close of the war he was only reimbursed his expenses. But the court being equally divided in opinion as to the authority of the President to bind the United States by the contract in question, decided, for the purposes of an appeal, against the claim and dismissed the petition.

We have no difficulty as to the authority of the President in the matter. He was undoubtedly authorized during the war, as commander-in-chief of the armies of the United States, to employ secret agents to enter the rebel lines and obtain information respecting the strength, resources, and movements of the enemy, and contracts to compensate such agents are so far binding upon the government as to render it lawful for the President to direct payment of the amount stimulated out of the contingent fund under his control. Our objection is not to the contract, but to the action upon it in the Court of Claims. The service stipulated by the contract was a secret service; the information sought was to be obtained clandestinely, and was to be communicated privately; the employment and the service were to be equally concealed Both employer and agent must have understood that the lips of the other were to be forever sealed respecting the relation of either to the matter. This condition of the engagement was implied from the nature of the employment, and is implied in all secret employments of the government in time of war, or upon matters affecting our foreign relations, where a disclosure of the service might compromise or embarrass our government in its public duties, or endanger the person or injure the character of the agent. If upon contracts of such a nature an action against the government could be maintained in the Court of Claims, whenever an agent should deem himself entitled to greater or different compensation than that awarded to him, the whole service in any case, and the manner of its discharge, with the details of dealings with individuals and officers, might be exposed, to the serious detriment of the public. A secret service, with liability to publicity in this way, would be impossible, and as such services are sometimes indispensable to the government, its agents in those services must look for their compensation to the contingent fund of the department employing them, and to such allowance from it as those who dispense that fund may award. The secrecy which such contracts impose precludes any action for their enforcement. The publicity produced by an action would itself be a breach of a contract of that kind and thus defeat a recovery.

It may be stated as a general principle that public policy forbids the maintenance of any suit in a court of justice, the trial of which would inevitably lead to the disclosure of matters which the law itself regards as confidential, and respecting which it will not allow the confidence to be violated. On this principle suits cannot be maintrined which would require a disclosure of the confidences of the confessional, or those between husband and wife, or of communications by a client to his counsel for professional advice, or of a patient to his physician for a similar purpose. Much greater reason exists for the application of the principle to cases of contract for secret services with the government, as the existence of a contract of that kind is itself a fact not to be disclosed.

Judgment affirmed.

WE are under obligations to JOSIAH H. BISSELL, official reporter, for the following opinion:

U. S. CIRCUIT COURT, N. DISTRICT OF ILLINOIS.

ROBERT E. JENKINS, Assignee of Commercial Ins. Co., *v.* JOSEPH F. ARMOUR. SAME *v.* SIX OTHER DEFENDANTS.

1. STOCK—NOTES IN INSOLVENT COMPANY—SET-OFF.—A stockholder in an insurance company, rendered insolvent by a fire, cannot escape his liability on a stock note, by surrendering a certificate of indebtedness on one of the adjusted policies, and withdrawing his note.

TRUST FUND.—Such a note constitutes a trust fund for the benefit of the creditors of the company, and the transaction is, in effect, a conversion of the company assets.

3. INTEREST.—The stockholder must pay interest from the date of the withdrawal of his stock-note.

There were seven suits against as many different defendants, on stock-notes given to the company. At the time of subscribing for the stock, each stockholder paid twenty per cent. in cash, and gave his note to the company for the balance, without interest, payable upon demand when needed to pay losses. The dividends, from time to time, declared by the company, had been applied upon these notes, until at the time of the great Chicago fire, of October 9, 1871, there was only thirty-five per cent. remaining unpaid on the notes.

Soon after this fire, each of these defendants purchased policies from other persons, procured their adjustment by the company, taking certificates of loss for the amount, which certificates they then surrendered to the treasurer at par in payment of their stock-notes.

BLODGETT, J.—There can be no doubt that each of these defendants, at the time of the transactions alleged, knew of the insolvency of the company and dealt with it upon that basis. The object of each of them was to obtain payment to themselves in full of their claims, notwithstanding the fact that such payment would be a withdrawal of the assets of the company from other policy holders; for these notes against the several defendants were in effect cash, and the amount thereof should have been paid in cash into the treasury of the company for distribution among the creditors. The defendants were all responsible, and the contingency having arisen when the cash was needed upon these notes to pay losses, it became their duty to pay it in to the company,

Following the law then, as laid down in Hitchcock *v.* Rollo and Sawyer *v.* Hoag, decided by Judge Drummond in this court, 3 Bissell, 276 and 293, and in the latter case as decided in the Supreme court, 17 Wallace, 610, and particularly the principles laid down by Judge Drummond in Scammon *v.* Kimball, 6 Chicago Legal News, 1, there can be no doubt but that such surrenders and transfers were a fraud, and such a fraud as would be set aside by the court without especial reference to the provisions of the bankrupt law. The stock-notes were a part of the capital stock of the company, and as such were a trust-fund for the creditors, and by collusion with the officers of the company, the defendants withdrew them from the treasurer. The fact that some of the defendants were also officers of the company made no difference, and those who were only stockholders are equally liable.

An important question, and one not easy of solution, arises as to the time when interest should begin to run on these stock notes, whether from the date of demand by the assignee, or of the exchange by the stockholders of these certificates for their notes. As against the company if it had continued solvent, interest would only run from the time of a proper demand. But in these cases the liability of the defendants arises from their own acts under circumstances where they are properly chargeable as trustees. They, in fact, wrongfully converted to their own use the assets of the company at the time when they made these exchanges. They received payment of debts in full from the company when they knew it to be hopelessly insolvent, and withdrew from the treasury of the company their notes which were valuable assets. The effect is the same as though they had taken and converted the amount in cash from the coffers of the company, and therefore they come within the rule that a trustee must pay interest from the date of conversion.

Judgment for plaintiff in each case with interest at 6 per cent. from date of withdrawal of stock-notes.

U. S. CIRCUIT COURT W. D. OF WISCONSIN.

JOHN V. FARWELL et al., *v.* C. D. CURTIS.

BANK CHECKS—RIGHTS OF HOLDERS AND DRAWERS—PRESENTMENT BY MAIL.

1. LOSS OF HOLDER.—That if a check is not regularly demanded, and the bank should fail after the time it ought to have been demanded, the loss will be the loss of the holder, who will be considered as having made the check his own by his *laches*. That if the check is presented and not paid, notice of dishonor must be given the drawer in order to charge him.

2. THE RULES NOT REGARDED IN THIS CASE.—That these rules were not regarded in this case. The plaintiffs sent the check in time, and if the presentation by a letter was a good demand, which the court doubts. It was presented on the 7th, in the morning: then it should have been paid on the 7th, and if not, the drawer should have been notified of its non-payment. But, instead of being paid in money, it was paid by draft on Chicago, and it was claimed that the plaintiffs had time to present that, to see whether it would be paid, and that if not paid, they could then protest the check; *held*, that this is not the law. The holder of a check cannot extend the time for which the drawer would be liable.

3. DUTY OF HOLDER.—The drawer had a right to have his check paid on the day presented, and it was the duty of the holder to see to it that it was so paid, or if not protested; and if the holder accepts the check or draft of the bank in payment, in lieu of money, he must present and collect it the same day, or else he is chargeable with *laches*. That he cannot, as in this case, keep it three days, as by so doing, he would extend the drawer's liability for two days beyond the time fixed by the law.—[ED. LEGAL NEWS.]

HOPKINS, J.—This action was brought to recover the price of certain goods sold by plaintiff to the defendant in April, 1875. The defence is payment. The issue has been tried by the court. The real point of the defence is, whether a check given by defendant on the 5th of April, 1875, for $800, was and is to be held as a payment. The parties have stipulated the facts to be: that on the 5th day of April, 1875, the defendant, a resident of New Lisbon, in this State, purchased goods of plaintiffs in Chicago, their place of business, to the amount of eight hundred dollars and over, and on that day gave his check to the plaintiff for the sum of $800 upon the Bank of New Lisbon, a banking house doing business in that place, to apply as *payment* towards the goods so purchased by him to that amount; that the plaintiffs, on the same day, sent the check per mail to the bank, the drawees, with instruction to collect and return; that there is a daily mail between Chicago and New Lisbon; that the check was received at the Bank of New Lisbon on the morning of the 7th of April, and was paid out of defendant's funds on deposit in the bank, there being sufficient for that purpose, and charged to his account; that the bank, on the 7th of April, sent to the plaintiffs, through the mail, a draft for the amount of the check on the Union National Bank, Chicago, which was received by them on the morning of the 9th, which they on that day deposited in the Bank of Montreal, of Chicago, for collection, and which was, on the 10th of April, presented to the Union National Bank for payment, and not paid, and was

returned on the same day to the plaintiffs, who, on the same day, wrote the New Lisbon Bank that the check would go to protest if not paid on Monday, and to defendant that it was not paid, and asking him "to poke up the bank on the matter." It not being paid, was, on Monday, the 12th, protested, of which defendant was notified per mail.

It is further stipulated that the Bank of New Lisbon could have paid said check *in money* up the 10th day of April; but that on the close of the day's business on that day it stopped payment, having up to that time paid all checks presented for payment; that the bank had not the funds in the Union National Bank to meet the draft when they drew it, nor authority to draw it without funds.

These are the material facts established by the evidence, and the question is, whether the plaintiffs were guilty of such negligence in presenting the check and demanding payment as to discharge the drawer.

The practice of sending checks by mail to the drawee I think is not usual and has not received much judicial consideration, and not any direct sanction that I can find. In Morse on banking, page 334, he says it is a good presentment, and cites for his authority Bailey *v.* Bordenham, 10 Law Times, N. S., 422. I have examined that case, and it gives some countenance to his assertion, but I think the point is not absolutely decided.

In these days when such facilities are furnished by express companies for presentation at distant places, there is no reason for adopting a less direct or effective mode to accomplish the object. In this case there is a daily mail, by railroad between Chicago and New Lisbon, and a daily express also, with route agents and local agents, which furnished ample opportunities for presentation at the bank counters, as early as the morning of the 7th of April, and probably on the morning of the 6th, if it had been sent by the first opportunity. But if sent by the last train on the 6th, it would have reached New Lisbon on the morning of the 7th, and could have been collected and returned so as to have reached the plaintiff by the morning of the 8th of April. To send by mail to the drawees with instructions to collect and return, under such circumstances, is hardly equivalent to a demand at the counter for payment. The bank could not have paid the currency if it had it, there was no one to pay it to. The admission is that the bank was paying and had the money to pay up to and including the 10th, so that if the money had been asked on the 7th, it would have been paid. Now, as the plaintiff adopted another course than the one which the exercise of ordinary care and diligence would have dictated, and loss has resulted by reason of it, they should stand it. But it may not be necessary to settle this point, as Morse, who says a presentation by mail is good, as well as the case cited by him to support the assertion, says, also, that when the holder sends by mail to the drawee directly, if the *money* does not come back by the *return* mail, notice of dishonor should be given. Adopting this rule would not relieve these plaintiffs, for they did not comply with it, the money did not come back by the next mail, nor was the check protested as required. But instead of the money on the 9th, four days after the receipt of the check, a draft came back on the Union Bank, but that was not presented until the 10th for payment, and was not protested until the 12th, so that conceding that the presentation by mail was sufficient, the plaintiff was guilty of *laches* in not presenting the *draft* before the 10th. This delay is inexcusable according to any rule of diligence that I know of, so that assuming that Mr. Morse states a safe and satisfac tory rule, it does not exonerate thesplaintiffs from *laches*. But I think if the time is extended beyond what it would have been if sent by the usual and ordinary modes, that is, by express, or to some party to present, and beyond the period established by law as reasonable for presentation, and a loss happens by reason of the failure of the drawee, the payee of the check is alone chargeable unto it.

For instance, in this case, it is admitted that the bank had the money to pay the check up to and including the 10th, so that if payment had been demanded in the usual way, it would have been paid, and if the parties chose to make the drawee their agent and the drawee, as their agent, sent a worthless draft instead of the money, which he would have paid to any party presenting the check at the counter and charged the check to the drawer, the same as if paid in money, so that he had no right to enforce his claim or power to protect himself. The payee should incur the loss instead of the drawer, that ensued by the subsequent failure. The charge to defendant's account was made on the 7th of April, in the morning, and the check marked paid, and what was done after that time was done by the bank at plaintiffs' request, and as *their* agent, and whether in good or bad faith on the part of the banker, the defendant is not to blame or chargeable therewith, or for any loss resulting therefrom.

The common or commercial law has fixed certain times within which checks must be presented to the drawees for payment, and when it appears that the bank was paying during that time, and the drawee's account was good for the same, and the refusal or failure to obtain payment after, was by reason of the failure of the bank occurring subsequent thereto, the loss has to be borne by the payee or holder of the check. That rule is in cases where the parties all reside in the same place, that it must be presented for payment before the close of business on the day following its date or delivery to the payee; and in cases where it is drawn upon a bank at another place, it must be sent at the fartherest, by the last mail on the next day after it is received and be presented by the party receiving it on the day following the reception by him. 20 Wen, Smith *v.* Janes, 192—Story on promissory note, 493.

If not thus regularly demanded, and the bank or bankers should fail, after those times, the loss will be the loss of the holder, who is considered as having made the check his own by his *laches*. If the check is presented and not paid, notice of dishonor must be given the drawer, in order to charge him. Now, in this case, it is plain that the plaintiffs did not observe these rules. They sent the check in time, and if the presentation by letter was a good demand, it was presented on the 7th in the morning; then it sould have been pald on the 7th, and if not, the drawer should have been notified of its non-payment. But instead of being paid in money it was paid by draft on Chicago, and it is claimed that the plaintiffs had time to present that, to see whether it would be paid, and that if not paid, they could then protest the check. This is not the law. The holder of a check cannot in that way extend the time for which the drawer would be liable. The drawer had a right to have his check paid on the day presented, and it was the duty of the holder to see to it that it was so paid, or if not protested, and if the holder accepts the check or draft of the bank in payment in lieu of money, he must present and collect it the same day, or else he is chargeable with *laches*. He cannot, as in this case, keep it for *three* days and then go back upon the drawer of the check if it is not paid, as by so doing he would extend the drawer's liability for two days beyond the time fixed by the law. Alexander *v.* Bruchfield, 7 Man. & G., 1061.

This point is directly decided in Smith *v.* Miller, 43 N. Y., 171. In that case the check of the drawee was taken and presented at the bank on the following day—but before its presentation the drawers of the check had failed. The party accepting the payment thereupon protested the draft which they received it in payment of, and brought suit to recover the amount of the draft, claiming that as the check was presented on the *next* day after its date, it was duly presented, and if not paid, the draft for which it was given was not paid.

On the contrary it was claimed that as the drawers of the check were paying all of the day on which it was given, and that if it had been presented on that day it would have been paid, and that as it was taken in lieu of the money, it should have been presented on that day, that the party could not have the whole of the next day to present a check taken under such circumstances, which was sustained by the court, which said:

"It was the duty of the plaintiffs to present the check at the bank, at least during the day on which they received it, and obtain either the money or a certificate, or cause the same to be protested for non-payment, and not having done so, they were chargeable with negligence and the consequent loss."

Here, even giving the plaintiffs the benefit of the time allowed when sent by mail, as in other cases, and they are guilty of negligence, they received the banker's check on the 9th, but delayed presenting it for payment to the Union National Bank until the 10th, Certainly such negligence cannot be tolerated in treating with paper that they had taken in lieu of money, without the consent or knowledge of defendant. The plaintiffs cannot hold the defendant liable on his check during the time they were thus experimenting with the check they received from the bankers, in payment of his check to them.

The bankers may have, and probably did, practice a fraud upon the plaintiffs when they sent this draft on the Union Bank. But the defendant is not chargeable with that. He can say to the plaintiffs, if you had sent the check to a party here to present in the usual way it would have been paid, and I have a right to require you to pursue the ordinary course in such case, and if you depart therefrom, and are defrauded by your agent, which in this case was the banker, it is your loss, and you alone are liable, as you brought it unnecessarily upon yourself.

Under the evidence, defendant must therefore have judgment.

TENNEYS, FLOWER & ABERCROMBIE for plaintiffs.

VILAS & BRYANT for defendants.

SUPREME COURT OF WISCONSIN.

OPINION, APRIL, 27, 1876.

A RESIDENT ATTORNEY OF ILLINOIS CANNOT BE ADMITTED TO THE BAR IN WISCONSIN.

In the matter of the motion for the admission to the bar of this court, of Ole Mossness, a member of the bar of the State of Illinois.

Opinion by RYAN, C. J.

It is, we believe, the general practice of courts of record in the several States, to permit gentlemen of the bar in other States to appear as counsel, on the trial or argument of causes. Such has been the uniform practice of this court. And under all ordinary circumstances, it will always be a pleasure to us to permit members of the bar of other States to argue causes here, whenever they may appear here to do so. No license to practice here is necessary or proper for that purpose; the usual and proper practice being to grant leave, *ex gratia*, for the occasion.

But general license to practice here as attorney and counselor rests upon quite different considerations. The bar is no unimportant part of the court; and its members are officers of the court. Thomas *v.* Steele, 22 Wis., 207; Cotteren *v.* Connaughton' 24 Wis., 134; See Bacon's Abr., Attorney, H.; 1 Tidd's Pr., 60; 3 Black, 25; 1 Kent, 306; Ex parte Garland, 4 Wall, 333. And if officers of the court, certainly in some sense officers of the State for which the court acts. Re Wood, Hopk., 6. This is not really denied in 20 Johns., 492, decided in the same year. And if it were, we have no doubt that the chancellor was correct; and that attorneys and counselors of a court, though not properly *public* officers, are *quasi* officers of the State, whose justice is administered by the court.

The State may have extra territorial officers, as commissioners to take acknowledgments, &c. But these are exceptions; and the general business of the State, within the State, executive, legislative and judicial, must be performed by citizens or denizens of the State; and the officers charged with it must be resident in the State. State *v.* Smith, 14 Wis., 497; State *v.* Murray, 28 Wis., 96.

So the courts may have extra territorial officers, for extra territorial functions, as commissioners to take depositions, &c. But for all functions within the jurisdiction of the courts, their officers must be residents of the State. This is essential to the nature of the functions themselves, and to the proper control of courts over their officers.

The office of attorney and counselor of the courts is one of great official trust and responsibility in the administration of justice; one liable to great abuse; and has always been exercised, in all courts proceeding according to the course of the common law, subject to strict oversight and summary power of the court. It would be an anomaly, dangerous to the safe administration of justice, that the office should be filled by persons residing beyond the jurisdiction of the court, and practically not subject to its authority. We take it that members of the bar of this State lose their right to practice here by removing from the State. After they become non-residents, they can appear in courts of this State *ex gratia* only. Our courts cannot have a non-resident bar.

This all appears to us to be so very plain, that it is difficult to believe that chap. 50 of 1865 was intended to do more than to authorize the appearance here, as counsel in the trial and argument of causes, of gentlemen of the bar of other States. If intended to do that, it was probably unnecessary. If intended to ro more, it was clearly without the power of the legislature.

For the reason only that the gentleman whose admission is moved is not a resident of the State, the motion must be denied.

UNITED STATES SUPREME COURT.

No. 471.—OCTOBER TERM, 1875.

MISSOURI, KANSAS, and TEXAS RAILWAY COMPANY, Appellant,
v.
THE UNITED STATES.

Appeal from the Circuit Court of the United States for the District of Kansas.

Mr. Justice DAVIS delivered the opinion of the court.

The decision in Leavenworth, Lawrence, and Galveston Railroad Company *v.* The United States, just rendered, controls this case. Each company claims a grant of land within the Osage reservation. This case involves substantially the same questions as the other, with this difference, that the act of 1866, under which this appellant claims, was passed after the Senate amendment was acted upon, and was beyond the control of the Senate.

In any aspect of this case the appellant cannot recover. The Senate amendment does not apply to the act of 1866, for it was adopted before this law was in force, and only refers to existing laws. It is true that the bill which subsequently became a law, was pending in Congress at the time the treaty was before the Senate, but if that body intended the amendment to affect not only existing but contemplated grants, language appropriate to such a purpose would have been used. And this remark applies to Congress also, for if it knew that the treaty, with its provisions, was pending, and meant, notwithstanding this, to grant these lands, they would have employed words to include them, or at least take them out of the excepting clause of the proviso. But the effect upon this case is the same, whether the act of 1866 is to be treated as taking effect before or after the treaty became operative by the proclamation of the President on the 21st of January, 1867. If it took effect for all purposes on the day it was passed, then the Indian title even was not extinguished, as the treaty had not been ratified. But if it be considered, so far as regards the provisions of the treaty, as in any sense taking effect after the treaty was ratified, then the claim of the appellant is defeated by the terms of the treaty appropriating the lands to other purposes. As these lands were set apart to be surveyed and sold for the benefit of the Indians, they were "otherwise appropriated" as much as they were before the treaty, and, consequently, within the meaning of the excepting clause in the act, reserved for the purposes to which they were appropriated.

Decree affirmed.

As an illustration of the absurdities produced by the "codes," the case of Bennett *v.* Butterworth, above referred to by Mr. Justice Grier, is worthy of attention. In that case the court were unable to discover from the pleadings the nature of the action or the remedy sought. It might with equal probability be called an action of debt or detinue, or replevin, or trover, trespass, or a bill in chancery. The jury and the court seem to have labored under the same perplexity. The jury gave a verdict for twelve hundred dollars, and the court rendered judgment for four negroes!

CHICAGO LEGAL NEWS.

Lex vincit.

MYRA BRADWELL, Editor.

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We call attention to the following opinions, reported at length in this issue:

Land Grants by Congress to aid Railroads—The Osage Ceded Lands—Effect of Land Grant on Indian Reservation.—The opinion of the Supreme Court of the United States by Davis, J., stating the rule of construction in determining the meaning of land grants by Congress, and holding that the words, "there be and is hereby granted," vest a present title in the State of Kansas, though a survey and a location are necessary to give precision to it, and attach it to any particular tract. After the location of the road the grant becomes certain, and by relation has the same effect upon the selected parcels as if they had been specially named at the date of the act; in other words, the grant was afloat until the line of the road should be definitely fixed, but Congress did not intend that this grant should reach the Osage lands further than to allow the company to construct its line of road through them; that the Indians have the right to the lands they occupy until that right shall be extinguished by a voluntary session to the government, and this right of occupancy is as sacred as the title of the United States to the fee. That this perpetual right of occupancy with the correlative obligation of the government to enforce it, negatives the idea that Congress even in the absence of any positive stipulation to protect the Indians, intended to grant their lands to a railroad company, either absolutely or *cum onere*. For all practical purposes the Osages owned the lands, as the actual right of possession, the only thing they deemed of value, was secured to them by the treaty of June 2, 1825, until they should elect to surrender it to the United States. In the free exercise of their choice they might occupy their lands forever, and whatever changed this condition or interfered with it, violated the guarantees under which they had lived since that date. Notwithstanding the length of this opinion, on account of its importance to a large number of our western readers, we publish it entire.

Public Policy — Action on Contract for Secret Service.—The opinion of the Supreme court of the United States by Field J., holding that an action cannot be maintained against the government in the court of claims upon a contract for secret services during the war, made between the president and the claimant. In delivering the opinion the court says, that public policy forbids the maintainance of any suit in a court of justice, the trial of which would inevitably lead to the disclosures of matters which the law itself regards as confidential, and respecting which it will not allow the confidence to be violated.

Stock Notes in Insolvent Insurance Companies.—The opinion of the United States Circuit court, Northern District of Illinois by Blodgett J., holding that a stockholder in an insurance company rendered insolvent by a fire, cannot escape his liability on a stock note by surrendering a certificate of indebtedness on one of the ajusted policies and withdrawing his note; that such a note constitutes a trust fund for the benefit of the creditors of the company and the transaction is in fact a conversion of the companies assets; that the stockholder must pay interest from the time of the withdrawal of the stock note.

A Non-Resident Attorney Cannot be Admitted to the Bar in Wisconsin.—The opinion of the Supreme Court of Wisconsin, by Ryan, C. J., holding that an attorney, residing in the State of Illinois, and only licensed by the Supreme Court of that State, cannot be admitted to the bar in Wisconsin. That no person but a resident of the State is entitled to receive license to practice law from the Supreme Court of Wisconsin. We have no doubt of the power of the legislature of a State to provide that a non-resident of the State may be admitted to its bar. And that when such a statute is passed, that it is the duty of all courts to follow it, no matter how high or learned they may be. We regard the doctrine as announced by Chief Justice Ryan, as dangerous; not because it excludes non-resident attorneys, or women, from the bar of Wisconsin, but because if followed it places the Supreme Court above the legislature, in all matters of practice. The legislature may pass statutes for the government of the court in matters of practice, and the court may follow them or not, as it pleases—as the court has done in this case. The legislature of Wisconsin has said: "It shall be the duty of any court of this State, upon application and proof aforesaid, to admit any attorney of the State of Illinois," etc. But Chief Justice Ryan says he won't do it. In this connection, we call attention to the comments of Mr. Mosness, upon this opinion, refusing him admission to the Wisconsin bar, on page 271 of this issue.

Bank Checks.—The opinion of the United States Circuit Court for the Western District of Wisconsin, by Hopkins, J., as to the rights, duties and obligations of the holders and drawers of bank checks. The court discusses whether the presentation of a check by mail is a valid presentation.

NOTES TO RECENT CASES.

THE STATE UNIVERSITY OF IOWA NOT A CORPORATION.

The Supreme court of Iowa in Weary et al. *v.* State University et al., 10 Western Jurist, 286, hold that the State University is not a corporation, but is the result of the legislative will, under the Constitution and is regulated and controlled like any other public institution of the State. Hence, a judgment against the university, if it were allowed, would be of no value.

MUNICIPAL CORPORATIONS—POWER TO ISSUE BONDS—RAILROAD.

The Supreme court of Iowa in Jefferies et al. *v.* Lawrence et al., 10 Western Jurist, 290, held where a city by its charter was authorized to subscribe stock to a railroad and pay for the same in its bonds, upon a vote of a majority of its citizens therefor, but after the citizens had voted to subscribe the stock and issue the bonds, a general law was passed by the legislature prohibiting all cities from subscribing stock, or issuing bonds therefor, that the general law *pro tanto* repealed the city charter and that after the general law took effect there was no power to issue the bonds and that no tax could be legally levied for the same. The authorities upon the question decided in this case are not all one way, in some cases holding that if the subscription is voted, the corporation may do all that is necessary to complete it after the passage of such a general law, that is if there is what amounts to an agreement to subscribe when the corporation has the power to subscribe. The subscription may be completed after the power has been taken from the corporation to subscribe.

The Supreme Court of the United States.—This tribunal adjourned for the term on Monday last, after being in session for seven months with only two recesses of ten or twelve days each. The business of this term has been greater than at any previous term. The number of cases on the docket was 973, of which only 330 have been disposed of. In 206 of these cases written opinions were delivered. There are now on the docket, undisposed of, 643 cases. The court adjourned with over a hundred more cases pending than at any previous term. The cases upon the docket of this court are continually increasing, and the question arises, what is to be done? The court does not meet until October. With over 600 cases now pending on its docket, it certainly does not look promising for any one having a case returnable to the October term, to get a hearing within any reasonable time. It often amounts to a complete denial of justice to have three or four years elapse before a case can be heard in a court of last resort. We do not believe that the bill now pending in Congress, if passed, would give the required relief. The best legal talent in the House and Senate should unite and perfect a bill that would enable parties to have their cases passed upon within a reasonable time by the Federal Supreme Court. For some reason or other, the federal courts have, in the last ten years, grown in popularity with the people. Points of law are often strained by suitors, and perjury committed in order to bring cases into these courts. They are less liable to be effected by local influences and prejudices. The jurors are selected from a larger extent of country; are generally men of greater experience, and better fitted to try cases than those selected in the State courts. The judges being appointed for life are more independent than they would be if they had to go before the people for re-election every four or six years.

A Deserved Compliment.—The Hon. John Wentworth in his lecture last Sunday, on the early history of Chicago, said that Judge Breese of the Supreme court of this State, knew more of the early history of the State of Illinois and the city of Chicago than any other living man.

Recent Publications.

The Practice on Appeals to the Supreme Court of Indiana; on Writs of Error from the Supreme Court of the United States to a State Court; on the Removal of Causes from State Courts to the Circuit Court of the United States; and a Complete Table of Cases Decided by the Supreme Court of Indiana, with Annotations Showing where any of such cases have been Cited, Distinguished, Criticised, Modified, Doubted or Overruled by Subsequent Decisions. By Samuel H. Buskirk, LL. D. Indianapolis: Jay V. Olds, Publisher. 1876.

The title of this volume states its contents. We have examined it with some care. It is absolutely indispensible for every Indiana lawyer, and will be found useful to the practitioner in States where a code prevails. A portion of the work is devoted to what is necessary to be done in the trial court to prepare a case for review in the Supreme Court. Another to the various modes of appealing a cause to the Supreme Court; and a third to the modes of procedure and rules of practice in such court. The practice in the courts of original jurisdiction has been examined only so far as was necessary to show how error must be made to appear upon the face of the record. A skeleton transcript is given for the purpose of showing what questions become a part of the record by force of the statute, and what must be made so by bill of exceptions or order of court. The chapters on writs of error from the Supreme Court of the United States to a State court, and on the removal of causes from a State court to a Circuit Court of the United States, will be of general interest to the bar. The recent decisions of the courts upon these questions, are cited. The table of cases will be useful to any person having a set of Indiana reports. The experience of Judge Buskirk upon the Supreme bench of the State, has fitted him for the preparation of such a work.

Referring Actions.—A very admirable practice (says the *Law Times*) is obtaining amongst solicitors in regard to the mode of referring actions. It is this: It being arranged to refer an action, say, to a professional man, agreed upon between the parties, a form of order of reference (sold, we believe, by Messrs. Evison & Bridge, the law stationers, in Chancery lane) is filled up and settled between the parties; this done, an order at chambers is—in the form arranged—drawn up in the usual way, thus avoiding the delay and expense of a summons to refer, and the disputes that often arise as to the form of the order to be made on such summons. We consider the plan is one which may well be universally adopted in such cases, as it enables solicitors to arrange the form of the order of reference, after taking their clients' instructions on all queries. When such matters are worked out by summons at chambers, much delay is often necessary before the parties can proceed.

The above, taken from the *Public Opinion*, is worthy of the consideration of our judges and law makers. If a proper law was passed, giving the courts power to assign cases to members of the bar for trial, without having first to get the consent of the parties. the judicial force we have would be ample, with the aid of the bar, to dispose of all cases within a reasonable time, and keep cases from accumulating on the dockets. With the legal talent in this country, justice ought to be administered without delay, It is all owing to our defective system that cases are allowed to remain on our dockets years, awaiting trial.

In the case of Musselman *v.* Musselman, in the Indiana Reports, vol. 44, p. 107, 1873, we find, among others, the two following head notes:

"Where it does not appear, on appeal, how smoking in court by the judge and attorneys prevented a party from having a fair trial, and the party assigning such conduct as a ground for a new trial does not appear to have objected to it, there is nothing for the Supreme court to consider in relation to such conduct."

"The assignment as a reason for a new trial, 'that the court erred in sleeping or sitting with his eyes closed during the reading of the written evidence on the part of the plaintiff at the trial of the cause,' is too vague and indefinite. If the judge were asleep, the party should have ceased reading or awakened him; if he sat merely with his eyes closed, it is presumed he did so to hear the more acutely."

XXIV. OHIO STATE REPORTS.

We are indebted to Robert Clark & Co., publishers, for advance sheets of the 24th volume of Ohio State Reports, from which we take the following head-notes:

DEDICATION OF STREET—REVOCATION.

The dedication of a street, as laid out on a town plat which is not executed in accordance with the statute, may, as against the corporation within which the land is situate, be revoked at any time before its acceptance by the corporation or by the public, notwithstanding lots laid out on the plat may have been sold; and a conveyance of the land in fee simple, by a deed of general warranty, operates, in law, as a revocation.—Village of Lockland *v.* Smiley, p. 94.

CONSOLIDATED RAILROAD COMPANIES—RATES.

Consolidated railroad companies, organized in pursuance of the act of April 10, 1856 (4 Curwen, 2791), are corporations formed under a general law, within the meaning of article 13, section 2, of the constitution of 1851, and as such are subject to the limitations and reservations contained in that section, and in article 1, section 2, of that instrument; and the general assembly has power to alter and regulate rates of fare chargeable by such companies.—Shields *v.* Ohio, page 90.

NATIONAL BANKS—INTEREST—PENALTY.

1. The knowingly taking or receiving by a national bank of a rate of interest greater than is allowed by law upon a loan of money, does not entitle the person paying the same to have it applied as a payment of so much of the principal, in an action brought to recover the principal debt more than two years after such payment was made.—Higley et al. *v.* First N. Bank of Beverly, p. 76.

2. The rights and liabilities of the parties in such case are prescribed in the national bank act, and cannot be controlled by State legislation.

3. Before judgment, the penalty allowed for the taking or receiving of usurious interest by a national bank does not bear interest.

ASSIGNMENTS—JUDGMENT LIENS.

Under section nine of the act regulating the mode of administering assignments in trust for the benefit of creditors, the priority of judgment liens is to be determined as the liens existed at the time the assignment took effect.—Scott et al. *v.* Dunn, p. 64.

PURCHASE OF MORTGAGE—INTEREST ON INTEREST.

1. Where one purchases land subject to a mortgage lien, and, as part of the consideration, agrees to pay the mortgage debt, he can not defend against the mortgage on the ground of usury.—Cramer *v.* Sepper et al., p. 60.

2. Under a contract for the payment of interest at a specified rate annually, upon default of payment, interest on the interest will be computed at six per cent.

CONTRACT FOR STREET IMPROVEMENT—PUBLICATION SHOULD BE IN A NEWSPAPER IN THE ENGLISH LANGUAGE.

1. A resolution of the city council awarding a contract for the improvement of a street, and directing the city auditor to enter into the contract with the bidder, is not a resolution of a "permanent or general nature," within the meaning of section 98 of the municipal code.—Cincinnati use, etc. *v.* Bicket et al., p. 49.

2. Where the preliminary ordinance for the improvement of street, and a subsequent ordinance assessing its cost upon abutting lots, are duly passed by concurrence of two-thirds of the members, it is not necessary, in order to constitute the work an improvement made by the concurrence of two-thirds of the members of such council within the meaning of section 540 of the municipal code, that two-thirds of such members should concur in the resolution awarding the contract to the successful bidder.

3. Where a statute of the State requires a publication to be made in a "newspaper," in the absence of any provision to the contrary, a paper published in the English language is to be understood as intended, and a publication in a paper printed in any other language, is not a compliance with the statute.

4. In cases under section 550 of the municipal code, where the court is authorized to render judgment against the defendant notwithstanding defects or irregularities in the proceedings of council in making an assessment for improvement, the sum "properly chargeable" against the defendant, and for which such judgment should be rendered, is not the amount of benefits accruing to him from the improvement, but that portion of the entire assessment which would have been chargeable to him, had the assessment been legally made.

5. In order to exempt abutting lots from assessment for construction of a sewer, on the ground that they are "already provided" with drainage, as specified in section 613 of the municipal code, it is not enough to show that an ordinance was passed years ago, but never carried into execution, authorizing the construction of other sewers for the drainage of such lots.

POWER TO DISMISS CHIEF OF DEPARTMENT—MANDAMUS.

Under the act of March 21, 1874 (71 Ohio L. 38), the board of fire commissioners is invested with power to dismiss for cause, members of the department; and having removed the chief of the department for incompetency, it can not be compelled by mandamus to restore him to his former position.—Ohio ex rel. Hill *v.* The B. of F. Com. of Cleveland, p. 24.

SUPREME COURT OF TENNESSEE.

Head notes to recent opinions from the *Commercial and Legal Reporter:*

JACKSON, SEPT. TERM, 1875.

Mary Routon v. *Louisville & Nashville R. R. Co.*

RAILROAD: SPECIAL PRECAUTIONS AGAINST ACCIDENTS.—Where the proof showed that there was no reversing of the engine in addition to the other precautions used to stop the train, because the danger apprehended therefrom was that of being thrown from the track and destroying human life on board; *held*, that the statutes intend that this is one of the means to be resorted to only when it can be done with safety. The protection of property is a secondary consideration, the paramount object of our rigid statutes being the protection of human life.

James Hagan v. *The State.*

NASHVILLE, APRIL 1, 1876.

EVIDENCE: HEREDITARY INSANITY.—The question of the prisoner's insanity being before the court, it was error to refuse to permit an inquiry into the mental condition of any of his immediate family.

STATEMENT OF EXPECTED PROOF.—Where the materiality of the proof proposed to be made was evident, it is not required to state the purport of the answer of the witness to show its materiality.

WITNESS.—The court having refused to permit a question to be answered by the first witness examined, it was not necessary, and would have been improper, for the counsel to have asked the question of any other witness.

Willis McDougal v. *The State.*

VERDICT: ASSAULT WITH ATTEMPT.—A verdict of "guilty of an assault with attempt to commit a rape," is sustainable under § 4630 of the Code.

EXCESSIVE PUNISHMENT.—Verdict for ten years' confinement, under the section cited, was unauthorized, and judgment thereon erroneous.

POWER OF REVISING COURT.—When juries exceed their powers in awarding punishment, and the judge pronounces judgment approving their erroneous verdicts, the Supreme Court can only reverse and remand.

Moses Brooks v. *The State.*

March 11, 1876.

LARCENY: PROOF OF OWNERSHIP.—There must be proof showing a property, either general or special, in the person charged in the indictment to be the owner of the property stolen.

The State v. *James Williams.*

April 5, 1876.

ASSAULT WITH INTENT TO COMMIT MANSLAUGHTER: INDICTMENT.—Manslaughter being a felony in this State, an attempt to commit manslaughter is an offense; and an indictment for an assault with intent to commit manslaughter is good under § 4630 of the Code.

AGENCY—POWERS PRIMA FACIE INCIDENT TO EVERY ASCERTAINED AUTHORITY.

MEANS JUSTIFIED BY THE USAGES OF TRADE.

The rule that an agent is empowered to use all the ordinary means justified by the usages of trade in executing his authority, was well established long anterior to the decision of the King's Bench in Sutton *v.* Tatham (10 Ad. & E. 27) in 1839. The defendant there had employed the plaintiffs as brokers, to sell 250 shares in a company. On the day after receiving authority they sold 109 shares, and on the following day 100 more. On the latter day, but after the sale, the defendant told the plaintiffs that he had made a mistake and intended to sell only fifty shares, and was informed that the sales could not be made void. The defendant left the matter in the hands of the plaintiffs to do the best they could. By the rules and usages of the Stock Exchange, if upon a sale of this description, the vendor was not prepared to complete his contract, the purchaser may buy the requisite number of shares, and the vendor is bound to make up the loss, if any, resulting from a difference in prices. The purchaser having bought at a loss, the broker paid the difference and then sued in assumpsit for money paid. At the trial Lord Denman thought that the principal was liable, but he left it to the jury to say whether the bargain for the loss on the second purchase was made within a reasonable time after the mistake was discovered. The jury found for the plaintiff. A motion for a new trial on the ground of misdirection was refused by the full court. The defendant relied chiefly upon the case of Child *v.* Morley (8 T. Rep. 610). But it is clear from the remarks of Lord Kenyon that the broker had a cause of action, though there were doubts as to the form in which it should be tried. His Lordship having made some severe remarks upon the nature of the defence set up, continued: "But I cannot perceive what benefit the defendant can propose to himself by such conduct; for the court have no doubt but that at all events the verdict must stand for the £12 10s., the amount of the plaintiff's commission as broker;" but as to the rest of the claim, there is a difficulty in the form of action; and perhaps it would have been better framed *ex delicto* than *ex contractu*. In Sutton *v.* Tatham (sup.), Littledale, J., laid down the rule in general terms: "A person who employs a broker must be supposed to give him authority to act as other brokers do. It does not matter whether or not he himself is acquainted with the rules by which brokers are governed." The former decision does not appear to have been at all discussed by the learned judges. Taking it in its widest extent, it is only an authority limiting the scope of the action of assumpsit.

In Taylor *v.* Stray (2 C. B., N. S., 175), Willes, J., traces the rule applicable to such cases to the rule which pervades the whole law of principal and agent, namely, that the principal is bound to indemnify the agent against the consequences of all acts done by him in pursuance of the authority conferred upon him. The court decided that the defendant, by directing the plaintiffs to purchase shares, necessarily gave them authority to pay for them according to the rules of the Stock Exchange.

Smith *v.* Lindo (5 C. B., N. S. 587), decided in 1858, presents some new features. The plaintiff, though he was not duly licensed, assumed to act as broker (in London) in the purchase of shares for the defendant, and had been obliged to pay to the seller the price of the shares by the usage of the share market. There was nothing to show that the payment was made in pursuance of any illegal contract, nor was it a necessary part of the duty of a broker as such to pay the money. The plaintiff brought an action for the amount paid by him on behalf of the principal, and for commission. At the trial a verdict was found for the plaintiff, and the Court of Common Pleas afterwards held that, although the plaintiff was, by the 6 Anne, c. 16, rendered incapable of suing for commission by reason of his not being duly licensed as a broker, yet that he might recover from his principal the price which, pursuant to a usage of the share market, he had been obliged to pay to the person from whom he purchased, the statute of Anne not making the contract void, but merely precluding the unlicensed broker from recovering any remuneration from his services in making it. The defendant's appeal from this decision was heard in the Exchequer Chambers before Wightman, Erle, Crompton, and Hill, J. J., and Martin, Bramwell, and Watson, BB. The decision of the court below was upheld, Crompton, J. alone dissenting, on the ground that the payment of the commission and the repayment of the money paid, both stand on the same footing. The view of the majority is supported by the decision of the Court of Exchequer in Pidgeon *v.* Burslem (3 Ex. 470). It is certainly the more just one.

With this decision may be compared the more recent case of Rosewarne *v.* Billing (15 C. B., N. S., 316; 33 L. J. 55, C. P.) The plaintiff sued the defendant for money alleged to be paid for the defendant at his request. To this the defendant pleaded that the money became due by reason of certain wagering contracts made by the plaintiff for the defendant with certain other persons since the passing of the 8 & 9 Vict. c. 109. To this the plaintiff demurred. Judgment was given for the plaintiff. "Now," said Chief Justice Erle, "the law as to gaming contracts is that all such contracts are null and void, and no action can be maintained upon them. But they are not therefore illegal. The parties making them are not liable to any action or to any penalties. . . . I am clearly of opinion that if a man loses a wager, and gets another to pay the money for him, an action lies for the recovery of the money so paid." This is consistent with Jessopp *v.* Sutwyche (10 Ex. 614), and Knight *v.* Chambers (15 C. B. 562). The effect of these cases, and others of the like kind, is that an agent's authority to act for his principal may be implied in any case where there is no illegality proved.

The law is now well settled that when a contract for the purchase and sale of shares has been entered into between individuals through their respective brokers, or with the intervention, as purchasers or their sellers, of jobbers, members of the Stock Exchange, the lawful usages and rules of the Stock Exchange are incorporated into, and become part and parcel of all such contracts, and the rights and liabilities of individuals, parties to any such contracts, are determined by the operation upon the contracts of these rules and usages. (Per Kelly, C. B., in Browning *v.* Shepherd, 7 L. Rep. Q. B. 309; Grissell *v.* Bristowe, 4 L. Rep. C. P., 36; Coles *v.* Bristowe, 4 L. Rep. Ch. 3.)

But although the authority of an agent *prima facie* includes an authority to act in accordance with established and reasonable usage, yet such authority will not be extended to cases where the agent is compelled to make a payment in the course of his agency by reason of a default of his own. In Duncan *v.* Hill (6 L. Rep. Ex. 255; 8 L. Rep. Ex. 242), finally decided in 1873, the defendant, (who was not a member of the Stock Exchange) instructed the plaintiffs (brokers on the Stock Exchange) to buy certain shares for him for the account of July 15th, 1870. On that day, acting upon his instructions, the plaintiffs carried the shares over to the account of July 29, and paid differences amounting to £1688. The plaintiffs subsequently became defaulters, and on the 18th were declared defaulters, and their transactions were closed in conformity with the rules of the Stock Exchange. The accounts were made up at the prices current on the 18th, without the knowledge of or any reference to the defendant. The result was that the sum due, including the £1688, upon the whole transaction was £6013 13s. 5d. For the plaintiffs it was argued that a defaulting broker has no right to avail himself of a usage regulating the mode of dealing with defaulters in order to fix his principal with an additional liability. The court below, accepting the principle (Grissell *v.* Bristowe, L. Rep. 3, C. P. 112; L. Rep. 4, C. P. 36; and Maxted *v.* Paine, L. Rep. 4, Ex. 203; L. Rep. 6, Ex. 132) that the whole of the usages and practice of the Stock Exchange were imported into the contract, thought that the plaintiffs had authority to bind the defendant, that the defendant being the real purchaser was so identified with the plaintiffs, his agents, as to be liable to

the performance of the contract made in all its incidents, and with all its consequences, and that he was accordingly liable for any result due to the operation of those rules of the Stock Exchange, which operated only in cases of default by the agent. This decision is open to the serious objection that it makes a plaintiff liable to the agent for losses which are directly due, not to the execution of the agency, but to a default on the part of the agent. The Court of Exchequer Chamber, consisting of Blackburn, Keating, Grove, Brett, Quain, Archibald, and Honyman, JJ., unanimously reversed the judgment of the court below upon that ground alone. The result is that a principal is bound to indemnify his agent for losses incurred by the latter, by the operation of an acknowledged usage or custom, unless the usage is unreasonable, or unless the loss is incurred by a default of the agent himself, as in this case, by reason of his insolvency. "It is argued," said Blackburn, J., in delivering the judgment of the court, "that where the agent, as in this case, is subjected to loss, not by reason of his having entered into the contracts into which he was authorized to enter by his principal, but by reason of his insolvency, brought on by want of means to meet his other primary obligations, it cannot be said that he has suffered loss by reason of his having entered into the contracts made by him on behalf of his principal, and consequently there is no promise which can be implied on the part of his principal to indemnify him. . . These allegations, both as to fact and law, seem to us to be correct." A curious circumstance in both the arguments and judgment is that no case was cited in support of the principle upon which the decision was based —London *Law Times*.

MR. MOSNESS ON JUDGE RYAN'S OPINION.

MRS. MYRA BRADWELL, Editor LEGAL NEWS, City:

Dear Madam: Since the application of Miss Goodell, of Janesville, for admission to the bar of the Supreme Court of Wisconsin, it seems that Chief Justice Ryan has thought it necessary to take the position that the legislature has not the power to provide who may practice in "his" court, or the legislature of Wisconsin might enact a law expressly providing for the admission of women in that State. The chapter referred to in the opinion herewith enclosed, provides as follows: "Any person who has been duly admitted and licensed to practice as an attorney and counsellor at law in the Supreme Court of the State of Illinois, and all other States in the Union where counsel of this State are admitted as counsel of such State, on the same terms hereinafter prescribed, *shall* be admitted and licensed to practice as an attorney and counselor at law in all the courts of this State, upon written application signed by such person, and upon presenting to such court proof that he has been so admitted to practice in the Supreme Court of Illinois, and all other States in the Union where counsel of this State are admitted as counsel of such State, on the same terms hereinafter prescribed, and an affidavit of good moral character, and that he is a resident of said State of Illinois." Taylor's (Wis.) Statutes, p. 1,344, § 39.

"It *shall* be the duty of any court of this State, upon application and proof aforesaid, to admit any attorney of the State of Illinois, and all other States," etc., etc. Ibid., p. 1,345, § 40. I was informed by several members of the bar of the court of which the learned Chief Justice is a member, that attorneys had habitually been admitted under this act, and that I was the first attorney whose motion had been denied, and it was generally supposed that Miss Goodell's case was the cause which actuated the court now for the first time to disregard the plain provision of the statute. Whether women ought or ought not to practice law I do not care to consider, but if the court was influenced in its opinion by motives founded on prejudice against women in the practice of law, it manifests a weakness inconsistent with the long-recognized ability of the learned Chief Justice who delivered the opinion. If the court continue to concede the power of the legislature as to this act, it must of course do so as to the other acts providing for the admission of attorneys, and hence the supposition that this opinion is a warning to the legislature of that State that an act providing for the admission of women to the bar, if attempted, will be unavailable.

Respectfully,
O. MOSNESS.

LADY LAWYERS IN LONDON.

I know of two lady-students of law. They are English women, living in London. They have chambers in Chancery Lane, these girls of the period; their names are on the door, flanked by those of legal gentlemen in the same house. They are installed in a large room, with the usual clerk's office, and they were, when I visited them, poring over massive volumes, each with a solemn reading-lamp before her. There was an abundance of green baize in the room, (green baize seems to be as necessary to lawyers as red tape is to governments,) and there were huge inkstands and formidable quill pens, like those which figure at the signing of a contract on the stage. The book-shelves were, of course, a store of legal wisdom, and, foremost among the treasures, there was a comprehensive edition of Blackstone, upon which my learned friends prided themselves greatly. These legal ladies were very simply dressed—one in gray, the other in black—and were thoroughly bent on abjuring the frivolities of womanhood and working like men. Now, I not being "a man"—or woman—"of the law, that have my tongue to sell for silver or favor of the world," as John Knox has said, could not see at first what work these ladies could do, since as yet they are not barristers or solicitors. But they assured me that as conveyancers they did not find time hang heavily on their hands; that they had as much work to do as they could possibly achieve; and their only fear was that when it was discovered how lucrative their branch of the legal profession might be, numbers of women would be anxious to join in it, and that Chancery Lane might thus be invaded by the gentler sex, its courts and passages ever echoing the rustle of feminine petticoats and the ripple of feminine laughter.

By the time, however, such progress is made, as that I have indicated, petticoats will have ceased to distinguish feminine humanity, and may have been relegated to men! In fact, one might almost think that men were forewarned of their doom as regards costume, and, in anticipation of the time when women shall wear trousers, are accustoming themselves to the skirts of an Ulster—that the transition may not be too complete. I am not as afraid of an overflow of legal ladies as are my friends the conveyancers, however, who have reached their present position, not only because they are clever women, but because they are more clever than the average young man. Each of them has taken signal honors, one of them having won prizes for jurisprudence and political economy over the heads of male students, while the other was far advanced in the study of medicine, when she was persuaded to turn her attention to law, and enter into partnership with the political economist. Such women as these are rare, it must be owned; and I may add that I think the qualities that go to make a clever lawyer are especially rare in women.

Logical acuteness, impassibility that is unmoved by sentiment and appearances, and strict impartiality are surely requisite in legal workers, yet, in these three qualities women are conspicuously deficient; and though several eminent judges have differed from me, and though I heartily wish to uphold the women who attempt to break away from the old conventional restrictions that forbade them to do more than mix a pudding and make a pinafore, I cannot think that the woolsack is the truest and most fitting feminine ideal. A due course of serious reading and thinking will not, depend upon it, interfere with, but rather improve upon, the mixing of the pudding and the sewing of the pinafore; but every woman who can read and thinks i not fit for one of the liberal professions, any more than the girl who has indulged in gymnastic exercises and school drill is fit to be a soldier.—*Home Journal*.

REMOVAL OF MR. KETTELLE FROM PEORIA TO CHICAGO—ADDITION TO THE CHICAGO BAR.—George H. Kettelle, late of the Peoria bar, has removed from that city to Chicago. At a meeting of the Peoria bar held on last Saturday, Wellington Loucks occupied the chair, and R. S. Bibb acted as secretary. The committee appointed at a previous meeting to draft resolutions relative to the proposed departure of Mr. Kettelle to Chicago, reported the following preamble and resolutions which were unanimously adopted:

WHEREAS, George H. Kettelle, Esq., a member of the bar of our city, is about to remove to Chicago to practice his profession, therefore,

Resolved, That having known Mr. Kettelle for a long period of time, and having always recognized the sterling integrity, ability and indefatigable energy which have made him not only one of the distinguished members of our bar, but also one of our most valued citizens, we deeply regret his intended departure from us, but trust that in his new field of labor his efforts will be rewarded with prosperity and success.

Resolved, That the secretary of this meeting furnish a copy of the foregoing preamble and resolutions to Mr. Kettelle, and also to the daily papers of Peoria, the Chicago *Legal News* and the *Legal Adviser*, with a request for the publication of the same.

Remarks relative to the occasion were made by Messrs. J. S. Lee, Thos. Cratty, A. C. Hewett, J. S. Starr, M. C. Quinn, E. G. Johnson, J. W. Cochran, Josiah Cratty, and Wellington Loucks.

Mr. George H. Kettelle responded with appropriate remarks, after which the meeting adjourned.

We understand Mr. Kettelle intends entering into a co-partnership with the Hon. W. W. O'Brien, formerly of Peoria.

UNITED STATES SUPREME COURT.

PROCEEDINGS OF.

VALIDITY OF BONDS.

710. Marcy *v.* Township of Oswego. Error to the Circuit Court for the District of Kansas. In this case, plaintiff sued on a number of bonds belonging to a series of $100,000 issued by the township, claiming that they were issued regularly in pursuance of the provisions of the statute authorizing them. The question was, therefore, whether in such a case, brought by a bona fide holder, for value, it could be shown, as defense, that at the time of voting and issuing the series of bonds the value of taxable property of the township was not in amount sufficient to authorize the voting and issuing of the whole series. It is held that the recital of the bonds that they were executed and issued by virtue of and in accordance with the act of the legislature of the State, was sufficient to charge the township, and the defense is not sustained. Justice Strong delivered the opinion. Justice Miller read a dissent, in which Justices Davis and Field concurred.

Under this decision, it would seem no matter what may be the limitations placed upon a municipal corporation as to the issuing of bonds, either by the Constitution or the statute; if the corporation does issue bonds in excess of he amount allowed by law, and it is recited in the bonds that they are issued in accordance with the provisions of the law, and they are in the hands of an innocent holder, that such corporation is helpless, and can make no defense to such bonds.

COTTON CLAIM.

908. United States *v.* Raymond, assignee in bankruptcy of Maybin and 12 other cases. Appeals from Court of Claims. These are a number of cases in which the identity of captured cotton was lost and property of different owners could not be traced. Much of the cotton was taken for military or defensive purposes in the siege of Vicksburg, and much of it was stolen, destroyed and lost after the surrender of Vicksburg. All that was of any value was collected aud became intermingled, and was stored in a common mass. In this condition it was forwarded and sold by treasury agents. The court affirms the judgment of the court of claims, sustaining the creation of a fund out of that money realized for cotton and distributing it among claimants, as a fund in trust for that purpose, upon their establishing their claims and affirming the propriety of the appointment of a commissioner to pass upon accounts presented. The Chief Justice delivered the opinion.

RAILWAY BONDS.

190. Chamberlain *v.* The Sioux City Railway Company, Southern Minnesota Railroad Company et al. Where land is conveyed to the State by the corporation as indemnity against losses on her bonds loaned to it, bondholders have no equity for the application of land payment bonds which can be enforced against the State, and her grantees take the property discharged of any claim of the bondholders. Affirmed. Justice Field delivered the opinion.

CUSTOMS DUTIES.

207. Barney, collector, *v.* Watson, etc. Error to Circuit Court for Southern District of New York. In this case, importers paid an ad valorem duty on certain flannels without protest, but afterward when the collector enacted a specific duty on the same goods, a protest was served, but not until the department had sustained the collector on the trial. The verdict was nearly twice the amount of the specific duty enacted, as to which excess there was no protest. The court hold that there can be no recovery except as to the amount required for the protestant. Reverse judgment. Justice Bradley delivered the opinion.

PATENTS.

215. Breckendorre v. Faber. Error to Circuit Court for Southern District of New York. This was a bill filed to restrain the alleged inf.ingement by Faber of an improvement in lead pencils, consisting in the construction of a pencil enlarged and recessed at one end for the reception of an eraser. The decision is that in the construction of the pencil patented, there is no new result in the combination of lead eraser which will make the improvement claimed patentable. It is also held that the decision of the commissioner of patents on the question whether the improvement or invention is patentable is not final, but will be reviewed by the courts. Affirmed. Justice Hunt delivered the opinion. Justice Strong dissented as to the patentability of the improvement.

DEPARTMENT CONTRACT.

937. Garfelde *v.* The United States. Appeal from Court of Claims. It is here held that the proposal or bid made in pursuance of the department advertisement and its acceptance by the department, creates a contract of the same force and effect as if a formal contract had been written out and signed by the parties. The Court of Claims, however, held that the contract in this case was invalid because the schedule of time was not given in the department notice. It is here said that the distance being given, the number of trips per month to be made, and the time of arrival and departure given, the notice was sufficient to sustain the contract, and valid. Justice Hunt delivered the opinion.

INSURANCE.

222. Franklin Fire Insurance Company of Philadelphia *v.* Vaughan. Error to Circuit Court of Arkansas. In this case it is said that in seeking to recover the amount insured upon his goods, destroyed by fire, the insured was bound to prove only his policy, his loss and service or preliminary proofs. Defense was that insured was not absolute owner of the property, because it was not paid for in full, and was not to be removed from the place where it was purchased until the balance of purchase money was paid. The court find that there was no claim of the vender to any ownership of the property, and that there was nothing in the circumstances stated to defeat the policy. Justice Hunt delivered the opinion.

NO JURISDICTION.

213. New York Life Insurance Company *v.* Henderson. Error to Supreme Court of Appeals of Virginia. In this case it is said the pleading, as well as instructions asked and refused, present questions of general law alone, and no Federal question was involved. Dis-

missed for want of jurisdiction. The Chief Justice delivered the opinion; dissenting, Mr. Justice Bradley.

CRIMINAL REWARD.

223. Shaey, executor of St. Marie, *v* The United States. Appeal from Court of Claim. In this case, court agree with the Court of Claims that the claim of St. Marie for $15,000 for services in apprehending Suratt, did not entitle him to the reward. The giving of information which led to the arrest, say the court, and the act of making it are distinct things, and were so recognized in the proclamation offering the reward. Affirmed. Justice Swayne delivered the opinion.

COTTON—CONFEDERATE STATES—CONTRACT.

198. Whitfield *v.* The United States. Appeal from Court of Claims. In this case it is held that cotton sold to the Confederate States during the war, by a resident of Alabama, he receiving confederate bonds in payment, passed to the Confederate States and became their property, liable to capture and confiscation by the government. Nor did it affect the transfer that the Confederate States afterwards became insolvent. The contract was executed before insolvency, and completed sales in such cases will be enforced, although contracts of sale in aid of rebellion would not be. The Chief Justice delivered the opinion.

WAR CLAIMS.

176. The United States *v.* Deckleman. Appeal from Court of Claims. This was a claim for damage by a Prussian subject for detention of the ship Essex at New Orleans by military authorities, in September, 1862. The substance of the decision is that by going to New Orleans the Essex subjected herself to the operation of martial law, and must be content. She went there for gain, and voluntarily assumed all chances of the war into whose presence she came. The Chief Justice delivered the opinion.

DECREES AFFIRMED.

205. A. H. Hammond et al., appellants, *v.* Mason & Hamlin Organ Company. Appeal from the Circuit Court of the United States for the District of Massachusetts. Justice Miller delivered the opinion of the court, affirming the decree of the Circuit court with costs.

195. Jacob Magee and Henry Hall, plaintiffs in error, *v.* Manhattan Life Insurance Company. In error to the Circuit Court of the United States for the Southern District of Alabama. Mr. Justice Swayne delivered the opinion of the court, affirming the judgment of said Circuit court in this cause, with costs and interest.

78. Charles R. Tyng et al, plaintiffs in error, *v.* Moses H. Grinnel. In error to the Circuit Court of the United States for the District of New York. Mr. Justice Clifford delivered the opinion of the court, affirming the judgment of said Circuit court in this cause with costs.

PROPELLER GALATEA.

211. Frederick Robert et al., appellants, *v.* Propeller Galatea, etc. Appeal from the Circuit court for the Southern District of New York. Mr. Justice Clifford delivered the opinion of the court, reversing the decree of the Circuit court with costs and remanding the cause with directions to enter a decree affirming the decree of the District court.

CAMDEN AND AMBOY RAILROAD.

219. Steam ferry-boat America, etc., Appellants, *v.* Camden & Amboy Railroad and Transportation Company. Appeal from the Circuit Court for the Southern District of New York. Justice Clifford delivered the opinion of the court, reversing the decree of the Circuit court, with costs, and remanding the cause for further proceedings, in conformity with the opinion of the court.

No. 900. Michael McStay et al., *v.* Joseph S. Friedeman. In error to the Supreme Court of California. Waite, C. J., delivered the opinion, dismissing the writ of Error for the want of jurisdiction.

No. 150. G. W. Haishman *v.* Bates County. In error to the Circuit Cour of the United States for the Western District of Missouri. Bradley, J., delivered the opinion, affirming the opinion of the Circuit court with costs.

No. 577. The Central Railroad and Banking Company *v.* The State of Georgia.

No. 578. The Southwestern Railroad Company *v.* The State of Georgia. In error to the Supreme Court of Georgia. Strong, J., delivered the opinion, remanding the causes for further proceedings, in conformity with the opinion of this court.

No 728. Humboldt Township, etc., *v.* A. Long, et al., In error to the Circuit Court of the United States for the District of Kansas. Strong, J., delivered the opinion, affirming the judgment of the said Circuit court, with costs, etc. Dissenting, Miller, Davis and Field, JJ.

No. 907. The United States *v.* George W. Ross. Appeal from Court of Claims. Strong, J., delivered the opinion, reversing the judgment of the Court of Claims, and remanding the cause, with directions to award a new trial.

No. 185. Henry Miller et al. *v.* George W. Dale et al. In error to the Supreme Court of the United States of California. Field, J., delivered the opinion, affirming the judgment of the said court in this cause with costs.

No. 128. Wm. Burdell et al. *v.* Augustus Denig and Wm. E. Ide. Error to the Circuit Court of the United States for the southern district of Ohio. Miller, J., delivered the opinion, reversing judgment of the Circuit Court with costs, and remanding the cause with directions to award a new trial.

No. 197. Francis L. Markey et al. *v.* W. C. Langley et al.; in error to the Circuit Court of the United States for the district of South Carolina. Swayne, J., delivered the opinion, affirming the decree of the Circuit Court in this cause, with costs.

No. 216. James P. Carroll et al. *v.* Joshua and Thomas Green; appeal from the Circuit Court of the United States for the district of South Carolina. Swayne, J., delivered the opinion, reversing the decree of the Circuit Court, with costs, and remanding the cause with directions to dismiss the bill.

No. 503. G. D. Newhall v. Charles W. Sanger; appeal from the Circuit Court of the United States for the district of California. Davis, J., delivered the opinion, reversing the decree of the Circuit Court, with costs, and remanding the cause with directions to dismiss the bill. Dissenting, Field and Strong, JJ.

No. 199. Branch Sons & Co. et al. *v.* City Council of Charleston et al. No. 200. City Council of Charleston et al. *v.* Branch Sons & Co.; appeals from the Circuit Court of the United States for the district of South Carolina. Bradley, J., delivered the opinion, modifying and affirming the decree of the Circuit Court in these causes, each party to pay their own costs.

No. 201. The Coastwise Company claimants *v.* Nicholas de Las Casas.

No. 202. Nicholas de Las Casas *v.* the steamer Alabama. Appeals from the Circuit Court of the United States for the southern district of New York. Bradley, J., delivered the opinion of the coutt, reversing the decree of the Circuit Court, and remanding the causes for further proceedings in conformity with the opinion of this Court. Dissenting, Clifford, J.

No. 221. The City of St. Louis *v.* The United States. Appeal from the Court of Claims. Miller, J., delivered the opinion, affirming the judgment of the Court of Claims in this cause.

No. 702. Isaac Taylor, collector, et al. *v.* James Secor and Wm. Tracy. Miller, J., announced the order of the court, modifying the decree in this cause.

AMENDMENTS TO RULES.

Amendments to rules were adopted as follows:

Add at the end of paragraph 3, rule 6: There may be united with a motion to dismiss a writ of error to a State court, a motion to affirm on the ground that although the record may show that this court has jurisdiction, it is manifest the writ was taken for delay only, or that the question on which the jurisdiction depends is so frivolous as not to need further argument.

Add to rule 10, paragraph 1, so that it will read as follows: In all cases the plaintiff in error, or appellant, (on docketing a case and filing the record), shall enter into an undertaking to the clerk with security to his satisfaction, for the payment of his fees, or otherwise satisfy him in that behalf.

Paragraph 6, change so that it will read as follows: In all cases of dismissal for want of jurisdiction, the fees for the copy shall be taxed against the party bringing the case into court, unless the court shall otherwise direct.

Adjourned to the time and place appointed by law.

The court adjourned on Monday, May 8th. for the term.

In a case that came before the magistrates at Willenhall, a report of which will be found elsewhere, the question was raised as to whether an innkeeper can be fined for being drunk on his own licensed premises. The magistrates decided the case on the ground that the drunkenness was not proved; but they intimated their opinion that the case was not within the Act. The exact words of sect. 12 of 35 and 36 Vict., c. 94, are: "Every person found drunk in any highway or other public place, whether a building or not, or on any licensed premises, shall be liable to a penalty not exceeding 10s.," &c. This would certainly include the landlord in the letter, if not in the intention; and we find a case, decided by some Yorkshire magistrates, mentioned in Wharton's Law Relating to Innkeepers, p. 81, in which a landlord was fined under this section, having been found drunk in bed in his inn by a police officer. That the landlord's private room, even after closing hours, comes within the term "licensed premises," is shown by the case of Patten *v.* Rhymer, (29 L. J., 189, M. C.), where it was held that an innkeeper is guilty of permitting gaming within the licensed premises, who allows his own private friends to play at cards for money in his own private room; and this was followed in Hare *v.* Osborne, 34 L. T. Rep. N. S. 294.—*The London Law Times.*

AN OLD STATUTE.—A case came before vice chancellor Hall, the other day, in which a tenant for life under a settlement had disappeared, and the reversioners, under a statute passed in the reign of Queen Anne, moved that the tenant for life should be produced at the door of the new church at Chingford, Essex. The vice chancellor, after saying that his jurisdiction had not been taken away by the Judicature Act, granted the application, and directed that the wife of the tenant for life should produce her husband one month after service of the order.

It seems strange to us Americans that an English vice chancellor should at this time consider that old statute in force, and order a wife to produce her husband at a church door within thirty days from the date of the order. If this statute is in force in England, is it not in force here? We suppose, however, that our judges would hold it is not applicable to this country.

MR. ANDREW P. CALLAGHAN, of the law book publishing house of Callaghan & Company, of this city, leaves to-day for the east, to be gone about three weeks. He will visit the law publishing houses of Albany, New York, Philadelphia, Boston, Baltimore and Washington. Mr. Callaghan is an energetic western business man, and our eastern publishers will do well if they succeed in infusing some of his spirit into their enterprises. The success of this house is wonderful. There is but one larger publishing house in the United States.

THE whisky trials have again commenced in this district. D. Munn, former supervisor, is being tried for conspiracy to defraud the government out of its revenue. He is being ably defended by Colonel Ingersoll. Mr. Ayer, in his opening for the government, stated a very strong case. Will the proof sustain the statement.

JUST as we go to press, we learn of the death of Major James Brown, of the law firm of Brown & Mosness, of this city, at his residence, at 8 o'clock this morning, after an illness of about ten days.

A SUNDAY QUESTION IN BALTIMORE.—An exchange says: A case was decided in Baltimore, on Saturday, which will be interesting to members of clubs, whose wont it is to frequent their club-houses at different times during the week, including Sunday, for social purposes. Four clubs of this character were recently presented in Baltimore for violating the Sunday liquor law, the question before the court being whether it was a violation of the law for these clubs to supply, on their own premises, their members and regular inmates with wines, liquors and meals on Sundays, as well as on days. Judge Gilmor took the view that the clubs in question had not violated the law, and consequently gave a verdict in their favor; saying that the object of the Sunday law was to prevent business traffic on Sunday, whereas in the club-houses there are no barter and sale, no profits as inducements to membership, nor any business relations, but rather retirement from business pursuits.

CHICAGO LEGAL NEWS.

SATURDAY, MAY 20, 1876.

The Courts.

UNITED STATES SUPREME COURT.

Nos. 557 and 558.—OCTOBER TERM, 1875.

W. S. GILMAN, N. A. COWDRY, LUTHER C. CLARK and HENRY A. BARLING, Appellants,
557. *v.*
THE ILLINOIS & MISSISSIPPI TELEGRAPH COMPANY, THE DES MOINES VALLEY RAILROAD COMPANY, and Others.

Appeal from the Circuit Court of the United States for the District of Iowa.

H. COYKENDALL, Garnishee, Plaintiff in Error.
558. *v.*
THE ILLINOIS & MISSISSIPPI TELEGRAPH COMPANY.

In Error to the Circuit Court of the United States for the District of Iowa.

GARNISHEE—THE EARNINGS OF AN INSOLVENT R. R. CO. — RIGHTS OF THE MORTGAGOR TO THE RENT OR EARNINGS OF THE MORTGAGED PROPERTY—PRACTICE.

1. The garnishee asked for further time to produce evidence. The case having been submitted to the court and argued by the counsel of both parties, the garnishee not having asked for a jury, the record in this respect shows no error. It is to be taken that both parties waived a jury, and they are to be bound accordingly.

2. POWER TO EXAMINE RULING.—That the proceeding not having been according to the act of March 3, 1865, this court has no power to examine any ruling of the court below, excepted to during the progress of the trial.

3. DISCRETION OF THE COURT.—That if this queston was before the court in such a shape that it could consider it, it would be a conclusive answer that the matter was one resting in the discretion of the court.

4. RIGHTS OF MORTGAGOR TO EARNINGS.—That in the suit for foreclosure and sale in the State court by the mortgagees in the second mortgage, those in the first having been made parties, and that mortgage thus brought before the court, that court had full jurisdiction as to the rights of the parties touching both instruments; that it would have been competent for the court, upon a proper showing, to appoint a receiver and clothe him with the duty of taking charge of the road, and receiving its earnings, with such limit of time as it might see fit to prescribe. When the final decree was made, a receiver might have been appointed and required to receive all the income and earnings until the sale was made and confirmed and possession delivered over to the vendee; that it is clearly implied in these mortgages that the railroad company should have possession and receive the earnings until the mortgagees should take possession, or the proper judicial authority should interpose. Possession draws after it the right to receive and apply the income. In this case the whole fund belonged to the company, and was liable to its creditors, as if the mortgages did not exist.—ED. LEGAL NEWS.]

Mr. Justice SWAYNE delivered the opinion of the court.

These cases have been argued together and will be decided together. The case last mentioned will be first considered.

On the 24th of May, 1872, the telegraph company recovered in the Circuit Court of the United States for the District of Iowa, a judgment for the sum of $23,734.04 and costs. On the 13th of June following execution was issued. The marshal to whom the process was directed, on the 16th of that month, served it by attaching as garnishees several persons, one of whom was Coykendall, the plaintiff in error. On the 27th of October, 1873, he filed his answer, and on the 27th of October, 1874, he filed a further answer.

By the first answer he admitted that since he was garnisheed he had received for, and paid over to the railroad company more than $37,000. In his second answer he set forth that he was the agent of the railroad company at Des Moines, and that his duties were to sell tickets and receive and ship freight, and to receive the charges upon such freight. For the moneys received both for tickets and freight, a large proportion belonged to other companies, but how much he did not know. All the moneys he received were regularly transmitted to the assistant treasurer of the Des Moines company.

The proper apportionment of the moneys was made by the officers of that company at Keokuk, and the Des Moines company was accountable to the other companies for what belonged to them. He was not in the employment of any other company or person during the time mentioned, and was not responsible to any other company or person for the moneys which he received, as before stated.

The gross amount received by him, between the time he was garnisheed and the appointment of the receiver who took possession of the road, was $27,000.

The case was submitted to the court, and argued by the counsel upon both sides The next day it was stated to the court by the counsel for the defendant, that proof could be adduced of the proportion of the moneys in question which belonged to other companies, and time was asked to procure it. The application was overruled, and the court gave judgment for $27,000 and costs. The garnishee thereupon excepted to the ruling of the court, refusing further time.

The case having been submitted to the court and argued by the counsel of both parties, the garnishee not asking for a jury, the record in this respect shows no error. It is to be taken that both parties waived a trial by jury, and they are bound accordingly. Phillips *v.* Preston, 5 How., 278; Campbell *v.* Boyreau, 21 How., 224; Kelsey *v.* Forsythe, Id., 86. The proceeding not having been acccording to the act of March 3, 1865, this court has no power to examine any ruling of the court below excepted to during the progress of the trial. Campbell *v.* Boyreau, supra; Guild and others *v.* Fontin, 18 How., 135; Kearney *v.* Case, 12 Wall., 275; Dickenson *v.* The Planters' Bank, 16 Id., 241. The only point attempted to be presented by the bill of exceptions was the refusal of the court to give time for the production of further evidence. If this subject was before us in such a shape that we could consider it, it would be a conclusive answer that the matter was one resting in the discretion of the court. Its determination, therefore, could not be reviewed by this tribunal.

The judgment of the Circuit Court is affirmed.

This brings us to the examination of the case in equity.

The bill was filed to prevent, by injunction, the collection of the moneys upon which the judgment in favor of the telegraph companies was founded. There is no controversy between the parties as to the facts.

On the 16th of February, 1857, the railroad company, by its then corporate name, executed a mortgage, and on the 1st of October, 1868, by its corporate name as altered, executed another. Both were given to secure the payment of its bonds, as set forth. A part of the premises described and pledged by both mortgages, besides the road, was its income.

In case of default in the payment of interest or principal the mortgagees were authorized to take possession and collect and receive the income and earnings of the road and apply them to the debt secured, and upon the request of one-third of the bondholders to sell the mortgaged premises.

The conditions of both mortgages having been broken the mortgagees in the second mortgage filed their bill of foreclosure in the Circuit court of Polk county, in the State of Iowa. The mortgagees in the second mortgage, various judgment and lien creditors, among the former the telegraph company, were made defendants. On the 31st of May, 1873, a decree of foreclosure and sale was rendered. It fixed the priorities of the several parties, and held that the judgment of the telegraph company was a lien subject to the mortgage in suit and other specified liens. It ordered a sale of the mortgaged property. The road was still in possession of the company. The decree made no provision for disturbing their possession, and none whatever as to the income of the road between the time of the decree and the time of the sale. The telegraph company proceeded, as we have stated, in disposing of the case at law. On the 20th of June, 1873, the appellants, who are the trustees in the two mortgages, filed this bill. On the 9th of September, 1873, after the sheriff had advertised the mortgaged premises for sale, the decree in the State court was amended by providing for the appointment of "a special receiver of all the income and earnings of the road" between the date of the decree and the time fixed by the sheriff for the sale to be made by him. This was done with a saving of the rights of the telegraph company. The special receiver took possession on the 15th of September, 1873. The sale by the sheriff was made on the 17th of October, 1873. The road was operated by the company up to the time when the receiver took possession.

During this period the fund was received for which judgment was given against Coykendall.

The proceedings in the case at law having been held valid, the telegraph company is entitled to the fund in controversy, unless the appellants have shown a better right to it. The question arises upon the mortgages. The civil law is the springhead of the English jurisprudence upon the subject of these securities. Originally, according to that jurisprudence, mortgages of the class to which those here in question belong, vested the fee, subject to be divested by the discharge of the debt at the day *limited* for its payment. If default was then made the premises were finally lost to the debtor. In the progress of time more liberal views prevailed, and the debt came to be considered as the principal thing, and the mortgage only as an incident and security. In the present state of the law, where there is no prohibition by statute, it is competent for the mortgagee to pursue three remedies at the same time. He may sue on the note or obligation, he may bring an action of ejectment, and he may file a bill for foreclosure and sale.—1 Hilliard on Mort., 9, 62; Ib., 104, 111; Andrews *v.* Sutton, 2 Bland, 665.

The remedy last mentioned was resorted to in the State court by the mortgagees in the second mortgage, those in the first having been made parties, and that mortgage thus brought before the court. That court, therefore, had full jurisdiction as to the rights of all the parties touching both instruments. It would have been competent for the court *in limine*, upon a proper showing, to appoint a receiver and clothe him with the duty of taking charge of the road and receiving its earnings, with such limit of time as it might see fit to prescribe. It might have done the same thing subsequently, during the progress of the suit. When the final decree was made, a receiver might have been appointed and required to receive all the income and earnings until the sale was made and confirmed and possession delivered over to the vendee.

Nothing of this kind was done. There was simply a decree of sale. The decree was wholly silent as to the possession and earnings in the meantime. It follows that neither, during that period, was in anywise affected by the action of the court.

They were as if the decree were not.

As regards the point under consideration, the decree may, therefore, be laid out of view.

The stipulation renders it unnecessary to consider the amendment to the decree.

Without that stipulation the result would have been the same. It could not affect rights which had attached before it was made.

Nothing was done in the exercise of the right which the mortgages gave to the mortgagees to intervene and take possession. We may, therefore, lay out of view also both these topics.

This leaves nothing to be examined but the effect of the mortgages, irrespective of any other consideration.

A mortgagor of real estate is not liable for rent while in possession.—2 Kent's Com., 172. He contracts to pay interest, and not rent. In Chinnery *v.* Black, 3 Doug., 391, the mortgagor of a ship sued for freight earned after the mortgage was given, but unpaid. Lord Mansfield said: "Until the mortgagee takes possession the mortgagor is owner to all the world, and is entitled to all the profit made." It is clearly implied in these mortgages that the railroad company should hold possession and receive the earnings until the mortgagees should take possession or the proper judicial authority should interpose. Possession draws after it the right to receive and apply the income. Without this the road could not be operated and no profit could be made. Mere possession would have been useless to all concerned. The right to apply enough of the income to operate the road will not be questioned. The amount to be so applied was within the discretion of the company. The same discretion extended to the surplus. It was for the company to decide what should be done with it. In this condition of things, the whole fund belonged to the company and was subject to its control. It was, therefore, liable to the creditors of the company as if the mortgages did not exist.

They in no wise affected it.

If the mortgagees were not satisfied they had the remedy in their own hands.

They could at any moment invoke the aid of the law or interpose themselves without it.

They did neither.

In The Galveston Road *v.* Gowdry, 11 Wall., 482, substantially the same question arose as that we are considering. The mortgage there contained provisions touching the income of the road similar to those in the mortgages before us.

This court held that, at least until after a regular demand was made, those who received the earnings were not bound to account for them.—See also The City of Bath *v.* Miller, 51 Maine 341; Noyes, Receiver, *v.* Rich, 52 Maine, 115.

Upon both reason and authority we think the appellants have no right to the fund in controversy.

The decree of the Circuit Court is affirmed.

UNITED STATES SUPREME COURT.

No. 184—OCTOBER TERM, 1875.

JOHN MONTGOMERY, JR., Assignee of Stewart, Porter, & Co., Plaintiff in Error,
v.
THE BUCYRUS MACHINE WORKS.

In Error to the Circuit Court of the United States for the Western District of Missouri.

FRAUDULENT REPRESENTATIONS — RIGHT TO RESCIND CONTRACT.

That the corporation had the right to rescind the contract on the ground of fraud, and follow the property, or its proceeds, wherever they could find it. This it did not do. But equity and good conscience required that the proceeds of property obtained from it by fraud, should be paid to it, or that the property itself, if unsold, be returned.

2. Having no information to the contrary, until after the bankruptcy of Stewart and Porter, and the receipt of the proceeds of its own property fraudulent procured from it, the corporation is not liable to the assignee of Stewart and Porter for such proceeds.—[ED. LEGAL NEWS.]

Mr. Justice DAVIS delivered the opinion of the court.

There can be no question, on the conceded facts of the case, that Stewart, Porter, and Wallace were co-partners under the firm name of Stewart, Porter & Co., so far as the transaction and contract with the defendant are concerned, and that they are bound to it by the duties and obligations arising out of that relation. The firm of Stewart, Porter & Co. was formed at Sedalia, Missouri, in January, 1870, by Stewart and Porter, to deal in agricultural implements, with a view to include Wallace, if he chose to join it, and the name of the partnership was taken for this purpose. Wallace was sent by Stewart and Porter soon after this to Ohio, where the works of the defendant, a manufacturing corporation, were situated, to make contracts with it as their partner, if he elected to become such. This election was all that was required to render him a member of the firm; there was no necessity that he should sign any articles of co-partnership.

Wallace, when he reached Ohio, elected to join the firm. Pursuant to the express authority conferred upon him by his associates in business, he entered into a contract of purchase with the defendant, to whom he represented that the firm, consisting of Stewart, Porter, and himself, was solvent and doing a good business, and that Porter was wealthy. Previous to this the defendant knew nothing of the firm, but relying on the truth of his statements, parted with its property to a firm composed of Stewart, Porter, and Wallace; nor did it learn that Wallace had retired from the firm until after proceedings in bankruptcy were commenced against Stewart and Porter. It dealt throughout, as it had commenced, with a firm composed of the three persons, and, so far as it is concerned, the firm was not changed.

It is true, before it closed its dealings it acted under the belief that this firm was insolvent, but this was a mistaken belief, as the firm owed no one else, and the firm composed of Stewart and Porter, which was insolvent, was not indebted to the defendant.

By the terms of the contract made by Wallace, on behalf of the firm, with the corporation, one car-load of machines was sold and delivered at the time, and there was a further agreement to fill all orders as soon as practicable. From time to time orders were made and machines forwarded. They were generally shipped direct to the different persons who had engaged to sell them for Stewart, Porter & Co., and the proceeds of these machines, when sold, were de-

voted, with the consent of all parties, to discharge the debt due the corporation, and the unsold machines were returned to it.

It had the right to rescind the contract on the ground of fraud, and follow the property or its proceeds wherever they could be found. This it did not do, because its agents and officers had no reason to believe that Wallace had actually misled them to its injury until after the machines were all sent forward. But equity and good consicence required that the proceeds of property obtained from it by fraud should be paid to it, or that the property itself, if unsold, be returned. This was recognized by Stewart, Porter and Wallace, and the arrangement by which this was done is binding on them and the corporation. The machines did not lose their identity, nor can it be said that they formed a part of the permanent stock of goods of the bankrupts, Stewart and Porter, so that they can be considered as having thereby obtained credit. Their creditors, therefore, have no right to complain, as the settlement was made in the absence of actual fraud. And the mere fact that when it was made the corporation knew that Porter and Stewart were insolvent, does not render it fraudulent under the bankrupt law. The transaction by which it got part of the machines back and received the proceeds of those which had been sold, was, under the circumstances, most equitable; and it cannot be defeated by the consideration that Wallace, after he had made the contract, was allowed to retire from the firm. It would be a great wrong to the corporation, who knew nothing of this, or of the untruthfulness of Wallace's representations until after the property had all been delivered. It always dealt with the firm as composed of Stewart, Porter, and Wallace. Having no information to the contrary, until after the bankruptcy of Stewart and Porter, and the receipt of the proceeds of its own property fraudulently procured from it, the corporation is not liable to the assignee of Stewart and Porter for such proceeds.

Judgment affirmed.

UNITED STATES SUPREME COURT

No. 43.—OCTOBER TERM, 1875.

THE TOWN OF CONCORD, Plaintiff in Error.
v.
THE PORTSMOUTH SAVINGS BANK.

In Error to the Circuit Court of the United States for the Northern District of Illinois.

EFFECT OF CONSTITUTION ON ACT AUTHORIZING TOWN TO SUBSCRIBE OR MAKE DONATIONS TO RAILROAD COMPANIES.

The Town of Concord voted, on the 20th of November, 1869, that it would make a donation, provided the company would run its railroad through the town. On the 20th of June, 1870, the company gave notice of its acceptance of the donation; but the town was not empowered to make the donation until the road was located and constructed through the town. It had no authority to make a contract to give, and the acceptance was an undertaking to do nothing which the company was bound to do before the authority of the town to make a donation, or to engage to make a donation came into existence. There was no contract to be impaired. A contract should be clearly proved before it invokes the protection of the Federal Constitution. That at the time the donation was made, there was no authority in the municipality to make a donation to the railroad company, it having been taken away by the Constitution of 1870, and, consequently, no authority to issue the bonds, and the bonds and coupons are void.—[ED. LEGAL NEWS.]

Mr. Justice STRONG delivered the opinion of the court.

The bonds to which the coupons in suit were attached purport to have been made under legislative authority given to the town officers by the act of March 7, 1867. Their recitals make direct reference to that act by its title, which is set forth at length, with an averment that they were issued under and by virtue of it. The primary question, therefore, is whether that statute did in reality give to the supervisor and clerk of the town, power to execute and deliver town bonds on the 9th day of October, 1871, (when the bonds were in fact issued), as an appropriation or donation to the railroad company. The first and second sections are the only ones to which reference need be made. By the first it was enacted that certain incorporated towns and cities, and towns acting under the township organization law, (among which it is conceded the town of Concord was one,) should be and were severally authorized to appropriate such sum of money as they might deem proper, to the Chicago, Danville and Vincennes Railroad Company, to aid in the construction of the road of said company; to be paid to the company as soon as the track of said road should have been located and constructed through said city, town or township respectively. To this was attached the following proviso: "Provided, however, that the proposition to appropriate moneys to said company shall be first submitted to a vote of the legal voters of said respective townships, towns or cities, at a regular annual or special meeting, by giving at least ten days notice thereof; and a vote shall be taken thereon by ballot at the usual place of election, and if the majority of votes cast shall be in favor of the appropriation, then the same shall be made, otherwise not." The second section empowered and required the authorities of said municipalities to levy and collect a tax and make such provisions as might be necessary for the prompt payment of the appropriation under the provisions of the law.

The authority given to the town of Concord by this statute was not to subscribe to the stock of the railroad company, but to make an appropriation or donation in aid of the construction of the road, and even that donation was not permitted to be made until after the completion of the location and construction of the road through the town. It has been strenuously insisted during the argument that the act conferred no power upon the town to make an appropriation or donation by the issuing of bonds or certificates of indebtedness. It is said other provision was made for the donation; provision by the levy and collection of a tax. We do not care, however, to discuss this matter, for in the view which we have of the case it is quite immaterial. A popular election having been held, and a majority of votes cast at the election having been in favor of the appropriation, it may be conceded that payment of the appropriation could lawfully have been made in town bonds, instead of money, if the donation itself was authorized. The real question is, whether the authority to make the donation existed when it was made. The act of the legislature of 1867 may have been authority for a donation at any time prior to July 2, 1870 and no authority at all afterwards. And such we think it was. The popular vote in favor of an appropriation was on the 20th of November, 1869, but it was not itself an appropriation or donation, and the town was not authorized to make it until the railroad was located and constructed through the town. Before that time, and before any attempt at a donation or appropriation was made, the authority to make it was withdrawn. If no effect be attributed to the rescinding vote of June 30th, 1870, the new constitution of the State, which came into operation on the 2d of July, 1870, annulled, we think, the power of municipalities to make donations to railroad companies. It ordained that "no city, town, township, or other municipality shall ever become subscribers to the capital stock of any railroad, or private corporation, or make donation to, or loan its credit in aid of such corporation. Provided, however, that the adoption of this article shall not be construed as affecting the right of any such municipality to make such subscriptions, where the same have been authorized under existing laws by a vote of the people of such municipalities prior to such adoption." This article, in our opinion, makes a clear distinction between subscriptions to the capital stock of a railroad company, or a private corporation, and donations or loans to such corporations. The latter are prohibited under all circumstances. The former may still be made, if they have been authorized by a vote of the people prior to the adoption of the constitution. A very able and ingenious argument has been submitted to us, aiming to show that in fact the article makes no such distinction, and that donations and subscriptions are put upon the same footing; but we cannot yield to it our assent. No matter what may have been the intention of the mover of the proviso, the intent of the framers of the article, and of the people adopting it, must be gathered from the article itself. There was reason for the distinction. For subscriptions to capital stock the municipality got something for which there was at least a possibility of return, more than was possible in the case of donation. In both cases public convenience may have been contemplated, but in the one more than that may have been contemplated and expected, and this may have been the prevailing motive for assent to a subscription. It cannot be doubted that a subscription would have been voted in many cases where a donation, or a loan of credit would not have been.

If, then, the State constitution prohibited donations to railroad companies, made after its adoption, the act of the legislature of 1867 became ineffective after July 2, 1870. After that date the power no longer existed in the municipality.

We do not say that the new constitution could annul or impair any contract that was made between the town and the railroad company, during the time in which the town had authority to make it. A constitution can no more impair the obligation of a contract than ordinary legislation can. But the record exhibits no contract made before July 2, 1870 The town voted on the 20th day of November, 1869, that it would make a donation, provided the company would run its railroad through the town. On the 20th of June, 1870, the company gave notice of its acceptance of the donation. But the town was not empowered to make the donation until the road was located and constructed through the town. It had no authority to make a contract to give. And the acceptance was an undertaking to do nothing, which the company was not bound to do before the authority of the town to make a donation, or to engage to make a donation came into existence. What is called the acceptance of the railroad company cannot be construed as an engagement to locate and build the railroad through the town. It amounted to no more than saying. "if we build our road through your town, we will receive your gift." There was, therefore, no consideration for the town's promise to give, even if the popular vote can be considered a promise. There was no contract to be impaired. A contract should be clearly proved before it invokes the protection of the federal Constitution.

We conclude, then, that at the time the donation was made there was no authority in the municipality to make a donation to the railroad company, and consequently no authority to issue the bonds. It follows that the bonds and coupons are void.

The judgment is reversed, and the record is remitted for a new trial.

WE are under obligations to the law firm of BISHOP & MCKINLAY, of Paris, Ill., for the following opinion:

U. S. CIRCUIT COURT, S. DISTRICT OF ILLINOIS.

OPINION MARCH, 11, 1876.

HENRY HERVEY et al., *v.* THE ILLINOIS MIDLAND R. R. COMPANY.

APPLICATION TO REMOVE THE CASE FROM THE EDGAR CIRCUIT COURT.

The statutes relating to the removal of cases from State to Federal Courts construed. The Court states in what cases, and by whom a cause may be removed, from a State Circuit to a Federal Court. —[ED. LEGAL NEWS.]

Opinion by DRUMMOND, J.

This case we think is not in such a condition that we can at present take jurisdiction of it.

We will state its condition, and the reasons why we cannot assume jurisdiction.

There was an original bill filed in the Edgar county Circuit court, on the 11th of September, 1875, by one Henry Hervey who claimed to be owner of the majority of the stock of various railroad companies; the Paris and Decatur, R. W. Co., the Peoria, Atlanta and Decatur R.W. Co., and the Paris and Terre Haute R. W. Co., all of which had been merged in the Illinois Midland Railway Company and which was made a defendant. The only plaintiffs in the original bill were Hervey and some judgment creditors of the Peoria and Decatur R. W. Co.

The original bill alleged that there were very large claims in judgment and otherwise against these various companies and that executions had been issued and that owing to the purchase by the Peoria and Atlanta R. W. Co., of the other roads, it could not be ascertained how the judgments could be collected or appropriated, and therefore asked for the appointment of a Receiver.

The claims outstanding — what are called the floating debts of the company —were said to be something over three hundred thousand dollars.

A receiver was appointed. An amended bill was then filed which set out in more detail the various facts stated in the original bill and also included numerous plaintiffs besides those in the original bill.

These various parties were stockholders of the road, and also judgment and other creditors, and it was stated in the amended bill that if the property was placed in the hands of a receiver, and thus a foreclosure prevented by the sale, under execution of the property, the company might be placed upon a stable footing, and that something might be realized for the stockholders and the creditors.

The receiver took possession; various applications were made by him to the court; money was paid under the direction of the court, and contracts also entered into with approbation of the court, by which the receiver became liable to pay certain moneys from time to time, and to issue certificates—a very objectional thing—which, however, the courts have, to some extent, countenanced of late, while the property is in possession of the receiver; but only to be permitted, I think, under extraordinary circumstances; so that the Edgar Circuit Court had retained possession of this property for a very considerable time.

The only defendant to the original and amended bill, was the Illinois Midland Railway Company. These were substantially the facts: When, in February, two creditors, Albert and Morris Grant, citizens of Great Britain, and representing themselves to be bondholders of all these various companies merged into the Illinois Midland Railway Company, came into court and asked to be made parties defendant, and also for leave to file a cross-bill. At the same time Secor, representing himself to be trustee of the mortgage executed by the Peoria, Atlanta & Decatur R.W. Co., asked to be made a party. An order was accordingly made by the court. The order seems to have anticipated the actual application—the order being on the 7th of February, and the application not being in fact made in the clerk's office until about the 15th of February. This, perhaps, is not material. They were made parties, on leave given by the court. They then filed answers to the original and amended bills, in which Secor set up that he was mortgagee and trustee of the Peoria, Atlanta & Decatur road; that he represented thirteen hundred thousand dollars for which the mortgage was given, and that the plaintiffs were seeking to make the property, which he states was covered by the mortgage, available to them to pay the claims which they had against these companies, alleging an independent fact—that the Midland Railway company, and all these companies, were insolvent, and that they had not property enough to pay the various mortgage debts against them, and that the bonds secured by the mortgage, were a prior lien over the claims represented by the various claimants in the original and amended bills.

These were also the substantial allegations of Albert and Morris Grant, with the exception that they represented in their answer that they were bondholders of these three companies. They allege also that there was a mortgage made by the Paris and Decatur road, of which they held bonds, and also by the Paris and Terre Haute road, of which they were the owners of the bonds, but who the mortgagees and trustees were they do not say. All that is stated is that there were mortgages or deeds of trust to secure bonds of which they were the holders.

Now this was the status of the case when, on the 16th of February these defendants, Albert and Morris Grant and Secor, filed a petition in the clerk's office of the Circuit Court of Edgar county, to have the cause removed to this court, for the reason that there was a controversy, which could be wholly determined as between the trustee and these bondholders and the plaintiffs in the original and amended bills; and if that were so there would be no objection in one aspect of the case for the court to take jurisdiction, because the language of the law is, that when the controversy is wholly between citizens of different States, the court may have jurisdiction, although perhaps

the implication is, there may be other controversies in the case between other parties.

It can hardly be said that is true in this case. For instance, in the original and amended bills, there is no allusion whatever to any of the bonds issued—to any paramount claim over that of the stockholders and the judgment and other creditors. But it is insisted that the property, if put in the hands of a Receiver, and taken care of, and an arrangement made by which the floating debt can be paid off, it can become valuable to the stockholders; and there is nothing in the original or the amended bill to indicate that the Midland Railway Company, which is a citizen of this State, has no interest in the property. And it is manifest that the case cannot be transferred without affecting the interest of the Midland Railway Company very seriously, and the only ground upon which it could be transferred by these bondholders and this trustee is that the Midland Railway Company is a mere nominal party.

If it is a real party, it being one of the defendants as well as the bondholders and the trustee, it is a controversy between that company as one of the defendants and the judgment and other creditors, the plaintiffs in the original and amended bills, and therefore it cannot be wholly determined as between these parties who seek for a removal.

But, independent of that, it appears that Albert and Morris Grant are citizens of Great Britain. They are not citizens of one of the States of this Union, which we think is the meaning of the last clause of the second section of the act of the 3d of March, 1875, under which this case is sought to be removed.

"Between citizens of a State and foreign States, citizens or subjects," is one of the conditions under which the federal court has jurisdiction. Now "citizens of a State" there means citizens of one of the United States, and the suits contemplated are suits between citizens of one of the States of the Union on one side and foreign States or citizens or subjects on the other.

Then the section proceeds to say, "and when in any suit mentioned in this section there shall be a controversy which is wholly between citizens of different States," (that means different States of this Union—not citizens of one of the States of this Union and foreign States, citizens or subjects; and the suits referred to are the suits which can be fully determined as between them,) "then either one or more of the plaintiffs or defendants actually interested in such controversy may remove such suit."

Now, as I have said, we cannot determine the controversy, whatever it may be, between these parties seeking a removal, and the plaintiffs in the original and amended bills without affecting the controversy which may exist between the Midland Railway Company and them, and therefore it is not wholly a controversy between the parties seeking such removal and the plaintiffs in the original and amended bills.

Why there was this distinction made—why the language was dropped in the last clause of the section which is contained in another part—it is not for us to determine. It is sufficient that the phraseology is changed, and seems to be limited when less than the whole of the plaintiffs or defendants have the right to remove the suit so that they must be citizens of different States of the Union, and the controversy must be wholly between them.

In this case it is not so. There is a controversy between citizens of the same State, namely, some of the plaintiffs, citizens of Illinois, and the Midland Railway Company, also a citizen of Illinois.

Again, it is stated in the application for removal, that some of the plaintiffs are foreigners. Waring and Company are bondholders, and are citizens of Great Britain and Ireland, and another party is a citizen of Canada. These are included among the plaintiffs in the amended bill.

Of course they are to be affected by the settlement of any controversy between the other plaintiffs and these defendants who seek a removal. For instance, if it is to be held that the trustee of the bondholders seeking the removal are to have a prior claim over the judgment creditors, then a foreigner is to be affected by that adjudication of the court, whatever it may be. So, in relation to the bondholders who are foreigners and plaintiffs, with the others.

It is not therefore in this aspect of the case a controversy wholly between citizens of different States, but it is a controversy between the citizens of a foreign country and citizens of one or more of the United States.

It has occurred to us as a question whether or not these difficulties may be removed, as in this very complicated case it has been suggested might perhaps be better for the interest of all parties that this court should take jurisdiction of the case. But of course we can only take it where the law enables us to do so. It is said that the Midland Railway Company, which is the only other defendant, has no interest in this controversy. If it be true, if it is actually insolvent, and all these various railroad companies of which it is the successor, are also insolvent, and there is not more than enough, or not enough, to pay the bonded debt, then it may be that and the other companies are merely nominal parties. They may have no real interest in the controversy. So perhaps it might be if the stockholders were parties and the stock was of no value whatever.

The controversy then would be, whether the bondholders should have this property or the judgment, and other creditors represented in the original and amended bills.

But we cannot assume now, in the present aspect of the case, as it appears upon the record, that this is so. It is alleged on one side, it is true, but it is in an answer which has not, as yet, judicially come to the knowledge of the court, and this allegation is entirely different from that in the bill.

We think that it must affirmatively appear that the court has jurisdiction. These answers were filed in vacation. The State court has never had its attention drawn to them—they never have come under its judicial cognizance in any way. It is to be observed that the Midland Railway Company has never answered, and the Paris and Decatur R. R., The Paris and Terra Haute R. R., The Peoria, Atlanta and Decatur Companies have never appeared directly in the case, nor have their trustees or mortgagees, except Mr. Secor.

The Midland Railway Co. may admit it, or it may appear to the satisfaction of the court that it has only a nominal interest, and so of the other parties named.

It may be remarked further there was no necessity for these bondholders, Albert and Morris Grant, to be made parties. The trustees could act for them, as there seems to be no antagonism or breach of duty on their part, especially under the allegation contained in Secor's answer, that he is requested by them to appear for the protection of the bondholders. He is so far actually interested, within the meaning of the last clause of the second section of the act of 1875, as to enable him to represent them, although he is a mere trustee, yet as a trustee representing their interests, he can become a party to the suit.

So then, if it did appear, or shall be made to appear that these various railroad companies are only nominally interested, and are nominal parties to this controversy, if the trustees shall come in and desire to appear as defendants, for the purpose of directing and controlling the litigation, and if it shall prove that there is no other real controversy in the case, except between them as representing the bond holders and the judgment and other creditors of these various companies, and that they are citizens of different states—then we think that the court may take jurisdiction.

Mr. Ingersoll—This case then remains as it is, as I understand it, as though no motion had been made. I will try to make it appear to this court by proper evidence on giving the other parties notice.

The Court—We understand that the Circuit court of Edgar county sits on Monday. I think you had better appear before that court and make your regular application, and then if what is proposed is true a proper case may be made.

Mr. Ingersoll—It seemed sufficient to say in the answer and petition, that the road is utterly insolvent, and that there is not property enough to pay the bonds—and to make it appear that they are merely nominal parties.

The Court—That may not be true.

Mr. Ingersoll—I say I supposed that would be sufficient.

The Court—I think the proper allegation would be to allege, that they were, from these circumstances, mere nominal parties.

It does not seem that we had better make any order in the case.

R. N. Bishop—It will be proper, then, for the Circuit Court of Edgar County to take notice and proceed with the case.

Judge Treat—The case is not here.

Mr. Bishop—I will state I have been perfectly willing to adopt the suggestion of the court, as to the removal of the cause here at the proper time, as soon as I have consulted my client, to strike out everybody that stands in the way.

BISHOP & MCKINLAY, for the plaintiffs.
ROBERT O. INGERSOLL, for defendants.

Through the kindness of the law firm of TULEY, STILES & LEWIS, of this city, we have received the following opinion:

SUPREME COURT OF ILLINOIS.

No. 312.—OPINION FILED JANUARY 21, 1876.

SUSAN W. HARRIS *v.* MOSES W. LESTER et al.

Appeal from Cook.

SALE OF REAL ESTATE TO PAY THE DEBTS OF A DECEASED PERSON—JURISDICTION—ATTACKING PROCEEDINGS COLLATERALLY—AFFIDAVIT OF NON-RESIDENCE—PUBLICATION NOTICE—RESTORING LOST RECORDS—RECITALS IN DECREE AS TO PUBLICATION—EFFECT OF FAILING TO MAKE GUARDIAN A PARTY AS SUCH.

1. WHAT A SUFFICIENT AFFIDAVIT.—An affidavit is simply a declaration on oath, in writing, sworn to by a party, before some person who has authority under the law to administer oaths. It does not depend on the fact whether it is entitled in any cause, or in any particular way, without any caption whatever, it is, nevertheless, an affidavit. That the affidavit is fully identified as having been filed in that cause: and what possible difference can it make, whether the title of the cause was written on the face above the affidavit, or on the back of it, or not at all?

2. JURISDICTION.—That should courts hold judgments invalid, as having been pronounced without jurisdiction, for such unsubstantial reasons, purchasers at judicial sales would have slight security for the titles to their property.

3. NOTICE.—That the notice contained everything the statute required it should contain, except a description of the premises to be sold, and was published for the requisite length of time.

4. RESTORING RECORDS ON EX-PARTE AFFIDAVITS.—That where the records in a case are destroyed by fire, and restored by the court upon *ex parte* affidavits, without notice to the parties adversely interested, the proceedings to restore the lost files are without authority of law and void. That the power of the court to replace that which has been lost or destroyed, from the files, for any cause, cannot be invoked except upon reasonable notice to parties adversely interested.

5. RECORD—EVIDENCE AS TO VALIDITY.—That a judicial record contains evidence of its own validity, and should the testimony *de hors* the record itself be admitted to contradict or vary its recitals, it would render such records of no avail, and defective sentences would afford but slight protection to the rights of parties once solemnly adjudicated; hence all records must be tried and construed by themselves.

6. RECITALS IN DECREE AS TO PUBLICATION.—That when a decree is attacked collaterally, the recital in it, "it appearing to the court that the said defendants have been duly notified of the pendency of said petition by publication, in accordance with the statute in such case made and provided," will be regarded as sufficient evidence of the fact that due publication was made as to all the defendants as the law directs.

7. PAROL EVIDENCE AS TO SERVICE.—Where service is by summons, verbal testimony cannot be received to prove or aid it. That can only be shown by the officer's return. It is otherwise where the service is by publication, when parol evidence may be received to prove the notice was published.

8. A DISTINCTION.—That there is a marked distinction in the cases where the decree is assailed on error or appeal, and where the same is attacked in a collateral proceeding.

9. OMISSION OF PERSON.—The court states the effect of omitting a person whom the statute says shall be made a party.

10. DESCRIPTION OF DEFENDANT.—Mrs. Douglas was made a party defendant in the proceeding to sell the land, and whether she was described as widow, devisee, or guardian, or by no description at all, is a matter of no consequence.

11. RIGHTS OF CREDITORS.—That persons who purchase at judicial sales, have rights that are just as sacred, and as much within the protection of the court, as the rights of minors.—[ED. LEGAL NEWS.]

Opinion by SCOTT, C. J.

Subject to the payment of his debts Stephen A. Douglas devised all his real estate, one half to his wife, Adele Douglass, and the other half to his two sons, Robert M. and Stephen A. Douglas. He nominated his wife and Daniel P. Rhoades, as executors of his will, but only the latter qualified and took upon himself the duties of the trust imposed. Such proceedings were subsequently had in the Circuit court of Cook county, where the testator had resided, and where the lands are situated, on the petition of the executor, that he was authorized by a decree of that court to sell, and did in pursuance of the decree sell all the lands of which the testator died seized, to pay the debts of the estate. The lands passed into the hands of *bona fide* purchasers, and many of them have since been conveyed to other parties, who have made valuable improvements, and from that cause and the general prosperity of the country, they have risen greatly in value. Mr. Douglas died in June, 1861, his will was admitted to probate in July following, and in 1864, the sale of the property to pay debts, took place.

Complainant claims to have been a creditor of the estate, but she never presented her claim, whatever it may have been against the estate for allowance.

In 1874, Robert M. and Stephen A. Douglas, who had then become of age, conveyed by quit claim deed whatever interest they had in the undivided half of the lands in controversy to complainant. The consideration named in the deed is nominal, but it is alleged the conveyance was made in consideration of the indebtedness due from the estate to her. Upon obtaining this title complainant filed a bill for partition, claiming to be the owner in fee of one half of the property, and that the proceedings under which the executors sale took place were void. Making defendants the unknown owners of the interest of Mrs. Douglas, and persons holding under her as parties claiming the other half, and also the purchaser at the executors sale, and parties claiming under him. She asks to have the title to one half of the lands in controversy established, and that the proceedings of the court and the executor's sale thereunder, be declared void, and removed, as a cloud upon her title. Most of the defendants answering admit the death, will, and seizure of the testator, and claim title under the executor's sale.

There is no controversy, the present holders all acquired title in good faith, for a valuable consideration, and with no other notice of any defect in their respective titles, than what may appear on the records of the court under which the executor's sale was made. A great many objections have been taken to the validity of the proceedings, under which defendants obtained their titles, but being collaterally assailed—as they are, it will only be necessary to notice such as have relation to the jurisdiction of the court to pronounce the decree.

No principal of law is better settled, than where a court has jurisdiction of the subject matter, and the persons of the parties, its judgment or decree when questioned collaterally will be held valid, and notwithstanding the court may have proceeded irregularly, a purchaser in good faith under its judgment or decree will be protected. This rule has its foundation in the policy of the law, and is intended to give permanancy to all judicial transactions, and rights acquired thereunder. The petition for the sale of the lands of the estate was by the executors filed in the Circuit court of Cook county. It is in the usual form, and contains every material allegation necessary to give the court jurisdiction in the premises. It sufficiently appears from the record, the real estate was situated in said county, and that it had been the residence of the testator. Under the statute said court had jurisdiction to order the sale of the real estate to pay debts. The heirs of the testator and his wife, all of whom were devises under the will were made defendants. A summons in the usual form was issued against them, but was returned by the sheriff, not found as to all of the defendants. Our statute has made provision where the defendants in any such proceeding are non-residents of the State, for bringing them into court by publication.

This was done, but one of the principal objections urged as showing a want of jurisdiction in the court to pronounce the decree, is that the affidavit of Jackson as to the non-residence of the several defendants is a nullity, and the reason assigned is, it was not entitled in any court, or in any cause, nor could it be told from it who was the plaintiff that was *sueing* the persons called defendants. The argument is, that such a paper is not an affidavit, but we are unable to appreciate the reasoning by which such a conclusion is reached. An affidavit is simply a delaration on oath in writing, sworn

to by a party, before some person who has authority under the law to administer oaths. It does not depend on the fact whether it is entitled in any cause, or in any particular way. Without any caption whatever, it is nevertheless an affidavit.

All the statute requires in such cases is, that petitioner shall file an affidavit in the office of the clerk of the court in which his petition is pending, showing that any defendant resides, or has gone out of the State, to authorize the clerk to make publication as to such defendant. It does not require the affidavit shall be in any particular form, or even that it shall be entitled in the cause. Petitioner is only required "to file with the clerk of the court in which the petition is pending, an affidavit showing that any defendants resides or hath gone out of the State," to authorize the clerk to make publication. The record in this case declares affirmatively, an affidavit showing that all the defendants in the proceeding in the Circuit court to sell the real estate of the testator, were non-residents of the State, was filed in the office of the clerk of the court in which the cause was pending with the files of the cause immediately before publication was made, and that is all the law required to be done. This view of the meaning of the statute is a full and complete answer to all the subtle reasoning of counsel upon this subject. The affidavit is fully identified as having been filed in that cause, and what possible difference can it make, whether the title of the cause was written on the face above the affidavit, or on the back of it, or not at all. Upon what principle, or by what process of reasoniog however subtle, could so trifling an omission, even if the statute had directed the affidavit to be entitled in the cause, which it does not, be regarded in a collateral proceeding as of sufficient importance to vitiate a solemn judgment of a court of superior jurisdiction, long years after it had been pronounced, and after parties strangers to the record had acquired rights under it. Should courts hold judgments invalid as having been pronounced without jurisdiction, for such unsubstantial reasons, purchasers at judicial sales would have but slight security for the titles to their property.

But a question is made as to the sufficiency of the publication notice to give the court jurisdiction of the persons of defendants because it did not contain a "description of the premises described in the petition." The statutory provision is, the notice shall contain "the names of the parties thereto, the title of the court, and the time and place of the return of the summons, and a description of the premises described in the petition." The notice in fact contained everything the statute required it should contain, except a description of the premises to be sold, and was published for the requisite length of time.

The original records of the Circuit court in which the proceedings to sell the lands of the testator were had were destroyed by fire in 1871. All the evidence we have of the contents of the original records in that cause is derived from a certified copy of the record that was made in 1870, on the application of the widow and heirs to have the clerk make a complete record of all the files of the cause on the record books of the court, under the provisions of the statute which gives a party the right to have complete record made at his own cost. When the clerk came to make up the record no copy of the publication notice, or the publisher's certificate, could be found among the files. This fact he reported to the court.

A petition was then filed by the parties interested in which they recited the proceedings to cause a complete record to be made up, and the inability of the clerk to comply with the order, and with it brought into court what they insisted was a copy of the publication notice and a copy of the proof of publication, and asked that such copies might be filed as of the proper time, and be substituted in place of the originals so lost or mislaid in making a complete record. On this application the court heard *ex parte* affidavits, and on the 28th day of March 1870, an order was entered finding that the publication notice part of the files in the original cause had been lost and could not be found, and directed the one recited in the application, be substituted in the place of the one lost, as a part of the record, and further finding that the notice had been published in the *Chicago Post*, and a certificate of such publication made, which had also been lost, and in like manner directed a copy of it to be filed as a part of the record. These proceedings were had in the Circuit court without any notice to the petitioner in the original cause, or to any of the purchasers at the executor's sale or to any other person adversely interested. Nearly six years had elapsed from the making up of the final order in the original cause after the sale, and we may presume it had been off the dockets for that length of time. There being no notice to any whose interests were to be affected or the adverse party, the proceedings to restore the lost files were without authority of law, and void. This proposition is so plain it need not be elaborated. Here was a proceeding to make a publication notice a part of the record, in place of the original one lost from the files, which would in the opinion of counsel, show the court had no jurisdiction of the cause, and yet the parties most vitally interested had no notice any steps were being taken in the cause. The title of all the purchasers at the executor's sale and their grantees in possession of the property to be affected was to be invalidated if this adjudication of the court is to be permitted to stand in a proceeding to which they were in no wise made parties, and of which neither they nor any one interested in maintaining the decree of the court had the slightest notice. On the plainest principles of natural justice the orders of the Circuit court to restore the lost publication notice and make the substituted one a part of the record, must be regarded as a nullity. The power of the court to replace that which has been lost or destroyed, from the files for any cause cannot be invoked except upon reasonable notice to parties adversely interested. The authorities in this court and elsewhere are to this effect. Heyworth *v.* Collins, 60 Ills., 328; Freeman on Judgment, Sec. 89.

The court in the original cause found it appeared, "the defendants have each been duly notified of the pendency of said petition by publication in accordance with the statute in such case made and provided." Evidence was offered on the hearing of this cause to prove the notice contained in the record was the only publication ever made, and was the one upon which the court must have relied. But one purpose could have been had in view in offering this evidence, viz: to contradict the recitals in the decree and establish the fact in opposition to the solemn finding of the court, the defendants had not been notified of the pendency of the petition in accordance with the provisions of the statute. Even for this purpose it was inadmissible under any rule of law with which we are familiar. We had occasion in the recent case of Barnett *v.* Wolf, (Sept. T. 1874,) to consider this question fully. The doctrine of that case is, the record of a court can never be contradicted, varied or explained by evidence beyond or outside of the record itself. Any other rule would be most disastrous in its results. A judicial record contains evidence of its own validity, and should testimony *de hors* the record itself be admitted to contradict or to vary its recitals, it would render such records of no avail and *defective* sentences would afford but slight protection to the rights of parties once solemnly adjudicated. Hence all records must be tried and construed by themselves.

The wisdom of the rule of law on this subject is apparent from what was done in the case at bar. The files of an old newspaper were examined and a notice published in it is produced and offered in evidence to contradict the finding of the court on a jurisdictional fact in a cause tried before it. It is a matter of common notoriety, of which the court may take notice that at the date the proceedings were had in the original cause other newspapers were published in the county of Cook. *Non constat* such a notice as the statute requires in such cases may have been published in some one of them, or even in the journal in which the alleged defective notice was found, and by fraud or accident lost from the files. But it is unnecessary to elaborate the argument or multiply illustrations, for the rule on this subject is settled by the decision of this court, and we see no reason to depart from it. The case of Barnett *v.* Wolf, in many points is analogous with the case at bar, and its reasoning is conclusive on this branch of the case. There can be no serious doubt that the publication notice found in the record is the one substituted for the original by the court on the *ex parte* hearing in March, 1870. Regarding it as we must do, as constituting no part of the record, it follows the record contains no publication notice. Hence the question arises, whether the recital in the decree "it appearing to the court that the said defendants have each been duly notified of the pendency of said petition by publication in accordance with the statute in such case made and provided," will be regarded as sufficient evidence of the fact that due publication was made as to all the defendants as the law directs.

In all collateral proceedings we entertain no doubt such pendency is sufficient evidence of service by publication as to defendants, nothing appearing in the record to the contrary, and to warrant the decree as in cases of regular notice by publication. There is absolutely nothing in this record after expunging that which was improperly introduced into it, to show the court found unadvisedly or incorrectly on this jurisdictional fact. It was the province of the court at the threshold of the investigation to determine whether it had jurisdiction of the defendants in any lawful way in that proceeding, and that question it did determine, and recorded its solemn finding and judgment. Upon the authority of the adjudged cases in this court, the record stating the court found the defendants had been duly notified of the pendency of the petition, by publication in accordance with the provisions of the statute, and nothing appearing to the contrary, such finding is evidence of the existence of that jurisdictional fact. According to the doctrine of Botsford *v.* O'Conner et al., 57 Ill.. 72, where the service is by summons, verbal testimony cannot be received to prove or aid it. That can only be shown by the officer's return. It is no doubt otherwise, where service is by publication, when parol evidence may be received to prove the notice was published. Before any court will proceed to adjudicate upon the rights of parties litigant, the presumption is, it heard evidence, and was in some legitimate mode satisfied the defendant had been duly notified, according to the provisions of the statute so as to confer jurisdiction.

In Reddick *v.* The State Bank, 27 Ill., 145, it was said: "It is to be presumed that no court will state of record the existence of facts which had no existence, or pass a decree or render a judgment, unless proof of service or notice were actually produced." In Moore *v.* Niel, 39 Ill., 256, it was objected that the notice was defective in not stating the first and last days of publication, as the statute required. The decree, however, recited that, "it appearing to the court that notice according to law was given of the pendency of this cause." It was held that this recital in the decree was sufficient evidence that the proper notice had been given. The court approve the cases of Gibson *v.* Roll, 28 Ill., 92, and Goudy *v.* Hall, 36 Ill., 319, and says: "Although the certificate of the printer was defective, yet we must presume from this recital that the court received other evidence of the date of publication."

The case of Miller *v.* Handy, 40 Ill., 448, is a well considered case, and on the authority of Reddick *v.* The State Bank, and Goudy *v.* Hall, the court says: "The record, therefore, stating the fact of the return of two nihils—and nothing to the contrary appearing—must be held *prima facie* evidence at least of the existence of that fact; and there is nothing in the case to show that the finding of the court was not in strict accordance with the fact."

Other cases in this court are to the same effect.

It will be observed that there is a marked distinction preserved in all the cases where the decree or judgment of the court is assailed on error, or on appeal, and where the same is attacked in a collateral proceeding. This distinction explains the apparent conflict in some of the cases on this question. By his will Mr. Douglas made his wife, Adele Douglas, the guardian of his children during their minority, and the point is made the Circuit Court had no jurisdiction to order the sale of real estate to pay debts, because the guardian in that capacity was not made a party with the heirs. A guardian, *ad litem*, was, however, appointed by the court for the heirs that were alleged in the petition to be minors, who took upon himself the trust, and assumed to act in their behalf.

The guardian of the minor heirs is one of the persons whom the Statute directs shall be made defendant to any proceeding had on the part of the executor or administrator to sell real estate to pay the debts of the deceased, but whether the omission to make such guardian a defendant would affect the jurisdiction of the court as to persons regularly before it, is a question that is pressed upon our attention, as affecting the validity of the decree under which the executor's sale was made. It would doubtless be a ground of error in any direct proceeding to reverse the decree, but where the decree is assailed collaterally, it would seem the omission of any person whom the statute directs shall be made defendant, in such proceedings, would not render the decree void as to persons made parties, and over whom the court had jurisdiction by service of process or otherwise. At most it would be but error, and would not concern the jurisdiction of the court. In Botsford *v.* O'Conner, this question was considered, and it was there said: "We do not understand the statute as requiring all persons in interest to be made parties, to confer jurisdiction of the subject matter upon the court. The court acquires that jurisdiction from the death of the party seized of the real estate; the grant of letters testamentary, or of administration, and his indebtedness, and filing the petition showing these facts. These are facts which confer jurisdiction upon the court as to the subject matter. * * * The failure to make the guardian a defendant may be an error, but it can not be held to be necessary to the jurisdiction of the court, because he is not made a defendant, and the omission is not objected to in the court below. We cannot hold that the court thereby failed to acquire jurisdiction over those properly in court."

But aside from this view of the law, Mrs. Douglas was made a defendant with the heirs in the proceedings had in the Circuit court, to sell the real estate, and whether she was described as widow, devisee, or guardian, or by no description at all, is a matter of no consequence. Having been made a defendant, and duly notified of the pendency of the petition, it will be presumed she was in court, and could defend in any capacity she chose. She was the widow of the testator and under his will she was a devisee and guardian of his minor children. It would be a work of supererogation in making her a defendant to describe her in three distinct capacities. The law will require no such useless formality. It is sufficient to answer all the requirements of the statute in such cases, that the guardian is in fact made a defendant with the heirs and brought into court, whether such party is described as guardian or not. It would be more regular to designate the guardian officially, but it is mere form, and the omission to do so would not deprive the court of jurisdiction.

The other objections taken to the validity of the proceedings under which defendants obtained title, all relate to mere irregularities, but do not concern the jurisdiction of the court. Some of them might have been fatal on error or on appeal, but not being jurisdictional do not vitiate the proceedings when called in question collaterally. We have therefore omitted any discussion of them. Undoubtedly the court had jurisdiction of the subject matter to order the sale of the real estate of the testator to pay the debts of the estate, and having acquired jurisdiction of the persons of all the parties whom the statutes direct to be made defendants by publication, in accordance with the provision of the statute, notwithstanding the court may have proceeded irregularly, its decree and the proceedings had thereunder were effectual to pass the title of the heirs and devisees to the lands sold to the purchasers at the executor's sale.

This is a contest between a creditor of the estate and purchasers at the executor's sale under a decree of court with jurisdiction of the subject matter, and of the persons of the parties affected,

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Lex vincit.

MYRA BRADWELL, Editor.

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We call attention to the following opinions, reported at length in this issue:

Practice—The Earnings of an Insolvent R. R. Co.—The Rights of Mortgagors to the Earnings.—The opinion of the Supreme Court of the United States, by Swayne, J., as to several questions of practice, and holding that where there are mortgages foreclosed against an insolvent railroad company, and the court does not appoint a receiver to run the road, or make any order in regard to the earnings, that the company is entitled to the earnings until the possession is taken under the mortgages, the same as if such mortgages did not exist, and the company being entitled to the earnings, they were liable to the creditors of the the company.

Fraudulent Representations—Right to Rescind Contract.—The opinion of the Supreme Court of the United States, by Davis, J., as to the right of a party in case of fraudulent representations, to rescind the contract, and follow the property or its proceeds.

Effect of the Constitution of 1870 on Act Authorizing Town to Make a Donation to a R. R. Co.—The opinion of the Supreme Court of the United States, by Strong, J., holding that the bonds and coupons in suit issued by the Supervisor and clerk of the town of Concord, under the act of March 7, 1867, are null and void. The Court states the effect of the Constitution of 1870, upon acts of the legislature authorizing towns and cities to subscribe to railroad stock or make donations to railroads. The act of 1867 was authority for a donation at any time prior to July 2, 1870, but was no authority at all afterwards; that the new Constitution annulled the power of municipalities to make donations to railroad companies; that a clear distinction is made in the Constitution between subscriptions to the capital stock of a railroad company, or a private corporation, and donations or loans to such corporations. The latter are prohibited under all circumstances; the former may still be made, if they have been authorized by a vote of the people prior to the adoption of the Constitution; that after July 2, 1870, the day when the new Constitution became effective, the power to make donations no longer existed in the municipality. The principle announced in this opinion will relieve several towns in the State from the payment of their bonds donated to railroads.

Removal of Cases from State to Federal Courts.—The opinion of the United States Circuit Court for the Southern District of Illinois, by Drummond, J., construing the statute relating to the removal of causes from a State Circuit Court into the Federal Courts, and stating in what causes and by whom a case may be removed from a Circuit Court of a State into a Circuit Court of the United States.

Sale of Real Estate to Pay Debts—Jurisdiction — Attacking Proceedings Collaterally—Affidavit of Non-Residence—Recitals in Decree as to Publication—Restoring Lost Records—Failing to Make Guardian Party.—The opinion of the Supreme Court of Illinois, by Scott, C. J. In a case brought to test the validity of a sale of the real estate of the late Senator Douglas to pay his debts, made by order of the Circuit court of Cook county, the court held that an affidavit is simply a declaration on oath in writing, sworn to by a party, before some person who has authority under the law to administer oaths; that it does not depend upon the fact whether it is entitled in any cause or in any particular way, without any caption whatever; it is, nevertheless, an affidavit; that it makes no difference whether the title to the cause was written on the face above the affidavit, or on the back of it, or not at all; that if courts should hold judgments invalid, as having been pronounced without jurisdiction, for such unsubstantial reasons, purchasers at judicial sales would have slight security for the title to their property. That where the records in a case are destroyed by fire, and restored by the court upon *ex parte* affidavits, without notice to the parties adversely interested, the proceedings to restore the lost files are without authority of law and void; that a record contains evidence of its own validity, and should testimony *de hors* the record be admitted to contradict or vary its recitals it would render such a record of no avail. All records should and must be tried and construed by themselves. The court states that recitals in a decree will be regarded as sufficient evidence of publication, and when the decree is attacked collaterally; that there is a marked distinction in the cases where the decree is assailed on error or appeal, and where the same is attacked in a collateral proceeding, the effect of not making the guardian of one of the minor defendants a party stated. The court says Mrs. Douglas was made a party defendant in the proceedings to sell the land, and whether she was described as widow, or guardian, or by no description at all, is all a matter of no consequence. As Judge John M. Wilson used to say, this opinion "bristles with fine legal questions." It settles the law upon several important questions of practice. This ruling of the Supreme Court will have a tendency to put a stop to the sharp practice of throwing a party out of court, because he does not happen to entitle his affidavit exactly as the case is entered on the docket.

Note—Usury—What Law Governs.—The opinion of the Supreme Court of the District of Columbia, by Olin, J., holding that a promissory note actually made and signed in the city of Washington, but dated at Leavenworth, in the State of Kansas, and sent to the Second National Bank of Leavenworth, and by it discounted, is to be governed as respects a question of usury by the laws of Kansas.

Personal Property Taxed in One State may be Taxed in Another.—The opinion of the Supreme Court of Rhode Island by Durfee, C. J., where a resident and taxpayer in Tiverton, Rhode Island, owned certain shares of manufacturing corporations, organized under the laws of Massachusetts, and located with their property in Fall River, in that State, where all their property was invested; was taxed in Fall River for these shares, assessed under the laws of Massachusetts at their fair market value, and paid the tax. In the same year he was again taxed in Tiverton, under the aws of Rhode Island, for the same shares. Held that this second tax was valid.

Receiver—Trust Deed.—The opinion of the Supreme Court of Tennessee, by Freeman, J., holding that the beneficiary in a trust deed may have a receiver appointed, and the proceeds of the security impounded for his benefit during the litigation, after his right to a sale of the property has been adjudged.

NOTES TO RECENT CASES.

INSURANCE—THROAT DISEASE.

The U. S. Circuit Court, E. D. of Missouri, by Dillon, J., 3 *Cent. Law J.*, 302, held that the words "throat disease," in a proposal for life insurance, mean something more than a temporary inflammation, which, at the time the proposal was made, was cured.

PREMIUM NOTE—NON-PAYMENT OF INTEREST—DAYS OF GRACE.

Judge Brown, of Michigan, in the U. S. Circuit Court, W. D. Tenn., in Jarman *v.* St. M. Ins. Co., 3 *Cent. Law J.*, 303, *held* that a premium note, when negotiable, is entitled to grace, like other commercial paper, and that a tender of interest on such note, within the days of grace, will prevent a forfeiture for non-payment of interest at maturity of the note.

SETTING ASIDE A DISCHARGE IN BANKRUPTCY—LIMITATION.

Judge Parker, of the U. S. District Court, W. D. of Arkansas, in Pickett *v.* McCarick, 3 *Cent. Law J.*, 303, refused to follow the opinion of Taft, J., in Perkins *v.* Gray, 3 N. B. R., 772, that a discharge may be attached at any time for fraudulant concealment, and *held*, that, although under the ordinary statutes of limitations, the rule is, that where the cause of action is based upon fraud, the statute does not commence to run until it has become known to the party injured by the fraud; still, as by Section 34 of the bankrupt act, it is positively provided that the discharge may be contested within two years after the date thereof, this must be taken as the limit, and the plea of the statute of limitations is not a good plea.

RAILROAD — NEGLIGENCE — BURDEN OF PROOF.

The Supreme Court of Nebraska, in B. & M. R. R. Co., *v.* Westover, 10 *Western Jurist*, 277, *held*, where damage is caused by the escape of fire from a railroad engine, the burden is upon the company to show that their engine was properly constructed, equipped and operated; and the question of the efficiency of such construction and equipment, is one of fact for the jury; that it is not necessarily negligence for a railway company to permit dry grass to remain on its right of way. The fact, however, is evidence for the jury, who may find negligence from it.

THE ATTORNEY GENERALSHIP.

The people of the State are interested in having a good lawyer and an honest man fill this position. It is gratifying to know that there are so many good lawyers who are qualified to fill the position, and will take it. The Republican Convention meets next week, at Springfield. Mr. Edsall, the present incumbent, has performed the duties of his office with ability, and has kept a watchful eye over the interests of the State, and is a lawyer of recognized ability.

Senator Canfield, who is a candidate for the office, is an able lawyer, a fine debater, and has had experience as a legislator. In this capacity he served his constituents faithfully and with distinguished ability. He took a leading part in securing the passage of the law authorizing the refunding of the taxes to the people illegally assessed under the act of 1869.

Senator Steele is a candidate for the office. He was a leader in the Senate, is one of the most eloquent speakers in the State, was one of the Revisors of the Statutes of 1874—and many of the reforms in the laws of that year originated with him. He is a lawyer of ability, and whatever he does he will do well and faithfully.

Mr. Callahan is a candidate for this position. He is an able lawyer, and an honest man. He was a member of the house in the last general assembly, and in that capacity served his constituents with marked ability.

Obituary.

Major James Brown, of the law firm of Brown & Mosness, of this city, departed this life on the 13th inst., after an illness of about ten days, leaving a wife and three children. Mr. Brown was born at Ash Ridge, Brown County, Ohio, on the 2d of July, 1835. He was a brother of the late Wm. B. Brown, Colonel of the seventieth Ohio regiment of infantry, who was killed at the battle of Atlanta.

The deceased served in the same regiment, as one of the bravest of soldiers, during four years, when he attained the rank of Major, and, after the war, established his residence in Ford County, in this State, where he held the office of superintendent of schools, for two terms. He commenced the practice of law in 1869; came to Chicago in 1871, where he has since been engaged in the successful practice of his profession. He was an active member of the United Presbyterian Church, a good Christian, an exemplary gentleman, and a lawyer of recognized ability.

Thomas S. Bowen, a member of the Ottawa, Ill., bar, died at his residence, in East Ottawa, on Monday last. Mr. Bowen was one of the soldiers of the late war. He enlisted as a private soldier, and lost his right arm in battle; since the war he has practiced law in Ottawa. He was thirty-two years of age, and highly respected by his professional brethren and friends. A meeting of the Ottawa bar was held at the court house, on Tuesday, at which a committee was appointed to draft resolutions, and report at a meeting to be held to-day.

Rev. David J. Perry, of Normal township, Ill., died at his residence on Monday morning, aged 80 years, from paralysis, which first disabled him about two years ago. Mr. Perry was for many years the pastor of the first Presbyterian church of Bloomington. After retiring from the active duties of the ministry, he held a position in the McLean county bank. He was the father of the wife of John M. Scott, the esteemed chief justice of the supreme court of this State. He was a good citizen, a christian gentleman, and much respected by all who knew him.

Chief Justice Gilpin, of Delaware, was taken suddenly ill at the court house, at Dover, on Saturday, 29th ult., and in an hour was dead. Heart disease was the cause.

(*Continued from page* 276.)

and it cannot be said complainant has any superior equities over defendants, because she dereigns title from the heirs who were minors when the proceedings were had. Purchasers at judicial sales who invest their capital upon the faith of a decree of court of competent jurisdiction have rights that are just as sacred and as much within the protection of the court as the rights of minor heirs. With the wisdom of this sale in the first instance, and of the propriety of making it in the manner it was, are questions with which this court has nothing to do in the present case. The defendants are in no way responsible for it, and are in no way answerable for any irregularities that may have intervened in conducting it.

The decree dismissing the bill will be affirmed.

Decree affirmed.

TULEY, STILES & LEWIS, attorneys for the appellees.

SUPREME COURT, DISTRICT OF COLUMBIA,

IN GENERAL TERM.

JANUARY, 1876.

THE SECOND NATIONAL BANK OF LEAVENWORTH
v.
SAMUEL S MOOT, SAMUEL C. POMEROY and EHUD N. DARLING.

At Law.—No. 12,432.

1. A promissory note, actually made and signed in the city of Washington, but dated at Leavenworth, in the State of Kansas, and sent to the Second National Bank of Leavenworth, and by it discounted, is to be governed as respects a question of usury by the laws of Kansas.
2. To take out interest in advance on discounting a note by a bank is not usurious.
3. A contract for a loan of money at a rate of interest which is legal in the place where the contract is made, though the money is to be repaid in a State where the rate of interest is lower, is not usurious, provided it be not a mere device to evade the laws of the State where the money is to be repaid.

The case is stated in the opinion of the court.

REGINALD FENDALL for plaintiff.

T. T. CRITTENDEN for defendant.

Mr. Justice OLIN delivered the opinion of the court.

The action in this case was brought by plaintiff as holder of a promissory note made by the defendants, Smoot and Pomeroy, bearing date on the 27th of Nov., 1873, for $7,000, which note was made payable to the order of the defendant, Darling, at the Second National Bank, Leavenworth, Kansas, with 12 per cent. interest until paid. This note thus made and indorsed was transferred by indorsement to the plaintiff.

The cause was tried at the Circuit court in this district, before Justice Humphreys, which resulted in a verdict for the plaintiff, though I cannot find that in the record; but I suppose if the verdict had been in favor of the defendants, they would not have brought the case here on a bill of exceptions, and I think for this reason, and this alone, that the verdict of the jury must have been against the defendants.

But this is by no means the chief objection to this paper called a bill of exceptions. After wading through the bill of exceptions, in which seems to be printed not only every question put by counsel on either side, but also questions put by the court, comments, or remarks by counsel and court, whether the same were of any or the slightest importance in the world.

The whole thing looks like an attempt to daguerrotype all the ludicrous features of a trial rather than attempt to present such questions of law as the facts proven on the trial tended to raise.

For the evidence of this, select any page of the 48 printed pages of this bill of exceptions, so called. Take for illustration, pages 18 and 19 of this record.

The case is in this wise:

Some time before 1873, Smoot, one of the defendants, obtained a loan from the plaintiff, (2d National Bank, Leavenworth, Kansas,) of $20,000.

This loan of $20,000 from the bank was secured by the promissory notes of Smoot and Pomeroy, the latter said to be a Senator from Kansas. These notes were given, one for $8,000, one for $7,000 and one for $5.000. These notes were made payable on time, executed and sent from Washington, D. C., to the bank in Kansas; and the bank paid to the defendant, Smoot, the proceeds of these notes, less the discount for the time they had to run, at the rate of 12 per cent. per annum; the rate of interest agreed upon in the notes was 12 per cent. per annum after the maturity of the notes until paid. Twelve (12) per cent. per annum being the highest rate of interest allowed by law to be taken for the loan of money in the State of Kansas. These notes not being paid at maturity, some or all of them, new notes were given in renewal, and the new notes secured the payment of the amount due, including principal and interest, at the rate above mentioned.

Thus went on the dealings between Smoot and the bank until all of the loan of $20,000, and interest thereon was paid, except a note for $7,000, dated the 27th of November, 1873, payable 90 days after date at the bank in Kansas, made by Smoot and Pomeroy and indorsed by the other defendant, Darling, upon which note this suit is brought.

The plea interposed was the general issue. Under that issue was attempted to be tried whether, if the loan was not usurious in its inception, it did not become so by the arrangements that were made on the renewal of the various notes that were given. Without stopping to inquire whether the defense of usury may be interposed to a suit brought upon a promissory note where the plea of the general issue is alone interposed, on looking through this cause it seems quite unnecessary to consider that question.

The defense seems to have relied mainly on three propositions:

1st. That the notes given to secure the original loan of $20,000, being actually made and signed in this city and sent to Bank of Leavenworth, and by it discounted, it was a contract made in Washington, and not in Kansas, and that the law upon the subject of usury in this District must govern this contract of loan, instead of the usury laws of Kansas, the rate of interest authorized to be contracted to be paid being much less per annum than the rate allowed by the law of Kansas.

We think this proposition cannot be maintained. No valid contract was made for this loan of $20,000, until the notes offered as a security for its payment were accepted by the plaintiff, and the money advanced upon them. It seems hardly necessary to inquire whether, in such a transaction, the law of usury of this District should be applied to it, or the law of the State of Kansas, in which State the plaintiff had a legal existence and nowhere else.

2d. That by the arrangement entered into by which the *discount* was taken out of the proceeds of these notes, whether of original or renewals, the contract was usurious.

This proposition cannot be sustained. To take out interest in advance, is discounting a note without regard to the rules of rebate or discount, and there is no distinction between bankers and others. Manhattan Bank *v.* Osgood, 15 Johns., 168; Bank of Utica *v.* Wager, 2 Cow., 712; New York Fireman's Insurance Co. *v.* Ely., 2 Cow., 678; New York Fireman's Insurance Co. *v.* Sturges, 2 Cow.. 664; Utica Insurance Co. *v.* Bloodgood, and 4 Wend., 652.

3d. That some one or more of the renewal notes were made payable in the city of New York, in which State the law allowed, upon contracts made by its citizens to be performed within the State, a rate of interest not to exceed 7 per cent. per annum. That this agreement did not render the loan usurious. see Pratt *v.* Adams, 7 Paige Chy., 655, in which it was held that a contract for a loan of money at a rate or interest which is legal in a State where the contract is made and where the loan is to be advanced, though the money is to be repaid in a State where the rate of interest is lower, is not usurious, provided it be not a mere device to evade the laws of the State where the money is to be repaid.

The corporate existence of the plaintiff was confirmed by law to the limits of the State of Kansas, and both under the laws of Kansas and the laws of Congress, it was authorized to loan money at such rate per annum as was allowed by the law of Kansas. The bank was not authorized to transact its business outside of the limits of the State of Kansas, yet no law of Congress or of the State of Kansas precluded a citizen of this district or of any other State in the Union, from making a loan from the plaintiffs at any rate of interest allowed by law in Kansas.

I see no error in the ruling of the justice who presided at the trial prejudicial to the defendant. The defense interposed was that of usury; and as we think there was no evidence in the case, all of which was recited in the bill of exceptions, proving or tending to prove any usurious agreement, the judgment of the court below must be affirmed with costs.

SUPREME COURT OF RHODE ISLAND.

OPINION MARCH 21, 1876.

CHARLES DYER, Collector of Taxes, *v.* JOSEPH OSBORN.

PERSONAL PROPERTY TAXED IN ONE STATE MAY BE TAXED IN ANOTHER STATE.

1. O., a resident and tax-payer in Tiverton, R. I., owned certain shares of manufacturing corporations organized under the laws of Massachusetts, and located with their property in Fall River in that State, where all their property was invested. O. was taxed in Fall River for these shares, assessed under the laws of Massachusetts at their fair market value, and paid the tax. In the same year he was again taxed in Tiverton under the laws of Rhode Island for the same shares.
Held, That under Gen. Stat. R. I., cap. 38, § 1, and cap. 39, § 10, this second tax was valid.
2. *Held*, further, that it did not conflict with Art. I., § 2 of the Constitution of Rhode Island, which provided that "the burdens of the State ought to be fairly distributed among its citizens."
3. *Held*, further, that the Massachusetts tax, even if valid, could not divest Rhode Island of its jurisdiction, and that the amount of tax levied "is, within reasonable limits at least, a legislative, not a judicial question."

DURFEE, C. J.—This is an action on the case to recover a tax of $280.00 assessed on the defendant in the town of Tiverton, in the year 1874. The defendant pleads in bar of the action, that in compliance with a notice given by the assessors as prescribed by the statute, Gen. Stat. R. I. cap. 40, § 6, he rendered an account on oath as required by § 7 of that chapter, and this tax was duly assessed by the assessors upon the ratable property and estate in said account mentioned, and was by him promptly paid to the collector of taxes, and he further avers and pleads, "the taxes in the plaintiffs declaration mentioned were assessed upon other property of the defendant, to wit: upon forty shares of the capital stock or corporate property of certain manufacturing corporations, organized under the laws of the Commonwealth of Massachusetts, and located with their said property in the city of Fall River, in the said commonwealth, which said shares were of the par value of $40,000; all of which said capital stock of said corporations was then invested in lands, factory buildings, tenement houses, permanent and movable machinery and stock in process, all located and established in Fall River aforesaid, and said shares in the said corporate property were all taxed to this defendant in said Fall River at their fair market value, and which said tax in said Fall River he duly paid; and this defendant avers that the tax in the said plaintiff's declaration mentioned was assessed on the said shares in the said corporate property, and not upon other and different property or estate of the defendant, and that the said property was not ratable in the said town of Tiverton, and that the said tax mentioned in the plaintiff's declaration and assessed thereon was and is illegal and void," etc. To this plea the plaintiff demurs.

The declaration describes the defendant as "of Tiverton," and for anything that appears in the plea, he was a citizen or inhabitant of the State, having his domicil in that town. The question, therefore, which is presented by the pleading is, whether a citizen or inhabitant of the State is liable to pay a tax assessed against him in the town of his domicil upon shares of stock which he owns in a manufacturing corporation of another State, he having been taxed and paid the tax on the same shares in such other State.

The question arises under chapters 38 and 39 of the General Statutes. The first section of chapter 38 declares that "all real property in the State, and all personal property belonging to the inhabitants thereof, shall be liable to taxation unless otherwise specially provided." Section 10 of chapter 39 declares that "personal property, for the purposes of taxation, shall be deemed to include all goods, chattels, debts due from solvent persons, moneys and effects, wherever they may be; all ships or vessels at home or abroad; all public stocks and securities, except those issued by the government of the United States; all stocks or shares in any bank or banking association; in any turnpike, bridge, or other corporation within or without the State, except such as are exempted from taxation by the laws of the State."

The language is plain. It clearly makes the shares of any corporation, whether manufacturing or other, whether without or within the State, liable to taxation, if the owner is an inhabitant of the state, unless such shares are exempted from taxation by the laws of the state. At the time the tax now sued for was assessed, shares in the stock of a manufacturing corporation of another State was not exempted from taxation by the laws of this State. Upon what ground then can we hold that the assessment of the tax was illegal and void?

The defendant says the practice of assessors in regard to the taxation of such shares has varied, and that in a majority of the towns such shares have not been taxed to their owners living in this State. A practice under a statute which has been uniform and long continued is entitled to weight in construing a statute, if the construction is open to serious doubt. The practice here invoked has not been uniform, and we do not think there can be any serious doubt of the true construction of the statute.

The defendant contends that the assessment, even if within the statute, was illegal and void. He does not point to any specific provision of the Constitution of either the State or the United States which is infringed by the assessment, or by the statute which authorized it, but he plants himself upon the broad ground that the assessment of such a tax is not the exercise of a legitimate power of the State. He has cited numerous cases which he contends support this position. The cases specially referred to are Green *v.* Van Buskirk, 7 Wall. 139; Railroad Co. *v.* Jackson, 7 Wall. 262; State Tax on Foreign-held Bonds, 15 Wall. 300; Jones *v.* Town of Bridgeport, 36 Conn. 283; Hoyt *v.* The Commissioners of Taxes, 23 N. Y. 224; Duer *v* Small, 17 How. Pr. 201; People ex rel. Trowbridge *v.* Com. of Taxes, 11 N. Y. Supreme Ct. 595.

In Green *v.* Van Buskirk, 7 Wall. 139, a resident of New York mortgaged personal property in Illinois to secure an existing debt. In New York no record or delivery of the property was required to give the mortgage effect, but in Illinois the mortgage without record and delivery was ineffectual as to third persons. The property was attached in Illinois after the mortgage was made and before it could be recorded. The Supreme court of the United States held that the property, though personal, being situated in Illinois, was subject to the law of Illinois, in respect to attachment.

In Railroad Co. *v.* Jackson, 7 Wall. 262, the point decided was that interest on bonds issued by a corporation created by two States, and binding the road in both States, could not be specifically taxed in one of the States. In this case the bondholder was a non-resident.

In State Tax on Foreign-held Bonds, 15 Wall. 300, it was decided that bonds issued by a railroad company of Pennsylvania and Ohio, and held by a non-resident, were not taxable in Pennsylvania, upon the ground that, being held by a non-resident, they were only property in his hands, and thus were beyond the jurisdiction of the taxing power of the State, and that the law authorizing their taxation impaired the obligation of the contract between the corporation and the bondholder.

In Jones *v.* Town of Bridgeport, 36 Conn. 283, real estate in Connecticut, belonging to a corporation in New York, was taxed to the corporation, after an assignment in bankruptcy, the assessors being ignorant of the assignment, which had not been recorded in Connecticut, and the tax was sustained.

In Hoyt *v.* The Commissioners of Taxes, 23 N. Y. 224, under a statute providing that "all lands and all personal estate *within this State*, whether owned by individuals or corporations, shall be liable to taxation," etc., it was decided that a resident of New York was not liable to taxation in that State for his capital employed in business in New Orleans, or for his farm stock and household furniture in New Jersey.

In Duer *v.* Small, 17 How. Pr. 201, it was held that a statute was not unconstitutional which provided that a non-resident doing business in New York was taxable the same as a resident upon his personal estate invested in the business.

The doctrine of these cases appears to

be that personal property which is visible and tangible, and which therefore can have a *situs* independent of its owner, may for certain purposes, and especially for taxation, be localized, so to speak, and subjected directly to the law of the State where it is situated; but that if it be a mere debt or pecuniary obligation, it is incapable of having a *situs* apart from its owner, and therefore can only be taxed to its owner in the State where he resides. We do not find anything in either of the cases which is to the effect that the shareholders of a corporation can only be taxed in the State where the corporation is situated.

The case of Trowbridge *v.* Com. of Taxes, 11 N. Y., Supreme Ct., 595, is more nearly in point. It was held in that case that the shares of a foreign corporation, owned in New York, were not property within that State, under the tax law of that State, but simply representatives of capital or property invested in the business of the corporation in the State where it was situated. The case seems to hold that the property of the shareholders is not distinguishable from the property of the corporation, and therefore cannot have a separate *situs* or locality. This may be so within the meaning of the tax law of New York, but ordinarily the property of shareholders is distinguishable from that of the corporation; for, whereas the shares are and must be personal estate of the nature of choses in action, the property of the corporation may be real estate or visible and tangible chattels or effects. Angell & Ames on Corp. (7th ed.), §§ 560, 561, and cases cited; Arnold *v.* Ruggles, 1 R. I., 167-9.

There are cases which expressly hold that an owner of shares in the stock of a foreign corporation is liable to taxation for such shares in the State where he resides. In Great Barrington *v.* County Commissioners of Berkshire, 16 Pick., 572, under a statute subjecting to taxation "shares or property in any incorporated company for a bridge or a turnpike road," it was held that a citizen of Massachusetts was liable to be taxed in that State for his stock in a New York turnpike corporation, notwithstanding the fact that under the law of New York the corporation held the soil of the road in fee. "No exception," say the court, "is made of companies in other States, and the court perceive no reason for raising any by implication."

In McKeen *v.* The County of Northampton, 49 Pa. St., 519, a person residing in Pennsylvania and owning 472 shares of stock in a manufacturing corporation of New Jersey, the capital of which was invested in a foundry, machine-shop, and other real estate in New Jersey, and taxed under the laws of that State, was held liable to taxation for his shares in Pennsylvania for State and county purposes. The court say: "The defendant below, being a citizen of this State, it is clear he is subject personally to its power to tax, and that all his property accompanying his person, or falling legitimately within the territorial jurisdiction of the State, is equally within its authority. The interest which an owner of shares has in the stock of a corporation is personal; whithersoever he goes it accompanies him, and when he dies his domicil governs its succession." The court also averts to the fact that the tax is not assessed upon the shares specifically, but upon the person of their owner, the shares being merely a measure of taxation, and is enforced by warrant against the owner personally or against any property he has, whether taxed or not. See also Whitesell *v.* The County of Northampton, 49 Pa. St., 526.

It has been held that shares in the stock of a corporation are taxable as such to their owner, though the corporation is itself exempt from taxation by charter. Union Bank *v.* The State, 9 Yerg., 490; or though the capital of the corporation is invested wholly or in part in United States bonds, which cannot themselves be taxed. National Bank *v.* Commonwealth, 9 Wall, 353; St. Louis Building and Savings Association *v.* Lightner, 47 Mo., 393. In Union Bank *v.* The State, 9 Yerg., 490, the doctrine of the court was that such a tax must be, from its very nature, a tax *in personam* and not *in rem*. "Bank stock," say the court, "is not a thing in itself capable of being taxed on account of its locality, and any tax imposed upon it must be in the nature of a tax upon income, and of necessity confined to the person of the owner, and if he be a non-resident, he is beyond the jurisdiction of the State, and not subject to her laws."

These cases are to the effect, that shares in the stock of a corporation are in the nature of choses in action, incorporeal, and have no *situs* independently of their owner, and that, consequently, the State has jurisdiction over them to tax them by having jurisdiction over their owner, the tax being in fact a tax upon the owner on account of his ownership, rather than upon the shares themselves. In the light of these cases, we think the defendant's claim, that the tax sued for could not be legally assessed for want of jurisdiction, cannot be sustained.

The plea avers that the defendant has already paid a tax assessed upon the shares in Massachusetts. It is doubtless a hardship for him to pay taxes on the same property in two States. But the Massachusetts tax, even if valid, could not divest this State of its jurisdiction. The laws of Rhode Island are paramount in Rhode Island, and all the inhabitants of the State are subject to them without regard to the laws of any other State. If there be any ground upon which the defendant is entitled to exoneration because of the Massachusetts tax, it is that clause of our Constitution which declares that "the burdens of the State ought to be fairly distributed among its citizens," and upon the claim that it is *unfair* to tax him in Rhode Island for property on which he has paid a tax in Massachusetts. We do not think, however, that the tax ought to be declared void under that clause of the Constitution. It would certainly be going too far to hold that a man of wealth, living in Rhode Island, cannot be taxed at all in Rhode Island, if his property is all invested in the stocks of a manufacturing corporation of another State, and there subject to taxation. And if such a man can be taxed at all in Rhode Island, the question of how much is, within reasonable limits at least, a legislative, not a judicial question.

The defendant's plea will be overruled, and judgment entered for the plaintiff for the amount of the tax with interest.

Demurrer sustained.

FRANCIS P. PECKHAM, for plaintiff.

WILLIAM P. SHEFFIELD, for defendant.

SUPREME COURT OF RHODE ISLAND.

NOTES TO CASES DECIDED IN 1876.

AMENDMENTS.

A statute providing that the court may at any time allow either of the parties to an action to amend any defect in the process of pleading.—A motion was made to substitute for the name of the plaintiff, H. H. Thayer, described in the declaration as "assignee of Walter W. Salter and Max F. Greene, both of said New York, copartners, as W.W. Salter & Company," the words, "W. W. Salter and Max F. Greene, both of the city, county and State of New York, copartners, as W. W. Salter & Company, as trustees for H. H. Thayer, of said city of New York, assignee of said W. W. Salter & Company. *Held*, that the amendment being tantamount to the substitution of a new action could not be allowed.—*Thayer* v. *Farrell.*

ATTACHMENT.

A statute providing that "every original writ issued against a female founded on a contract shall be a writ of summons."—a writ in *assumpsit* was served on an executrix *de son tort* by attaching her personalty. *Held*, the service was illegal. *Martin* v. *Hand.*

EXECUTION.

Execution for costs against the body of a plaintiff in trover was served by arrest. *Held*, on petition for *habeas corpus*, that as it did not appear the imprisoned plaintiff was about departing from the State without leaving sufficient estate to satisfy the judgment, or that he had fraudulently concealed and detained or disposed of his property, the execution against the body was illegal.—*Thayer's Petition.*

MUNICIPALITY.

Contract made by D. "in behalf of the city of Providence," signed and sealed by D. *Held*, the contract of D., not that of the city. *Semble*, that the general rule, that contracts by a public officer in his official capacity in behalf of the public, will not bind such officer personally, does not apply to municipal officers.—*City of Providence* v. *Miller.*

INDICTMENT.

1. In an indictment for embezzlement, or in one for aiding and counseling embezzlement, the day named for the commission of the offense is not material, and evidence may be given referring to any other day before the finding of the indictment.

2. An accused, indicted for embezzlement, will, on application to the prosecutor, be informed of the specific acts to be proven against him. This information, if refused, may be ordered by the court.

3. Arrangements for embezzlement by the fraudulent issue of checks, were made between C., the aiding and abetting accomplice, and B., the principal, September 21. The embezzlement was consummated by cashing the checks, September 24. *Held*, that C.'s offense was continuous from the arrangements of the 21st to the consummation on the 24th. *State* v. *Cushing.*

ULTRA VIRES.

1. A corporation was created by the legislature of Rhode Island under the name of the W. Co. Nothing in the act of incorporation specified the business to be done, nor did anything in the corporate name suggest it. All its stock was held by a single stockholder. The corporation entered into a partnership with A., to be terminated at will by the corporation.

Held, that the partnership was not *ultra vires* on the part of the corporation.

2. *Semble*, that if A. was to have no control as partner, and was to receive part profits for his services, the partnership could not on any principle be *ultra vires* on the part of the corporation. *Allen* v. *Woonsocket Co.*

SUPREME COURT OF INDIANA.

From the *Indianapolis Sentinel*:

CRIMINAL PRACTICE — CERTAINTY OF DESCRIPTION IN INDICTMENT.

John Ripley Arnold *v.* the State of Indiana, Shelby C. C. Buskirk, J.

It is not necessary in an indictment for the larceny or robbery of bank-notes to state the numbers upon the bills; but the number of the bills stolen, with their denominations and value, should be stated. The indictment in the case in judgment should have been quashed for its failure to state the denominations (or the equivalent words for the payment of a certain sum of money) of the bills alleged to have been taken. Judgment reversed.

PRACTICE—BILLS OF EXCEPTIONS.

Leander Bringham *v.* William Elmore, White C. C. Downey, J.

The only question submitted for decision in this case is as to the correctness of an instruction given by the court. The instruction is not in any bill of exceptions, nor is it signed by the judge or by the attorney of the defendant. There is this entry at the bottom of it: "Given and excepted to," signed by the attorney of the plaintiff. We think the instruction is not properly in the record. 37 Ind. 325, 46 Ind. 197. Judgment affirmed.

Peter Kutch *v.* John J. Combs, Greene C. P., per Curiam.

This case having been dismissed before the opinion was filed, and that fact having been overlooked, it is now ordered that the judgment of this court reversing the judgment below be set aside, and that the cause stand dismissed according to the former order.

AGENCY—THE CONSTRUCTION OF AN AGENT'S AUTHORITY WHERE THE AUTHORITY IS GIVEN BY A FORMAL INSTRUMENT.

When an authority is conferred upon an agent by a formal instrument, as by a power of attorney, there are two rules of construction to be carefully attended to:—

1. The meaning of general words in the instrument will be restricted by the context, and construed accordingly.

2. The authority will be construed strictly, so as to exclude the exercise of any power which is not warranted either by the actual terms used, or as a necessary means of executing the authority with effect.

With respect to the former rule, which is not confined to questions of ageucy, a leading case upon the general principle is Lord Arlington *v.* Merrick (2 Wms. Saunders, 411a), decided at the King's Bench in 1672. An action of debt on a bond having been brought against the defendant, he prayed oyer of the condition of the bond. Lord Arlington, Postmaster-General for the time being, had appointed one J., as his deputy at Oxford for the term of six months following, on condition that he would faithfully perform all the duties of the office. One of the deputy's duties was, at the end of every month to pay into the General Post Office all moneys received by him in his office. The bond was dated and executed in 1667. Within two or three years of its execution J. received money for which he failed to account, and an action was thereupon brought against the defendant as his surety. Hale, C. J., and the other learned judges were clearly of opinion that the condition should refer only to the recital by which the defendant was bound for six months, In Rooke *v.* Lord Kensington (2 K. & J., 753) the subject was fully considered by Sir W. Page Wood, V. C. Jenner *v.* Jenner (L. Rep. 1 Eq., 361) is a later authority; but the above principle is well established, and has been applied in a variety of cases, for example, by Lord Mansfield in Moore *v* Magrath (1 Crop., 9.)

Now let us turn to the more modern cases in which the question had reference to the authority of an agent. In Hay *v.* Goldsmidt (referred to in Hogg *v.* Snaith, 1 Taunt. 349) decided by the Court of King's Bench in 1804, the action was brought to recover money received by the defendants upon a bill of exchange. The bill was payable to the plaintiff's testator or his order. The testator had granted to J. and R. a power of attorney authorizing them to ask, demand and receive "all money that might become due to him on any account whatsoever, and to transact all business, and upon non-payment or non-delivery thereof, for him, and in his name, to use all such lawful ways and means for the recovery thereof as he might or could do if he was personally present and did the same." They received the bill abovementioned under this power, and having severally indorsed it in the name of the testator, discounted it with the defendants, who afterwards received the value from the acceptors. At the trial a verdict was found for the plaintiffs, but a rule was granted for setting aside the verdict and entering a nonsuit, on the ground that J. and R. had authority to indorse and discount the bill. Upon argument, the court held that the power "to transact all business" did not authorize the indorsement, and that inasmuch as the largest powers must be construed with reference to the subject matter, the words "all business" must be confined to all business necessary for the receipt of money. So in Hogg *v.* Snaith, (*sup.*) decided in 1808, where the power of attorney authorized the agent to receive all salary and money, to compound, discharge, give releases, and appoint substitutes, it was held that the power did not authorise the negotiation of bills received in payment, nor the indorsing of them in the agent's own name. It was further held that evidence of an usage at the navy office to pay bills indorsed by the attorney in his own name, and negotiated by him under such a power, could not be received to enlarge the operation of the power.

The above decisions were approved in Murray *v.* East India Company, (5 B. & A. 204), decided 1821, in which it was held that a power of attorney empowering an agent to demand, sue for, recover and receive all moneys, debts and dues, and to give discharges, did not authorize him to indorse bills for his principal.

Similar questions were again raised in Attwood *v.* Munnings, (7 B. & C. 278), decided in 1827. The defendant, a member of a firm of merchants, on going abroad, granted a power of attorney to A., B., and C. his wife, jointly and severally for him and in his name, and to his use, to sne for and get in moneys and goods, "to indorse, negotiate and discount, or acquit and discharge the bills of exchange, promissory notes, or other negotiable securities which were or should be payable to him, and should need and require his indorsement." By another power of attorney subsequently executed, he gave to his wife C., amongst other powers, authority for him and on his behalf, to pay and accept such bills of exchange as should be drawn or

charged on him by his agents or correspondents as occasion should require, ... and generally to do, negotiate and transact the affairs and business of him, defendant, during his absence, as fully and effectually as if he were present and acting therein. While he was abroad, A., who was also one of the partners in the same business, and who acted as the defendant's agent, drew four bills of exchange upon the defendant, for the purpose of paying creditors of the partnership business. They were accepted by the defendant's wife in his name, and the proceeds applied in payment of the partnership debts. The plaintiffs were indorsees of the bills. The court decided, upon these facts, first, that the right of the indorsee depended upon the authorities given by the attorney: secondly, that the powers applied only to the defendant's individual and not to his partnership affairs; thirdly, that the special power to accept extended only to bills drawn by an agent in that capacity, and that A. did not draw the bill in question as agent, but as partner; and lastly, that the general words in the powers of attorney were not to be construed at large, but as giving general powers for carrying into effect the special purposes for which they were given. "By the first of the powers in question," said Mr. Justice Bayley, "the defendant gave to certain persons authority to do certain acts for him, and in his name and to his use. It is rather a power to take than to bind; and, looking at the whole of the instrument, although general words are used, it only authorizes acts to be done for the defendant singly; it contains no express power to accept bills, nor does there appear to have been an intention to give it. The first power, therefore, did not warrant acceptance. The second power gave an express authority to accept bills for the defendant and on his behalf. No such power was requisite as to partnership transactions, for the other partners might bind the firm by their acceptance." A judgment of nonsuit was entered.

This decision of tho Court of King's Bench was mentioned with approval in the Court of Common Pleas two years afterwards, in the case of Withington *v.* Herring, (5 Bing. 442), 1829, where, however, owing to the different facts of the case, a different *ratio decidendi* applied. C. entered into an agreement with the defendants in which he undertook to carry on certain mining speculations for them in America. He was furnished with instructions and a letter of authority to draw on the defendants for £10,000. By a power of attorney he was authorised "to take and work mines, to purchase tools and materials, and erect the necessary buildings, and to execute any deeds or instruments he might deem necessary for the purpose." After he had raised the £10,000 under the letter of authority, he obtained £1,500 of the plaintiff in America, and applied the money to the use of the defendants. He did not show the letter of authority to the plaintiff, nor did it appear that the plaintiff knew that money had been previously raised by C. The court was of opinion that the plaintiff was entitled to recover the £1,500 from the defendants, as money had and received to their use. The court was of opinion that the agent had an implied authority to raise the money advanced, for the reason apparently that the exercise of authority in raising the money was an act necessary for executing the original authority with effect. This seems to be the true ground of the decision.

The rule was stated by Baron Alderson in a later case, (Esdaile *v.* La Nanze, 1 Y. & C. 394, 1835), to the effect that general words "must be construed with respect to the antecedent matter which states the purpose for which the letter of attorney was given. Perhaps they would be sufficient to confer all powers not specifically enumerated, but necessary to carry the principal purpose of the letter of attorney into effect."—The London *Law Times*.

THE London *Solicitors' Journal* says: "A curious case has recently arisen in Japan, bearing on the press laws which exist in that country. A British subject claiming the rights of a free press under the extra-territorial jurisdiction clause of our treaty, established a Japanese newspaper, and began to circulate it. The press laws insist on the registration of a Japanese paper; this was unregistered. They control the expression of opinion; the proprietor of this journal claimed that he was liable to no such control. The Japanese represented to Sir Harry Parkes the anomaly and manifest injustice involved in this claim; and, feeling the justice and reason of the representation, Sir Harry issued a notification, in virtue of the powers vested in him by the Order in Council for China and Japan, making it penal for British subjects to publish newspapers in the Japanese language.

SUPREME COURT OF TENNESSEE.

NASHVILLE, JAN. 22, 1876.

Bidwell and Wife v. *Paul and Others.*

RECEIVER.—The beneficiary in a trust deed may have a receiver appointed, and the proceeds of the security impounded for his benefit, during the litigation, after his right to sale of the property has been adjudged.—*Ed. Com. and Legal Reporter.*

By the court, FREEMAN, J.

This is an application for a receiver. Property was conveyed by deed of trust to secure payment of debts. One side claimed the deed was fraudulently obtained, and the beneficiary filed cross-bill to enforce trust by sale of property, asking for a receiver. None was appointed, however, in the court below, and no steps taken in that direction, we believe.

The Chancellor finally decreed sale of the property to pay a debt ascertained by him as a lien on the fund under the trust deed. An appeal is prosecuted *in forma pauperis*. In addition, it is alleged in the cross-bill, that the security is scarcely sufficient to pay the debt claimed.

Under these facts a receiver must be appointed and property rented out—the fund thus arising to be held subject to final disposition of the cause. In case of strict mortgage, it is well settled the mortgagee is entitled to a receiver of the rents during progress of the suit to foreclose, and that one will be appointed, even though there be no prayer for it in the bill, if the facts stated or shown to the court require it. Henshaw, Ward & Co. *v.* Wells et al., 9 Hum., 583. A deed of trust is in substance a mortgage, though some immaterial differences may be found between them. The trustee in this case was bound to have sold long since by terms of the deed. The security may be impaired by use, and change of circumstances of the country. It has been conveyed to the trustee for payment of this debt. It is not unreasonable that the proceeds of the security shall be impounded for benefit of creditor during the litigation, especially after his right to sale of property has been adjudged. In renting the property, the claimants will be entitled to preference, upon securing the rent by note to the receiver. The property will be rented for a year from this time.

U. S. CIRCUIT COURT OF OREGON.

BEFORE DEADY, J.

W. T. Wythe v. *A. Myers—Action to recover possession of real property.*

Monday, April 10, 1876.

In an action to recover possession of real property, a statement in the answer of the grounds upon or means by which the defendant claims to be the owner of the property is irrelevant, and may be stricken out on motion.

An allegation in the answer to the effect that the defendant derives title to the premises from the administrators of W. H. Willson, it not appearing that said Willson was ever seized or possessed of the property, is frivolous, and may be stricken out on motion.

An allegation of the administrators of said Willson conveyed the premises to the defendant's grantors on March 30, 1859, "in obedience to an order of the probate court of Marion county," of March 29, 1859, may be stricken out as frivolous and irrelevant—it not appearing therefrom that said order was duly or lawfully made, or that such court had authority to make the same.

The defendant may allege in his answer that he is the owner of the premises in controversy, but if he couples such allegation with a statement of the grounds of his title from which it does not appear that he is such owner the matter may be stricken out as sham.

A counter-claim for permanent improvements should not be pleaded to the whole complaint, but only to so much thereof as to which it is an answer or defence; and it should allege the *present* value of said improvements, and that they better the condition of the property for the ordinary purposes for which it is used.

The right to damages for withholding the possession of real property given by the Or. Code, (§§ 313, 318), is equivalent to the action of trespass for mesne profits given by the common law, and includes all damages to which the owner is entitled on account of the wrongful occupation of the premises, as well as for waste committed or suffered by the occupant as the value of the use and occupation; such right is a distinct cause of action, and if joined with a claim for possession, should be separately stated.

Lapse of time short of twenty years is not a bar to an action to recover possession of real property when the defendant claims under a sale by an administrator, except where the sale was made under § 42 of chap. V., of the Code of 1854, to pay the decedent's debts, and the plaintiff claims under such decedent.

If a defendaut wishes to contest the citizenship of the parties to an action in the national courts, he must do so by plea in abatement; and such a plea, if joined to one to the merits, may be stricken out; but is not liable to a demurrer.

DR. KENEALY AND THE BENCHERS OF GRAY'S INN.—The long pending suit between Dr. Kenealy and the benchers of Gray's Inn has at last been set down for hearing in the Chancery Division of the High Court of Justice. The benchers claim possession of the set of chambers which Dr. Kenealy formerly occupied as a bencher of the Inn, and which, they claim, reverted to the Inn when the Doctor was disbarred. Dr. Kenealy, on the other hand, seems to insist that his estate in the rooms in question is a freehold for his life, while he adds a counter-claim in tort for wrongful and malicious disbarment, in respect of which he estimates his damages at £25,000. There can be, of course, no doubt, (says the *Observer*) as to the decision at which the Vice Chancellor, before whom the case is heard, will arrive. Dr. Kenealy, however, if he chooses to contest the point by way of advertisement for himself and his wrongs, will be able to carry an appeal to the full court, and thence, if he pleases, to the House of Lords. The principle that an Inn of Court is a perfectly voluntary body like a club, and is not liable at law for anything which it may choose either to do or to refuse to do, has been repeatedly affirmed; and we may consequently take it for granted that the Doctor's case will be tried, not upon the facts, but upon demurrer, and that whatever development the cause may assume, the bencher's of Gray's Inn will ultimately succeed in their ejectment. At the same time it is clear that the position of an Inn of Court, as a purely voluntary body, is not without its disadvantages. If the benchers of Gray's Inn had been ordinary landlords, and Doctor Kenealy an ordinary tenant, notice to quit could have been served and ejected effected long ago, without all the trouble and expense of a chancery suit.—*Public Opinion.*

THE Supreme Court of Illinois will meet at Mount Vernon, on Tuesday, June 6th. There will undoubtedly be a large number of the members of the bar from southern Illinois, in attendance at this term—this being the presidential year. The bar in southern Illinois have, for years, made it a practice to endeavor to meet their brethren at the June term, and talk over political matters.

IMPRISONMENT FOR DEBT.—The bill to abolish imprisonment for debt by the county courts in England, is to be read a second time on the 20th of June.

BANKRUPTCY—PROOF OF DEBT—NOTARY PUBLIC.—Among our new bankruptcy blanks we have a blank for proof of debt, prepared expressly for notaries public.

CHICAGO LEGAL NEWS.

SATURDAY, MAY 27, 1876.

The Courts.

UNITED STATES SUPREME COURT.

No. 857.—OCTOBER TERM, 1875.

H. G. ANGLE, Appellant,
v.
NORTHWESTERN MUTUAL LIFE INSURANCE COMPANY

Appeal from the Circuit Court of the United States for the District of Iowa.

AUTHORITY OF AGENT—RIGHT TO FILL BLANKS IN NOTE—EFFECT OF ERASING WHAT IS WRITTEN OR PRINTED IN A NOTE.

1. AUTHORITY OF AGENT.—That persons dealing with an agent are entitled to the same protection as if dealing with the principal, to the extent that the agent acts within the scope of his authority.

2. FILLING BLANKS IN NEGOTIABLE NOTE.—That where a party to an negotiable instrument, intrusts it to another for use as such, with blanks not filled up, such instrument so delivered, carries on its face an implied authority to complete the same, by filling up the blanks; but the authority implied from the existence of the blanks, would not authorize the person entrusted with the instrument, to vary or alter the material terms of the instrument, by erasing what is written or printed as part of the same, nor to revert the scope and meaning of the same, by filling the blanks with stipulations repugnant to what was plainly and clearly expressed in the instrument before it was delivered.

3. WHEN CHANGES MAKE NOTE INVALID.—That when one entrusted with negotiable securities for use by the parties to it, may, if it contain blanks, fill the same; but if he materially change words which are printed or written, the note, by such change, would be rendered invalid.

4. WHERE THERE ARE MARKS OF ALTERATION ON FACE OF NOTE.—That where a person takes a note with such marks upon its face, he must be presumed to have knowledge of what it imported.

5. ACTUAL NOTICE.—That actual notice, in such a case is not required, even in suits founded upon negotiable securities, where the evidence of its infirmity consists of matters apparent on its face; nor is any different or stricter rule applicable in cases like the present, it appearing that the printed words, though erased so as to be inoperative, were still entirely legible, even to the casual reader, and the words "current funds," inserted before the erased word "drafts," were plainly repugnant to the erased words "drafts to the order of," which followed them in the same connection.

6. CONSTRUCTIVE NOTICE.—That constructive notice, in such cases, is held sufficient, upon the ground that when a party is about to perform an act which he has reason to believe may affect the rights of third persons, an inquiry as to the facts is a moral duty, and diligence an act of justice. Whatever puts a party upon inquiry in such a case, is sufficient notice in equity, where the means of knowledge are at hand: and if the party, under such circumstances, omits to inquire, and proceeds to do the act, he does so at his peril, as he is then chargeable with all the facts which, by a proper inquiry, he might have ascertained. —[ED. LEGAL NEWS.]

Mr Justice CLIFFORD delivered the opinion of the court.

Persons dealing with an agent are entitled to the same protection as if dealing with the principal, to the extent that the agent acts within the scope of his authority.

Pursuant to that rule, it is settled law that where a party to a negotiable instrument intrusts it to another for use as such, with blanks not filled up, such instrument, so delivered, carries on its face an implied authority to complete the same by filling up the blanks; but the authority implied from the existence of the blanks, would not authorize the person intrusted with the instrument to vary or alter the material terms of the instrument by erasing what is written or printed as part of the same, nor to pervert the scope and meaning of the same by filling the blanks with stipulations repugnant to what was plainly and clearly expressed in the instrument before it was so delivered.

By virtue of the implied authority, such a depositary may perfect, in his discretion, what is incomplete, by filling the blanks, but he may not make a new instrument by erasing what is written or printed, nor by filling the blanks with stipulations repugnant to the plainly expressed intention of the same, as shown by its written or printed terms. (Goodman *v.* Simonds, 20 How., 361; Bank *v.* Neal, 22 Id., 108.)

Much reference to the pleadings will be unnecessary, as the questions presented for decision arise chiefly out of the facts deducible from the proofs exhibited in the record. Suffice it to say, in that regard, that the suit was instituted by the complainant to procure a decree that the bond and mortgage and the two fire insurance policies described in the bill of complaint, were delivered and assigned to the respondents without consideration, and to obtain a decree setting aside said bond and mortgage and for a return of said policies, the same having been delivered to the respondents as additional security for a loan of ten thousand dollars, the proceeds of which never came to the hands of the complainant; and he charges that the proceeds of the loan were never forwarded to him by his authority, that if the insurance company ever paid the same in current funds to the person through whom the loan was negotiated, upon any order signed by him, as pretended by the respondents, the order was forged by the party who presented it or by some person interested, to cheat and defraud the complainant out of the money.

Service was made and the corporation respondents appeared and filed an answer, in which they allege that the bond, mortgage and fire policies were duly delivered to the company by the agent of the complainant, and they deny that the order for the payment of the proceeds of the loan was forged, and aver that they made the payment to the person who presented it, in good faith. Proofs were taken, and the court, having heard the parties, entered a decree dismissing the bill of complaint, and the complainant appealed to this court.

Sufficient appears to show that the respondents are a corporation created by the laws of Wisconsin, and that they were doing a life insurance business throughout the Northwestern States, and it also appeared that they were accustomed to loan money on real estate securities. Agents were appointed by the respondents, in the different States, whose duty it was to solicit applications for policies and to transact other matters connected with their insurance business.

State agents were appointed by the company, but it is conceded that they in turn appointed sub-agents to perform the same duties, and it appears that the commissions for all such services were paid by the company to the State agents.

Applications for loans of money were frequently made to the company through the state agents, and it appears that such agents of the company were furnished with blank forms for such applications and for the appraisement of real estate intended as security for such loans. When an application for a loan was made the blank forms were filled up by the agent, and it was the business of the borrower to furnish abstracts of the title of the real estate offered as security, all of which were transmitted by the agent to the home office for examination, and if approved, the course of business was that the bond and mortgage were prepared and forwarded to the agent to be delivered to the applicant for execution and return.

Of course the applicant might still refuse to execute the bond and mortgage, but if he was satisfied with the terms of the instruments, and completed the same they were given back to the agent and were by him returned to the company, and it seems that the money loaned was usually transmitted to the applicant by means of a draft payable to the order of the borrower, or, in certain cases, the money was paid by the company at the home office, pursuant to the written order of the borrower, evidenced by a receipt on the back of the order by the person in whose favor it was drawn. Such papers from the home office to the borrower and from the borrower to the company, it is conceded, are usually mailed to the State agent, and that they pass through his office but it is insisted by the respondents that he has no interest in the business and that he receives no compensation from the company for his services.

Sub agents, it is conceded, were employed by the agents appointed by the company, and it appears that I. T. Martin, during the winter and spring of 1871, was a regular agent of the company, appointed for the State of Iowa, and that he employed one C. W. Copeland, as sub-agent, to solicit applications for life insurance, and that Copeland claimed to be the agent of the company to effect loans in their behalf on security of real estate, and that he represented to the complainant that he, the sub-agent, could procure for the complainant a loan from the company of ten thousand dollars on such security.

Both the complainant and Copeland then resided at Cedar Rapids, and it was at that place and about that time that the former was introduced to the latter, and it appears that Copeland was, at that time, canvassing for the company, to procure customers to take policies in the company, and to induce persons to take loans from the company on security of real estate. About the same time Copeland published a card in one or more of the local newspapers, representing that he was the agent of the company, and it appears that he exhibited to the complainant pamphlets, circulars, and other documents, of the kind prepared and distributed by the State agents as the means of extending the business of the company, and that notice was published by the same party, in one or more of the local journals, in which he is described as the agent of the insurance company.

Evidence entirely satisfactory was introduced, showing that it was during that period that the complainant commenced negotiations with Copeland to obtain for him a loan from the company for the sum of ten thousand dollars, to be secured by bond and mortgage of real estate. Conversation ensued between them, and the evidence shows that Copeland told the complainant that he was going to quit preaching, and that he had made arrangements to act as attorney for the said insurance company, that he had already secured a loan for one person, and that, being an intimate friend of the general agent, he could get the money whenever he recommended a loan.

Blank forms were requisite, and it appears that Copeland furnished the complainant with a printed blank form of an application for a loan, and that he requested the complainant merely to insert the description of the property to be offered as security and his valuation of the same, stating that he, the agent, would fill the other blanks and send the application forward. Accordingly the complainant inserted the description of the property, giving his valuation of the same in figures, and also gave the name of his wife and the date of the instrument and his own name and place of residence. Incomplete, though the instrument was, yet the witness states that he delivered it to Copeland, and that he, the witness, never saw it afterwards until he gave his deposition in the case, and that the endorsements on the back of the instrument were not there when it left his possession.

Due notice was received by the complainant, from the president of the company, that his application for the loan was accepted, and he was also informed, in the same communication, that abstracts of the title of the property and certain certificates were required to show that the property was free of incumbrances and liens, and that when the same were received, if found to be correct, that their attorney would prepare the bond and mortgage and forward the same to him for execution.

Such abstracts and certificates were procured by the complainant, at the instance of Copeland, and they were delivered by the complainant to him at his request, and it appears that Copeland presented to the complainant the bond and mortgage, ready for his signature, he having procured the signature of the complainant's wife to the mortgage before the instruments were exhibited to the complainant for execution. They were signed by the complainant at his house, no one being present except his wife and Copeland, and the complainant testifies that he then and there delivered the same to Copeland, together with two fire policies of insurance, in order that the fire policies might be endorsed by the agent of the companies issuing the same, in a way to make the loss, if any, payable to the corporation respondents. Decisive proof that Copeland received the bond and mortgage for record and transmission is also exhibited by the receipt which he gave in behalf of the company and which he signed as agent.

Throughout the whole transaction the negotiations with the complainant were conducted by Copeland, and the evidence shows beyond doubt that all the instruments and documents which were delivered by the complainant to Copeland were by him delivered or transmitted to the State agent of the company, and that they were all forwarded by the latter to the company at their home office, where the officers of the company transact all their business.

Such applications for loans are usually made direct to the executive committee, and are required to be signed by the party desiring the loan, and when the loan papers have been perfected the company pay to the owner directly, either in checks or drafts *to his order*, unless the borrower, by written request or order, may have otherwise directed, but the president, in his testimony, admits that the State agent sometimes forwards applications to the executive committee for parties residing in the State, and that the home office does advise such parties, through him, of the action of the company in respect to such applications. Cases of the kind, therefore, it may be assumed, had occurred before, where the business was transacted through the State agent, but if not, still it is proved beyond all doubt that all the negotiations with the complainant were conducted by the sub agent, and that all the propositions to and from the company in respect to the loan in question were transmitted to the company through the same State ageut.

Satisfactory abstracts and certificates having been forwarded, and the due execution and delivery of the bond and mortgage having been procured, nothing remained to be done to enable Copeland to carry his fraudulent scheme into effect, except to get an order for the money in such a form that he could convert the fund to his own use, without danger of immediate exposure and detection. Antecedent conversations between the parties made it known to him that the complainant expected to receive the proceeds in drafts payable to his own order, it appearing that the complainant had told him that he wanted the amount in two drafts, one for six thousand dollars and the other for four thousand dollars, each payable to his own order. Apprised of what the complainant desired, he doubtless thought it prudent to seem to conform to his expressed wish. Circumstances occasioned some delay, but Copeland finally informed the complainant that the papers had gone forward, and stated that notice that the papers were satisfactory might come any day, and suggested that the complainant might as well sign the blank order for the money, adding that he "would fill it out," and the witness testifies that he looked at the blank, and seeing that it contained the words "in drafts to the order of," he put his signature to it and placed it in the drawer of Copeland, and went home.

Taken as a whole the evidence satisfies the court, beyond all doubt, that the blank form which the complainant signed was without date, except the year, which was in printed figures; that it contained no direction except the printed word "To," followed by a blank; that it did not contain the name of any payee nor anything upon the subject, except the printed words "Pay to," followed by a blank; that it did not specify any amount, nor contain anything upon the subject, except the printed word "dollars," preceded by a blank; that it did not specify for what the payment was to be made, nor did it contain anything upon the subject, except the printed words "on account of," followed by a blank; and that it contained nothing in respect to the medium of payment, except the printed words "in drafts to the order of," the word "of" immediately preceding the name of the plaintiff, H. G Angle, and so close to the first initial of the signature as to leave no blank between the erased sentence and the name of the complainant.

Subsequent to the time when the blank form was signed by the complainant and was left in the drawer of Copeland, the printed words "drafts to the order of," just preceding the signature of the complainant, were erased, evidently with pen and ink, and the words "current funds" were inserted in writing between the printed word "in" and the word "drafts," which is the first word of the sentence "drafts to the order of," the effect of which was to authorize the company to pay the proceeds of the loan "in current funds," instead of "drafts to the order of" the signer of the blank form.

Armed with that instrument, the blanks having been filled and the words "current funds" having been inserted, in lieu of the words "drafts to the order of," which were erased, Copeland went to the home office and obtained the whole proceeds of the loan, and absconded with the whole amount.

Full power to receive the proceeds of the loan would have been conferred up-

on the person who presented it, even if the holder of the blank form had done nothing more than to fill the blanks contained in the incomplete instrument, but it is quite obvious that if he had merely filled the blanks of the instrument, the company would have been obliged to make the payment "in drafts to the order of" the complainant, which, it is easy to see, would have defeated the fraudulent intent of the party who presented it for payment, as the drafts, if payable to the order of the complainant, could not be by that party converted into current funds Had he merely filled the blanks, the body of the completed instrument would have read as follows, to wit: Pay to [the person named] ten thousand dollars, on account of bond and mortgage, in drafts to the order of H. G. Angle. Evidently such an instrument would not have answered the purpose of the holder of the blank form, if he intended to betray his trust, and to convert the proceeds of the loan to his own use, without the consent of the lawful owner of the fund.

Blanks necessary to complete the instrument and render it operative, it may be admitted, might be filled by the holder of the instrument, but it is clear that it was not possible, within the meaning of that rule, to give the instrument such a form as would make it answer the supposed fraudulent intent, without doing violence to the scope and design of the blank form, as evidenced by the printed terms it contained, which, as outlines, plainly indicate that the signer required that the payment of the proceeds of the loan should be made in drafts to his own order. Manifest as that indication was, and as it would be, even to the casual reader, it became necessary, in order to make the completed instrument answer the fraudulent intent of the holder, to change the scope and design of the same, which he effectually accomplished by erasing the printed words "drafts to the order of," which immediately preceded the name of the signer, as before explained, and by inserting the words "current funds" between the erased word "drafts" and the word "in," between which and the erased word "drafts" there was a short blank, scarcely sufficient to admit the written words "current funds," as will be seen by reference to the instrument actually presented to the company, which was sent up with the transcript as an original paper.

Compare the altered instrument with what it would have been if nothing had been done to it except to fill the blanks, and the criminal character of the act is manifest. By the erasure and insertion of the words "current funds," it was made to read as follows: Pay to [the person named] ten thousand dollars, on account of bond and mortgage, in current funds.

Such an alteration, it is insisted by the complainant, is not and can not be justified by any implication which arises from the existence of blanks in the instrument, inasmuch as the alteration consists both of the erasure of material words and the insertion of other material words in lieu of those erased, which change the scope and legal effect of the instrument from what it would have been if the blanks had been filled without any such erasure and insertion.

Complainant concedes that blanks in such an instrument may be filled by the person to whom it is intrusted for use, but he contends that the said alterations made in the instrument in this case were a forgery, which renders the completed instrument void, and the court here concurs in that proposition.

Negotiable instruments are frequently delivered for use, with blanks not filled, and in respect to such instruments, it is held that where a party to such an instrument intrusts it to the custody of another for use, with blanks not filled up, whether it be to accommodate the person to whom it was intrusted, or to be used for the benefit of the signer of the same, such negotiable instrument carries on its face an implied authority to fill up the blanks necessary to perfect the same; and the rule is that, as between such parties and innocent third parties, the person to whom the instrument was so intrusted, must be deemed the agent of the party who committed the instrument to his custody, in filling the blanks necessary to perfect the instrument.—(Violet *v.* Patton, 5 Cran., 142. Russell *v.* Langstaffe, 2 Doug., 514. Collis *v.* Emmet, 1 H. Black., 313. Montague *v.* Perkins, 22 Eng. L. & Eq. 516.)

Questions of the kind most frequently arise in respect to negotiable instruments, but the court here is of the opinion that the same rule is properly applicable to the case before the court. Authority to act for another may be express or it may, in certain cases, be implied, but an implied authority has its limitations as well as that which is express. Examples to prove that proposition exist everywhere, but it would be difficult to give one more apposite and striking than the one presented by the case in decision, where the authority to fill blanks is implied from their existence in an instrument intrusted to another for use.—(1 Greenl. Ev. (12th ed.) sec. 567.)

Beyond all doubt such a party may fill every blank which it is necessary should be filled to perfect the instrument and render it operative, within its scope and design, if the terms or words of the instrument sufficiently indicate what that scope and design are. Cases arise, it must be conceded, where a party signs his name to a blank paper and intrusts the paper containing his signature to another for use, but it is sufficient to say upon the subject, that the case before the court is not of that character. Instead of that the blank form signed by the complainant contained terms clearly indicating that the money was to be paid on account of "the bond and mortgage," and that the signer of the blank form required the payment to be made "in drafts to the order of" the signer of the same, and it was no more competent for the person to whom it was intrusted, in that state of the case, to erase the words "drafts to the order of," and to insert in the short blank preceding that sentence, the words "current funds," than it would have been for that person to have prepared and executed a new instrument in the name of the signer, requesting the company to pay the proceeds to the order of the holder of the blank form.

Argument is scarcely necessary to support that proposition, as it is self evident that the erasure of the words "drafts to the order of" changed the manifest scope and design of the incomplete instrument, and it is equally clear that the words "current funds," which were inserted, are utterly repugnant to the printed terms "drafts to the order of," which were erased by black lines.—(Bank *v.* Douglas, 31 Conn., 180.)

Properly applied that case is decisive of the present case. It appears that the defendant in that case put his name upon an inchoate bill of exchange, drawn and signed by the maker, on a certain firm, blanks being left for the date, amount, time of payment, and the name of the payee, and that the defendant delivered the paper, thus indorsed, to the maker of the same, who struck out the name of the place where it was made, and the name of the firm on which it was drawn, and filled out the instrument, so as to make it a promissory note for three thousand five hundred dollars, payable to the order of another party. Upon these facts the court held that an inference arose, which in favor of a *bona fide* holder of the paper was irresistible, that the person to whom the paper was intrusted, was authorized, by filling the existing blanks, to complete the instrument and to fill the blanks, so as to bind the defendant as indorser of a bill of exchange, drawn by him on the firm therein named, for any sum, payable at any time and place. But, say the court, no inference or presumption of authority, can arise that he might turn the bill drawn on one firm into a bill drawn on another, or to turn it into a promissory note. Neither dictum nor decision, say the court, has been cited to warrant such a claim, and they add that they suppose that none such can be found. Suit in that case was brought by the bank, claiming to be an innocent holder, but the court held that, notwithstanding the erasures, unmistakable evidence of the original character of the instrument remained, and that the evidence was amply sufficient to excite distrust and make it the duty of any one to whom the paper was offered to inquire when and by what authority, such erasures and alterations had been made.—(Gardner *v.* Walsh, 32 Eng. L. & Eq. 162.)

Where blanks exist, in negotiable securities, delivered to another for use, the custody of the paper, under such circumstances, gives the custodian the right to fill the blanks, but it does not confer authority to make any addition to the terms of the note, and if any such, of a material character, are made by such a party, without the consent of the party from whom the paper was received, it will avoid the note, even in the hands of an innocent holder.—(Ivory *v.* Michael, 33 Missouri, 400.)

Proof was given in that case that the parties had for many years been in the habit of endorsing for each other, that the defendant endorsed the note, which was in blank, as to the time of payment, and was payable without defalcation or discount. Before using it the other party filled the blank with thirty days, and added after the word discount, "bearing ten per cent. after maturity." Attempt was made in argument to sustain the right to make the addition to the note, because it was delivered before the blank was filled, but the court held that the insertion of the words "bearing ten per cent. after maturity," was not the filling of a blank, and that it rendered the note invalid.—(Wood *v.* Steele, 6 Wall., 80.)

Persons intrusted with negotiable securities for use, by the parties to it, may, if it contains blanks, fill the same, but Mr. Parsons, though he admits that rule to its fullest extent, adds that if one materially changes words which are printed or written, the note by such change would be rendered invalid, and certainly it must be so if the change substantially varies the scope of the instrument, to the prejudice of the party from whom it was obtained.—(2 Pars. on B. & N., 566.)

Suppose that is so, still it is insisted by the respondents that the rule is not applicable in this case, because they had not notice of the defect in the blank order, but the court here is entirely of a different opinion. Even the holders of negotiable securities, taken in the usual course of business, before the securities fall due, are held chargeable with notice where the marks on the instrument are of a character to apprise one to whom the same is offered of the alleged defect.—(Goodman *v.* Simonds, 20 How., 365.)

When it is proposed to impeach the title of a holder, for value, by proof of any facts and circumstances outside of the written instrument itself, it is a very different matter. He is then to be affected, if at all, by what has occurred between other parties, and he may as well claim an exemption from any consequences flowing from their acts, unless it be first shown that he had *knowledge* of such facts and circumstances at the time the transfer was made. These principles are of universal application, but where a person takes a negotiable security which, upon the face of it, is dishonored, he cannot, says Taney, Ch. J., be allowed to claim the privileges which belong to a *bona fide* holder.—(Andrews *v.* Pond, 13 Pet., 65.)

If he chooses to receive it under such circumstances he takes it with all the infirmities belonging to it, and is in no better condition than the person from whom he received it; and the same doctrine was enforced and applied in a subsequent case, where, in speaking of a promissory note, so marked as to show for whose benefit it was to be discounted, the court held that all those dealing in paper "with such marks on its face, must be presumed to have *knowledge* of what it imported."—(Fowler *v.* Brently, 14 Pet., 318. Brown *v.* Davis, 3 Term., 80.)

Actual notice in such a case is not required, even in suits founded upon negotiable securities, where the evidence of its infirmity consists of matters apparent on its face; nor is any different or stricter rule applicable in cases like the present, it appearing that the printed words, though erased, so as to be inoperative, were still entirely legible, even to the casual reader, and that the words "current funds," inserted before the erased word "drafts" were plainly repugnant to the erased words "drafts to the order of," which followed them in the same connection.

Constructive notice in such cases is held sufficient, upon the ground that when a party is about to perform an act which he has reason to believe may affect the rights of third persons, an inquiry as to the facts is a moral duty, and diligence an act of justice. Whatever fairly puts a party upon inquiry in such a case is sufficient notice in equity, where the means of knowledge are at hand; and if the party, under such circumstances, omits to inquire and proceeds to do the act, he does so at his peril, as he is then chargeable with all the facts which by a proper inquiry he might have ascertained.—(Hawley *v.* Cramer, 4 Cow., 712. Hill *v.* Simpson, 7 Ves., Jr., 170. Kennedy *v.* Green, 3 Myl. & Keen, 722. Booth *v.* Barnum, 9 Conn., 286. Pitney *v.* Leonard, 1 Paige, 461. Pringle *v.* Phillips, 5 Sand., 157.)

Authorities to show that the material alteration of a written instrument renders it void is unnecessary, as it is a principle of universal application.

Decree reversed and the cause remanded, with direction to enter a decree in favor of the complainant.

UNITED STATES SUPREME COURT.

No. 503.—OCTOBER TERM, 1875.

G. D. NEWHALL, Appellant, *v.* CHALES W. SANGER.

Appeal from the Circuit Court of the United States for the District of California.

GRANTS OF LAND TO AID RAILROADS—SPANISH OR MEXICAN CLAIMS.

1. GRANTS IN AID OF RAILROADS.—That grants of land to aid in the construction of works of internal improvement, attach only to so much of our national domain as might be sold or otherwise disposed of, and that they do not embrace tracts reserved by competent authority, for any purpose or in any manner, although no exception of them was made in the grants themselves.

2. PUBLIC LANDS.—That the words, "public lands" are habitually used in our legislation to describe such as are subject to sale, or other disposal under general laws.

3. STATUS OF SPANISH OR MEXICAN CLAIMS.—That the status of lands covered by Spanish or Mexican claim, pending before the tribunals charged with the duty of adjudicating it, must be determined by the condition of things which existed in California at the time it was ceded, and by our subsequent legislation.

4. FAILING TO PRESENT CLAIM.—The act declares that all lands, the claims to which should not have been presented within two years, should be deemed held, and considered to be a part of the domain of the United States." A failure, therefore, to present the claim within the required time, or a rejection of it either by the commission or the District court, without seeking to obtain a review of their respective decisions, or by this court, rendered it unnecessary to reserve the claimed lands from settlement and appropriation. They then became public in the just meaning of that term, and were subject to the disposing power of Congress. This is the true interpretation of the act of 1851.

5. RELATION BACK—TERM.—There is a fiction of law that a term consists of but one day; but such a fiction is only tolerated by the courts for the purpose of justice. To antedate the rejection of a claim, so as to render operative a grant which would be otherwise without effect, does not promote the ends of justice, and cannot be sanctioned. —ED. LEGAL NEWS.]

Mr. Justice DAVIS delivered the opinion of the court.

The object of this suit is to determine the ownership of a quarter section of land in California. The appellee, who was the complainant, claims through the Western Pacific Railroad Company, to whom a patent was issued in 1870, in professed compliance with the requirements of the acts of Congress commonly known as the Pacific Railroad Acts. The appellant derives title by mesne conveyances from one Ransom Dayton, whose patent, of a later date than that issued to the company, recites that the land was within the exterior limits of a Mexican grant called Moquelamos, and that a patent had, by mistake, been issued to the company. The court below decreed that the appellee was the owner in fee simple of the land, and that the patent under which the appellant claims, so far as it relates to the land in controversy, should be cancelled.

The act of July 1, 1862, (12 Stat., 492,) grants to certain railroad companies, of which the Western Pacific, by subsequent legislation, became one, every alternate section of public land designated by odd numbers, within ten miles of each side of their respective roads, not sold, reserved, or otherwise disposed of by the United States, and to which a homestead or pre-emption claim may not have attached at the time the line of the road is definitely fixed. It requires that within a prescribed time a map designating the general route of each road shall be filed in the Department of the Interior, and that the secretary thereof shall then cause the lands within a certain distance from such route to be withdrawn from pre-emption, private entry, and sale. The precise date of the location of the Western Pacific road is not stated in the record, but the inference is that it took place between the first day of the December term (1864) of this court, and the 13th day of February, 1865. At all events, the withdrawal for this road was made on the 31st of January, 1865, and the records of the court show that the Moquelamos grant, which had been regularly presented to the commis-

sioners, under the act of March 3, 1851, and duly prosecuted by appeal, was rejected here February 13, 1865. It is a conceded fact that the lands embraced by it fall within the limits of the rail road grant, which were enlarged by the amendatory act of 1684. (13 Stats., p. 358.) This act also declares that any lands granted by it, or the act to which it is an amendment, "shall not defeat or impair any pre-emption, homestead, swamp-land or other lawful claim, nor include any government reservation or mineral lands, or the improvements of any *bona fide* settler."

There can be no question that, by the withdrawal in question, the grant took effect upon such odd-numbered sections of public lands within the prescribed limits as were not excluded from its operation, and the question arises whether lands within the boundaries of an alleged Mexican or Spanish grant, which was then *sub judice*, are public lands within the meaning of the act of Congress under which the patent, whereon the appellee's title rests, was issued to the railroad company.

The subject of grants of land to aid in constructing works of internal improvement was fully considered at the present term, in Leavenworth, Lawrence and Galveston Railroad Company *v.* The United States. (8 CHICAGO LEGAL NEWS, 265.)

We held that they attached only to so much of our national domain as might be sold or otherwise disposed of, and that they did not embrace tracts reserved by competent authority for any purpose or in any manner, although no exception of them was made in the grants themselves. Our decision confined a grant of every alternate section of "land" to such whereto the complete title was absolutely vested in the United States. The acts which govern this case are more explicit and leave less room for construction. The words "public lands" are habitually used in our legislation to describe such as are subject to sale or other disposal under general laws. That they were so employed in this instance is evident from the fact that to them alone could, on the location of the road, the order withdrawing lands from pre emption, private entry, and sale, apply.

The status of lands covered by a Spanish or Mexican claim, pending before the tribunals charged with the duty of adjudicating it, must be determined by the condition of things which existed in California at the time it was ceded, and by our subsequent legislation. The rights of private property were not impaired by the change of sovereignty and jurisdiction. They were fully secured by the law of nations, as well as by treaty stipulation. The country, although sparsely populated, was dotted over with land claims. Without our establishing a tribunal clothed with full authority to examine and decide them, their extent and validity could not be determined. It had been the practice of Mexico, to grant large tracts to individuals, sometimes as a reward for meritorious public services, but generally with a view to invite emigration, and promote the settlement of her vacant territory. Exact information in regard to them, although indispensable, could hardly be obtained during the eager search for gold which prevailed soon after we acquired California. It was not until 1851 that our government undertook to discharge the obligation it assumed, to adjust the property rights arising under Mexican or Spanish grants. The act of March 3, of that year, created a commission to pass upon them, and allowed two years from that date within which to present claims. Prior to, or during this period, as an extension of our land system to California would have produced the utmost confusion in title to real estate, it was wisely withheld by Congress until such claims should be presented, or be barred by lapse of time. The act declared that all lands, the claims to which should not have been presented within said two years should "be deemed, held, and considered to be a part of the public domain of the United States." This was notice to all the world that lands in California were held in reserve to afford a reasonable time for asserting rights thereto before a tribunal authorized to take cognizance of them. The claimant was not concluded by an adverse decision of the commission, but was entitled to have it reviewed by the district court, with a right of ultimate appeal to the Supreme Court. If he, however, neglected to take, within the time prescribed by the statute, the proper steps to obtain such review, the decision was thereby rendered final and conclusive. The lands then fell into the category of public lands. The same remark will apply to the judgment of the district court; but if he prosecuted his appeal to the tribunal of last resort, the lands retained their original character in all the successive stages of the cause, and they were regarded as forming a part of our national domain only after the claim covering them had been "finally decided to be invalid."

A failure, therefore, to present the claim within the required time, or a rejection of it either by the commission or by the district court, without seeking to obtain a review of their respective decisions, or by this court, rendered it unnecessary to reserve the claimed lands from settlement and appropriation. They then became public in the just meaning of that term, and were subject to the disposing power of Congress.

This is, in our opinion, the true interpretation of the act of 1851. In view of the circumstances which then existed, the intention of Congress cannot be mistaken.

It may be said that the whole of California was part of our domain, as the United States acquired it by treaty and asserted dominion over it. The obvious answer is that the ownership of so much of the soil as was vested in individual proprietorship did not pass to them. They took the remaining lands, subject to all the equitable rights of private property therein which existed at the time of the transfer. Claims, whether grounded upon an inchoate or a perfected title, were to be ascertained and adequately protected. This duty, injoined by a sense of natural justice and by treaty obligations, could only be discharged by prohibiting intrusion upon the claimed lands until an opportunity was afforded the parties in interest for a judicial hearing and determination. It was to be expected that during that time of feverish speculation in California, unfounded and fraudulent claims would be presented for confirmation. There was no way of separating them from those which were valid without investigation by a competent tribunal, and Congress, therefore, shaped our legislation so that all lands to which a claim attached should, until it was barred or passed upon, be excluded from any mode of acquiring them.

Until recently, this view of the act of 1851 was adopted by the Interior Department upon the advice of the law officers of the government, (Opinions of Att'y-Gen'l, vol. 11, p. 493; *Id.*, 13, p. 388,) and it was, at least by implication, sanctioned by this court in *Frisbie* v. *Whitney* (9 Wallace, 187). No subsequent legislation conflicts with it. On the contrary, the excepting words in the sixth section of the act of March 3, 1853, introducing the land system into California (10 Stats., 246), clearly denote that Congress did not treat lands in the condition that these were at the time of the location of the road, as a part of the public domain. They were not in a condition to be acquired by individuals or granted to corporations. This section expressly excludes from pre-emption and sale all lands claimed under any foreign grant or title. It is said that this means "lawfully" claimed; but there is no authority to import a word into a statute in order to change its meaning. Congress did not prejudge any claim to be unlawful, but submitted them all for adjudication. Besides the act of March 3, 1853, which submitted to settlement and purchase the lands released by the operation of the previous law of 1851, there was a general law (*Id.*, 244) passed on the same day which conferred upon a settler on lands theretofore reserved on account of claims under foreign grants, which had been, or should thereafter be, declared by the Supreme Court to be invalid, the rights granted by the pre-emption law, after the lands should have been released from reservation—a class of lands which it had been the policy of the government to reserve until all claims thereto of that character had been adjusted.—(See Act of 1811, 2 Stat., p. 664-5, sec. 6 and 10.) This authorized right of pre-emption so conferred, clearly implies that no rights previously attached to lands by reason of their settlement and cultivation prior to the rejection of such claims.

It is unnecessary to dwell longer upon this question or to review subsequent statutes touching the government lands in California. It suffices to say, that there is nothing in any of them which weakens the construction we have given to the act of 1851. This controversy depends upon that act and the Pacific Railroad Act which we have cited.

The appellee invokes the doctrine that judgments of a court during a term are, by relation, considered as having been rendered on the first day thereof. There is a fiction of law that a term consists of but one day; but such a fiction is only tolerated by the courts for the purpose of justice.—(*Gibson* v. *Chouteau*, 13 Wallace, 92). To antedate the rejection of a claim, so as to render operative a grant which would be otherwise without effect, does not promote the ends of justice and cannot be sanctioned.

As the premises in controversy were not public lands, either at the date of the grant or of their withdrawal, it follows that they did not pass to the railroad company.

The decree of the Circuit Court is reversed and the case remanded to that court with directions to dismiss the bill.

Mr. Justice FIELD dissenting.

I am not able to agree with the majority of the court in this case. The only lands excepted by Congress from its grant to the Western Pacific Railroad Company, consisted of sections within certain limits, which at the time the line of the road was definitely fixed, had been "sold, reserved, or otherwise disposed of by the United States," or to which a pre-emption or homestead claim had then attached. The exception was intended to keep the public lands open to settlement and sale until the line of the road was established. I cannot understand how the presentation of a fraudulent claim to any portion of the lands within the limits designated, founded upon an invalid or forged Mexican grant, could change the character of the sections as public lands, or impair the title of the company, or have any other effect than to subject the company to the annoyance and expense of exposing and defeating the claim. Nor can I perceive the bearing upon the case of the act of March 3d, 1853, "to extend pre-emption rights to certain lands therein mentioned;" for that act applies only to pre-emption rights, and by its terms is limited to lands *previously* reserved.

I think the judgment of the court below should be affirmed; and Mr. Justice Strong concurs with me in this opinion.

UNITED STATES SUPREME COURT.

OCTOBER TERM, 1875.

HENRIETTA HOFFMAN, Appellant,
v.
JOHN HANCOCK MUTUAL LIFE INS. CO.

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

An agent can only bind the company by acts done in the way usual in the line of business in which he is acting.

The acceptance of a horse in part payment of a life premium by the agent, was *ultra vires*, and did not constitute a valid contract, binding the company.

Decree affirmed.

Opinion by SWAYNE, J. There is a direct conflict in the testimony of the two principal witnesses in this case, and the discrepancies are irreconcilable. According to our view, the case must turn upon the application of legal principles to facts about which there is no controversy. An elaborate examination of the testimony is therefore unnecessary. A brief statement will be sufficient for the purposes of this opinion.

Justin E. Thayer was the general agent of the appellee at Cleveland, Ohio. He was authorized to appoint sub-agents, and on the 7th of April, 1869, appointed A. C. Goodwin such agent. This arrangement continued until the 7th of June, 1869. It was then put an end to by the parties, and they agreed that thereafter, Goodwin should act as an insurance broker, and that he should receive for such applications as he might bring to Thayer, thirty per cent. of the first premium paid for the insurance.

On the 7th of August, 1869, Goodwin gave to Frederick Hoffman a receipt, signed by Goodwin as agent, setting forth that he had received from Hoffman $922.57, "being the first annual premium on an insurance of eight thousand dollars on the life of Frederick Hoffman, for which an application is this day made to the John Hancock Mutual Life Insurance Company, of Boston. The said insurance to date from August 7th, 1869, subject to the conditions and agreements of the policies of said company, and provided that the said application shall be accepted by the said company and a policy be by them granted thereon. The said policy, if issued, to be delivered by me when received to the holder of this receipt, which shall then be given up. It is expressly agreed and understood that if the above mentioned application shall be declined by the said company, it shall be deemed that no insurance has been created by this receipt, but the amount above receipted shall be returned to the holder of this receipt, which shall then be given up."

The amount of the premium specified was paid by Hoffman to Goodwin, as follows:

A horse valued at . . .	$400 00
A sixty day note to Goodwin,	100 00
A canceled debt owing by Goodwin to Hoffman, ...	53 57
A premium note of	369 00
	$922 57

Goodwin reported the application to Thayer, but said nothing of the receipt. Thayer forwarded the application, and in due time received the policy. Some time afterward Hoffman called for the policy. Thayer demanded the premium. Hoffman refused to pay it, and produced Goodwin's receipt. Thayer then, for the first time, learned the existence of the receipt and the particulars of the alleged payment of the premium. He refused to ratify the transaction.

Ineffectual attempts were made to sell the horse. Finally Thayer, to save trouble to his company, offered, if Hoffman would take back the horse and pay in its stead $250 to the company, the transaction should be closed and the policy be delivered. This Hoffman refused to do, and sued the company in the Court of Common Pleas of Cuyahoga County for what he had delivered to Goodwin. A verdict was found for the defendant. He took a new trial under the statute of Ohio. Upon the re trial a verdict was rendered in his favor. The defendant moved for a new trial, which was granted. The suit abated by his death, and was not revived. Thereupon his widow, Henrietta Hoffman, filed this bill. It prayed that the company should be compelled to deliver the policy to her and to pay the amount of the insurance money specified. The policy was upon what is known as the "endowment plan." It provided that the amount insured should be paid to Hoffman at the end of ten years, or to his wife in the event of his death in the meantime. No part of what was paid by Hoffman to Goodwin ever came into the hands of Thayer or the company, or inured in any wise to the benefit of either.

Goodwin testified that his share of the premium was "two hundred and seventy-six dollars and some cents," and further, that Thayer assented to the transaction in advance, and with full knowledge of the facts ratified it subsequently.

If it be admitted that the facts as to the assent and ratification by Thayer are as stated by Goodwin—a concession by no means warranted, in our judgment, by the state of the evidence—the question arises, what is the legal result?

Agencies are special, general and universal. Story's Agency, sec. 21. Within the sphere of the authority conferred, the act of the agent is as binding upon the principal as if it were done by the principal himself. But it is an elementary principle, applicable alike to all kinds of agency, that whatever an agent does can be done only in the way usual in the line of business in which he is acting. There is an implication to this effect arising from the nature of his employment, and it is as effectual as if it had been expressed in the most formal terms. It is present whenever his authority is called into activity, and prescribes the manner as well as the limit of its exercise. Upton *v.* Suffolk Co. Mills, 11 Cush., 586; Jones *v.* Warner, 11 Conn., 48; Story's Agency, sec. 60, and note; 3 Chitt. Law of Com. & Manuf., 199; U. S. *v.* Babbitt, 1 Black, 61; 1 Parsons on Contracts, 4th ed., pp. 41, 42.

Life insurance is a cash business. Its disbursements are all in money, and its receipts must necessarily be in the same

medium. This is the universal usage and rule of all such companies.

Goodwin had settled his own debt to Hoffman of $53.57, and had appropriated to himself Hoffman's note of $100.

If he had the right to take his percentage in such way as he might think proper, this did not justify his taking the horse at $400 Nor, if Thayer had expressly agreed to take the horse in payment of the premium *pro tanto*, could that have given validity to the transaction. If the agent had authority to take the horse in question he could have taken other horses from Hoffman, and have taken them in all cases. This would have carried with it the right to establish a stable, employ hands, and do everything else necessary to take care of the horses until they could be sold. The company might thus have found itself carrying on a business alien to its charter, and in which it had never thought of embarking.

The exercise of such a power by the agent was liable to two objections. It was *ultra vires*, and it was a fraud as respects the company. Hoffman must have known that neither Goodwin nor Thayer had any authority to enter into such an arrangement, and he was a party to the fraud. No valid contract as to the company could arise from such a transaction. This objection is fatal to the appellant's case.

It is insisted by the counsel for the appellee that Hoffman, by the bringing of his action at law, repudiated and rescinded the contract, if there was one, and that the appellant is thereby estopped from maintaining this bill. Authorities are cited in support of this proposition. Herrington *v.* Hubbard, 2 Illinois, 569; Dalton *v.* Bently, 15 ib., 420; Smith *v.* Smith, 19 ib., 319; Cooper *v* Brown, 2 McLean, 495; Williams *v.* Washington Life Ins.Co.,4 Big.Life & Acc.Ins. Rep.56.

As the point already determined is conclusive of the case, it is unnecessary to consider this subject.

The decree of the Circuit Court is affirmed.

OUR thanks are due JOHN J. ALLEN, of the Brooklyn,N. Y., bar, for the following opinion:

U. S. DISTRICT COURT, E. DIST. OF NEW YORK.

OPINION FILED APRIL 11, 1876.

In re the PETITION OF H. B. TITUS for a *Habeas Corpus.*

THE LAWS RELATING TO THE EXTRADITION OF FUGITIVES FROM ONE STATE TO ANOTHER.

On November 7th, the Governor of Arkansas commissioned the petitioner to present to the Governor of New York, his requisition for the surrender of McDonald, a fugitive from justice, together with a copy of the indictment. The petitioner presented the requisition to the Governor of New York, who issued his mandate to the sheriff of Kings county, directing the arrest of McDonald, and his delivery to the petitioner. The sheriff arrested McDonald for the purpose of delivering him to the petitioner, but before he could make such delivery he was released from his custody on *habeas corpus*, issued by a State judge. After being so released, McDonald brought an action for malicious prosecution, in the State court, against the petitioner, who was arrested in such action, and now makes this application for a *habeas corpus* to be discharged from custody. *Held*,

1. That this is a case in which a judge of a United States Court has a right to grant a writ of *habeas corpus*.
2. That acts performed in and about the surrender of fugitives from justice, are acts done in pursuance of the laws of the United States.
3. That the petitioner, who was a mere messenger of the Governor of Arkansas, was not bound to look into the indictment and determine whether it charged a crime within the meaning of the United States statutes.
4. That the petitioner has done no more than is prescribed to be done by the laws of the United States, acting under the direction of the executive, who, by the law, was authorized to give such a direction.
5. No personal liability was therefore incurred by the petitioner, nor is the case changed by the allegation that the motives actuating the petitioner were malicious.—[ED. LEGAL NEWS.]

BENEDICT, J.—The petitioner, H. B. Titus, presents his petition for a writ of *habeas corpus* directed to the sheriff of the county of Kings, to the end that he may be discharged from the custody of such sheriff. The facts upon which the petitioner bases his demand for a discharge are as follows:

On the 7th day of November, the governor of the State of Arkansas commissioned the petitioner to present to the governer of the State of New York the requisition of the governor of Arkansas for the surrender of a fugitive from justice from the State of Arkansas, named Augustine R. McDonald, together with a duly authenticated copy of an indictment found against the said McDonald by the grand jury of Ashley county, Arkansas. In pursuance of his commission and the instructions of the governor of the State of Arkansas, the petitioner as such agent presented said requisition, together with said authenticated indictment to the governor of the State of New York, who thereupon issued to the sheriff of the county of Kings, his mandate directing the arrest of McDonald, and his delivery to the petitioner, the agent of the State of Arkansas, duly commissioned and authorized to receive said fugitive, in accordance with the laws of the United States in such case made and provided. The sheriff of Kings county, on receipt of the mandate of the governor, arrested McDonald for the purpose of delivering him to the petitioner in accordance with the terms of the mandate, but before such delivery was made the fugitive was released from the custody of the sheriff upon *habeas corpus* issued by a justice of the Supreme Court of the State of New York. After being so released McDonald brought an action for malicious prosecution against the petitioner, and obtained from the Supreme Court of the State an order for his arrest, in pursuance whereof he is now held in custody by the sheriff of Kings county. Being so detained in custody, he presents his petition to this court, setting forth the above facts, and claims his discharge at the hands of this court upon the ground that he is detained in custody by reason of acts committed by him in pursuance of the laws of the United States, and which are justified by such laws. Notice of the application having been given to the attorneys for McDonald, at whose suit the petitioner is imprisoned, they have appeared and, in opposition to the petition, deny the jurisdiction of this court to issue the writ of *habeas corpus*, upon the ground that the acts of the petitioner, which were the foundation of the action against him, are not acts done in pursuance of any law of the United States, and the further ground that the indictment presented to the governor of the State of New York, and upon which he issued his mandate to the sheriff, does not charge any crime of which the grand jury of Ashley county, Arkansas, could take cognizance; whence it is contended that all the proceedings toward the surrender of McDonald were void, and afford no justification for the petitioner, and no foundation for the interposition of this court. By the Constitution of the United States the whole subject of interstate extradition is remitted to the cognizance of the general government. This jurisdiction of the government of the United States is exclusive. (Prigg *v.* Commonwealth of Penn., 16 Pet., p. 622.) The act of 1793, now section 5,278 of the Revised Statutes of the United States, provides the method by which such extradition is to be accomplished. That statute authorizes the Executive authority of any State from which a fugitive from justice may have fled, to demand his return of the executive authority of the State to which such person has fled, upon producing to such executive a copy of an indictment found, or an affidavit made before a magistrate of the State, charging the person demanded with having committed treason, felony, or other crime, such indictment or affidavit to be certified as authentic by the governor or chief magistrate of the State from which the person so charged has fled. Upon receipt of the requisition and certified indictment, the executive authority of the State to which such person has fled, is authorized to cause him to be arrested and secured, and to cause notice of the arrest to be given to the executive authority making the demand, or to the agent of such authority appointed to receive the fugitive, and to cause the fugitive to be delivered to such agent when he shall appear.

The peititon and accompanying documents disclose plainly that the only acts charged upon the petitioner, and because of which he is arrested, are acts performed by him as the agent appointed by the Executive of the State of Arkansas, in pursuance of the commission issued to him by such Governor, which acts are those prescribed by act of 1793, as above stated.

The case of the petitioner, therefore, is that of a ministerial officer acting within the scope of an authority conferred upon him by the Governor of a State by virtue of the provisions of the act of 1793, who, being held in custody by reason of such acts, applies for his discharge from such custody by virtue of the provisions of law found in Chapter 13, Title 13 of the United States Revised Statutes.

Those provisions of law make it the duty of the Judges of the Courts of the United States, within their respective jurisdictions, to grant writs of *habeas corpus* for the purpose of inquiring into the cause of restraint of liberty where a prisoner is "in custody for an act done or omitted in pursuance of a law of the United States." (Sec. 753, U. S. Revised Statutes.)

The question, therefore, is whether the petitioner is in custody for acts intended to be covered by Section 753 of the Revised Statutes of the United States.

It is contended in opposition to the petition that acts performed in and about the surrender of fugitives from justice are not acts done in pursuance of the laws of the United States, but are the acts of a Governor of a State done in discharge of his duty to the State, and not otherwise. Reliance is placed upon the case of "Commonwealth of Kentucky vs. Dennison." (24 How., p. 66), for this position. But I do not find the position to be supported by the authority referred to, nor do I consider it tenable on principle. The case of "Kentucky vs. Dennison" simply decides that the Supreme Court of the United States has no power to issue a mandamus to compel the Governor of a State to cause the surrender of a fugitive when demanded by the Executive of the State from which he has fled. The question here raised could not arise in that case, for the reason that in that case the Governor of Ohio refused to act at all. Here the Governors respectively have acted, and the acts performed are those required by the laws of the United States to be performed. It seems clear that the authority exercised is an authority conferred by the laws of the United States and by no other laws. The Supreme Court of the United States in "Prigg vs. Commonwealth of Pennsylvania," when speaking of the act of 1793, say "as to the authority so conferred upon State magistrates, while a difference of opinion has existed and may exist still, on the point in different States, whether State magistrates are bound to act under it—none is entertained by this Court, that State magistrates may, if they choose, exercise that authority, unless prohibited by State legislation." So in "Kentucky vs. Dennison," where it was argued that the act of 1793 must be held to speak only to State authorities, and to leave its execution wholly to the authorities of the States themselves and therefore to be void, the Supreme Court maintaining the validity of the act, declares that the act makes it the duty of the State Executive to cause a fugitive from justice to be delivered up, and that "as the duty of the Governor of the State where the fugitive was found, is in such cases merely ministerial without the right to exercise either executive or judicial discretion, he could not lawfully issue a warrant to arrest an individual without a law of the State or Congress to authorize it."

There are no laws of the State to authorize the acts specified in the act of Congress. The Governors and their agents are compelled therefore to rely upon the statute of the United States for authority to do the acts required thereby, and the statute of the United States affords them justification. It seems impossible, therefore, to hold that when they so act they act otherwise than in pursuance of a law of the United States. In so acting they but discharge an absolute obligation created by a law of the United States, which they are bound to perform and for which there is no other law, and their acts are none the less acts done in pursuance of a law of the United States, because, as decided in Kentucky *v.* Dennison, there is no power in the General Government to use coercive measures to compel performance.

This view of the scope of section 753 appears to be in harmony with the object of the statute which plainly is intended to afford to all persons arrested for acts done in discharge of obligations to the United States, and arising under the constitution and laws thereof, a summary method of obtaining release from unjust imprisonment. Certainly those are entitled to such protection and clearly within the spirit of the act who, in conformity with a law of the United States, exercise that portion of the delicate and important power in respect to fugitives from justice granted by the constitution to the National Government, which has been called into operation by the act of 1793—a power of necessity belonging to the National Government, but which operates largely, if not exclusively, in the interest of harmony between the States.

Entertaining these views, which find support in the case of Smith (3d Mahon, p. 131), I am bound to hold that the petitioner is entitled to require of this court a writ of *habeas corpus*, to the end that an inquiry be had into the causes of the restraint of his liberty.

A further question presented by the petition has been discussed upon this motion, and may here be decided. It arises out of the matter charged in the indictment which accompanied the requisition of the governor of Arkansas, and discloses the judicial proceeding in Arkansas upon which the surrender of the fugitive was demanded.

The contention upon the indictment is that it is an indictment found by the Grand Jury of Ashley county, Arkansas, and undertakes to charge McDonald with a crime not cognizable by any Court of the State of Arkansas, the charge being subornation of perjury committed within such State in procuring one Martin to commit willful perjury within said State before a United States Commissioner in a deposition taken by such commissioner to be used in an action then pending between said McDonald and the United States.

This indictment, it is said, is void, because it charges no crime within the jurisdiction of a grand jury of the State of Arkansas, and renders all the proceedings taken in regard to the surrender of the fugitive void; whence, it is concluded, that the acts performed by the petitioner cannot be held to be acts done in pursuance of a law of the United States.

But I cannot accede to this view. If it be true that it is competent for this court to look into the indictment transmitted by the governor of Arkansas and authenticated by him, and if this court can be called upon to determine whether a crime has been charged therein in the manner required by the laws of the State of Arkansas, and whether as matter of law subornation of perjury committed within the State of Arkansas can by the laws of the State of Arkansas be made an offense against the laws of that State, when the perjury is committed before a United States commissioner in a deposition taken to be used in a court of the United Slates. Still it cannot be that the petitioner, who is simply a messenger of the governor of the State of Arkansas, and who is not alleged to have done otherwise than is required by his commission, was bound to look into the indictment and required at his peril to determine whether it charged a crime within the meaning of the laws of the United States. The petitioner did not arrest the fugitive nor demand his arrest. The arrest was made by direction of the governor of the State of New York upon the demand of the governor of Arkansas. And if there can be said to have been anything done by the petitioner in respect to the arrest of the fugitive which could render him liable in an action for malicious prosecution, his acts are plainly ministerial, and he is justified therefor by the directions of the governor.

The jurisdiction of the executive of the State over the subject matter is clear, and the petitioner has done no more than is prescribed to be done by the laws of the United States, acting under the direction of the Executive, who by the same law was authorized to give such direction. No personal liability was therefore incurred.

Nor is the case changed by the allegation that the motives actuating the petitioner were malicious. So long as the acts done were within the scope of the authority conferred upon him, and justified by the laws of the United States, it matters not what feelings the petitioner entertained toward the fugitive, nor what result he hoped would follow from the action taken by the governor of the State.

My determination therefore is, that the petitioner is entitled to his writ of *habeas corpus* as prayed for.

For the petitioner, John J. Allen, esq.; opposed, Algernon S. Sullivan and ex-Judge Ray.

CHICAGO LEGAL NEWS.

Lex vincit.

MYRA BRADWELL, Editor.

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We call attention to the following opinions, reported at length in this issue:

Authority of Agent—Right to Fill Blanks in Note—Effect of Erasing what is Written or Printed in a Note.—The opinion of the Supreme Court of the United States, by Clifford, J., holding that persons dealing with an agent are entitled to the same protection as if dealing with the principal, to the extent that the agent acts within the scope of his authority; that where a party to a negotiable instrument entrusts it to another for use as such, with blanks not filled up, such instrument, so delivered, carries on its face an implied authority to complete the same by filling up the blanks; but the authority implied from the existence of the blanks, would not authorize the person entrusted with the instrument to vary or alter the material terms of the instrument, by erasing what is written or printed as part of the same, nor to pervert the scope and meaning of the same by filling the blanks with stipulations repugnant to what was plainly and clearly expressed in the instrument before it was delivered; that when one entrusted with negotiable securities for use by the parties to them, may, if they contain blanks, fill the same; but if he materially change words which are printed or written, the note, by such change, would be rendered invalid. This opinion is of more than usual interest to bankers and commercial men.

Land Grants—Mexican or Spanish Claims.—The opinion of the Supreme Court of the United States by Davis, J., construing the law relating to land grants by the general government, in aid of internal improvements, and Mexican or Spanish claims.

Insurance Agent no Authority to Take a Horse for Premium.—The opinion of the Supreme Court of the United States, by Swayne J., holding that an insurance agent can only bind the company by acts done in the usual way in the line of business in which he is acting; that the acceptance of a horse in part payment of a life premium by the agent was *ultra vires*, and did not constitute a valid contract, and did not bind the company. Courts have gone to the very verge of the law in not holding insurance companies liable for the acts of their agents. If an insurance company send an agent out to solicit insurance and deliver policies, and he takes a horse in payment instead of money, the company or the agent ought to stand the loss, if there is any, and not the farmer. If a farmer sent his hired man to the city with a load of wheat, with instructions to sell it for cash, and he sold it to an insurance company and took a policy of insurance on the farmer's property at the usual rates in payment, no court would relieve the farmer from the acts of his agent.

Extradition of Fugitives from Justice—Liability of Messenger.—The opinion of the United States District Court, for the Eastern District of New York, by Benedict, J., where the Governor of Arkansas commissioned one Titus to present his requisition for the surrender of one McDonald, a fugitive from justice, to the Governor of New York, and Titus presented the requisition to the Governor of New York, who issued his mandate to the sheriff of Kings county, directing the arrest of McDonald and his delivery to Titus. The sheriff arrested McDonald for the purpose of delivering him to Titus, but before he could make such delivery, McDonald was released from his custody on a *habeas corpus*, issued by the judge of a State court. After being released, McDonald brought an action in a State court, against Titus, for malicious prosecution, who was arrested in such action. *Held*, that the Federal judge had power to issue a writ of *habeas corpus*, and to discharge him from such arrest; that Titus was the mere messenger of the Governor, and could not be made liable for following the directions of the requisition; that he was not bound to look into the copy of the indictment which accompanied the requisition, to determine whether a crime had been charged within the meaning of the United States statutes; that if the messenger acted through malicious motives, it would not change his liability. There are several novel and interesting questions decided in this opinion.

Controversies Between Foreign Seamen on Foreign Ships.—The opinion of the United States District court for the district of Louisiana by Billings, J., holding that the limitation in the acts of congress allowing the arrest of the defendant on mesne or final process, issuing out of the courts of the United States, only in cases, in which the courts of the State in which the United States courts sit could cause arrests, applies to the admiralty as well as to the common law process. The court also defines the jurisdiction of the United States courts in controversies between foreign seamen on foreign ships.

Raised Check.—The opinion of the Supreme Court of Louisiana, upon the liability of a bank to pay a raised certified check.

Rights of Persons of Color in Theatres.—The opinion of the Supreme Court of Louisiana, by Ludeling, C. J., in a case where a colored man recovered, in the court below, $5,000 for being ejected from a theatre on account of his color and the Supreme Court reduced the judgment to $300.

THE STATE CONVENTION.

The Republican State Convention met at Springfield on Wednesday and nominated a full ticket. S. M. Cullom was nominated for Governor. He has served three terms in the House of Representatives of the State, and was twice elected Speaker of the House. He has also served the State in the House of Representatives at Washington. Mr. Cullom is popular with the people of the State. For years he has been in the habit of giving annual parties at his residence at Springfield. These parties have been attended by more people than any others at the Capital, and were an evidence of the good feeling of the people of the State toward Mr. Cullom.

Andrew Shuman, the editor of the Chicago Evening Journal of this city, received the nomination for Lieutenant Governor. Mr. Shuman is well known by the people of the State. He is in favor of good laws, good government, and an honest administration of public affairs, and, should the ticket upon which he has been nominated be successful, he will make an excellent officer.

The convention endorsed the official action of Attorney General Edsall by renominating him. He has made an excellent law officer for the State, and it is no disparagement to the able lawyers that contended with him for the nomination that they were not selected.

George H. Harlow, the present Secretary of State, received a re-nomination. He has made an excellent and obliging officer. The books and papers of the State have been kept in an orderly and careful manner, and the business of the Secretary's office transacted with accuracy and despatch.

City Matters.—Mayor Hoyne, who was elected Mayor at the late city election, has been recognized as the Mayor of the city by the council, and presides at its meetings, and performs the duties of the office. He has removed the Comptroller, City Marshal, Building Inspector, etc. Mayor Colvin still claims to be Mayor, and has sued out a *quo warranto* to test the legality of Mayor Hoyne's election. From the way Mr. Hoyne is exercising the duties of the office, it is evident he is not afraid to take the responsibility when he thinks the interests of the city require prompt action. It is to be regretted that the law has been so carelessly drawn that two persons should claim to be Mayor of the city at the same time, and find lawyers who advocate the claims of both, believing they are right. Mr. Hoyne is an old citizen of Chicago, and has the interests of the city at heart. He is an able, positive man, and has for years been one of the leading members of the bar. He will administer the affairs of the city as he would his own.

Samuel J. Frost was executed on yesterday at the county jail in Worcester, Mass., for the murder of his wife's brother, Franklin P. Toune, on the fourth of July, 1875, in a barn. When the drop fell, a terrible scene was enacted. The fall was so great that the head of Frost was jerked from his body, and hung in the rope which had been the means of taking the life of the unfortunate man. Such scenes as this are enough to convince any one, if the lives of human beings are to be taken by sentence of the law, there should be some improvement in the manner of the execution of the sentence.

The execution of Thomas A. Piper, formerly the sexton of the Warren Avenue Baptist Church, in Boston, took place at the Charles street jail, in that city, on yesterday. Piper was convicted last February, on his second trial, of the murder of Mabel Young, aged only five years, in the tower of the church on the 23d of May, 1875. The circumstances connected with the murder were the most revolting. Such was the feeling against the criminal, that when it was announced from the jail that the execution had taken place, the crowd outside gave round after round of applause.

The great trial of Ex-Collector Munn, before Judge Blodgett and a jury, for conspiracy to defraud the Government, has resulted in a verdict of not guilty.

On Wednesday, B. W. Parks, the father-in-law of Col. R. G. Ingersoll, was buried in Springdale. At the grave, Col. Ingersoll said: "With morn, with noon, with night, with changing clouds and changeless stars; with grass, with trees and birds, with leaf and bud, with flowers and blossoming vine, with all the sweet influences of nature, we leave our dead."

Recent Publications.

Abridgment of Elementary Law; Embodying the General Principles, Rules and Definitions of Law, together with the Common Maxims and Rules of Equity Jurisprudence as stated in the Standard Commentaries of the leading English and American authors; embracing the subjects contained in a regular law course; collected and arranged so as to be more easily acquired by Students, comprehended by justices, and readily reviewed by young practitioners. By M E. Dunlap, counselor-at-law. St. Louis: Soule, Thomas & Wentworth, 1876.

This is a volume of 425 pages. It is designed to aid students in their course by presenting to them, in a condensed form, pruned of all redundancies, the leading and important principles, rules, and definitions of law as laid down in the standard elementary works. It contains the pith of the important branches of the law student's course, collected from Blackstone's Commentaries and leading authors on Evidence, Contracts, Pleading and Equity. The author says the work is not intended as a substitute for text-books, but simply to lighten the labors and shorten the work of the student when he shall have carefully read the whole course, and commenced his review preparatory to final examination for the bar. This is the second edition of the work.

Obituary.

Hiram M. Chase, a member of the Chicago bar, and one of the Masters in Chancery of the Circuit Court, died at his residence on the 23rd inst., after a protracted illness. Mr. Chase was born in Essex county, New York, in 1831, and was admitted to the bar of old Essex in 1853. He read law with Judge Simmons, of Keyesville. Mr. Chase fitted himself so thoroughly for the bar that he achieved success very soon after entering the profession, and became the law partner of Samuel Ames of Keyesville, a lawyer of great ability. In 1856, he was elected State's Attorney of Essex county, and was re-elected in 1858. He gave universal satisfaction to the people of his county, and discharged the duties of his offices with fidelity to the people, and with marked ability.

In 1860, at the close of his second term as Prosecuting Attorney, he moved to Chicago, where he has since resided, with the exception of a short time, he resided in Lexington, Mo., where he went to regain his failing health.

He was Master in Chancery of the Recorder's Court of this city until that court was abolished by the new Constitution; and upon the remodeling of the courts he was appointed one of the Masters in Chancery of the Circuit Court, which position he held up to the time of his death. He was at one time the senior member of the law firm of Chase, Sawin & Munson, and then of Chase, Storrs & Munson, and afterwards of Chase & Munson. As a Master in Chancery, he gave universal satisfaction to the bar, and possessed the confidence of the judges; as a lawyer, he was able and ever faithful to the interests of his clients; as a man he was kind hearted, courteous, and generous. He was respected by all who knew him. He had been for a number of years prior to his death one of the leading elders in the Westminster Presbyterian Church.

Mr. Chase leaves a wife and only daughter to mourn the loss of a faithful husband and an affectionate father. Mrs. Chase has our sympathy, as she has that of all her friends and acquaintances.

U. S. DISTRICT COURT, DISTRICT OF LOUISIANA.

OPINION, APRIL, 1876.

JURISDICTION OF UNITED STATES COURTS IN CONTROVERSIES BETWEEN FOREIGN SEAMEN ON FOREIGN SHIPS.

ANTHONY FRY *v.* LLEWELLYN COOK, ET ALS.—IN ADMIRALTY.

The limitation in the acts of the Congress allowing arrest of the defendant on mesne or final process, issuing out of the courts of the United States, only in cases in which the courts of the State in which the United States courts sit could cause arrests, applies to the Admiralty as well as to the Common Law processes.

When a suit is brought by a foreign seaman against the ship of a friendly foreign government, or its officers, growing out of a round voyage to and from the ports of such government which the libellant contracted to make, in the midst of such voyage, and when there has been no discharge of the seaman, or termination of the voyage, or brutality on the part of the officers, and the resident consul of such friendly government protests, the courts of the United States are bound by the comity between nations to decline to exercise jurisdiction.—*The Louisiana Law Journal.*

Opinion by BILLINGS, J.

This is an action brought to recover damages for assault and battery alleged to have been committed on the high seas. An order of arrest was at first issued, which, on argument, was vacated on the grounds that the statutes of the United States and the rules of the Supreme Court allowed an arrest by virtue of a process from a court of the United States only in cases in which an arrest authorized by the laws of the State in which such court was sitting; that this limitation applied to admiralty as well as to common law processes; and that, according to the laws of the State of Louisiana, the body of a non-resident could not be taken on any mesne process, unless he was an absconding debtor.

The case is now before me on an exception to the exercise of jurisdiction on the part of this court. I had directed testimony to be taken summarily before the commissioner on the merits, so that all the facts are before me. The question is, ought this court, from a regard to the commerce of a friendly government, to refrain from granting relief.

It appears that the libellant is a foreigner and a seamen on a British vessel, upon which the beating is alleged to have been inflicted, he having shipped in Liverpool for the round voyage to this country and back, and upon that voyage, and having arrived at the port of New Orleans; that the defendants are all British subjects.

The British Consul, resident at this port, having been notified, came before me and remonstrated against this court taking cognizance of the cause.

Independently of the considerations which arise from the nationality of the parties and vessel, the weight of evidence is against the libellant. But as these considerations have been so fully and ably presented, I will avail myself of the aid which the proctors have rendered, and state my conclusion, as to the duty of courts in interfering or withholding jurisdiction in such cases.

It is undoubtedly true, as a general proposition, that an action for a personal tort follows the person, and may be brought in any foreign court.

It is also true that the courts of a nation are established and maintained for the convenience of its own citizens or subjects, and if foreigners are permitted to become actors therein, it is because of what is termed comity between nations. American Law Review, vol. 7, p. 417, and Daniel Webster's Works (Everett's edition), vol. 6, pp. 117 and 118.

The only ground upon which a foreigner could urge a claim to become a libellant in our courts, would be, that it was by comity due his government that its subject should be thus heard; and so far as this claim could be considered as a right, it could be insisted on only by that government, and except in cases of inhumanity or gross injustice, would disappear whenever the claimant's government took a position against it.

There is in this case no circumstance—such as the unwarranted termination of the voyage, the discharge of a seaman, or brutality—which might possibly constitute a proper ground for the interposition of the jurisdiction of a foreign court without the request of the representative of libellant's government.

It is a suit brought by a foreigner, springing out of a voyage on the ship of a friendly nation, in the midst of that voyage, against the subjects of that nation, on account of alleged grievances. The libellant not only proposes to disconnect himself from the ship, but asks the detention of ship, officers and crew, in a foreign port, in order to settle a dispute, which can far better be settled by the tribunals of the country in which, under whose laws and in connection with whose commerce, he made his contract, and to which he agreed to return. The representative of that country asks this court not to interfere. It is urged, and that fairly, that by the very agreement of the parties, the articles of shipping, the courts of the kingdom of Great Britain have been made the forum for the settlement of this dispute; that they afford adequate redress, and that for courts to entertain this and similar suits, during a voyage which the parties had agreed to make, at intermediate points at which the vessel might touch, would impose delays which might seriously and uselessly embarrass the commerce of a friendly power.

The exercise of jurisdiction in such a case is discretionary, and, until the Congress of the United States controls the subject by legislation, is discretionary with its courts. In this case I am satisfied by reason and abundant authority that the court should decline to entertain jurisdiction.

Geinar *v.* Meyer, 2 H. Bl. 603; The Golubchhinck, 1 W. Rob., 143; Gonzales *v.* Minor, 2 Wall. p. 348; The Bercherdass Amboidass, 1 Lowell, 569; The Maggie Hammond, 9 Wall. 435; 194 Shawls, Abbotts, adm'r., 317; Gardner *v.* Thomas, 14 John, 134; Johnson *v.* Dalton, 1 Cowen, 543; and the very able article on "Suits between aliens in the courts of the United States," American Law Review, vol. 7, p. 417, from which a reference to many of the above cases was derived.

Let the libel be dismissed.

Let the suit of the same libellant against the British bark Carolina, for the same reasons be dismissed.

SUPREME COURT OF LOUISIANA.

OPINION FILED MAY 19, 1876.

PETER HELVESE *v.* HIBERNIA NATIONAL BANK.

Appeal from the Sixth District Court, Parish of Orleans.

LIABILITY UPON A RAISED CERTIFIED CHECK.

Opinion of the court: Plaintiff appeals from the judgment rejecting his demand against the defendant on a certain check for $4,150. The defense is the check was raised after it was certified, and the date was altered.

It appears the Hibernia Bank on the 2d of July, 1874, certified a check of its customer, J. Weidner, for $41. That there was a blank between the words "forty-one" and "dollars," in which the drawer inserted the words "one hundred and fifty;" that the date was changed from the 2d to the 7th of July, and that plaintiff acquired it on the 7th of July in due course of business for value; also, that Wiedner has absconded.

The bank was negligent in certifying the check without drawing a line with a pen across the blank between the words forty-one and dollars, thereby enabling the drawer to perpetrate the fraud. It is admitted that if George Soule, an expert, had been produced as a witness, he would testify, "that if a line had been drawn from these words (forty-one) to the word dollars, it would have been impossible to erase it without leaving a mark; there was no such line drawn; such a line could not have been taken out by the use of chemicals without leaving some traces of the action of the acid on the paper."

The evidence is, there was nothing in the appearance of the check to excite the suspicion of the plaintiff as a prudent man of business.

We think this case is controlled by the case of Isnard *v.* Torris and Marquis, 10 A, 103, where the indorser was held liable for a note raised from $150 to $450 under similar circumstances. The court said: "There was a want of proper caution on the part of Marquis in indorsing a note containing such a blank. This want of proper caution on his part enabled Torris to commit a fraud by filling up the blank so as to increase the amount in a manner entirely free from suspicion; and surely the equity of Marquis, whose case is certainly a hard one, is inferjor to that of Isnard, who has parted with his money on the faith of a state of things which the imprudence of Marquis enabled Torris to create. By the Law Merchant of this country the certificate of the bank that a check is good, is equivalent to acceptance." 10 Wallace, 647.

It is therefore adjudged that the judgment herein in favor of defendant be annulled, and that plaintiff recover of defendant $4,150, with legal interest from 7th July, 1874, and costs of both courts.

SUPREME COURT OF INDIANA.

From the Indianapolis Sentinel.

ASSAULT AND BATTERY—INDICTMENT FOR CONSTRUCTION OF THE STATUTE.

5567. The State *v.* Wright et al, Allen C. C. C. Affirmed. Worden, J.

Held, That an indictment for an assault and battery should allege that the unlawful touching, striking, etc., was either in a rude, insolent or angry manner. Indictments upon statutes should embrace a charge of all the particulars that enter into the statutory description of the offense, either in the language of the statute or its equivalent. (See 2 G. and H., 459, sec. 97.)

CHANGE OF GRADE OF STREET—CONSEQUENTIAL DAMAGES—CONSTRUCTION OF STATUTE (3 IND. STAT. 74, SEC. 27.)

4459. The city of Wabash *v.* Alber, Kosciusko C. C. Reversed. Downy, J.

The authorities of the incorporated town of Wabash established a grade of the streets in the town, and they were graded accordingly in 1863; in 1865 the incorporated town became a city, under the act of 1865; afterwards the city changed the grade of the streets previously fixed, cutting them down, adjoining the appellee's property, some five feet, destroying access thereto, etc.: and, in addition to this, the city assessed against the lot a portion of the cost of the charge. The question presented is: Could the city thus change the grade of the street without the payment to the appellee of the consequential damages sustained by him?

The court is of the opinion that the provision of the statute (3 Ind., stat. 74, sec. 27) which declares that "when the city authorities have once established the grade of any street, * * * such grade shall not be changed until the damages occasioned by such change have been assessed and tendered," or, does not apply to this case. The city authorities had never before established the grade of the street in question. It has been done by the town authorities. In the absence of any statutory prohibition streets in towns and cities may be changed at pleasure, and there is no liability of the corporation for consequential damages, provided the work be done in pursuance of legal authority and with reasonable skill.

INDICTMENT FOR BEING INTOXICATED IN A PUBLIC PLACE, UNDER SEC. 11, ACT OF MARCH, 1875.

5380. The State *v.* Sowers, Parke C. C. Affirmed. Petitt, J.

Held, That the private house of a gentleman, at which he holds a social party, cannot be understood to be a "public place."

INDICTMENT FOR ALLOWING A MINOR TO PLAY AT BILLIARDS, (ACTS 1873, P. 30).

4996. Donniger *v.* The State, Decatur C. C. Reversed. Worden, J.

Held, 1. That the indictment is bad in not allowing that the minor was allowed to play at the game or upon the billiard table.

Held, 2. That the indictment is defective in not stating the name of the person with whom the minor was suffered to play the same. (47 Ind. 463.)

ACTION ON THREE PROMISSORY NOTES—DURESS AS, TO MAKER—EFFECT OF, AS TO SURETY.

4287. Coffelt and Anderson *v.* Wise et al., Warren C. C. Reversed. Biddle, J.

This case turns upon the question whether the answer of appellants to the complaint was good. It was averred, substantially, that one Wiles came to the defendant, Coffelt, representing himself as a United States officer, armed with a warrant issued by the United States Court for his arrest, etc., and, producing something like a warrant, said that he would arrest him unless he (Coffelt) would give his notes with the defendant, Anderson, as surety, etc., payable to appellees, or

Held, "That when there is an arrest for improper purposes without a just cause, or when there is an arrest for a just cause but without lawful authority, or when there is an arrest for a just cause under lawful authority for unlawful purposes, it may be construed a duress;" (3 N. H., 508); or, "If a man execute a bond for fear of unlawful imprisonment, he may avoid it on the ground of duress;" (Whitfield *v.* Longfellow, 13 Maine.)

Held, 2, That a bond obtained by duress is not only void as to the principal, but also as to the surety. (15 John R. 256; 27 Alabama 44; 20 Ind. 97; 41 Ind. 312; 49 Ind. 573. That the answer therefor was good.)

EVIDENCE—HUSBAND AND WIFE.

3794. McConnell *v.* Martin and Martin, Tippecanoe, C. C. Affirmed. Downey, C. J.

STATEMENT.—This was an action by appellees against the appellant to recover possession of certain real estate. The land had been sold and conveyed to appellees, the plaintiffs, as husband and wife, and afterwards sold on execution against the husband. Appellant claims title under a sheriff's deed. It was claimed in the trial that the deed to the husband and wife was void as against creditors, the title having been conveyed in that manner to defraud creditors.

Held, That the husband could testify in his behalf and the wife in her behalf, though the evidence of each might inure to the benefit of the other, they having been deprived of the estate by entirety. (46 Ind., 1.)

OBSTRUCTING HIGHWAY—PRESUMPTION OF DEDICATION.

5151. Sullivan *v.* The State, Switzerland, C. C. Reversed. Buskirk, J.

STATEMENT.—This was a prosecution for obstructing a highway.

Held, 1, That the second instruction complained of is objectionable; by it the jury was told that if the road had been used by the public for a considerable length of time with the knowledge of the owner, a dedication might be presumed. The knowledge of the owner is not sufficient, for he may have objected and protested against its use. (See Somers *v.* The State, present term.)

Held, 2, That the other instructions complained of are not objectionable.

LICENSE TO SELL INTOXICATING LIQUORS—FORFEITURE—AGENT.

5335. Runyon *v.* The State, Marion, C. C. Reversed. Worden, J.

STATEMENT.—The appellant was indicted of the offense of selling intoxicating liquors without license. Samuel McKay had a license to sell liquor at the time and place of the sale, and McKay and appellant had a contract under which appellant was acting.

Held, That a license to sell spirituous liquors is not transferable by assignment or otherwise (5 Blackf., 151), and that a removal from the State operates as an abandonment of the license (47 Ind. 519) but while the licensee remains in the State he may carry on his business by his agent, and the agent will not be responsible, as for selling without license, (20 Ind., 116). That in this case it does not appear that the licensee had in any manner forfeited his license; and that appellant was acting as agent for McKay.

EVIDENCE—VARIANCE BETWEEN INDICTMENT AND PROOF—CHRISTIAN NAME.

5088. Choen *v.* The State, Cass, C. C. Affirmed. Worden, J.

Held, That where one is indicted for assault and battery upon one described as "George W. Shott," and the evidence shows an assault and battery upon "George Shott," there is no variance between the indictment and the proof. The law knows but one christian name. The initial letter of the middle christian name may be regarded as surplusage. (5 John., 84; 1 Hill, 102; 14 Barb., 255—307; 3 Green, 130; 21 Ill., 242; 40 Ill., 116; 6 Col., 205; 4 Watts, 329.) Pettit, J., dissenting.

Held, 2, That the evidence sustains the verdict.

SUPREME COURT OF INDIANA.—The following official statement by the Supreme Court clerk shows the number of opinions filed by the judges of the Supreme Court of Indiana since January 3, 1865.

IN THE SUPREME COURT,
NOVEMBER TERM, 1875.

Exhibit of the number of cases decided by the judges of the Supreme

Court in which written opinions were filed by them from January 3, 1865, until May 20, 1876, each number representing the aggregate decisions at the respective term.

Hon. R. C. Gregory; 34, 39, 39, 38, 34, 35, 45, 36, 47, 21, 38, 35, 8—449.

Hon. J. S. Frazer; 42, 40, 35, 35, 28, 38, 44, 44, 38, 29, 35, 30, 8—444.

Hon. J. T. Elliott; 26, 31, 40, 35, 32, 34, 44, 41, 36, 21, 35, 27, 5—407.

Hon. C. A. Ray; 35, 31, 38, 39, 30, 28, 47, 22, 37, 40, 35, 31, 4—417.

Hon. J. Pettit; 44, 20, 55, 35, 38, 17, 52, 28, 35, 29, 30—383.

Hon. A. C. Downey; 80, 74, 106, 87, 82, 70, 96, 92, 109, 63, 128—987.

Hon. J. L. Worden; 47, 30, 76, 37, 42, 23, 37, 26, 60, 31, 52—461.

Hon. S. H. Buskirk; 29, 34, 66, 39, 42, 37, 90, 59, 78, 11, 31—516.

Hon. A. L. Osborn; 25, 34, 72, 23, 6—160.

Hon. H. P. Biddle; 37, 26, 56—119.

The State of Indiana, Supreme Court, ss.

I, Charles Scholl, clerk of said Supreme Court, do hereby certify that the above and foregoing is a full, true and complete exhibit of the number of cases decided by the judges of the Supreme Court within the period named, as appears of record in my office.

[SEAL.] Witness my name and the seal of said Supreme Court, given at Indianapolis, this 20th day of May, A. D. 1876.

CHARLES SCHOLL,
Clerk Supreme Court.

AGENCY—THE CONSTRUCTION OF THE AUTHORITY.

WHERE THE INSTRUCTIONS ARE AMBIGUOUS.

When the instructions given to an agent are clear and defined, his duty is to observe them faithfully. He will not be allowed to violate them in any particular, provided they may be lawfully carried out. On the other hand, if the instructions are given in such uncertain terms as to be susceptible of two different meanings, and the agent *bona fide* adopts one of them and acts upon it, it is not competent to the principal to repudiate the act as unauthorized because he meant the instructions or orders to be read in the other sense of which it is equally capable. It is a fair answer to such an attempt to disown the agent's authority to tell the principal that the departure from his intention was occasioned by his own fault, and that he should have given his order in clear and unambiguous terms: (Per Lord Chelmsford in Ireland *v.* Livingstone, L. Rep. 5 H. of L. 416.)

In one of the earliest reported cases, Moore *v.* Mourgue (Cowp. 479), decided in 1776, the action was for negligence in not insuring a cargo of fruit according to the plaintiff's directions. At the trial it did not appear that the plaintiff had given any particular directions how or with whom to insure. The instruction was a general one to insure the cargo. The defendant insured with a company which always in policies upon fruit inserted the clause "free from particular average." After insurance a partial loss occurred. The proceeds of the damaged part of the cargo were insufficient to pay the salvage claim. There were apparently two offices in which the exception was never put in policies. "To maintain this action," said Lord Mansfield, "the defendant must be guilty either of a breach of orders, gross negligence, or fraud. . . In delivering their verdict they (the jury) say they did not think the defendant guilty of gross negligence, or that he acted *mala fide*. The court, herefore, will not say so. . . He (the plaintiff) gives no directions at all. Therefore, he left it to the discretion of his correspondent, who, if he meant no fraud, was at liberty to disbelieve the underwriters. . . If upon all the circumstances the jury had found for the plaintiff, it might have been a cast whether the court would have granted a new trial. *A fortiori* in a hard action, where as no particular orders were given, there has certainly been no breach of orders; where the defendant appears to have acted *bona fide*, and where the plaintiff has himself been guilty of the first omission in giving no directions at all, there seems to be no ground for the court to interfere against the defendant." The other judges concurred, and a rule for a new trial was discharged.

The principle deducible from this case is that where the instructions are ambiguous, an agent will be protected if he acts in a way warranted by one of the constructions to which the instructions are susceptible, provided he is guilty of neither *mala fides* nor gross negligence.

The Court of Common Pleas decided in 1851, a case in which a similar principle was involved, (Boden *v.* French, 10 C. B., 886.) The defendant was employed by the plaintiff to sell for him a quantity of coal at such a price as would realize "not less than 15s. per ton, net cash, less your commission for such sale." The defendant sold one hundred tons of the coal at 15s. 6d. per ton, at two months credit. The plaintiff then sued *in assumpsit*, averring in his declaration that the defendant promised the plaintiff that he would not sell the coals otherwise than for ready money. At the trial before Chief Justice Jervis, the plaintiff was nonsuited, the learned judge being of opinion that the instructions did not bear the construction put upon them in the declaration. It was customary in the coal trade to sell coals at a credit of two months, except on the wharf. Leave was reserved to move to enter a verdict for the plaintiff, if the court should be of opinion that the evidence sustained the declaration. The rule was discharged by the full court. "The letter of instructions," said Chief Justice Jervis, "will admit of at least three significations. It may mean sell for cash down, 15s., or at such price as will eventually realize 15s., or a *del credere* (p. 887) . . . it is the plaintiff's duty to make out that the construction which he has put upon it in declaring is the true one; and this he has failed to do if the matter be at all doubtful." This case was decided upon more technical grounds than the former; there is, nevertheless, a similarity in the *ratio decidendi*.

The decisions of the Court of Queen's Bench, the Exchequer Chamber, and the House of Lords in Ireland *v.* Livingstone (L. Rep. 2 Q. B. 99; 5 ib. 516; 5 H. of L. Cas. 395), the final decision being given in 1872, should be carefully studied. The defendant wrote to the plaintiffs, who were commission agents at Mauritius, "Should the beet crop prove less than usual there may be a good chance of something being made by importing cane sugar, at about the limit I am going to give you as a maximum, say 26s. 9d., for Nos. 10 to 12, and you may ship me 500 tons, to cover cost, freight, and insurance; 50 tons more or less of no moment, if it enables you to get a suitable vessel. I should prefer the option of sending vessel to London, Liverpool, or the Clyde; but if that is not compassable you may ship to either Liverpool or London." According to the ordinary course of purchasing sugars in the Mauritius, it was not usual, or even possible, to buy the whole of the sugar at once. The usage there was to make shipments of less than the whole quantity ordered. The plaintiffs accordingly purchased about 400 tons, being unable to get any more within the defendant's limit. They were shipped about the end of September. The prices of sugar fell in England in the meantime, and the defendant wrote a countermand of his order, which was received by the plaintiffs on the 20th Oct. The defendant refused to accept the 400 tons when they arrived in England, on the ground that his order had not been complied with. The Court of Queen's Bench, consisting of Chief Justice Cockburn, Justices Mellor and Shee, decided that the defendant was bound to accept and pay for the 400 tons. Nothing turned upon any ambiguity on the instructions. The grounds upon which the court decided were simply that a discretion was given to the plaintiffs by the words "fifty tons more or less," and that the defendant must be taken to have given the order with reference to the circumstances of the Mauritius market. On appeal to the Court of Exchequer Chamber, Baron Cleasby and Mr. Justice Montague Smith were of opinion that the judgment of the Queen's Bench should be affirmed, whilst the majority, Chief Baron Kelly, Barons Martin and Channell, and Mr. Justice Keating reversed that judgment on the ground that the instructions gave no discretion; that the order being unambiguous for a single cargo of 500 tons in a single ship, no question could be raised respecting the custom at the Mauritius. On behalf of the respondent it was contended, on the authority of Bayliffe *v.* Butterworth (1 Ex. 425; 17 L. J., Ex. 78), that inasmuch as the order was not so unambiguous as to exclude the custom, the custom of the market at Mauritius must be referred to to explain it. This was the opinion of Mr. Justice Montague Smith, one of the minority. In the House of Lords this opinion prevailed, and it was held by the Lords present, namely, Lords Chelmsford, Westbury, and Colonsay, to be sufficient for the decision of the case. The judgment of the Court of Exchequer Chamber was reversed.

An examination of the judgments of the several learned judges who heard the case shows that there were two material questions involved in the case. The first related to the relation existing between the plaintiffs and the defendants—was that relation that of principal and agent, or that of vendor and vendee? The other related to the construction of the distinctions sent to the defendant—was the order given for an entire quantity to be shipped in one ship, or was a discretion allowed?

Upon the former question a difference of opinion existed among the judges who touched upon it. Baron Martin, in the Exchequer Chamber, relying upon Feise *v.* Wray (3 East 93) and Kreuger *v.* Blanck (L. Rep. 5 Ex. 179), thought there could be no doubt that the relation existing was that of vendor and vendee. Baron Cleasby and Mr. Justice Byles were of the contrary opinion, and Mr. Justice Blackburn, in his elaborate opinion, delivered before the House of Lords, explained the twofold character of consignors. "If the consignor is a person who has contracted to supply the goods at an agreed price, to cover cost, freight, and insurance, the amount inserted in the invoice is the agreed price, and no commission is charged. . . . Every party there takes upon himself the risk of the rise or fall in price, and there is no contract of agency or trust between them, and therefore no commission is charged. But it is also very common for the consignor to be an agent, who does not bind himself absolutely to supply the goods, but merely accepts an order by which he binds himself to use due diligence to fulfil the order. In that case he is bound to get the goods as cheap as he reasonably can, and the sum inserted in the invoice represents the actual cost and charges at which the goods are procured by the consignor, with the addition of a commission; and the naming of a maximum limit shows that the order is of that nature." His Lordship then proceeds to examine the argument of Martin B.: "It is quite true that the agents who in thus executing an order, ships goods to his principal, is in contemplation of law a vendor to him. The persons who supply goods to a commission merchant sell them to him, and not to his unknown foreign correspondent, and the commission merchant has no authority to pledge the credit of his correspondent for them . . . the commission merchant is a vendor, and has the right of one as to stoppage in *transitu*." This, however, is no reason for saying that it is not a contract of agency. "When the order was accepted by the plaintiffs there was a contract of agency, by which the plaintiffs undertook to use reasonable skill and diligence to procure the goods ordered, at or below the limit given."

The difference of opinion upon the second question was even greater than upon the first. In the Queen's Bench, Chief Justice Cockburn, justices Mellor and Shee were of opinion that the words "50 tons more or less" gave a discretion, and that they had reference to the advantage of getting a suitable vessel. In the Exchequer Chamber this was substantially the opinion of Baron Cleasby, Mr. Justice Montague Smith, Chief Baron Kelly. Barons Channell and Martin, and Mr. Justice Keating, on the other hand, thought that the authority pointed to a single shipment of one cargo and by one vessel. The judges having been summoned to the House of Lords, Barons Cleasby and Martin supported their former opinions. Justices Byles, Blackburn, and Hannen supported the judgment of the Queen's Bench. After having heard the opinions of the judges, the learned Lords decided—(1) That the question was one between principal and agent, though the plaintiffs might in some respects be looked upon as vendors to the defendant, so as to give them a right of stoppage *in transitu*, following the opinion of Mr. Justice Blackburn. (2) That the ambiguity of the order justified the plaintiff's mode of executing it. The case was thus brought within the operation of a well-established rule.—London *Law Times*.

LORD ST. LEONARD'S WILL.

PROBATE — LOST WILL — PRESUMPTION OF REVOCATION — SECONDARY EVIDENCE OF CONTENTS — INTERESTED WITNESS — DECLARATIONS OF TESTATOR — CONTENTS OF WILL NOT ALL PROVED. — We have heretofore given an account of the decree entered by the President of the Probate Division of the High Court of Justice admitting the will of Lord St. Leonard to probate. An appeal was taken from that decree to the Court of Appeals in Chancery. The appeal was heard on March 7, 8, 10 and 13, before COCKBURN, C. J., JESSEL, M. R., JAMES and MELLISH, L. JJ., and BAGGALLAY, J. A. The opinion of this court in the case is published in the London *Law Times* Reports for May 13, and occupies 16 double column pages. The following are the head notes to this remarkable opinion as published in the *Reports*:

Where a will traced to the possession of the testator cannot be found after his death, and there is no evidence what has become of it, the presumption arises that the will has been destroyed by the testator for the purpose of revoking it, but this presumption may be rebutted by parol evidence.

All statements and declarations, written or oral, made by a testator, whether before or after the execution of the will, are admissible as secondary evidence of its contents.

Quick *v.* Quick (10 L. T. Rep. N. S., 619; 3 Sw. & T. 442) overruled (Mellish, L. J. dissenting).

The absence of evidence as to some of the contents of a lost will will not prevent the court from granting probate, if it is satisfied that the instrument propounded contains the substantial parts of the lost will.

A testator duly executed a holograph will and eight codicils, and deposited them in a box, the key of which he always kept in his own possession. He frequently expressed adherence to the will down to within a few days of his death. On his death the codicils were found in the box, but the will was missing, and could nowhere be found. Thereupon the testator's unmarried daughter C., who had lived with him all her life, and had frequently read the will, in the preparation of which she had assisted him, wrote out from memory the alleged contents of the will, which included a bequest to her of 6000*l.* and of one-third of the residuary personal estate (equivalent to 10,000*l.*). Some corroboration of C's account of the contents of the will was found in the codicils and in certain quasi testamentary papers of the testator. But her testimony as to the residuary bequest was not at all corroborated. C. admitted that the contents of the will as written out by her were not complete, there being some small legacies and certain ulterior limitation of real estate which she could not remember. C's veracity was not questioned by the persons who opposed the granting of probate:

Held (affirming the decision of the President of the Probate Division), that C's statement of the contents of the will was substantially correct, and that probate should be granted accordingly.

A REMEDY FOR STATE ANARCHY.

The following is the amendment to the National Constitution which was proposed by Mr. C. C. Bonney, to provide a remedy for the anarchy lately existing in some of the Southern States:

Whenever it shall appear by vote of two-thirds of the members of the House of Representatives, that the State government of any one of the United States is unable to protect the people thereof against domestic violence; or that a condition of anarchy exists therein; or that there are conflicting State governments in such State, and that the conflict between them has not, within a reasonable time been determined, and that in consequence of such conflict, the persons and property of the people are seriously endangered; thereupon, the president

of the United States shall, without any unnecessary delay, nominate and appoint, subject to confirmation by vote of two-thirds of the members of the Senate, seven judicial commissioners to ascertain the facts of the case, and to recommend such measures as may appear to be necessary for the restoration of peace and the establishment of good government. None of said commissioners shall be residents of the State in question, nor shall more than one commissioner be taken from any one State. Said commissioners may, among other things, recommend the removal of officers of such State, or persons acting as such officers, and that vacancies of any State offices be declared; and they may also recommend suitable persons to be appointed and installed provisional officers *de facto*, to hold office, executive, legislative, or judicial, as the case may be, until their respective successors shall be chosen and accept in due course of law. Said judicial commissioners shall have, so far as may be necessary, all the powers of a judicial court, for the purpose of ascertaining the facts in the case; and the reasonable expenses of said commission shall be paid out of the treasury of the United States.

The president of the United States shall have power, and it shall be his duty to carry all such measures as shall be recommended by said judicial commission under this amendment, and as shall be conformable to its intent and purpose, into speedy and complete effect.

The unreasonable continuance of such provisional government, and any serious abuse of power under this amendment, may be restrained or annulled, as occasion may require, under such rules as the Supreme court of the United States, may establish in that behalf.

SUPREME COURT OF LOUISIANA.

OPINION FILED AT NEW ORLEANS, APRIL 10, 1876.

PETER JOSEPH v. DAVID BIDWELL. FROM FOURTH DISTRICT COURT, PARISH OF ORLEANS.

A COLORED MAN RECOVERS A JUDGMENT OF $5000 FOR BEING EJECTED FROM A THEATRE ON ACCOUNT OF HIS COLOR, AND THE SUPREME COURT REDUCE IT TO $300.

Opinion of the court by LUDELING, C. J.

The plaintiff, a colored man, sued the defendant, the proprietor of the Academy of Music, a public theatre in the city of New Orleans, for $5000 damages, for refusing to admit him into the theatre after he had purchased a ticket which entitled him to a seat in the parquette of said theatre. The case was tried by a jury, who disagreed, and, under the statute of the State, the court discharged the jury, and rendered a judgment in favor of the plaintiff.

We have been unable to discover anything unconstitutional in the act of 1870 or 1871, referred to by counsel. The provision of the Constitution of the United States, which guarantees trials by jury, has no application to trials in State courts. This has been repeatedly decided, and is not an open question. Article thirteen of the Constitution declares that "all persons shall enjoy equal rights and privileges upon any conveyance of a public character; and all places of business or of public resort, as for which a license is required by either State, parish or municipal authority, shall be deemed places of a public character, and shall be open to the accommodation and patronage of all persons, without distinction or discrimination on account of race or color."

This article of the Constitution does not enunciate a mere abstraction, but it guarantees substantial rights. To facilitate the enforcement of these rights, the General Assembly has enacted laws, and it is the duty of courts, when called upon, to enforce them.

An examination of the evidence in this record satisfies us, that the plaintiff was rudely denied admittance to the theatre solely on account of his being a colored man. See Sauvinet vs. Walker and Decuir vs. Benson. Mr. Justice Taliaferro and I think the amount of damages awarded by the lower court not too high, but as a majority of the court do not agree in this, the judgment will be reduced to $300, with interest from the date of the judgment. It is therefore ordered that the judgment of the lower court be amended by reducing the amount of the judgment in favor of the plaintiff to $300, with five per cent. per annum from the eighth of June, 1874, and costs of the lower court, the cost of the appeal to be paid by the appellee.

Justice Taliaferro concurring:

After a very careful perusal of all the evidence found in the record of this case, I am well satisfied there has been, through the conduct of an agent of the defendant, a wanton violation of a right and privilege secured to the plaintiff by the Constitution and laws of this State, as well as by the paramount law of the land. I am equally well satisfied that this violation of that right was perpetrated from no other consideration than that the plaintiff is a man of color, and that the personal indignity offered him proceeded solely from the same cause. The violation of the plaintiff's legal right to enter, on the same conditions that all other spectators enter the place of public amusement managed by the defendant, renders the latter liable in damages to the plaintiff; for the act of the agent, under the circumstances of this case, must be regarded as the act of the principal. The amount awarded by the lower court as damages is not exorbitant or unreasonable. The judgment ought to be affirmed.

Justice Wyly dissents.

THE POSTAGE QUESTION.

On the 28th of April, Hon. S. S. Cox, of New York, introduced a bill in Congress to remedy the blunders of the last Congress on the postage question. If this bill becomes a law, attorneys and others can receive books, blanks, etc., by mail, at the rate of eight cents per pound. Every attorney, as well as every literary person, is interested in having this bill pass. We hope Mr. Cox will not allow it to sleep. The bill is entitled one to fix the rate on certain small matter, and for other purposes, and runs as follows:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That from and after the passage of this act, first class mail matter shall include all written matter except corrected proof sheets passing between authors and publishers, and except the written presentation in any book or pamphlet and the name and address of the sender, preceded by the word "from," and also the number and price, and a brief statement of the contents, and only the contents, which may be written on the wrapper, and only on the wrapper, of any article or package, of mailable matter of the second, third or fourth class. without subjecting the same to any higher rates than would otherwise be chargeable; and except all such matter as is otherwise classified by this act. Second class matter shall comprise specimens of ores, minerals, precious stones, jewelry, teas, sugar, coffee, flour and all other granular articles, unless specially excepted, and shall be prepaid for by weight and with stamp, as heretofore provided for third class matter, the rate to be one cent per ounce. Third class matter shall comprise all transient and occasional printed publications, such as pamphlets, handbills, posters, unsealed circulars, prospectuses, books, proof sheets, corrected proof sheets, maps, prints, engravings, blanks, exclusively in print, flexible patterns, sample cards, photographic paper, letter envelopes, postal cards, upon which there is neither printing nor writing other than that which is printed by Government, and the written or printed address of some person or persons to whom they are to be sent through the mail, postal envelopes and wrappers, cards, plain and ornamental paper, photograpic representations, types, seeds, bulbs, roots, cuttings, scions, and all other matter not otherwise provided for and not by law excluded from the mails, and to be paid for by weight and in bulk, the same as heretofore provided for second class matter, the rate to be one cent for two ounces. Fourth class matter shall embrace only periodical matter issued regularly at stated periods from a known office of publication or news agent, and as frequently as once in three months, and shall be carried at a uniform rate, to be paid by weight and in bulk, as heretofore prescribed for second class matter; the rate to be two cents per pound. All mailable matter of the first second and third class may be registered on the prepayment of a registration fee in addition to the postage, under such rules and regulations as the Postmaster General may prescribe.

Sec. 2. That when the postage on any mailable matter deposited in a post office for forwarding or delivery shall, through inadvertence of the writer or sender thereof, have been left wholly unpaid, or prepaid to any amount less than full rate, such matter shall, if the name or address of the writer or sender be known or can be readily ascertained by the postmaster, be returned to such writer or sender in order that the postage on the same may be fully prepaid; and if such name and address are not known and cannot be readily ascertained by the postmaster, then such matter shall be forwarded to destination, charged with double the amount of postage found deficient at the rate as provided for such matter when prepaid, which charge shall be collected before delivery; provided, that no matter of the first class, the postage on which shall have been purposely or designedly left either wholly unpaid or prepaid to an amount less than one full rate, shall be forwarded or delivered, but shall be held for postage and forwarded to the Dead Letter Office in Washington, unless returned to the writer or sender thereof as by law provided.

Sec. 3. That all provisions of law inconsistent herewith are hereby repealed.

The bill was read twice, referred to the Committee on Post Offices, and ordered to be printed.

EVIDENCE.

We clip the following paragraphs from a compendium of Louisiana Jurisprudence on evidence, published in the Louisiana *Law Journal:*

SEC. 165.—*Signatures and Handwriting.*—The opinions of witnesses or experts are received for the purpose of proving the genuineness of signatures, whether such opinions are based on a previous knowledge of the parties' signatures, or are the result of comparison with other signatures, whose genuineness is undisputed. C. C. Art. 2245 (2241); C. P. Art 325; Greenleaf Evid. § 440, 576 7; See Infra. § 343.

SEC. 166.—*Experts.*—With regard to persons who may be sworn as experts for such purpose, it is not required that they should belong to the trade or profession in question, provided it be shown that they are skillful or proficient in that respect; their opinions are admissible in evidence subject to be weighed like all other evidence. Langfit vs. Clinton R. R., 2 R. R. 217. Of this hereafter.

SEC. 164.—*Matters of Law; Opinion.*—Matters of law, involved in a case, are the exclusive province of the Court, and, as a general rule, are not open to the opinions of witnesses. Bowman *v.* Flower, 7 L. R., 111; Zeringue *v.* White, 4 A. R., 301. Nor are their opinion of facts any more admissible; they must relate only facts; and upon these the judge forms and pronounces his opinion. Kreutler *v.* U. S. Bank, 11 R. R, 216; Harris *v.* Allnut, 12 L. R. 465; Fleming *v.* Hall, 17 L. R., 1; Mechanics' Bank *v.* Watson, 7 R. R., 451. To this rule an exception lies as regards foreign laws, the proof of which must be made as of any fact, since the courts cannot take judicial cognizance of their existence. Such laws may be proven by witnesses testifying simply to their existence; or in case of laws of sister States, by the production of the volume, purporting to be an official publication. Supra. § 5 10; Layton *v.* Chalon, 4 A. R., 318.

To the rule that witnesses must testify as to facts and not express their opinions, an exception lies in questions of science, skill, trade or other of like kind, when men versed therein are admitted to give their opinions or experience in evidence. Thus "terms of art or technical terms and phrases are to be interpreted according to their received meaning and acceptation with the learned in the art, trade or profession, to which they refer." C. C. Arts. 15 (15), 1947 (1942).

Thus it is customary to take the opinions of physicians as to the sanity of individuals, the cause of decease or death, or the consequences of wounds, whether such opinions be founded on personal observation or on a hypothetical case. Such testimony, however, is far from being always conclusive; it must be weighed like other evidence.

Besides, it must not be allowed to extend to the general merits of the case, but must be limited to the particular fact which gives rise to the expression of such opinion. Greenleaf Evid. § 440; State *v.* Bailey, 4 A. R., 377. In Brabo *v.* Martin, 5 L. R., 276: "The general rule of evidence is, that facts are to be proved to a jury. An exception is made on questions of science, in matters purely professional, and particular branches of trade or manufacture. Opinions of persons skilled in these respective matters are received; and those of physicians fall within one of the classes just stated. Their opinions, are evidence, but they must state the facts upon which these opinions are based; and in case witnesses of this description differ in opinion, the jury must judge at last which of them is entitled to most weight." Holland *v.* Cammett, 5 A. R., 705; Dupre *v.* Demarest, 5 A. R., 591; Roca *v.* Slawson, 5 A. R., 708; Virgin *v* Dawson, 15 A. R., 532; Cahn *v.* Costa, 15 A. R., 612: Paty *v.* Martin 15 A. R., 620; Forsyth *v.* Desperveis, 14 L. R, 215. "But witnesses are not receivable to state their views on matter of legal or moral obligation; nor, on the manner in which other persons would probably be influenced, if the parties acted one way, rather than another." Greenleaf evid., § 441. As to opinions in matters of insurance, involving questions of skill and judgment, see Greenleaf Fvid., § 441; Phillip Am. Ed. Evid., § 899; 2 Starkie Evid., 886–888 of 3d London Ed. See also Bonnier, Preuves, pp. 71-90, Expertise et visite sur les lieux.

THE LIABILITY OF DIRECTORS OF RAILWAY COMPANIES.—A somewhat remarkable case has lately been decided in the Common Pleas Division of the High Court. As is well known, a shareholder in a railway company who has not paid the calls on his shares, is liable to the extent of such calls to the creditors of the railway; but certain directors of an abortive railway, called the Didcot, Newbury, and Southampton, concluded that they were not so liable on the shares allotted them for their qualification, because no shares or scrip certificates could be proved to have been issued, and no register of shares kept, or even procured. They argued that there was no proof that they were shareholders, or could be proceeded against as such. But the court of course said, that if a register was not kept, it was the fault of the directors, and that they could not be allowed to take advantage of that fault to excuse themselves from liability. The fact as we (*Economist*) understand the circumstances to be, is that the directors in question were promoters of the company, and took their "qualification" in shares accordingly, without much considering the liabilities it involved. But this is a reason for holding them bound to pay calls, rather than the contrary. Such persons are the principal agents in the announcement and commencement of abortive railways, and they must be made to understand that they will have to pay the debts of such companies, at least as far as the calls on the shares which qualify them to be directors will go.

SEA INSURANCE POLICIES.—An Act of Parliament has just been printed, and recently passed, to amend the law relating to the stamping of policies of sea insurances. It is now provided that a policy by which the separate and distinct interests of two or more persons are insured, being stamped in respect of the aggregate of such interests, but not duly stamped in respect of each of such interests, may be stamped with an additional stamp or stamps at any time within one month after the last risk has been declared. Section 16 of the Stamp Act, 1870, is to apply to a policy of sea insurance. Such policy for the purposes of the section is to be an instrument which may be legally stamped after execution, and the penalty payable by law on stamping is to be £100.

CHICAGO LEGAL NEWS.

SATURDAY, JUNE 3, 1876.

The Courts.

UNITED STATES SUPREME COURT.

No. 149.—OCTOBER TERM, 1875.

Appeal from the Circuit Court of the United States for the District of South Carolina.

HENRY H. BLEASE, Appellant, *v.* ALBERT C. GARLINGTON.

MISREPRESENTATIONS ON SALE OF CLAIM—HOW EVIDENCE MUST BE TAKEN IN EQUITY CAUSES IN FEDERAL COURTS—EXCEPTIONS—PRACTICE.

1. MISREPRESENTATIONS ON SALE OF CLAIM.—The court states the effect of making misrepresentations on the sale of a claim against a person in precarious circumstances, and the duty of a person to whom such representations are made, to endeavor to determine whether they are true or false.

2. EXAMINATIONS OF WITNESSES ORALLY IN FEDERAL COURT.—The court does not say that even since the Revised Statutes, the Circuit Courts may not, in their discretion, under the operation of the rules, permit the examination of witnesses orally in open court, upon the hearing of causes in equity. The court does not say that now they are not by law required to do so, and that if such practice is adopted in any case, the testimony presented in that form must be taken down, or its substance stated in writing, and made part of the record, or it will be entirely disregarded by the Supreme Court on appeal.

3. WHEN TESTIMONY OBJECTED TO.—If testimony is objected to and ruled out, it must still be sent to the Supreme Court with the record, subject to the objection, or the ruling will not be considered by the Court.

4. CASE WILL NOT BE SENT BACK.—That a case will not be sent back to have the rejected testimony taken, even though the court, on examination, might be of the opinion that the objection to it ought not to have been sustained.

5. PRACTICE IN STATE COURTS.—The statute of 1872, providing that the practice, pleadings and forms, and mode of proceeding in civil causes, in the Circuit and District Courts, shall conform as near as may be, to the practice, etc., in the State courts of the State, has no application to this case, because equity and admiralty cases are, in express terms, excepted from the operation of the act.—[ED. LEGAL NEWS.]

Mr. Chief Justice WAITE delivered the opinion of the court.

This suit was brought for the foreclosure of a mortgage made by Blease to Garlington. The bill is in the ordinary form. Blease, in his answer, admits the execution of the note and mortgage, but insists, by way of defense, that Garlington "deceived him as to the value of the consideration of the said note and mortgage and has not complied with his positive agreement." The history of the transaction, he says, is as follows:

"The complainant, as the administrator of J. M. Young, deceased, held a large claim against the estate of John B. O'Neall, deceased, who had been the guardian of the said J. M. Young, and Robert Stuart and H. H. Kinard were the sureties on his bond. The complainant had commenced suit on said bond against Robert Stuart, and proceeding to force him into bankruptcy, and his life seemed to be endangered by the excitement which this last proceeding produced, he being naturally in very feeble health. Under these circumstances, negotiations were commenced between the complainant and this respondent, the friend of the said R Stuart, in regard to the sale of the claim of the said complainant against the said Robert Stuart, as surety on the said guardianship-bond of said J. B. O'Neall, deceased, and this respondent was induced to purchase said claim at six thousand dollars, (four thousand dollars of which was paid in cash, and the note described in bill given for $2,000), by the assurance of the complainant that said claim was worth at least six thousand dollars, and he made some calculations to show this, and said, as this claim was worth six thousand dollars, it would not be right for him to take less than that sum, and that he would not do it. This purchase was made upon the further assurance and undertaking of the complainant that he would obtain judgment to this respondent. This defendant avers that said purchase would not have been made by him at that price, but for the said assurance and promise of the complainant in which this respondent put implicit confidence. This respondent, further answering, states, that the said Robert Stuart died before judgment was obtained in said claim, and this respondent has been informed and believes that his estate is so utterly insolvent, that it will not pay anything like the sum of six thousand dollars on said claim, and he asks that this case be not tried until the true condition of said estate can be ascertained. This defendant further submits to this honorable court that, the complainant having deceived this defendant as to the value of said claim against Robert Stuart, and not having complied with his part of the contract, to obtain judgment on said claim, is not entitled to enforce collection of said note and mortgage in this court, where equity is administered, and asks that the whole contract may be set aside, and the complainant required to deliver up to this defendent the said note and mortgage, to be canceled, and to refund the four thousand dollars paid in cash to him on said contract, with interest."

Upon the hearing in the court below, after the plaintiff had submitted his case upon the pleadings and his mortgage, the defendant presented himself as a witness to be examined orally in open court and proposed to testify to the following facts, to wit:

"1. That one of the conditions of the original agreement for the sale of the liability of Robert Stuart, as one of the sureties of the bond of J. B. O'Neall, as guardian of J. M. Young, plaintiff's intestate, to the defendant, was that the plaintiff should obtain judgment against the said R. Stuart, and that when the agreement was drawn up and presented to the defendant, he called attention of plaintiff to the fact that that part of the agreement which obligated him to get judgment had been left out, and insisted that it should be inserted, and he was assured that that condition should be carried out, and that it was not necessary to rewrite the agreement for the purpose of putting it in.

"2. That during the negotiations for the sale of the aforesaid liability of R. Stuart, the plaintiff presented to the defendant that said liability or claim was worth at least six thousand dollars, and that in fact it is not worth twenty-five hundred dollars.

"3. That the defendant did not know the then financial condition of R. Stuart, and put implicit confidence in the promises and representations of the plaintiff, and would not have made the trade but for such assurance."

His proposition made in writing is sent here as part of the record. The court refused to receive the testimony, and it was not taken. A decree having been entered in favor of Garlington, Blease brings the case here by appeal.

Cases in equity come here from the Circuit courts and the District courts, sitting as Circuit courts, by appeal, and not by writ of error. (Rev. Stat., sec. 692.) They are heard upon the proofs sent up with the record from the court below. No new evidence can be received here. (Rev. Stat., see. 698.)

The facts relied upon by Blease were neither proven nor admitted in the court below. Testimony in support of them was offered, but it was not received. We do not know that if it had been received it would have been sufficient. If we find that the court erred in refusing the testimony, we shall be compelled to affirm the decree because of the lack of proof, or send the case back for a new hearing.

An important question of practice is thus presented for our consideration.

The judiciary act of 1789 (1 Stat., 88, sec. 30) provided that the mode of proof by oral testimony and examination of witnesses in open court should be the same in all the courts of the United States, as well in the trial of causes in equity as of actions at common law. By section 19 of the same act it was made the duty of the Circuit court, in equity cases, to cause the facts on which they founded their decree fully to appear upon the record, either from the pleadings and decree or a statement of the case agreed upon by the parties or their counsel, or if they disagreed, by a stating of the case by the court. Subsequently, in 1802, (2 Stat., 166, sec. 25,) it was enacted that in all suits in equity the court might, in its discretion, upon the request of either party, order the testimony of witnesses therein to be taken by depositions. In 1803 (2 Stat., 244, sec. 2) an appeal was given to this court in equity cases, and it was provided that, upon the appeal, a transcript of the bill, answer, depositions, and all other proceedings in the cause should be transmitted here. The case was to be heard in this court upon the proofs submitted below.

In Conn. *v.* Penn., 5 Wheat., 424, decided in 1820, this court held that a decree predicated in part upon parol testimony must be reversed, because that portion of the testimony which was oral had not been sent up. For this reason, among others, the cause was sent back for further proceedings according to equity. Chief Justice Marshall, in delivering the opinion of the court said (p. 426): "Previous to this act (that of 1803) the facts were brought before this court by the statement of the judge. The depositions are substituted for that statement, and it would seem, since this court must judge of the fact as well as the law, that all the testimony which was before the Circuit court ought to be laid before this court. Yet the section (of the act of 1789) which directs that witnesses shall be examined in open court, is not, in terms, repealed. The court has felt considerable doubts on this subject, but thinks it the safe course to require that all the testimony, on which the judge founds his opinion, should, in cases within the jurisdiction of this court, appear in the record."

Under the authority of the act of May 8, 1792. (1 Stat., 276, sec. 2,) this court, at its February term, 1822, adopted certain rules of practice for the courts of equity of the United States. (7 Wheat., v.) Rules 25, 26, and 28 related to the taking of testimony by depositions and the examination of witnesses before a master or examiner, but by Rule 28 it was expressly provided that nothing therein contained should "prevent the examination of witnesses *viva voce* when produced in open court."

These rules continued in force until the January term, 1842, when they were superseded by others then promulgated, (1 How., xlii.,) of which 67, 68, 69, and 78 related to the mode of taking testimony, but made no reference to the examination of witnesses in open court further than to provide, at the end of Rule 78, that nothing therein contained should "prevent the examination of witnesses *viva voce* when produced in open court, if the court shall in its discretion deem it advisable."

Afterwards, in August, 1842, Congress authorized this court to prescribe and regulate the mode of taking and obtaining evidence in equity cases.—(5 Stat., 518, sec. 6.) While these rules remained in force substantially as originally adopted, and before any direct action of the court under the special authority of this act of Congress, the case of Sickles *v.* Gloucester Co., 3 Wall., Jr., 186, came before Mr. Justice Grier on the circuit, and he there held that, notwithstanding the rules, witnesses might still be examined in open court. It was his opinion that the act of 1789 guaranteed to suitors the right to have their witnesses so examined if they desired it; that rule 67 did not affect or annul the act of Congress or the policy established by it, and that a party had therefore the right to demand an examination of witnesses within the jurisdiction of the court *ore tenus*, according to the principles of the common law, either by having them produced in court or by having leave to cross-examine them, face to face, before the examiner.

This case was decided in 1856, and, at the December term, 1861, of this court, rule 67 was amended so as to provide for the oral examination of witnesses before an examiner. The part of the rule as amended, pertinent to the present inquiry, is as follows: "Either party may give notice to the other that he desires the evidence to be adduced in the cause to be taken orally, and thereupon all the witnesses to be examined shall be examined before one of the examiners of the court, or before an examiner to be specially appointed by the court, the examiner to be furnished with a copy of the bill and answer, if any; and such examination shall take place in the presence of the parties, or their agents, by their counsel or solicitors, and the witnesses shall be subject to cross examination and re-examination, and which shall be conducted as near as may be in the mode now used in common law courts. The depositions taken upon such oral examinations shall be taken down in writing by the examiner in the form of narrative, unless he determines the examination shall be by question and answer in special instances; and, when completed, shall be read over to the witness and signed by him in the presence of the parties or counsel, or such of them as may attend; provided, if the witness shall refuse to sign the said deposition, then the examiner shall sign the same: and the examiner may, upon all examinations, state any special matters to the court as he shall think fit; and any question or questions, which may be objected to, shall be noted, by the examiner, upon the deposition, but he shall not have power to decide on the competency, materiality, or relevancy of the questions; and the court shall have power to deal with the costs of incompetent, immaterial, or irrelevant depositions, or parts of them, as may be just."

The act of 1789, in relation to the oral examination of witnesses in open court, was not expressly repealed until the adoption of the revised statutes, sec. 862 of which is as follows: "The mode of proof in causes of equity and of admiralty and maritime jurisdiction shall be according to the rules now or hereafter prescribed by the Supreme Court, except as herein specially provided."

Since the amendment of rule 67, in 1861, there could never have been any difficulty in bringing a case here upon appeal, so as to save all exceptions as to the form or substance of the testimony, and still leave us in a condition to proceed to a final determination of the cause, whatever might be our rulings upon the exceptions. The examiner before whom the witnesses are orally examined is required to note exceptions, but he cannot decide upon their validity. He must take down all the examination in writing, and send it to the court with the objections noted. So, too, when depositions are taken according to the acts of Congress or otherwise, under the rules, exceptions to the testimony may be noted by the officer taking the deposition, but he is not permitted to decide upon them. And when the testimony, as reduced to writing by the examiner, or the deposition, is filed in court, further exceptions may be there taken. Thus both the exceptions and the testimony objected to are all before the court below, and come here upon the appeal as part of the record and proceedings there. If we reverse the ruling of that court upon the exceptions we may still proceed to the hearing, because we have in our possession and can consider the rejected testimony. But under the practice adopted in this case, if the exceptions sustained below are overruled here, we must remand the cause in order that the proof may be taken. That was done in Conn. *v.* Penn., which was decided before the promulgation of the rules. One of the objects of the rule in its present form was to prevent the necessity for any such practice.

While, therefore, we do not say that, even since the revised statutes, the Circuit courts may not in their discretion, under the operation of the rules, permit the examination of witnesses orally in open court upon the hearing of cases in equity, we do say that now they are not by law required to do so, and that if such practice is adopted in any case the testimony presented in that form must be taken down or its substance stated in writing and made part of the record, or it will be entirely disregarded here on an appeal. So, too, if testimony is objected to and ruled out, it must still be sent here with the record, subject to the objection, or the ruling will not be considered by us. A case will not be sent back to have the rejected testimony taken, even though we might on examination be of the opinion that the objection to it ought not to have been sustained. Ample provision having been made by the rules for taking the testimony and saving exceptions, if parties prefer to adopt some other mode of presenting their case, they must be careful to see that it conforms in other respects to the established practice of the court.

The act of 1872 (17 Stat. 197, Rev. Stat., sec. 914) providing that the practice, pleadings, and forms, and modes of proceeding in civil causes in the Circuit and District courts shall conform, as near as may be, to the practice, etc., in the courts of the States has no application to this case, because it is in equity, and equity and admiralty causes are in express terms excepted from the operation of that act.

We might, therefore, affirm the decree below because there is no testimony before us in support of the defence. But if we waive this question of practice, which, on account of its importance and

the misapprehension that exists in respect to it in some of the circuits, we have thought it proper at some length to consider and determine and look to the merits of the case, we find no error.

The defence, as stated in the answer, amounts to nothing more than that Garlington, in the progress of the negotiations for the sale of the claim against Stuart to Blease, stated that the claim was worth six thousand dollars, and undertook to obtain judgment upon it for Blease, and that Stuart died before a judgment was obtained, and his estate was so utterly insolvent that it would not pay anything like six thousand dollars on the claim. There is no pretence that there was not at least six thousand dollars due from Stuart, or that Garlington had any better means of knowing his pecuniary condition than Blease had. On the contrary, it appears that Blease made the purchase because he was the friend of Stuart and desired to put a stop to the proceeding on the part of Garlington to force him into bankruptcy, which seemed to be endangering his life in his then feeble state of health. Certainly, under such circumstances, it would have been easy for Blease to test the truth or falsehood of the statement made by Garlington, and if he did not, it was his own fault. He had no right to rely upon the representations of Garlington. It was his duty to use reasonable diligence to enquire and ascertain for himself whether Garlington's estimate of the value of the claim was correct or not.

But, again, from the answer itself, it is apparent that the statement relied upon was only an expression of opinion as to the value of the claim, and that Blease had no right to consider it as anything else. The language is that "this respondent was induced to purchase said claim at six thousand dollars by the assurance of the complainant that said claim was worth at least six thousand dollars, and he made some calculations to show this, and said as this claim was worth six thousand dollars it wonld not be right for him to take less than that sum, and that he would not do it." There seems to have been no dispute as to the amount. All depended upon the ability of Stuart to pay. Each of the parties had equal opportunity of judging as to that. Certainly there is nothing to show that Garlington had any advantage over Blease in this respect. Garlington was pressing Stuart into bankruptcy to coerce payment. This Blease desired to prevent, and for that purpose was willing to purchase the debt and pay for it as much as it was worth. The parties were engaged in endeavoring to ascertain what this was, and the whole subject was equally open to both for examination and enquiry. Under such circumstances, neither party is presumed to trust the other, but to rely upon his own judgment.—(Smith *v.* Richards, 13 Pet., 37.)

So, too, as to the alleged undertaking on the part of Garlington to obtain judgment on the claim. There is no allegation that he was not proceeding for that purpose, without unnecessary delay, up to the time of the death of Stuart, or that Blease, when Stuart did die, was not in as good condition, for all the purposes of collection, without a judgment as he could have been with. We are clearly of the opinion, therefore, that the answer, if taken as true, did not present a valid defence, and, as the defendant could not make any defence by his proof different from that set out in his pleading, the court below very properly refused to hear any testimony in support of the answer.

This makes it unnecessary to consider the questions presented in the argument as to the competency of the proof offered.

The decree of the Circuit court is affirmed.

U. S. CIRCUIT COURT—SOUTH CAROLINA.

In re BLUE RIDGE RAILROAD COMPANY.

Where property which is encumbered by liens, is sold at the suggestion of the general creditors, and brings no more than the amount of the liens, it is not chargeable with any costs, except the actual costs of sale.

Where property is sold free from a mortgage, the Bankrupt court has no authority to adjust the claims of the trustee under the mortgage against the *cestui que trust*, nor to ascertain what is due by him to his counsel.

BOND, J.—It appears from the record in this case that the Blue Ridge Railroad Company is a corporation under the laws of South Carolina, and that on the 20th day of April, 1854, it executed a mortgage of all its property whatsoever, to certain persons therein mentioned, to secure the payment of certain bonds named in said mortgage, and the interest thereon to accrue.

And further it appears, that after the mortgage debt aforesaid became due and payable, and was unpaid, certain creditors of said bankrupt filed a petition in the District Court, asking that the said corporation might be declared a bankrupt, which was accordingly done, and assignees were duly appointed to take charge of the bankrupt.

It appears also that the said corporation, at the time of its adjudication as a bankrupt, had no other property whatever than that covered by the said mortgage, and that the property mortgaged was totally inadequate, when sold, to pay the debt for which it was pledged.

It appears further, that on the 16th of January, 1873, the assignees of the said bankrupt filed a petition in the bankrupt court, asking that the property of the corporation, mortgaged as aforesaid, might be sold, and the court directed a sale thereof. At which said sale one Robert K. Scott, who was authorized by his fellow bondholders to purchase the road in their behalf, became the purchaser thereof, being the highest bidder therefor.

Prior to said sale, the bankrupt court made an order directing James Simons, Esq., as special master in the case, "to inquire and report what compensation the trustees and assignees were entitled to, by way of commissions, expenses incurred, services rendered and to be rendered up to and including the sale proposed, and also inquire and report what fees the counsel for the trustees and assignees were entitled to, and out of what fund payment should be made therefor." Under this order, the special master filed his report of the 12th of March, 1874, by which he allowed to the assignees of the bankrupt certain commissions, fees and expenses for themselves and their counsel, and to the trustees under the mortgage, another large sum of money by way of commissions, counsel fees, and expenses, amounting in all to about thirty thousand dollars, and he directs or recommends that the larger part of those payments be made out of the proceeds of the sale of the mortgaged property, and bases his estimate upon the supposition that the road is worth two hundred and fifty thousand dollars.

The property of the railroad sold at the sale for fifty thousand dollars.

From the order making the reference to Special Master Simons, and from the order overruling the exceptions to his report and confirming the same, the petitioners here file their petition, asking the aid of the supervisory jurisdiction of the Circuit court.

It is plain from the record in this case, that at the time of the filing of the petition in bankruptcy, the bankrupt company had no property, the sale of which would produce anything for its general or unsecured creditors. All that it owned was mortgaged greatly beyond its value.

The only justification of the petition of the assignees for the sale of this property by the Bankrupt court, is that they supposed it would realize something for the general creditors. This the sale did not do, and every one concerned in the proceeding had reason to know it would not. When a Bankrupt court, at the suggestion of the general creditors, authorizes the sale of property encumbered by liens, and the proceeds of sale amount to no more than the claims of the lien creditors, it has no control over the fund but to pay it to such lien creditors, and it is not chargeable with any costs in the bankrupt proceeding, except the actual costs of sale. The fund is sacred, and is devoted to the payment of the lien creditors whose property has been sold, and they are chargeable with no other or further costs than they would have incurred had they sold the property under their liens. The assignees in this proceeding were acting not for the benefit of the bondholders who were secured by mortgage, but for the general creditors of the bankrupt. By what rule of equity can the lien creditors be required out of their funds to pay the expenses of a litigation which was solely for the benefit of the general creditors? Both they and their counsel must look to the general assets of the bankrupt estate for payment of their claims, if they be entitled to payment at all.

Nor can the allowance by the special master to the trustees and their counsel, which was confirmed by the Bankrupt Court, be permitted.

The District Court, when it ordered the sale of the railroad property, was acting solely for the general creditors. When the property was sold under its own order, and it was found there was nothing in hand belonging to them, its sole duty was to ascertain who the lien creditors were, the priority and amount of their claims, and to pay over to them the proceeds of the sale.

It had no authority in this proceeding to adjust the claims of the trustees under the mortgage against their *cestui que trusts*, nor to ascertain what was due by trustees to counsel.

The mortgaged property in the hands of the Bankrupt court, was and is bound for nothing but for the lawful charges for the administration of that property in that court.

The sale not being objected to, and no motion being made to set it aside, will be allowed to stand, but the Circuit court will pass an order revoking the order of the District court, referring this cause to special Master Simons for report, and reversing the order of the District court confirming the report of said master, and will direct that this cause be remanded to the District court with directions to ascertain what were the actual costs incurred in the sale of said mortgage property, as determined by the bankrupt law, and which, in accordance with this opinion, are properly chargeable to the proceeds of this sale.

OUR thanks are due EARL BILL, clerk of the court at Cleveland, for the following opinion:

U. S. CIRCUIT COURT N. D. OF OHIO.

OPINION FILED MAY 20, 1876.

WILLIAM BRICE et al. *v.* HENRY SOMMERS et al.

Petition for Removal of Cause.

REMOVAL OF CAUSE FROM STATE TO FEDERAL COURT.

1. BEFORE FINAL HEARING.—That the act of Congress of March 2, 1867, under which the removal is asked, only authorizes a removal where an application is made before the final hearing or trial of the suit, and this means before final judgment in the court of original jurisdiction where the suit is brought.

2. WHEN CASE APPEALED.—That when a case is commenced in the common pleas court of a State, and a trial had in such court, and the case appealed to the District court of the State, it is then too late to ask to have such cause removed into the United States Court, under the above-named act.—[ED. LEGAL NEWS.]

Opinion by WELKER, J.

William Brice & Co., on the 18th day of November, 1872, filed their petition in the court of Common Pleas of Stark County, Ohio, against Henry Sommers and others, including George W. Trimble, to foreclose a mortgage executed to them by said Henry Sommers, on a tract of twenty acres of land owned by him, situate in Stark county, with a distillery and other buildings thereon, the same being recorded the 10th of February, 1872, and on which they claimed the sum of $7,107.01. George W. Trimble was made a defendant, with others who claimed interests in, or liens upon said real estate. Trimble in his answer, sets up as a defense, that after the execution of the mortgage to William Brice & Co., Sommers and others associated with him, carried on the distillery business on the premises so mortgaged, and that divers taxes were assessed against them, under the internal revenue laws of the United States, by the officers of the government, which taxes, it is averred, were a first lien on the distillery and premises, and a superior lien to the mortgage of Brice & Co.; that the taxes not being paid the collector of the district on the 10th day of October, 1872, in pursuance to the provisions of the revenue law, sold said mortgaged premises to the defendant Trimble to pay the taxes so assessed, and gave him the proper certificate of purchase; that under said sale he took and holds possession of the mortgaged premises and claims title thereto. Brice & Co. filed their reply to this answer, making an issue upon the same.

At the February term, 1874, of the Court of Common Pleas of Stark county, a hearing was had of the case, and the issue found in favor of the defendant, Trimble, and a decree was entered dismissing the petition of Brice & Co., at their costs. Within the time prescribed by the Ohio statute, William Brice & Co., in the manner provided by law, appealed said case to the District Court of said Stark county, where the same is now pending. Whilst said cause was so pending in Stark county, on the 30th day of September, 1875, this petition for removal to this court was filed by the defendant, Trimble. In it he alleges as cause for removal, that he holds title to the mortgaged premises derived from the Collector of Internal Revenue, an officer of the United States, and that the action is brought against him to defeat his title, and affects the validity of the Internal Revenue laws of the United States.

Brice & Co. now file their motion in this court to dismiss the petition of Trimble for such removal.

1. Because the case, previous to the filing of this petition, whilst pending in the Court of Common Pleas of Stark county, had been finally heard and tried in that court, and there was there a final trial and final hearing of the cause between the parties, and a final decree entered therein, and therefore this court after such fact has no jurisdiction.

2. Because of other manifest reasons apparent on the face of the proceedings.

On the argument it was claimed that the petition did not show that by the defence set up in the answer of Trimble, *the validity of the Internal Revenue law was affected*, so as to constitute a cause for removal under section 643 of the Revised Statutes of the United States.

In the view I take of the motion, it is not necessary to decide this question.

The first ground for the motion involves the construction of the provisions of sec. 643, fixing the *time* at which a petition for removal may be filed. It provides that it may be filed "at any time before the trial or final hearing thereof." This has been construed to mean the same as if it read "final trial, or final hearing;" and that *trial* refers to cases at law, and *hearing* to chancery causes. This case is what would be denominated in this court a chancery cause. The inquiry here arises, and this is the question to be determined, what is a final hearing within the meaning of the act of Congress? Does it mean a final hearing in the court in which the suit is commenced, or does it mean the final hearing in an appellate court to which it may be carried? In the case of Insurance Company *v.* Dunn, 19 Wallace, 214, the Supreme Court decided that where a second trial is allowed in the same court, by the statute of the State, the first trial is not a final trial, and before the second trial a petition for removal could be filed. The statute of Ohio (S. & S., 589) does not allow a second trial in the class of cases now before us. Instead thereof, an appeal is allowed by either party upon giving bond, etc., from the Court of Common Pleas to the District Court of the county, and it provides "that the action so appealed shall be again tried, heard and decided in the District Court in the same manner as though said District Court had original jurisdiction of the action." After the appeal is thus perfected, the case is tried or heard in the appellate court as though originally commenced there, and does not return to the Common Pleas for any action in reference to the trial or hearing, but may come back for the purpose of execution of the judgment or decree of the District Court.

It is claimed by counsel for Trimble, that such appeal vacates the decree of the Common Pleas, and that the hearing or trial in the District court is a second hearing or trial, and that therefore the first hearing in the Common Pleas is not a *final* hearing; that the case of Insurance Company *v.* Dunn is not authority against this view, but substantially supports it; that the hearing on appeal is but the second hearing of the same case, and amounts to the same as the second trial in the same court. It is true that the appeal vacates the decree of the Common Pleas, but is it not also true that the decree so far as that court is concerned is final—no other or further hearing thereof can be had in that court? In which court, then, is the "*final hearing*" referred to in the statute, before which the petition may be filed? In the case of Stevenson *v.* Williams, 19 Wallace, 572, the Supreme court, it seems to me, has settled that question. In that case, Justice Field delivering the opinion, says: "The act of Congress of March 2d, 1807, under which the removal is asked, only authorized a removal

where an application is made "before the final hearing or trial of the suit," and this clearly means before final judgment in the court of original jurisdiction where the suit is brought." In that case suit was originally brought in the District court by Williams to annul a judgment before that time recovered by Stevenson, and a judgment rendered in the District court in favor of Williams, which was appealed from that court to the Supreme court of Louisiana, and while so pending on such appeal the petition for removal to the Circuit court of the United States was filed by Stevenson. It does not appear in the case whether the appeal vacated the judgment of the District court, but that did not seem to be important in the case, as the court put it upon the ground that there had been a final judgment of the court of original jurisdiction, and where the suit was brought, and after that, it was too late to file the petition for removal. This construction is supported by the phraseology of the section of the statute itself. It provides that where any civil suit, etc., is *commenced* in any court of a State, not *pending* in any court of a State, against an officer, etc., a petition for removal may be filed, etc. The same words are substantially used in all of the removal statutes from the act of 1789 to the present time. Again, the section also provides that where suit is *commenced* in a State court by summons, petition for capias, etc., the clerk of the Circuit court shall issue a writ of certiorari, or habeas corpus, to be served upon the clerk of such State court, requiring him to send copies, etc. These expressions of the act seem to refer alone to the cases pending in the State court in which they were commenced. Any other construction would in effect make this court an appellate court from the court of Common Pleas, making the State District court a mere highway to reach this court by way of appeal. To reach this court parties could try the case in Common Pleas, and on defeat appeal to the District court, and while the case was there pending, file the petition here for removal, and then re-try the case in this court. But it is claimed by counsel for the defendant, Trimble, that two terms of the Circuit court having been held after the filing of the transcript and pleadings, and before the motion to dismiss was filed, it was too late to do it then. If the complainants had appeared and pleaded in the case after such filing, it might be regarded as a waiver of the right to make the motion, and an admission of the jurisdiction of this court. No new pleadings were, however, filed by the complainants before their motion to dismiss, and this objection is not, therefore, well taken.

The motion to dismiss is sustained, and order entered accordingly.

U. S. DISTRICT COURT, DISTRICT OF OREGON.

THE UNITED STATES *v.* CHARLES BROWN. SAME *v.* DAVID MANNING; SAME *v.* JOHN JOHNSON; SAME *v.* FRED. ANDERSON.

Information for Disobeying Orders on Shipboard.

A PROSECUTION CANNOT BE MAINTAINED AGAINST A SEAMAN FOR ANY OF THE OFFENCES DEFINED IN SECTION 4596 OF THE R. S., UNLESS AN ENTRY OF THE CIRCUMSTANCES IS MADE BY THE MASTER IN THE OFFICIAL LOG-BOOK OF THE VESSEL AS SOON AS POSSIBLE AFTER THE OCCURRENCE, AND READ OVER TO HIM OR A COPY FURNISHED HIM, AND HIS REPLY THERETO ENTERED IN THE SAME MANNER.

Separate informations were filed against the defendants in the above entitled cases, charging each of them with wilful disobedience to the lawful commands of the master of the ship, William H. Thorndyke, upon which they were lawfully engaged as seamen on a voyage from Philadelphia to Sitka, at Sitka, on February 14, 1876, by refusing to discharge cargo.

The defendants pleaded not guilty, and were tried together by the court.

The prosecution called the master of the ship, and offered to prove the commission of the offense by him. The defense objected, and demanded the production of proof of the entry in the official log book concerning the same, as required by section 4597 of the R S. The log book was produced, but contained no entry on the subject.

Opinion by DEADY, J.

The crimes defined by section 4596 of the R. S., which includes the charge against the defendants, relate to the discipline and conduct of the ship rather than the general public. If the master intended to prosecute a seaman for the commission of any of them, it is made his duty by sections 4290, 4291 of the R. S., to make an entry concerning the same in the official log-book as soon as possible after the occurrence, and to read the same to the offender, or furnish him with a copy of the same, and enter his reply thereto. Section 4597 of the R. S. provides that "in any subsequent legal proceedings" said entries "shall, if practicable, be produced or proved, and in default of such production or proof, the court hearing the case may, at its discretion, refuse to receive evidence of the offense."

It is maintained on the part of prosecution that when an entry *was* made, it must be produced or proved, or the court in its discretion may refuse to hear the evidence in support of the charge, but when it appears that *no* entry was made, then the statute does not apply. But this construction of the statute would make it almost devoid of meaning and useless. The evident purpose of the statute is to prevent prosecutions for breaches of discipline on shipboard, except in those cases where the master shall deem the matter of sufficient importance, while the circumstances are all fresh in his memory, and before there is any temptation to make use of it as a means to some other end, to enter a charge against the offender, together with his reply, in the official log-book. If any difficulty arises between the crew and the master, a previous offense or dereliction of which no entry was made, cannot be invoked or trumped up, as a make-weight in this subsequent controversy.

In this case it appears by the affidavit of the master, made before the deputy collector and ex-officio shipping-master at Sitka, that the defendants, in company with one Antonio Page, attempted to desert the ship in a small boat at Sitka, but being capsized, were discovered and rescued by the officers of the ship, except Page, who was drowned. The defendants then refused to work, and the master, by the advice of the collector, put them in irons until they consented to work, and made this affidavit of the transaction instead of making an entry in the log-book. The confinement of the defendants was proper enough, if they refused to work, but if it was intended to prosecute them also for the offense of disobeying orders, it was incumbent on the master to have made the proper entries in his log-book. This not having been done, the law presumes that it was not deemed of sufficient importance at the time, but it is now sought to be done as an afterthought or with some ulterior purpose.

The defendants are found not gullty and discharged.

RUFUS MALLORY for the U. S.

DAVID GOODSELL and JOSEPH SIMON for he defendants.

BALTIMORE CITY COURT.

ALBERT ORDWAY *v.* THE CENTRAL NATIONAL BANK OF BALTIMORE.

NATIONAL BANK—DISSOLUTION OF—ACTION AGAINST FOR TAKING MORE THAN LAWFUL INTEREST IS TO RECOVER A PENALTY—STATE COURT NO JURISDICTION.

1. CLOSING NATIONAL BANK.—The court states the manner and effect of a national bank going into liquidation and closing up.
2. SUIT FOR A PENALTY.—This was an action brought against a National bank in a State court, to recover double the amount of interest alleged to have been usuriously taken by such bank. *Held*, that it was a suit brought to enforce a penalty under an act of Congress.
3. INTENTION OF CONGRESS.—That it was the intention of the act to give State courts jurisdiction in such cases.
4. ACT UNCONSTITUTIONAL.—That the act is unconstitutional so far as it seeks to give State courts jurisdiction to enforce penalties under an act of Congress.—[ED. LEGAL NEWS.]

Opinion of the court by BROWN, J.

This suit was docketed as of the 25th of July, 1874, and is an action of debt brought to recover double the amount of interest alleged to have been usuriously charged by the defendant, which is a national banking association chartered under the laws of Congress on the 16th of January, 1871, on certain loans made by it to the plaintiff.

A suggestion has been filed by the counsel of the defendant that the defendant has been legally dissolved by its own voluntary act in pursuance of the act of Congress of 1864, chapter 106, section 42, and therefore that this suit, being an action at law, must abate and be discontinued.

The act provides (section 4) that such an association shall have succession for twenty years, unless sooner dissolved, according to the provisions of the articles of a sociation or by the act of its *shareholders* owning two-thirds of its stock, or unless the franchise shall be forfeited by a violation of this act. The articles themselves provide that the association is to continue for twenty years unless sooner dissolved by the act of its stockholders owning at least two-thirds of its stock, who may dissolve and *close up the* association in such manner as they may deem to be for the interest of the stockholders and creditors of the association, but subject to the restrictions, requirements and provisions of the act.

If it has been dissolved it is conceded that the legal consequence suggested would follow.

The said forty-second section of the act provides "that any association" (that is, any national banking association) "may go into liquidation and be closed by the vote of its shareholders owning two-thirds of its stock."

Proof was offered that on the 15th of July, 1874, it was voted by the shareholders of defendant "owning more than two-thirds of its stock that said association go into liquidation and be closed."

Objection has been made to the sufficiency of the proof on this point, but for the purposes of the case it will be considered as sufficient.

The claim of the plaintiff was made known to the defendant on the 25th of July, 1874, the day on which this suit is by agreement to be considered as docketed.

Whenever a vote is so taken the same section requires a notice to be published for two months "that said association is closing up its affairs, and notifying holders of its notes and other creditors to present the notes and other claims against the association for payment, and at any time after the expiration of one year from the time of the publication of such notice as aforesaid, the said association may pay over to the treasurer of the United States the amount of its outstanding notes in the lawful money of the United States, and take up the bonds which said association has on deposit with the treasurer for the security of its circulating notes, which bonds shall be assigned to the bank in the manner specified in the nineteenth section of the act, and from that time the outstanding notes of said association shall be redeemed at the treasury of the United States, and the said association and the shareholders thereof shall be discharged from all liabilities therefor."

The notice was published by the association, and at a proper time thereafter the amount of the outstanding notes was paid by it to the Treasurer of the United States, whose duty it became to redeem them, and the bonds which the association had on deposit for the security of its notes were then assigned by the Treasurer of the United States to the defendant. Why were they by law required to be so assigned? Clearly because they were assets of the association, to be used by it for the purpose of paying, in the first place, the debts of the association, in pursuance of the call in the published notice for creditors, other than note holders, to present their claims, and, in the next place, after the debts were paid, for distribution among the stockholders. The fact that the act requires the bonds to be assigned to the defendant demonstrates that it was then an existing association, and while the process of paying the debts was going on or ought by law to have been going on, it could not dissolve itself. It would be contrary to all sound principles of interpretation to suppose that the act was framed with any such intent, because such a construction would enable every national banking association, by going into voluntary dissolution, to deprive its creditors of all their legal remedies. The vote by two-thirds of the stockholders to "go into liquidation and be closed," was not of itself an act of dissolution, and did not profess to be so. It was simply a resolve to cease active business and to wind up its affairs, an essential part of which was to pay the debts it owed, and the claims for which it was liable. The suggestion of dissolution is, therefore, overruled.

But a demurrer to the declaration has also been filed, under which three principal questions have been presented.

First. Is this a suit for a penalty under a law of the United States?

Second. Did the act of Congress intend to give the State courts jurisdiction of such a case?

Third. If it did, was the provision constitutional?

First. I have no doubt that this is a suit for a penalty.

It is brought under the thirtieth section, which provides that "the knowingly taking, receiving, reserving or charging a rate of interest greater than aforesaid, shall be held and adjudged a forfeiture of the entire interest which the note, bill, or other evidence of debt carries with it, or which has been agreed to be paid thereon: and in case a greater rate of interest has been paid, the person or persons paying the same, or their legal representatives, may recover back, in any action of debt, twice the amount of interest thus paid from the association taking or receiving the same." The excessive interest must not only have been taken, but must have been knowingly taken, and the consequence of such taking is declared to be that the excessive interest is forfeited, and that the borrower can recover from the association taking it, double the amount of the interest paid in an action of debt. When the notes fell due on which the interest in these cases was exacted, the plaintiff could have refused to pay them to the defendant unless the excessive interest was abated, and the defendant could only have recovered the amounts of the notes, less the excessive interest. This point has recently been decided by the Supreme court of the United States in the unreported case of the Farmers and Mechanics' National Bank of Buffalo *v.* Dearing. But in addition to this forfeiture of the excessive interest to be paid, which the plaintiff failed to exact, he is entitled to recover double the amount of the interest paid in an action of debt for which he now sues. This is certainly more than a compensation to the plaintiff, it is a punishment or penalty imposed on the defendant for the violation of the law. An action of debt is the usual mode of enforcing such penalties, and it was undoubtedly competent for Congress to provide, as it has done, that the amount should be recovered by the borrower or his legal representatives. The case above referred to expressly declares that the "said thirtieth section is remedial as well as *penal*," and this, I think, establishes the penal character of this suit, and that the claim is for a penalty.

Second. Did the act intend to give this court jurisdiction of the case?

The 57th section of the act provides "that all suits, actions and proceedings against any association under this act may be had in any circuit, district or territorial court of the United States held within the district in which such association may be established, or in any state, county or municipal court in the county or city in which said association is located, having jurisdiction in similar cases." The language is so broad and comprehensive that its meaning cannot well be doubted. It declares that all suits, actions and proceedings against any association under this act may be had in any State court in which the association is located, having jurisdiction in similar cases. This is an action of debt for a penalty, and in similar cases this court has jurisdiction, and therefore it necessarily follows that the act intended to give jurisdiction in this particular case. It is true that the judiciary act of 1789, section 10, first statutes at large, page 77, declares that the district courts of the United States have exclusive original cognizance of all suits for penalties and forfeitures incurred under the laws of the United States, and that the same provision has been re-enacted in the revised statute, page 134, but it is also true that various acts of Congress since 1789 have in terms professed to give jurisdiction to State courts over actions brought to recover certain specified penalties, and therefore it cannot be successfully contended that the policy of Congress not to confer on State courts jurisdiction over penalties is so clearly established that the 57th section of the act of 1864 must be construed as not being intended to do so, although by the plain meaning of the language used such jurisdiction is conferred. Moreover, as the said section confers on the State courts and on the United States courts precisely the same jurisdiction, it follows that if the act did not intend to confer on the State courts jurisdiction over cases for penalties, neither did it intend to confer such jurisdiction on the United States courts, and the result would be that it did not

intend to confer jurisdiction in the matter on any court. This is a conclusion which the court cannot adopt.

Third. But the important question still remains whether it is possible for an act of Congress to confer jurisdiction on a State court over penalties for violation of a law of the United States?

The Constitution of the United States declares (article III. section 1,) that "The judicial power of the United States shall be vested in one Supreme court and in such inferior courts as Congress may from time to time order and establish," and that—

Sec. 2. "The judicial power shall extend to all cases in law and equity arising under this Constitution, the laws of the United States and treaties made, or which shall be made, under their authority."

It declares (article VI.) that the Constitution, and the laws of the United States which shall be made in pursuance thereof, "shall be the supreme law of the land, and the judges in every State shall be bound thereby." But it nowhere declares that Congress can confer jurisdiction on the State courts. In Houston *v.* Moore (3 Wheat, 25) it is declared that "Congress cannot confer jurisdiction upon any courts but such as exist under the Constitution and laws of the United States, although the State courts may exercise jurisdiction in cases authorized by the laws of the State and not prohibited by the exclusive jurisdiction of the federal courts."

Many rights arising under the laws of the United States can be enforced in the State courts, just as many rights arising under the laws of the States can be enforced in the courts of the United States, but in all cases the courts respectively derive their jurisdiction from the authority which created them.

The doctrine is not questioned that the criminal jurisdiction under the laws of the United States belongs exclusively to the courts of the United States. "No part of the criminal jurisdiction of the United States," says Chancellor Kent in his Commentaries, vol. 1, p. 397, "can, consistently with the Constitution, be delegated to State tribunals." It has been suggested as a reason for this rule, that "Every criminal prosecution must charge the offense to have been committed against the sovereign whose courts sit in judgment upon the offender, and whose executive may pardon him." 1 Kent's Com., 397.

But if the State court had jurisdiction of such a case, there could be no difficulty in the indictment charging the offense to have been committed against the United States, and in case of conviction, the President would have his constitutional right to pardon. The real reason why a State court can have no jurisdiction of a crime against the United States, and why a United States court can have no jurisdiction of a crime against a State, is that the crime is committed only against the government whose law is violated, and because, in reference to crimes and offenses committed against the States respectively or the general government, they are independent of each other. The same objection which applies to the punishment by State courts of crimes against the United States, extends to the recovery of penalties imposed by the laws of the United States by suits in the State courts. These penalties are punishments for offenses committed, not against the State, but against the United States. They are penal, although they are recovered in a civil action.

And this is a doctrine which is sustained by a great preponderance of authority. I quote from Story's commentaries on the Constitution, vol. iii., section 1750. He says: "In regard to jurisdiction over crimes committed against the authority of the United States, it has been held that no part of this jurisdiction can consistently with the Constitution be delegated to State tribunals. It is true that Congress has in various acts, conferred the right to prosecute for offenses, penalties and forfeitures in the State courts. But the latter have in many instances declined the jurisdiction, and asserted its unconstitutionality; and certainly there is at the present time, a decided preponderance of judicial authority in the State courts against the authority of Congress to confer the power." The authorities which he quotes fully sustain this position. It is also supported by the more recent authorities. See cases cited in Jordan *v.* Downey, 40 Md., 410.

In the case of the First National Bank of Plymouth *v.* Price, 334 Maryland, p. 487, the Court of Appeals refused to enforce a penalty imposed by the laws of Pennsylvania on the directors of a coal company, a corporation created under the laws of the State of Pennsylvania, on the principal that "it is well settled that no State will enforce penalties imposed by the laws of other States; such laws are universally considered as having no extra territorial operation or effect."

It is true that the laws of the United States, which are operative over the whole Union, cannot be considered as extra-territorial in any part, but while in our complex system of government there are two sovereignties, each exercising different powers within the territory of each State, the rights of the different sovereigns in their respective spheres, are as separate and distinct as if they occupied separate territories. Each sovereignty has its own code of crimes and offenses. The law of the State of Maryland, 1st code, article xcix., section 9, provides, "that any person guilty of usury, shall forfeit all the excess above the real sum or value of the goods and chattels actually lent or advanced, and the legal interest on such sum or value, which forfeiture shall inure to the benefit of any defendant who shall plead usury and prove the same." This is the forfeiture and the only forfeiture which this court is authorized by the statue law of the State to enforce. The common law right of a borrower to recover back in an action for money had and received, the usurious interest he has paid still remains, but has been very materially limited by an act of Assembly which will go into effect on the 1st of June next. The law of Maryland does not apply to this defendant, which is a creature of the general government, and which is subject to the penalty for usury which Congress has thought proper to impose, but this court can not inflict a forfeiture different from that which the power that created it has chosen to prescribe. In the case above cited, of the Farmers and Mechanics National Bank of Buffalo *v.* Dearing, which originated in a State court of New York, and was finally decided by the Supreme Court of the United States, and was a suit to recover the amount of a note from which illegal interest had been discounted in advance, it was held that the New York court should have deducted the interest unlawfully taken and have given judgment for the residue; and it has been insisted in argument that such deduction was in fact enforcing by a State court a forfeiture imposed by the law of the United States; but the answer to this position is that the deduction was not the enforcement of a penalty, but simply withholding an amount illegally claimed under a contract. The statute did not make the contract wholly void, but only the part of the contract which was for usurious interest. The court say: "Where a statute prescribes a rate of interest and simply forbids the taking of more, and more is contracted for, the contract is good for what might be lawfully taken and void only as to the excess."

The case of the Chesapeake Bank *v.* The First National Bank of Baltimore, garnishee, 40th Maryland, page 269, has been relied on as conclusive to show that this court has jurisdiction in the present case; but I understand that case as deciding only that the act of Congress of 1873, which declares that no attachment, injunction or execution shall be issued against a national banking association or its property before final judgment in any suit, action or proceeding in any State court is valid, on the ground that Congress has the right to provide in what tribunals these banks shall be sued and to what suits or actions they shall be subjected, because it is the sole judge what provisions tend to promote the efficiency of these banks in performing the functions by which they were designed to serve the government. But to admit the right of Congress to prohibit certain legal proceedings from being instituted against the banks in the State courts does not concede the right of Congress either to impose on State courts the duty, or to give them the power to enforce penalties imposed on those banks for violations of the laws of the United States. The two propositions have no logical connection with each other.

After a careful investigatian I have arrived at the following conclusions:

First. That the suit in this case is to enforce a penalty under an act of Congress.

Second. That it was the intention of the act to give this court jurisdiction in such a case.

Third. But that the act is unconstitutional in this respect.

It is insisted that the declaration is defective in some other respects, but as these defects, if they exist, could be amended, and as the question of jurisdiction is conclusive of the case, it is not necessary to consider them. The demurrer is sustained.

ENGLISH COURT OF APPEAL.

THURSDAY, FEB. 3, 1876.

(Before the LORD CHANCELLOR, LORD COLERIDGE, and MELLISH, L. J.)

RUMMENS *v.* HARE and ANOTHER.

Appeal from an order of the Exchequer Division.

POLICY OF ASSURANCE—GIFT OF—DETINUE—DONEE'S RIGHT TO RETAIN POSSESSION OF PAPER-WRITING AGAINST DONOR'S ADMINISTRATOR.

J., having insured his life for 100*l*., handed over the policy to the defendant, who was his mother, as a voluntary gift. He afterwards paid two premiums upon the policy, and gave the receipts for such payments to the defendant. Some time after the gift of the policy to the defendant, J. married, and he died intestate, leaving a widow.

Held, (affirming the judgment of the Exchequer Division below), that the defendant was entitled to retain possession of the paper-writing of the policy as against the widow, who claimed as administratrix of J.

On the 27th Aug., 1873, one J. G. Rummens, who was then living with his mother, effected an insurance on his own life for the sum of £100 in the Breton Medical and General Life Association. Shortly afterwards, upon his mother asking him to make provision for her, he handed over to her the policy of assurance, saying, "If I die, you will receive the money."

He afterwards paid two premiums on the policy, the receipts for which payments he also handed over to his mother. No money consideration passed from mother to son for the policy, which has remained in the mother's possession since the gift of it to her.

J. G. Rummens married in 1874, and died, intestate, on the 25th Jan., 1875, leaving his widow, Elizabeth Rummens, him surviving.

Elizabeth Rummens, as the administratrix of the estate, being unable to obtain payment from the company of the £100 secured by the policy, unless she produced the policy itself, thereupon commenced an action against the defendants, the mother of the intestate and her solicitor, to recover the possession of it.

The cause was tried before Cleasby B. at the sittings for Middlesex, after Hilary Term, 1875.

The plaintiff's declaration was "for that the defendants detained from the plaintiff a certain policy of assurance of the plaintiff, numbered 38,135, for assusuring £100 on the life of the said intestate (J. G. Rummens) in the Breton Medical and General Life Association; also certain receipts for premiums paid thereon by the said intestate; and also divers other documents and papers connected therewith, whereby the plaintiff has not only been deprived of the possession of the same, and also of the power of raising money thereon for the purposes of the said administration, but has also been delayed, as well in proceeding to obtain payment of the said policy, as also in administering the proceeds thereof as assets in the said administration." There was a further count in the declaration for conversion of the policy, receipts, etc., and the plaintiff claimed a return of the policy, receipts, and documents, and damages for their detention.

The defendants pleaded: *Non detinet*, that the property was not the plaintiff's as alleged, and not guilty, and issue was joined on these pleas.

The jury found for the defendants on both counts.

On the 21st July, 1875, a rule was obtained in the Exchequer by the plaintiff calling upon the defendants to show cause why the verdict entered for them should not be set aside and a new trial had, on the ground that, upon the facts as proved at the trial, no interest passed to the defendant, Sarah Rummens, in the policy of assurance itself, and that the learned judge should have directed a verdict for the plaintiff.

On the 7th Dec., 1875, the Exchequer Division made an order discharging this rule, and it was from this order the defendants now appealed.

The case will be found reported on another point, 32 L. T. Rep. N. S. 428.

Tapping, for the appellant, plaintiff below (with him the *Solicitor-General*).—There was no valid assignment of the policy to the defendant. By sec. 3, of the 30 and 31 Vict., c. 144, notice of the assignment must be given to the assurance company, in order to make the assignment good; and by sec. 5, such assignment may be made by indorsement or by a separate instrument. This was an imperfect voluntary gift. The intestate's intention could not be carried out, and the property remained in him; the defendant has no right to retain the policy. She cannot obtain the money secured by it: Searle *v.* Law (15 Simon's Reports, 95). It is true that the principle laid down in this case has been considered in Barton *v.* Gainer, 3 H. & N. Ex. Rep., 387.

Grantham for the defendants (with him *Day*, Q. C.) not called on.

THE LORD CHANCELLOR.—This is a question not involving the right to the money secured by the policy of assurance. It is an action brought in order to recover possession of the actual policy itself, and different considerations apply to proceedings to recover the paper writing than would apply to proceedings to recover the money. The intestate, having insured his life, gave to his mother, upon her remonstrances, the policy of assurance, and told her to take and keep it, which she did until his death. He also gave her receipts for two premiums which he had paid After his death his widow sues the defendant as administratrix, and the court below has held, upon the authority of Barton *v.* Gainer, that the administratrix could not maintain trover against the defendant, the donee of the policy. I agree with that holding. This was a gift without consideration, no doubt, but still it was a gift. The plaintiff may not be able to recover evidence of her debt, and yet the person having the paper may not be able to recover the money secured by it, but the defendant is entitled to retain what was given to her—the paper and writing of the policy.

The rest of the Court, (Lord Coleridge, C. J., and Mellish, L. J.), concurred.

Judgment for respondents, defendants below.

Solicitor for the plaintiff, *A. S. Hatchett Jones*.

Solicitors for the defendants, *Wood* and *Hare*.

THE CARRIERS' ACT.—A simple point, but one of great importance, under the Carriers' Act, was recently decided by the Queen's Bench Division, in Way *v.* The Great Eastern Railway Company. The facts appear, says the *Law Times*, to be that the plaintiff delivered three pictures by Vandyke, Poussin, and Wilson, to be carried by the plaintiffs, without declaring their value, which was agreed to be £1,000. The pictures were stolen by a person who pretended to be one of the company's servants, but in fact was not. It was argued the acting as a servant constituted the thief a servant *pro hac vice* within the meaning of the 8th section of the Carriers' Act. But Mr. Justice Blackburn observed that "the question under the Act was whether the thief was in truth the servant of the company, and in truth he was not so. It was highly artificial reasoning to say that because he succeeded in imposing upon the company, therefore he became their servant." Judgment was therefore entered for the company, and the decision appears to be perfectly correct. That there was negligence in the company seems probable enough, but it was held in Hinton *v.* Dibbin (2 Q. B. 646), that the Carriers' Act is a protection even in the case of the grossest negligence. And, indeed, Mr. Way's case appears to have been just one of those which the Carriers' Act was intended to meet. If the company had known that they were carrying Vandykes and Poussins they would have "charged £50, and sent a policeman" with them. As it was, they charged 3s., and took at least no more than "ordinary care"—with the result as we have stated.—*Public Opinion*.

CHICAGO LEGAL NEWS.

Lex vincit.

MYRA BRADWELL, Editor.

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We call attention to the following opinions, reported at length in this issue:

MISREPRESENTATIONS ON SALE OF CLAIM—HOW EVIDENCE MUST BE TAKEN IN EQUITY CASES IN THE FEDERAL COURTS—ACT OF 1872.—The opinion of the Supreme Court of the United States, by WAITE, C. J., stating the effect of making misrepresentations on the sale of a claim against a person in precarious circumstances, and the duty of a person to whom such misrepresentations are made, to endeavor to determine whether they are true or false, and holding that the statute of 1872, providing that the practice, pleadings and forms, and mode of proceeding in civil cases in the Circuit and District courts of the United States shall conform as near as may be to the practice in the State courts of the State, has no application to the case before the court, it being a case in equity, and equity and admiralty cases being excepted from the act.

BANKRUPTCY—SALE OF PROPERTY—COSTS—LIENS.—The opinion of the United States Circuit Court of South Carolina, by Bond, J., holding that where property which is encumbered by liens is sold, at the suggestion of the general creditors, and brings no more than the amount of the liens, it is not chargeable with any costs except the actual costs of sale; that where property is sold free from a mortgage, the bankrupt court has no authority to adjust the claims of the trustee under the mortgage against the *cestui que trust*, nor to ascertain what is due by him to his counsel.

REMOVAL OF CASE FROM STATE TO FEDERAL COURT.—The opinion of the United States Circuit Court for the northern district of Ohio, by WELKER, J., holding that when a case is commenced in the Court of Common Pleas of a State, and a trial had in such court, and the case appealed to a District Court of the State, it is then too late to ask to have such case removed into the United States Court under the act of March 2, 1867.

DISOBEYING ORDERS ON SHIP BOARD.—The opinion of the United States District court of Oregon by DEADY, J., holding that a prosecution cannot be maintained against a seaman for any of the offenses defined in sections 4596 of the revised statutes, unless an entry of the circumstances is made by the master in the official log book of the vessel, as soon as possible after the occurrence, and read over to him or a copy furnished him, and his reply thereto entered in the same manner.

NATIONAL BANK—DISSOLUTION OF—ACTION AGAINST FOR TAKING MORE THAN LAWFUL INTEREST—STATE COURT NO JURISDICTION.—The opinion of the City Court of Baltimore by BROWN, J., stating the manner and effect of a national bank going into liquidation and closing up, and holding that an action brought in a State court against a national bank to recover double the amount of interest alleged to have been usuriously taken by such bank, is a suit brought to enforce a penalty under an act of Congress, and that a State court has no jurisdiction of such an action. The reader will find a very elaborate opinion of the Supreme Court of this State by WALKER, C. J., in the case of the Miss. River Telegraph Co. *v.* The First National Bank, etc., reported 7 CHICAGO LEGAL NEWS, 158, in which the same conclusion is arrived at as in the Baltimore case.

POLICY ON LIFE—GIFT OF—RIGHT TO POSSESSION.—The opinion of the English court of Appeal where J., having insured his life for 100*l*, handed over the policy to the defendant, who was his mother, as a voluntary gift. He afterwards paid two premiums on the policy, and gave the receipts for such payments to the defendant. Sometime after the gift of the policy to the defendant, J. married and he died intestate, leaving a widow. Under this state of facts the court held affirming the judgment of the Exchequer Division below that the defendant was entitled to retain possession of the paper writing of the policy as against the widow, who claimed as administratrix of J.

BIGAMY NOT A CONTINUING OFFENCE—STATUTE OF LIMITATIONS.—The opinion of the Supreme court of Pennsylvania by PAXSON, J., holding that bigamy is not a continuing offence in Pennsylvania, nor is the offence perpetuated day by day by cohabitation under the second marriage; that the second and unlawful contract of marriage is the offence in the eye of the law and cohabitation is not an element of the offence but a separate and distinct offence of itself; that the statute of limitations begins to run from the time of the execution of the illegal contract of marriage; that the statute runs from the time the offender becomes liable to the penalties of the law.

NOTES TO RECENT CASES.

LAWS REGULATING THE SALE OF PATENT RIGHTS.

The Common Pleas Court of Dauphin Co., Pa., in Bowen *v.* Kemer et al., reported 5 Luzerne Legal Register, 104, where a note, not negotiable, was given for the purchase of a patent right, and no notice to that effect was endorsed on the note. Held, that it was illegal and void, and that there could be no recovery thereon, as such a transaction was in violation of the act of 1872 relating to the sale of patents. We had supposed that it was understood by all good lawyers and judges that a State had no constitutional authority to pass laws regulating the sale of patent rights. Our own Supreme Court, in the case of Halladay et al. *v.* Hunt, reported in 6 CHICAGO LEGAL NEWS, 343, held an act of the legislature of Illinois regulating the sale of patent rights passed in 1869, similar to the Pennsylvania statute, to be unconstitutional. Judge Davis, in the United States Circuit Court for the D. of Indiana, in *ex parte* Robinson, reported 2 CHICAGO LEGAL NEWS, 297, held that the law passed by the legislature of Indiana to regulate the sale of patent rights was void; that property exists in inventions by virtue of the laws of Congress, and no State has the right to interfere with its enjoyment or to annex conditions to the grant.

THE AUTHORITY OF THE PRESIDENT OF A R. R. CO.

The Supreme Court of Pennsylvania in the J. R. R. Co. *v.* The Penn. R. R. Co., 33 Leg. Intel., 193, held, where the president of the Pennsylvania Railroad Company is its chief executive officer and general agent in the matter of operating its lines under the powers contained in the charter; that he cannot, as such agent, give away a dollar of its property, an inch of its track, or the least of its franchises.

COMMON CARRIER—LIMITING LIABILITY.

The Court of Appeals of Virginia in V. & T. R. R. Co. *v.* Sayers, 15 *Am. Law. Reg.*, 297, held that a common carrier may, by contract or by notice, restrict his common law liability as insurer against purely accidental loss or injury, but that he cannot even by express contract, avoid liability for negligence, nor limit it to gross negligence. This is an elaborate and well considered opinion.

THE COUNTY RING.—For years it has been charged that our county affairs have been managed by a ring, and that those who did not contribute as the managers of the ring directed could not secure a contract of the county officials, no matter how low their bid might be. Some of the County Commissioners have done their duty faithfully and tried to break the ring, but it was too strong for them. The newspapers have cried fraud and corruption. Grand juries have endeavored to indict, but failed to get the necessary evidence and the work of the ring went on. This week, however, the Grand Jury, profiting by the labors of previous grand juries and the evidence obtained from some of the conspirators, returned into court indictments for conspiracy to defraud the county, against George B. Kimberly, the present warden of the Poor House, C. F. Periolat, Patrick O'Donnell, Hugh H. Sweetson, and A. B. Johnson, John McCaffery, Patrick Carroll, John J. Russell, John Crawford, Samuel Ashton, John Jones and C. C. P. Holden, now or late County Commissioners. These trials should be conducted with the utmost fairness and dispatch. No one should be convicted because he is found in bad company, but such of the defendants as the evidence shows to be guilty should be punished to the extent of the law. It is difficult to name a greater crime than that of a number of County Commissioners and contractors conspiring together to defraud the county and to deprive the helpless insane and miserable paupers of proper clothing and wholesome food. No one has had more to do in breaking up this contractors' ring than Mr. Story, of the *Times*. For months he has assailed it vigorously in his paper and as foreman of the last Grand Jury, he grouped together the leading facts and circumstances in such a manner as to enable the present Grand Jury to obtain the necessary evidence to indict. Editors make the best kind of grand jurors. Mr. Shehan, of the *Tribune*, is on the present Grand Jury, and rendered it valuable aid in its investigations.

Recent Publications.

AGAINST FATE—A True Story, by Mrs. M. L. Rayne. Chicago: W. B. Keen, Cook & Co. 1876.

The graceful, spicy correspondent of the Chicago press, Mrs. M. L. Rayne, who used to write for the Chicago *Tribune*, under the name of "Vic.," and who in later years was the Editor and Publisher of the *Chicago Magazine*, has entered upon a new field, viz: that of book making. She has succeeded in producing a most readable book.

The narration purports to be a true story, although it reads very much like a romance. It has so much of every day life, so faithful a picture of the over-zealous reformer, and the poor girl, struggling for a livelihood, that if we judge of her by what she has said in her story, we must conclude that she has a keen sympathy with what is earnest and honest. Success to the fair writer and her book. It will no doubt have a ready sale, as it most richly deserves.

A PRACTICAL TREATISE ON THE LAW OF EVIDENCE. By Thomas Starkie, Esq., of the Inner Temple, one of Her Majesty's counsel. The tenth American, from the fourth London edition, by Dowdeswell and Malcolm, of the Inner Temple, barristers-at-law. With the notes to former American editions, by Metcalf, Ingraham and Gerhard, and additional notes and references to American cases, by George Sharswood. Philadelphia: T. & J. W. Johnson & Co., law booksellers, publishers and importers, No. 535 Chestnut street, 1876. Sold by E. B. Myers, law bookseller, Chicago.

There is not a common law lawyer in England or America but what knows and will admit the great merits of Starkie on Evidence. The publishers will receive the thanks of the profession for bringing out this edition of their favorite text book on the Law of Evidence. Mr. Sharswood, the editor of the present American edition, proclaims himself in favor of the repeal of all arbitrary rules for the exclusion of evidence. He says, in a note under date of April, 1876, that the Fourth English Edition has been adapted to the present state of the law in England. That it is true some of the alterations recently adopted by statute in that country have not yet been universally introduced into this. In many of the States, however, they have already been incorporated into their legislation. The experience of those States where the law of evidence has been simplified by the repeal of all arbitrary rules of exclusion speaks so loudly in favor of that reform, that the example must spread. That the labors of the former American editors have been carefully retained. Notes and references to the more recent decisions have been added to bring up the work to the present time. Attorneys who have not already got Starkie will do well to add this volume to their libraries.

THE CONSTITUTIONAL AND POLITICAL HISTORY OF THE UNITED STATES. By Dr. H. Von Holst, professor at the university at Freiburg. Translated from the German by John J. Lalor and Alfred B. Mason. 1750—1833. State Sovereignty and Slavery. Chicago: Callaghan and Company, 1876.

This is the most extensive work of the kind ever undertaken in Chicago — the translation and publication of several large volumes of a foreign work, being the Constitutional History of the United States by a foreigner. The undertaking of such an enterprise reflects credit upon the publishers, Messrs. Callaghan and Company. The translation is entirely a Chicago production. The translators, Messrs. Lalor and Mason, are Chicago men. The composition is by Blakely & Brown. The plates from the foundry of Marder, Luse & Co. The press work by the Chicago Legal News Company, and the binding by A. J. Cox and Company. We take pleasure in saying that the translating has been done in the most admirable and skilful manner. Von Holst is one of the great thinkers of Europe. He says in his preface that he has one great advantage over all his American predecessors: he is a foreigner. This he considers to be an advantage, though during his sojourn in the United States (1867-1872) he had frequently to hear, "you are a foreigner, you cannot fully understand our system of government." The professor very

appropriately commences his preface by saying: "The United States are about to commence the second century of their life as an independent commonwealth and as a republic. It is a curious fact that, at the same time, they evidently are entering upon a new phase of their political development. The era of buoyant youth is coming to a close: ripe and sober manhood is to take its place. I take it to be a good omen for the success of this work that just at this moment an English translation of it is to be offered to the American public." We cannot perhaps give the reader a better idea of this volume than by stating its contents. It is divided into twelve chapters as follows: 1. The Origin of the Union, the Confederation and the Struggle for the Present Constitution. 2. The Worship of the Constitution and its Real Character. 3. The Internal Struggles during Washington's two Administrations. Alexander Hamilton. The First Debate on the Slavery Question. Influence of the French Revolution. Consolidation of Parties. Gradual Intensification of Geographical Differences. 4. Nullification. The Virginia and Kentucky Resolutions. 5. The Presidential Election of 1801. The Fall of the Federalist Party. Jefferson and the Purchase of Louisiana. The Burr and Federalist Intrigues. 6. The Embargo. Madison and the Second War with England. The Hartford Convention. 7. History of the Slavery Question to 1787. The Compromises of the Constitution on Slavery. 8. History of the Slavery Question from 1789 until the Missouri Compromise. 9. The Economic Contrast Between the Free and Slave States. The Missouri Compromise. 10. Development of the Economic Contrast Between the Free and Slave States 11. The Panama Congress. Georgia and the Federal Government. 12. The Doctrine of Nullification. The Compromise between South Carolina and the Federal. Government. The professor intends visiting this country again before completing his work. How industriously he has collected and digested the material at his command every page of this volume bears witness. We Americans will not all agree with him in the estimate he has put upon our great men who founded this government, who to a certain extent have become our national idols nor in his views on the great questions which have threatened our existance as a nation, and been the subject of controversy for the last hundred years. But we will all give him credit after reading his work of having expressed his opinion of us and our institutions unmoved by passion and uninfluenced by prejudice either for or against us. We predict that the work will have an extensive sale.

UNITED STATES DIGEST; A DIGEST OF DECISIONS OF THE VARIOUS COURTS WITHIN THE UNITED STATES. By Benjamin Vaughan Abbott. New series, vol. VI, Annual Digest for 1875. Boston: Little, Brown & Company, 1876. Sold by Callaghan & Co., Law Book Publishers, Chicago.

This series of the United States Digest by Mr. Abbott, is absolutely indispensable to every lawyer who wishes to refer readily to the cases in the recent volumes of reports. There are ninety-one volumes of reports comprised in this volume of the Digest—eleven United States Reports and eighty State Reports. The 64, 65, 66, 67, 68 and 76 of Illinois Reports are also comprised in it. It is a sufficient guarantee of its mechanical execution to say that it is from the press of John Wilson & Son, and published by Little, Brown and Company, the largest law publishing house in the world.

SUPREME COURT OF PENNSYLVANIA.

GISE *v.* THE COMMONWEALTH.

Error to the Quarter Sessions of Luzerne County.

1. Bigamy is not a continuing offense in Pennsylvania, nor is the offense perpetuated day by day by cohabitation under the second marriage.
2. The second and unlawful contract of marriage is the offense in the eye of the law and cohabitation is not an element of the offense, but a separate and distinct offense of itself.
3. The statute of limitation (two years) begins to run from the time of the execution of the illegal contract of marriage. The statute runs from the time the offender becomes liable to the penalties of the law.
4. Bigamy is a misnomer of the offense, polygamy is the proper word to signify the crime.

Opinion by PAXSON, J. Delivered May 18th, 1876.

This case presents a single question, the plaintiff in error was indicted for the crime of bigamy. Upon the trial in the court below, the statute of limitations was set up as a defence. It appears that the second marriage took place more than two years prior to the commencement of the prosecution. The court ruled that bigamy was a continuing offence, and that the statute did not apply. The defendant was convicted and sentenced, and the record having been brought into this court upon a writ of error, we are required to decide upon the correctness of this ruling.

Our statute of limitations contains no clause excepting bigamy out of its operation. Its language is; "all indictments which shall be brought or exhibited," &c. Were we now to say that all indictments except bigamy shall be barred unless brought or exhibited within the statutory period, we should be vesting into the act of assembly that which the law-making power has not placed there. This is clearly not within the province of the judiciary. It is said, however, that the statute of limitations does not apply by reason of the peculiar phraseology of the section of our code defining bigamy; that the offence is the having of two wives or two husbands at one and the same time, and is of a continuing nature. This is certainly a very literal construction of the act, and taken in this strict sense it defines no offence, for the reason that under the law of Pennsylvania it is impossible as a legal proposition for a man to have two wives, or a woman to have two husbands at the same time. A man who takes a wife here cannot have a second wife so long as his former marriage is undetermined by divorce or death. He may indeed enter into a second marriage contract pending the first. But the second woman is never a wife; the law strikes down such second contract as void, and the offence is bigamy on the part of the man.

It is very clear that at common law the crime of bigamy occurs and is complete when the second marriage is accomplished. It follows that the statute would commence to run from that time. This has never been questioned. But it is said that owing to the peculiar language of our statute it seeks to extend the offence of bigamy beyond the mere marriage contract and cover the subsequent cohabitation of the parties, which being continuous in its nature is not affected by the bar of the statute. Yet a little reflection will show that our code so far from being peculiar in its terms, merely defines the offence of bigamy at common law. It is said in Bacon's Abridgment that bigamy is the "having of a plurality of wives," and that the offence consists of "marrying a second wife, the first being alive." Bouvier defines it to us, "the state of a man who has two wives, or of a woman who has two husbands living at the same time." Blackstone says, it is the "having of a plurality of wives at once." It will be seen that our code, 34th section of act of 31st of March, 1860, P. L. 392, uses almost the precise phraseology of the text writers. Its language is: "if any person shall have two wives or two husbands at one and the same time," or, nor can it be claimed that there is anything novel in this section. It is but a re-enactment of the act of 1705 (1 Smith's Laws, 29), so far as it relates to the description of the offence. In a note to the last named act, it is said that this statute merely defines the offence of bigamy which "is understood in law to be where a person marries a second wife or husband, the first being living." Such has been the uniform construction of our statute since the act of 1705. Our indictments have been so drawn. The forms which are given by Mr. Wharton in his Precedents, at page 582, charge the second marriage as the offence as at common law. One of those forms was prepared by Mr. Jared Ingersoll, while attorney-general, in 1795; the other by Attorney-General Bradford in 1790. Both of these eminent lawyers evidently regarded the second marriage as the offence; and such has been the uniform construction from that day to the present time. That they were right in this is manifest from the fact that the indictment for bigamy is always under our practice found within the jurisdiction where the second marriage took place. That the venue must be so laid is elementary law. Wharton's A. C. L., § 2627; Finney *v.* State, 3 Head., 544; People *v.* Mosher, 2 Parker, 195. It is not so in England, nor in New York, nor Virginia. But this rests upon statute. We have no such statute, and the common law rule prevails.

What our statute forbids is the contracting of a second marriage during the lifetime of a former husband or wife, as was said in the State *v.* Patterson, 2 Iredell, 346: "Marriage, or the relation of husband and wife, is in law complete when parties able and willing to contract, actually have contracted to be man and wife, in the form and with the solemnities required by law. It is marriage; it is their contract which gives to each right or power over the body of the other, and renders a consequent cohabitation lawful; and it is the abuse of this solemn and formal contract, by entering into it a second time when a former husband or wife is still living, which the law forbids, because of its outrage upon public decency, its violation of the public economy, as well as its tendency to cheat one into a surrender of the person under the appearance of right. A man takes a wife lawfully when the contract is lawfully made. He takes a wife unlawfully when the contract is unlawfully made, and this *unlawful contract* the law punishes." In Reg. *v.* Baron, 1 Cox, C. C. 34, it was said by Lord Denman, C. J.: "The offence consisted in going through the ceremony of marriage and appearing to contract that which was a legal and binding union at the time when she (the defendant) had already a husband living. That single fact constitutes the crime and the proof of it." It is needless to multiply authorities.

The doctrine now for the first time asserted that the continuing cohabitation is the offence, does not need an extended discussion. It is not necessary to allege or prove cohabitation upon an indictment for bigamy. Cayford *v.* Case, 7 Greenleaf, 58; Gahagan *v.* The People, 9 Parker; State *v.* Patterson, *supra*. On the contrary, a man may be convicted of bigamy who separates from his second wife at the altar, and has never cohabited with her at all. The *gravamen* of the offence is the second marriage contract, by means of which the offending party fraudulently obtains dominion or control over the body of the other. Mere lewdness or unlawful cohabitation is provided for by other sections of the code. The doctrine of continuing offences is novel. No text writer in England or America has ever asserted it. No respectable authority has ever recognized it. It is wholly unknown to the criminal law. There is a period in the history of every crime when it is completed, and the offender becomes liable to the penalties of the law. From that moment the statute commences to run.

It is said that if the statute runs from the second marriage, a man can defy the law by keeping his second marriage secret until after the statutory period has passed. This hardly rises to the dignity of an argument. Carried to its legitimate conclusion, it would apply to every case of crime, and entirely annul the statute. It is true, a man may live openly with his second wife after the bar of the statute. So he may with any other woman. I do not see that the scandal, or the injury to the public morals is greater in the one case than in the other. In either case, he may be punished according to the nature of his offence. When a married man unlawfully cohabits with a woman, he commits the crime of adultery. When he contracts a second marriage, he is guilty of bigamy. The difficulty in this case arises from the attempt to punish a man for one offence under a statute defining and punishing a different offence.

The statutes of several of the States differ from our own. So does the English statute. But the difference is more in form than substance. They are generally intended to define and punish the offence of bigamy. We have already seen in what that offence consists.

I have used the word bigamy according to its popular signification. Strictly speaking, it means twice married, as its derivation clearly shows. This was never an offence at common law, although made so by the canonists. Polygamy is the proper term to describe the offence we have been discussing, but by long usage bigamy has come to be understood in law to be the state of a man who has two wives, or of a woman who has two husbands at the same time.

The statute of limitations is a bar to this prosecution. It follows, therefore, that the plaintiff in error was illegally convicted and sentenced, and should be restored to his liberty. The judgment is reversed, and the record remitted to the Court of Quarter Sessions, with directions to carry this order into effect.

RELIGIOUS AMENDMENT OF THE CONSTITUTION.

By SAMUEL T. SPEAR, D. D.

It is the opinion of a portion of the American people that our National Constitution ought to be so amended as to establish "a Christian government." The amendment proposed for this purpose, if adopted, would make the preamble read as follows:

"We, the people of the United States *acknowledging Almighty God as the source of all authority and power in civil government, the Lord Jesus Christ as the ruler among the nations, and His revealed will as of supreme authority* in order *to constitute a Christian government*, to form a more perfect union, establish justice, insure domestic tranquility, provide for the common defence, promote the general welfare and secure the blessings of liberty to ourselves, and our posterity, do ordain and establish *the following* Constitution for the United States of America."

The words in italics are the ones which the advocates of a religious amendment to the Constitution desire to insert in its preamble. The object is to make the Government "a Christian government," and the method of doing it is to assert these three propositions: 1. That God is the source of all authority and power in civil government. 2. That the Lord Jesus Christ is the ruler among the nations. 3. That His revealed will is of supreme authority.

It is undoubtedly true that neither the Constitution nor the Government is now Christian in the sense contemplated by this amendment. It is, however, true that the Constitution establishes "a Christian government" in the sense of providing for those great *moral* ends that refer to the present welfare and happiness of society. Unity among the people, justice, tranquility, the common defense, the general welfare, and the blessings of liberty are enumerated as ends to be attained. These, surely, are not anti-Christian ends; and it is not straining the import of the term to say that they are Christian, considered with reference to that department of Christianity which relates to the interests and duties of time. In this sense the Constitution already provides for "a Christian government."

Let us then see in what further sense the Constitution would establish "a Christian government" if the preamble were amended in the manner proposed. What would be the *legal* effect? In answering this question, it is important to remember that the preamble of the Constitution is simply an *enacting* clause, analogous to the title of a legislative act; and that, in itself considered, it makes no grants of power, imposes no restraints, and contains no provision for the organization and administration of a government. Except in connection with what follows in the several articles of the Constitution, it is as meaningless and powerless as would be a legislative act if the whole of it consisted in its title. The preamble, for example, declares the establishment of justice to be one of the ends sought; yet this mere statement would be utterly inoperative if the Constitution, in the legislative, executive, and judicial grants of power to the General Government contained no provisions for the attainment of the end. The same would be true of all the

other objects specified in the preamble, if divorced from those provisions which are designed and adapted to secure them. Justice Story, in his "Commentaries on the Constitution" (section 462), says:

"And here we must guard ourselves against an error which is too often allowed to creep into discussions upon this subject. The preamble never can be resorted to to enlarge the powers confided to the General Government or any of its departments. It cannot confer any power *per se;* it can never amount by implication to an enlargement of any power expressly given. It can never be the legitimate source of any implied power when otherwise withdrawn from the Constitution."

It, hence, follows that, if the preamble were amended as proposed, not the slightest practical change would be made in the Constitution itself or in the character of the government. The added words would be in the preamble; but the government would be no more "Christian" than it is without them. It would still be true that "no religious test shall ever be required as a qualification to any office or public trust under the United States;" that "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof;" and that "the powers not delegated to the United States by the Constitution nor prohibited by it to the States are reserved to the States respectively or to the people." These provisions would remain in the body of the Constitution; and unless we adopt the false doctrine that the preamble is itself a grant of powers to the General Government the words proposed to be added to it would be legally a dead letter. The Constitution is not constructed to give any effect to such words or the ideas which they convey. There is nothing in it corresponding to them or that furnishes any method or legal machinery for their application. In this sense they would be perfectly useless.

The proper mode of making the Government "a Christian government," according to the model proposed, is to adopt an amendment that would substantially read as follows:

"SECTION 1. It is hereby declared that God is the source of all authority and power in civil government, that the Lord Jesus Christ is the ruler among the nations, and that his revealed will is of supreme authority.

"SEC. 2. Congress shall have power, by appropriate legislation, to enforce the provisions of this article."

This, which might be called the Sixteenth Amendment, would certainly gain the end proposed on the basis of the three religious doctrines affirmed. But, in securing this end, it would fundamentally change the whole theory of the Constitution in regard to religion and, in the powers of Congress, establish a complete religious despotism. The doctrines, being thus constitutionally affirmed and thus accompanied with an enforcing power in Congress, would "constitute a Christian government" in a sense that might well fill the country with alarm. If, however, these doctrines were simply in the preamble, dissevered from any enforcing power, they would have no more legal significance than if they were found in a treatise on theology.

Moreover, if these propositions were added to the preamble, and all the other parts of the Constitution were left unchanged, there would be no *authoritative* method of determining their meaning, or in what sense they would make the government "a Christian government." Congress could not legislatively express any opinion on the subject, since it would have no power of legislation in reference to it. The Supreme Court of the United States could not judicially expound or apply the propositions, since no case under them could arise over which it would have jurisdiction. Ecclesiastical courts could not determine their meaning, since they are not the authorized interpreters of the Constitution. Their meaning would be purely a matter of *private* interpretation, and no such interpretation would have any authority. The *words* would be in the preamble; but, as a national confession of faith, they would be accompanied by no legislative or judicial commentary on their import. Whether God is the source of all authority and power in civil government, merely in the general sense of creation and providence, or in the special sense of investing such government with a portion of his own authority; whether the Lord Jesus Christ is the ruler among the nations in any other sense than that in which he is the ruler over the fowls of the air and the beasts of the field; where his revealed will is to be found, and for what purposes and in what relations it is to be applied—these and the like questions would be open to all sorts of answers, according to the varying notions of different persons, with no tribunal and no authority anywhere to give the true answer. The words themselves are sufficiently elastic to be capable of different interpretations; and, hence, in the absence of an authentic expounder, there would be no means of deciding in what sense the people use hem in the preamble.

Nor do we see any reason why, if the door is to be opened sufficiently wide to admit these three religious dogmas, it may not be opened wide enough to admit forty—indeed, to permit the ingress of all the cardinal doctrines of Christianity. Why not also declare that Christ died for our sins, according to the Scriptures; that he rose again on the third day; that he ascended into Heaven; and that he will come again to raise the dead and judge the world? These and the like are certainly Christian truths; and the theory which demands the utterance of three such truths may just as well be extended to the whole system. It imposes upon itself no limitation. Indeed it would be a question of interpretation, without anybody authorized to answer it, whether the phrase "his revealed will" would not by implication embrace the whole circle of Christian doctrine and precept as given in the Bible. Words, when used in constitutions, are generally interpreted to include everything to which, being taken in their natural sense, they are applicable; and under this rule the phrase referred to would have a very broad import.

What practical service would the insertion of these words in the preamble, with no power in the government either to explain them or put them into legal execution, render to either God or man? A church creed is operative for its appropriate purposes, because behind the creed we have a church organization to work it; but such a creed, either in whole or in part, in the constitution of a government, without the power to work it, would be of no productive value. It might gratify the wishes of a certain class of the people, while it would be contrary to the convictions and wishes of a much larger class; but it would not make one Christian more or one sinner less. It would not increase the religious zeal of the people or add to the general influence of Christianity upon the popular mind. It would not make the careless thoughtful, or convert Atheists and Deists to the faith. It would not build a church or raise a dollar for religious purposes. It would not control the legislation of the government or furnish any guaranty that the legislation would be just and right. It would not add to the sense of God in the councils of the nation or in individual hearts. It would not purify political parties or make officeholders more circumspect. We are at an utter loss to see how the simple creed contained in the words proposed, unaccompanied by any enforcing power, as it would be if found merely in the preamble, and as it must be, or be the basis of a most dangerous religious despotism—would secure any desirable result that would not just as well and just as certainly be secured without it. There is not a solitary thing which the creed in this form of utterance would or could do to make the government a "a Christian government" in any sense not now real, or to make the people any more Christian than they now are. Some might think it a religious ornament to the Constitution; yet a much greater number would regard the ornament as not being in its proper place.

The one great objection to the amendment, though, as we have shown, it would be legally meaningless and powerless, consists in the *principle* which underlies it, and which those who framed the Constitution meant utterly to exclude. The American people, so far as they are religious at all, are Christian by a very large preponderance, and in this sense they may be justly spoken of as being a Christian people; and yet nothing is more conspicuous in their political and civil institutions than their general refusal to incorporate *pro forma* their christianity into the language of their constitutions or laws. The great idea which they have sought to realize is that of the most perfect religious liberty and equality among all the citizens of one common government; and, in order the more effectually to gain this end, they have denied to civil government any jurisdiction in matters of religious faith and practice, beyond that of extending an impartial protection to all the people. Adopting this principle, they have with scrupulous care limited their constitutions and legal systems to the attainment of purely temporal ends, and hence omitted to place in them any affirmations or denials of religious dogmas.

There can be no doubt that the amendment proposed, though confined to the preamble of the Constitution, and really granting no power to the general government, would, nevertheless, be a departure from this principle. By it the people of the United States, not as individuals, but in their political and corporate capacity, would place a confession of religious faith in their national constitution. This would be a step in the wrong direction, provided the doctrine of absolute religious equality is to be maintained. The next step would be to clothe the government with power in respect to this confession; and this would at once erect a religious despotism. The safe course for the people is not to take the first step; and if they do not propose to take the second step there is no occasion for taking the first. When they are prepared to make christianity a *legalized* system, then and not till then will it be seasonable to stamp its doctrines with a constitutional affirmation.

Looking, finally, at the process by which the proposed amendment must be adopted, if at all, we cannot resist the conviction that its advocates are engaged in the most hopeless of all undertakings. In order to succeed, they must persuade *two thirds* of both houses of Congress to propose the amendment, or *two thirds* of the legislatures of the several States to ask Congress to call a convention to propose it. And when they have gained this end, they must persuade *three-fourths* of the legislatures of all the States or conventions in *three fourths* of the States to ratify the proposition. This is the constitutional method of changing the fundamental law of the land. Does any man in his senses suppose that the amendment in question can be carried through this process? Nothing short of a largely predominant public sentiment could secure the result. No such sentiment now exists, and there is not the remotest probability of creating it by any amount of discussion. The tendency of discussion would be in the opposite direction. A political party organized on the basis of such an amendment would not live long enough to be entitled to a name, and any existing party adopting it as an article of its political creed would be crushed by its weight. The advocates of the amendment may as well save their time and money, and apply both to the attainment of more practical objects.—*N. Y. Independent.*

THE EFFECT AS AGAINST THE CREDITORS OF A TESTATOR OF AN EQUITABLE MORTGAGE BY A DEVISEE.

The case of the British Mutual Investment Company *v.* Smart is noteworthy, inasmuch as it overruled the decision of Vice Chancellor Kindersley, 2 Drewry, 248; 23 L. J., 629; 2 L. T. Rep., 235, and extends to *bona fide* alienations in equity by an heir to purchasers or persons in the position of purchasers the protection which *bona fide* common law alienations enjoyed under 11 Geo. 4, and 1 Will. 4, c. 47, in the administration of a testator's assets.

Sir John Romilly's act for consolidating and amending the laws for facilitating the payment of debts out of real estate, (11 Geo. 4, and 1 Will. 4, c. 47), s. 6, directs that in all cases where any heir-at-law shall be liable to pay the debts or perform the covenants of his ancestors in regard of any lands, tenements, or hereditaments, descended to him, and shall sell, alien, or make over the same before any action brought or process issued out against him, such heir-at-law shall be answerable for such debt or debts in an action or actions of debt or covenant to the value of the said lands so by him sold, aliened, or made over, in which case all creditors shall be preferred, as in actions against executors and administrators, and such execution shall be taken out upon any judgment or judgments so obtained against such heir to the value of the said land as if the same were his own proper debt or debts, saving that the lands, tenements and hereditaments *bona fide* aliened before the action brought shall not be liable to such execution.

The facts in Carter *v.* Sanders were as follows: N. and C., the daughters of M., were jointly indebted to W. S., and the debt was secured by deposit of title deeds of property belonging to C. M. appointed N. her executrix. Part of her property consisted of a mortgage debt, and after her will she purchased some real estate, which descended to N. and C. N. died, leaving a large amount of M.'s debts unpaid, and she made the plaintiff her executrix, so that the plaintiff was personal representative both of M. and N. After the death of M., N. and C. borrowed money of S. upon deposit of the title deeds, by which M.'s mortgage debt was secured, and of the title deeds of the real estate which descended to N. and C. S. knew that the money was only partially wanted for the purposes of M.'s estate. There had been another suit to administer the estates of M., and part of the real estate of M. sold on a bill by the plaintiff against S. seeking to recover the title deeds deposited. Vice Chancellor Kindersley held that the mortgage by N. and C., as heiresses of M., did not relieve the purchaser from the suit of M.'s representative. A deposit of the deeds with a creditor for an advance was not within the principle of a mortgage by the heir of the legal estate, or of all the interest that he had.

In Coope *v.* Cresswell (14 L. T. Rep. N. S., 202; L. Rep. 2 Ch. 112), Lord Chancellor Chelmsford impugned the principles of Carter *v.* Sanders, holding that under the Statute of Fraudulent Devises (3 W. & M., c. 14) an equitable devisee might be sued for breach of a covenant by the testator, and further, that a conveyance to new trustees was not such an alienation within sect. 7 as would preclude the action. "For under the statute the liability attaches upon the land and not upon the person, except in case of alienation, and therefore, although the trustees are not liable to the debts of the devisor, yet the creditors may through them make the land available for the satisfaction of their debts. Upon a judgment against the trustees, execution would of course extend to the whole estate. But if any beneficial interest in it had been *bona fide* aliened before action brought, the court would upon application, *semble*, prevent the interest so aliened from being affected by the execution." If so, a mortgagee would be protected.

Accordingly the Lords Justices held that there was no doubt that the alienation of the assets by the heir or devisee prevented the creditors of the executor or testator from following the assets in the hands of a *bona fide* purchaser where the alienation was a legal one. It also appeared to them "that by analogy the court ought to treat an equitable alienation of equitable assets as having the same effect. Vice Chancellor Hall had treated Carter *v.* Sanders (2 Dr., 248) as an authority; but that case was contrary to the opinion expressed by Lord Chancellor Chelmsford in Coope *v.* Cresswell, (L. Rep. 2 Ch. App., 122)." Independently of the statute, the law seems now to be settled that a person having only an equitable estate may avail himself of the defense of purchase for valuable consideration without notice against another having a legal title without an equity. (Colyer *v.* Finch, 5 H. of L. Cas., 905; Bowen *v.* Evans, 1 Jo. & L., 264). In Rogers *v.* Seale, (2 Freem., 84), Lord Chancellor Nottingham decreed otherwise. Lord Chancellor Rosslyn apparently thought the decree made by the reporter, and not by the judge, and decided in opposition thereto. Lord St. Leonards thought Lord Rosslyn's decision, which has since been acted upon, to be correct.—The London *Law Times.*

SUPREME COURT OF INDIANA.

From the Indianapolis *Sentinel.*

CONTRACT—CONSIDERATION—ADMINISTRATOR—ESTOPPED.

3945. Howard Lee, administrator of

George Clem *v.* Allen Carter, Bartholomew, C. C. Affirmed. Buskirk, J.

Held, 1—That the Court cannot consider the error assigned calling in question the action of the court below in overruling the motion to reject the amended complaint, the motion not being in the record.

Held, 2—That services rendered under an express agreement that they were to be compensated by a provision to be inserted in the will of the party for whom they were ventured, were a sufficient consideration for such promise, and that the promise alleged upon that consideration made a valid contract, not affected by the statute of frauds, and for a breach of which an action arises as in any other case of breach of contract. (24 Ind., 286.)

Held, 3—That in an action to recover a money judgment against the estate of a descendent, the administrator of such estate cannot set up an estoppel in his favor in his individual capacity.

SHERIFF'S SALE—PAYMENT OF TAXES BY THE VENDEE—SET OFF.

4483. Semans *v.* Harvey, Hamilton C. C. Affirmed. Downey, J.

Statement—Appellee sued appellant for money had and received, and for work and labor performed. The case comes up on demurrer sustained to the fourth paragraph of the answer. This paragraph sets up that the defendant purchased at a sheriff's sale, on a decree of foreclosure, certain real estate in Hamilton County, which was then owned in fee by plaintiff, subject to the mortgage afore aid; that the taxes for three years prior were unpaid; that the plaintiff failed to redeem under the sale, and the lands were conveyed to the defendant by the sheriff, and that thereafter the defendant paid said taxes, etc., and prayed that the amount so paid be declared a set-off.

Held—That in judicial sales there is no warranty; the purchaser takes what he gets. (Roser on sales, p. 167).

Held—That the defendant having purchased the land with the incumbrance upon it, it may be presumed that he took the incumbrance into account in determining the value of the land, and, therefore, the demurrer was correctly sustained.

MUNICIPAL CORPORATION—LIABILITY AND DUTIES—PLEADING—NEGLIGENCE.

4874. Rall et al. *v.* The City of Indianapolis, Marian C. C. C. Affirmed. Biddle, J.

STATEMENT—Action by appellants against appellee, charging the wrongful establishment of an insufficient sewer and certain catch basins, and improperly turning certain drainage into them, whereby the plaintiffs were injured in their property.

Held, 1—That municipal corporations are not liable to individuals for judicial errors, although private rights may be injured thereby.

Held, 2—That such corporations are not liable to individuals for this exercise of their ordinary powers, however mistaken, or even corrupt, their policy may be, and although private injuries may result therefrom.

Held, 3—That such corporations are liable to individuals for wrongful acts of derelictions of duty, in the exercise or their ministerial acts, whenever injury to private rights is the direct and natural consequence.

Held, 4—That when liable they are liable the same as individuals would be under the same circumstances.

Held, 5—As to the cross-error: That in such a case as this the plaintiffs need not allege that the wrongs complained of were without any fault or negligence on their part; such allegation is necessary only in cases wherein the issue is solely a question of negligence.

SUPREME COURT OF MICHIGAN.

APRIL TERM, 1876.

Abstract of opinions fromt the *Michigan Lawyer*.

AGENCY—AUTHORITY—RATIFICATION FINDING OF FACTS—WEIGHT OF EVIDENCE—BONA FIDE HOLDER—EVIDENCE—ERROR CURED — CONTRACTS — PLACE — FOREIGN LAW—PRESUMPTIONS — PROHIBITORY LIQUOR LAW—PURCHASE OF GOODS FOR ILLEGAL USE—KNOWLEDGE OF VENDOR—CONTACTS MALUM IN SE—MALUM PROHIBITUM.

Austin B. Webber v. *John C. Donnelly.* Error to Superior Court.

JOHN C. HOWLAND and MAYBURY & CONELY for plaintiff in error.

ATKINSON & ATKINSON for defendant in error.

Opinion by MARSTON, J.

Donnelly sued Webber in assumpsit to recover the amount of a draft drawn by Enwright & Kelley, of Chicago, upon Webber. The draft purported to have been accepted by one Henshaw. Defendant denied the authority of Henshaw to accept the draft and denied any subsequent ratification of his act. The court below found that Henshaw had no authority to accept the draft, but also found that the subsequent conversations and acts of Webber amounted to an assent or ratification of Henshaw's act.

Held, That there being evidence tending to show such ratification the question whether it was sufficient to establish that fact is not for this court to determine, but is one addressed to the court below, and the conclusion there arrived at as to the weight of the evidence is conclusive.

It appeared that C. S. Parsons called upon the defendant and presented the draft to him for payment. Upon cross-examination he was asked, "By whose authority did you call upon him?" This was aked to prove plaintiff was not a *bona fide* holder. It was objected to and excluded. Atkinson was also asked as a witness, "How did he (Kelley) come to turn it (the draft) over to you?" which was also excluded on objection. The court, however, found that plaintiff was not a *bona fide* holder.

Held, That this finding cured any error in excluding the evidence.

The court below found that Enwright & Kelley, prior to and on February 22, 1875, were copartners in the business of selling spirituous and intoxicating liquors at wholesale in Chicago; that Webber, during the same time and till May, 1875, was engaged in a similar business at Detroit; that on February 22, 1875, Webber at Detroit sent by mail to Enwright & Kelley at Chicago an order for five barrels of whisky, who in pursuance of the order shipped the goods to Webber, delivering them to the Michigan Central Railroad Company at Chicago, to be conveyed in the ordinary course to defendant at Detroit; that the goods were so conveyed and received by defendant and entered into and became part of his stock in trade and that the same were spirituous and intoxicating liquors; that for a long time prior to this order Webber had purchased such liquors of Enwright & Kelley; that the contracts for such purchases had been generally made with Kelley in person, at Webber's store, and that Kelley had on several occasions been at Webber's store when his liquors were sold and knew his course of trade. Defendant offered to show that Enwright & Kelley sold these liquors to Webber in the ordinary course of business transactions with Webber, and that they knew that Webber was a dealer in spirituous and intoxicating liquors here contrary to the laws of Michigan. This was objected to and excluded.

Held, 1. That the contract entered into between the parties was made in Illinois and that such contract must be presumed to be valid in that State, no showing to the contrary having been made.

Held, 2. That the undoubted weight of authority is that mere knowledge by the vendor that the vendee at the time of the purchase of property intends to use it for an illegal purpose, will not prevent his recovering from the vendor the value of the property.

Held, 3. That the contract here in question is not *malum in se*, and not being shown to be *malum prohibitum*, but being presumptively valid where made, the same reasoning will not apply as would be applicable to a contract *malum in se;* and reference is made to Tracy *v.* Tallmadge, 14 N. Y., 162, and Hill *v.* Spear, 50 N. H., 253, as covering the whole ground.

Judgment affirmed with costs.

MORTGAGES—FORECLOSURES— DEEDS —CONVEYANCE SUBJECT TO MORTGAGE WHICH GRANTEE AGREES TO PAY—ACCEPTANCE OF SUCH DEED—CONTRACT RELATIONS—PERSONAL LIABILITY OF GRANTEE—MORTGAGEE—MORTGAGOR'S PERSONAL LIABILITY— EVIDENCE OF ACCEPTANCE—MISTAKE IN DESCRIPTION—POSSESSION—CONSIDERATION—DEFENSE TO MORTGAGE.

Andrew Crawford v. *William Edwards, et al.* Appeal in Chancery from Berrien Circuit.

POTTER & POTTER for complainant.

MUZZY & GILBERT for defendants.

Opinion by Marston, J.:

This was a foreclosure bill. The case raises the question of the position of one who accepts a deed which is made expressly subject to a prior mortgage and which he therein stipulates to pay as part of the consideration of the deed.

Held, 1. That the acceptance of such a deed binds the grantee as effectually as though the deed had been *inter partes* and had been executed by both grantor and grantee, and is tantamount to an express agreement to assume and pay the mortgage.

Held, 2. That this case differs from that of a conveyance of property simply subject to the mortgage and that in the latter case the property would be made primarily liable for the debt, but the grantee would not have assumed and would not be personally liable for its payment.

Held, 3. That where such a grantee assumes and expressly agrees to pay the mortgage and the amount of the mortgage is deducted from the purchase price of the land, his obligation to pay enures in equity to the benefit of the mortgagee, who may enforce it against such grantee in a bill to foreclose his mortgage.

Held, 4. That the mortgagor's personal liability to his mortgagee would not be discharged by the acceptance of such a deed, except at the option of the mortgagee, but the latter may treat both the mortgagor and his grantee under such a deed as principal debtors to him and have a personal decree against either or both.

The grantee in this case insists that he had no knowledge that the deed contained such agreement and did not accept it, and that, owing to a mistake in the description of the premises in his deed, he obtained no title by it to the lands mortgaged, and ought not to be held responsible.

Held, That the evidence satisfactorily shows that he did accept the deed and knew of its contents, and that though by reason of the mistake he obtained no legal title to the premises, he did thereby obtain possession of the same, with the right to have the mistake corrected, and that if he did not avail himself of that right, but permitted a conveyance to a third person in order to cut off the mortgage, a court of equity will not step in and sanction and complete the transaction thus fraudulently commenced in order that a party to the fraud may thereby make a gain.

It is also urged that as there was a like mistake in the deed to the mortgagor, so that he got no title to the lands for the purchase price of which the note and mortgage were given, and that therefore the note and mortgage were without consideration and could not be enforced against the mortgagor; and that consequently his grantee under a deed containing a stipulation to assume and pay the mortgage is entitled to the benefit of this defense.

Held, That a similar theory was set up in Comstock *v.* Smith, 26 Mich., 321, and was held no defense, and that case disposes of this question.

Decree below reversed and decree entered here in favor of complainant and against defendant, William Edwards, personally, with costs of both courts.

HIRAM M. CHASE.

MEETING OF THE BAR.

According to previous notice a Bar meeting in memory of Hiram M. Chase, whose death we announced in our last issue, was held Saturday afternoon in the rooms of the Chicago Law Institute. The meeting was fully attended, and those present were deeply impressed by the death which had so unexpectedly called them together. William P. Black was chosen chairman, and Franklin Denison secretary.

The chairman, Judge Van Buren, E. W. Evans, Gen. R. W. Smith, and Rufus King addressed the meeting and spoke feelingly of their friendship for the deceased, and gave just tribute, by their remarks, to his high character as a lawyer and a man.

Gen. R. W. Smith, M. F. Tuley, and W. H. King were appointed a Committee on Resolutions, and presented the following, which were unanimously adopted:

WHEREAS, It has pleased the "Judge of all the Earth" to summon from among us our friend and brother, Hiram M. Chase, in the prime of his life, and the noon-time of his hopes and usefulness; therefore,

Resolved, That in the death of Brother Chase the Bar has lost one of its valued members, the community a good citizen and worthy man, and his family a faithful husband and loving father.

Resolved, That in his fidelity to his clients, his integrity and devotion to his profession, he has filled up the measure of a just lawyer and an honest man, and left us an example well worthy of imitation.

Resolved, That we mourn with his family in their affliction, and tender them our warmest sympathy in this their sad bereavement.

Resolved, That a copy of these resolutions be furnished his family, and that they be presented to each of the courts of this city with the request that they be spread upon their records.

The following gentlemen respectively were designated to present the resolutions adopted to the courts of record in this city: Circuit Courts, E. W. Evans; Superior Court, E. Van Buren; United States Court, Robert Hervey; County Court, R. W. Smith.

JUDGE T. F. TIPTON, of McLean county, was nominated for Congress by the Republican convention held at Lincoln, Ill., on the 30th ballot. We think the Judge has made a mistake. He was popular with the bar as a judge, and could undoubtedly have held that position as long as he desired. A Congressman's term is only for two years, and it is a very uncertain office. A man may be honest and do his duty faithfully for the two years, and at the expiration of the term be repudiated by the politicians, and turned out because he has refused to use his influence to have their corrupt tools appointed to Federal offices.

THE EVANS-CALLAGHAN QUO WARRANTO.—Judge MOORE filed in the Criminal Court, on yesterday, an elaborate opinion in the case of the People *ex. rel.* Michael Evans *v.* Bernard Callaghan, being a petition for leave to file an information in the nature of a quo warranto against the defendant to determine his right to hold the office of Collector of the town of South Chicago. The Court refused to grant the petitioner leave to file the information. Mr. M. W. Fuller, counsel for Evans, prayed an appeal to the Supreme Court. which was granted on condition that a bond in the sum of $200 be filed in twenty days.

THE will of A. T. Stewart, the late merchant prince of New York, is to be contested. In many cases if men could only know how their relatives would fight for their property after their death, they would be their own executors and dispose of their property while living. How much good Mr. Stewart could have done for poor suffering humanity while living.

RELIGIOUS AMENDMENT TO THE CONSTITUTION.—The article in the New York *Independent*, by Dr Speer, discussing the question of adding a religious amendment to the Federal Constitution, so nearly expresses our views that we republish it entire. The Doctor is the best constitutional writer connected with the religious press.

THE June Term of the Supreme Court of this State will commence at Mt. Vernon on Tuesday next.

BANKRUPTCY—PROOF OF DEBT—NOTARY PUBLIC.—Among our new bankruptcy blanks we have a blank for proof of debt, prepared expressly for notaries public.

CHICAGO LEGAL NEWS.

SATURDAY, JUNE 10, 1876.

The Courts.

UNITED STATES SUPREME COURT.

No. 147.—OCTOBER TERM, 1875.

WILLIAM BARNES, Plaintiff in Error,
v.
THE DISTRICT OF COLUMBIA.

In Error to the Supreme Court of the District of Columbia.

LIABILITY OF CITIES FOR INJURIES CAUSED BY THE NEGLIGENCE OF BOARDS OF SUCH CITIES.

1. LIABILITY OF A MUNICIPAL CORPORATION FOR NEGLIGENCE.—*Held*, that a municipal corporation is liable for an injury to an individual, arising from negligence in the construction of a work authorized by it.
2. BOARD OF PUBLIC WORKS OF DISTRICT.—That the Board of Public Works of the District of Columbia, is invested with the entire control and regulation of the repair of streets and alleys, by the legislative Assembly or by Congress. That they may disburse all the moneys appropriated for the improvement of streets, etc.
3. FEE IN UNITED STATES.—That the fee of the streets is in the United States, and not in the munipal corporation, is not material to this case.
4. LIABILITY OF DISTRICT.—That the District of Columbia is liable to a party injured through the negligence of the Board of Public Works in not keeping the streets of the city of Washington in repair.—[ED. LEGAL NEWS.]

Mr. Justice HUNT delivered the opinion of the court.

This is an action to recover damages for a personal injury received by the plaintiff on the 14th of October, 1871, in consequence of the defective condition of one of the streets in the city of Washington. The accident occurred on K street east, and arose from the construction of the Baltimore and Potomac Railroad through that street. The road was built by permission of the corporation, and authority was given to the road to change the grade of the streets according to a plan filed. In making this change, a deep pit or excavation was made, into which the plaintiff fell. The injury to the plaintiff, the defective condition of the street, and the negligence of those having it in charge, are not before us. These questions were submitted to the jury, and the jury have found the issue upon each of them in favor of the plaintiff The verdict of the jury, by which they awarded to the plaintiff the sum of three thousand five hundred dollars as damages, besides his costs, and the judgment thereon, were set aside by the general term of the district, and judgment ordered in favor of the defendant. From this judgment the present writ of error was brought.

The municipal corporation, "the District of Columbia," was organized under the act of Congress of February 21st. 1871. (16 Stat. at Large, 419.)

[We omit to give here about three pages of the opinion, which are devoted to the acts of Congress relating to the District of Columbia, stating how a municipal corporation may act, and the powers of the Board of Public Works. The opinion concludes as follows:

1. The four persons composing this board are nominated by the President, and hold their offices for a fixed period of time. They cannot be removed except by the President of the United States. The same thing is true of the governor and of the secretary of the District, except that as to them there is no power of removal. Each is appointed in the same manner, and holds until the expiration of his term and until his successor is qualified. The same is true, also, of the members of the council, except that their term is of shorter duration. It is true, also, in relation to the house of delegates, except that they are elected by the people and hold their offices for a fixed term of one year. We have already endeavored to show that it is quite immaterial, on the question whether this board is a municipal agency, from what source the power comes to these officers, whether by appointment of the President or by the legislative assembly or by election.

2. This board is invested with the entire control and regulation of the repair of streets and alleys, and all other works which may be entrusted to their charge by the legislative assembly or Congress. They shall disburse all the money appropriated by the legislative assembly or by Congress, or collected from property-holders for the improvement of streets and alleys.

It is to be noticed here, that the municipal corporation, as represented by the legislative assembly, may impose upon this board such other duties as they think proper. The board is to perform "all other work entrusted to their charge by the legislative assembly or Congress." In this respect, certainly, it is not an independent body. It is subject to two masters, either of whom may impose upon it any other work it may choose, and which work it is bound to perform. Its dependence upon Congress and upon the legislative assembly in this respect rests upon the same basis. It will not be claimed by anyone that it is not subject to the control of Congress and dependent upon that body.

3. The board shall disburse all moneys appropriated by the United States to the District of Columbia, or collected from property-holders for improvements of streets or alleys. In doing the two acts here first specified the board again acts as the hand and agent of the United States or of the district, as the case may be.

4. On or before the first Monday of each year, the board is required to make a report of their transactions during the preceding year, to each branch of the legislative assembly, and also to the President, to be placed before Congress by him. This duty is also an indication of their subordination equally to Congress and to the legislative assembly. The powers given to this board are not of a character belonging to independent officers, but rather those which indicate that it is the representative of the municipal corporation.

Notwithstanding these features, and notwithstanding we find this power given by the act which creates the municipality, and that this is one of the powers ordinarily belonging to a municipal government, and although the manner of its bestowal and the selection of the agents who exercise it are similar to that of the other appointees and agents of the municipal corporation, it is still contended that no liability exists on the part of the corporation to compensate the plaintiff for his injuries.

It is denied that a municipal corporation (as distinguished from a corporation organized for private gain) is liable for the injury to an individual arising from negligence in the construction of a work authorized by it. Some cases hold that the adoption of a plan of such a work is a judicial act, and if injury arises from the mere execution of that plan no liability exists. (Child *v.* Boston, 4 Allen, 41; Thayer *v.* Boston, 19 Pick., 511.) Other cases hold that for its negligent execution of a plan good in itself, or for mere negligence in the care of its streets or other works, a municipal corporation cannot be charged. City of Detroit *v.* Blackely, 21 Mich. R., 84, is of the latter class, where it was held that the city was not liable for an injury arising from its neglect to keep its sidewalks in repair.

The authorities establishing the contrary doctrine, and that a city is responsible for its mere negligence, are so numerous and so well considered that the law must be deemed to be settled in accordance with them. (English Authorities.—Mayor *v.* Henley, 2 Cl. & Fin., 331; Mersey Docks *v.* Gibbs; Same *v.* Penhallow, 1 H. Ld. Cas., N. S., 93; 1 H. & N., 439; Lan. Canal Co. *v.* Parnably, 11 Ad. & Ellis, 223; Scott *v.* Mayor, 37 Eng. Law & Eq., 465. United States Authorities.—Weightman *v.* Washington, 1 Bl., 39; Nebraska *v.* Campbell, 2 Bl., 590; Robbins *v.* Chicago, 4 Wall., 658; Superv's *v.* U. S., 4 Wall., 435; Mayor *v.* Sheffield, 4 Wall., 194. New York Authorities.—Davenport *v.* Ruckman, 37 N. Y., 568; Requa *v.* Rochester, 45 N. Y., 129; Rochester W. L. Co. *v.* Rochester, 3 N. Y., 463; Conrad *v.* Ithaca, 16 N. Y., 158; Barton *v.* Syracuse, 36 N. Y., 54. Illinois Cases.—Browning *v.* City of Springfield, 17 Ill., 143; Claybury *v.* City of Chicago, 25 Ill., 535; City of Springfield *v.* La Clare, Chicago Legal News, Apl. 3d, 1870. Alabama Cases.—Smoot *v.* Mayor of Wecumpka, 24 Ala., N. S., 112. Connecticut Cases.—Jones *v.* City of New Haven, 34 Conn. North Carolina Cases.—Meares *v.* Wilmington, 9 Iredell, 73. Maryland Cases.—County Commissioners of Anne Arundel county *v.* Duckett, 20 Md., 468. Pennsylvania Cases.—Pittsburgh City *v.* Grier, 22 Penn., 54; Erie City *v.* Schwingle, Ib., 388. Wisconsin Cases.—Cook *v.* City of Milwaukee, Law Register for April, 1870, vol. 9, N. S. P., 263; Ward *v.* Jefferson, Ib. Virginia Cases.—Sawyer *v.* Corse, 17 Grattan, 241; City of Richmond *v.* Long, Ib., 375. Ohio Cases.—Western College *v.* Cleveland, 12 Oh., 377, N. S; McCombs *v.* Akron, 15 Oh., 476; Rhodes *v.* Cleveland, 10 Ib., 159.)

And here a distinction is to be noted between the liability of a municipal corporation, made such by acceptance of a village or city charter, and the involuntary *quasi* corporations known as counties, towns, school districts, and especially the townships of New England. The liability of the former is greater than that of the latter, even when invested with corporate capacity and the power of taxation. (1 Dillon, §§ 10, 11, 13; 2d, § 761.)

The latter are auxiliaries of the State merely, and when corporations, are of the very lowest grade and invested with the smallest amount of power. Accordingly, in Conrad *v.* Ithaca, 16 N. Y., 158, the village was held to be liable for the negligence of their trustees, while in Weet *v.* Brockport, the town was said not to be liable for the same acts by their commissioners of highways. (Ib., 163, 4, 9; see "Brooks' Abridgement," "Action on the Case;" Russell *v.* Men of Devon, 2 T. R., 308, and cases there cited; 16 N. Y., supra.)

Whether this distinction is based upon sound principle or not, it is so well settled that it cannot be disturbed. Decisions or analogies derived from this source are of little value in fixing the liability of a city or a village. (See *Dillon, supra.*)

Again: It is contended that the board of public works of the District of Columbia is an independent body, acting for itself, not forming a part of the corporation, and that the corporation is not responsible for its acts. We have analyzed the power of this body in a previous part of this opinion, and have set out in full the language of the 37th section.

Upon this point, also, we are able to derive assistance from the adjudged cases.

The case of Bailey *v.* Mayor, in the Supreme court of New York, 3 Hill, 531, and again in the court of Errors, 2 Denio, 431, is a leading authority upon this question. In the year 1834 the legislature of the State of New York passed an act "to provide for supplying the city of New York with pure and wholesome water." —(Sess. Laws, 1834, p. 531.) The act provided that the governor should appoint five persons, to be known as water commissioners, whose duty it was made to examine all matters relative to that subject (§ 2); to employ such engineers as they should deem necessary (§ 3); to adopt such plan as they should deem most advantageous for procuring such supply of water; to ascertain the amount of money needed for the purpose, and to make conditional contracts for the purchase of lands required, subject to the ratification of the common council of New York (§ 4). The plan, the estimate of the expense, the conditional contracts, and all other matters connected therewith were to be presented by the commissioners to the common council of New York, (§§ 5 6,) who were directed to submit the plan to the electors of New York for their rejection or approval (§ 7). If approved, the council were to direct the commissioners to proceed with the work, and the council was authorized to raise by loan $2,500,000, which money was to be applied to the purposes of the act "by or under the direction of the commissioners" (§ 11). The commissioners were authorized to enter upon lands, agree for their purchase or take measures for their condemnation, (§§ 12, 13, 14,) and to use the ground or soil under any street or highway within the State for the purpose of introducing the water (§ 15). The commissioners were authorized to draw on the city comptroller for all sums due for the purchase of lands, and sums due to contractors, and for their own incidental expenses, and the payments were required to be reported to the council once in every six months.

Under this statute a plan was prepared and approved by the citizens of New York, money was raised, and the work was entered upon. It was proved that the commissioners entered into a contract with Crandall & Van Zandt for building a dam across the Croton river, which was about forty miles from the city of New York and in another county, in pursuance of the plan adopted. The plaintiff offered also to prove that it was so negligently and carelessly constructed, that upon the occurrence of a freshet in 1841 it was swept away and the property of the plaintiff, real and personal, situate on both sides of the river below the dam, was destroyed to the value of $60,000. The circuit judge rejected the evidence and directed the plaintiff to be non-suited. The case was carried to the Supreme court, where the non-suit was set aside. The judgment was delivered by Nelson, Ch. J., whose opinion opens in these words: "The principal ground taken at the circuit against this action, and the one upon which it was understood the cause there turned, was that the defendants were not chargeable for negligence or unskillfulness in the construction of the dam in question, inasmuch as the water commissioners were not appointed by them nor subject to their direction or control." The learned judge repudiates the argument arising from the fact that the commissioners were appointed by the State; that the defendants had no control over their actions; that they were bound to employ them and submit to the independent exercise of their control. He held that the commissioners were the agents of the city, and that the latter was responsible for their negligent conduct.

The case was then carried to the court of Errors of the State of New York, (2 Denio, 433,) where the judgment of the Supreme court was affirmed. Chancellor Walworth bases his opinion of affirmance chiefly upon the fact that the city was the owner of the land on which the dam was built, and, therefore, liable for the negligent conduct of those who built it. Senators Hand, Bockee, and Barlow base their judgments of affirmance on the ground that the commissioners were the agents of the city. Gardner, lieutenant-governor, delivered an able dissenting opinion.

This case is nearer to the one we are considering than any other reported in the books. The struggle in the New York courts was between the dictates of that evident justice and good sense which required that the city should indemnify a sufferer for the loss arising from the acts of those doing a work under its authority and for its benefit, and the technical rule which exempted it from liability for acts of officers not under its control or appointed by it.

If these courts had had before them the additional facts which exist in this case, to wit, that in the very statute which made the city of New York a municipal corporation these persons had been appointed to do everything necessary to be done respecting the care and improvement of the streets, being invested with their exclusive control; that without that body, and two other equally independent bodies, to wit, the mayor and the legislative assembly, neither of them being declared in words to be parts of the municipal body, the municipal corporation had no one part of an organized existence, we think they would have arrived at the same conclusion, but would have found less difficulty in choosing a ground on which to place their judgment.

In the case before us we think that Congress intended to make the board of public works a portion of the municipal corporation. The governor, or mayor, as he would ordinarily be called, represented the executive department; the legislative assembly, like a common council, had the exclusive authority to pass all laws or ordinances upon the large class of subjects committed to its charge, with certain specified restrictions; and to the board of public works, like an ordinary agent of the corporation, was given the exclusive control of the streets and alleys. Names are not things. Perhaps there is no restriction on the power of Congress to create a State within the limits of the District of Columbia, but it does not make an organization a State to call its mayor a governor, or its common council a legislative assembly, or its superintendent of streets a board of public works, especially when the statute by which they are created opens with a declaration of

its intention to create a municipal corporation. We take the body thus organized to be a municipal corporation, and that its parts are composed of the members referred to, and we hold, therefore, that the proceedings by that body, in the repair and improvement of the street, out of which the accident in question arose, are the proceedings of the municipal corporation. That in such case the corporation is responsible we have already cited the authorities to show.

No doubt there are authorities holding views not in all respects in harmony with those we have expressed. Among these are Thayer *v.* Boston, 19 Pick., 510; Walcott *v.* Swampscott, 1 Allen, 101; Child *v.* Boston, 4 Allen, 41. The first of these cases holds that a city corporation is liable in tort provided the act is done by the authority and order of the city government, or those branches of the government invested with authority to act for the corporation; but that it must appear that the act was done by the express authority of the city, or *bona fide* in pursuance of a general authority on the subject. To this we assent. Walcott *v.* Swampscott was an action against a town. The surveyor of highways employed one O'Grady to drive a horse and cart with a load of gravel for the repair of a highway, and while thus engaged he came in collision with the plaintiff. The town was held not to be liable, on the theory that the surveyor was not an agent or servant of the town, but an independent officer appointed to perform a public duty in which the town had no interest. In Child *v.* The City of Boston it was held that the city was not responsible for any deficiency in the plan of drainage adopted by the city, although the plaintiff was injured thereby; that the duty in this respect was of a *quasi* judicial nature, involving discretion, and depending upon public considerations; that in this they acted not as agents of the city, but as public officers. In this respect the case is in hostility to Roc. White Lead Co. *v.* Rochester, 3 N. Y., 463, where the city was held liable because it constructed a sewer which was not of sufficient capacity to carry off the water draining into it. The work was well done, but the adoption and carrying out of the plan was held to be an act of negligence. The Boston case, however, held that if a sewer, originally well constructed, becomes defective by reason of low lands being filled up so that the outflow is obstructed, it becomes the duty of the city so to extend the sewer that its efficiency should be restored, and that for a failure to do so it becomes liable to those whose property was injured by the overflow of the sewer. In its practical results this is one of the strongest cases to be found in favor of municipal liability.

We do not perceive that the circumstance that the fee of the streets is in the United States, and not in the municipal corporation, is material to the case. In the most of the cities of this country the fee of the land belongs to the adjacent owner, and upon the discontinuance of the street the possession would revert to him. The streets and avenues in Washington have been laid out and opened by competent authority. The power and the duty to repair them is undoubted, and would be no different were the streets the absolute property of the corporation. The only questions can be as to the particular person or body by which the power shall be exercised, and how far the liability of the city extends.

The judgment of the general term is reversed, and the case is remanded to the Supreme Court of the District of Columbia, with directions to affirm the judgment of the special term upon the verdict.

Dissenting, Mr. Justice SWAYNE and Mr. Justice STRONG.

FIELD, J.—I dissent from the judgment in this case. I do not think the District of Columbia should be held responsible for the neglect and omission of officers whom it has no power to select or control.

Mr. Justice BRADLEY concurs in this dissent.

ENGLISH SOLICITORS.--The duty on solicitors' certificates—the name of "attorney" no longer being used in legal circles—amounted in the year ended 31st of March last to £94,433. The number practicing in the United Kingdom was 14,409.

OUR thanks are due H. B. HOPKINS, of the Peoria bar, for the following opinion:

UNITED STATES SUPREME COURT.

No. 710.—OCTOBER TERM, 1875.

THE TOWN OF ELMWOOD, Plaintiff in Error,
v.
GEORGE O. MARCY.

In Error to the Circuit Court of the United States for the Northern District of Illinois.

RAILROAD AID BONDS—TOWNSHIP OF ELMWOOD—WHEN THE DECISIONS OF THE SUPREME COURT OF A STATE WILL BE FOLLOWED.

1. RAILROAD AID BONDS.—*Held*, that under the facts in this case, and the legislation of Illinois applicable to them, there existed no power and lawful authority to issue the bonds and coupons in controversy, so as to render them valid and collectible in the hands of the plaintiff below.

2. LAWS OF 1869.—The court construes several sections of the laws of Illinois, of 1869, relating to the power of towns and cities to subscribe for railroad stock and issue bonds.

3. CONSTITUTIONAL PROVISION AND DECISIONS.—The court cites the Illinois opinions which hold that the clause of the Constitution under consideration, is a limitation upon the power of the legislature to grant the right of corporate or local taxation to any other persons than the corporate or local authorities of the municipality or district to be taxed, and that the legislature could not compel a municipal corporation, without its consent, to issue bonds or incur a debt for a merely corporate purpose.

4. POWER OF LEGISLATURE.—That it is not competent for the legislature to single out the supervisor and town clerk, and confer on them, powers which the Constitution limits to the corporate authorities as an aggregate body.

5. WHEN STATE DECISIONS WILL BE FOLLOWED.—That the decisions of the Supreme Court of Illinois adjudged that these bonds are void, and there being no conflict in the decisions of the Illinois Supreme Court, these decisions are binding upon the court. That the Federal Supreme Court has always followed the decisions of the highest court of a state in the construction of its own Constitution and laws. That it is only where they have differed, that, in cases like this, the court has adopted the rule, and followed the first and rejected the last.—[ED. LEGAL NEWS.]

Mr. Justice DAVIS delivered the opinion of the court.

The judges of the Circuit court were divided in opinion whether under the facts of this case and the legislation of Illinois applicable to them, there existed power and lawful authority to issue the bonds and coupons in controversy, so as to render them valid and collectible, in the hands of the plaintiff below, who is defendant here. Judgment was rendered in his favor, and the cause is brought here for review. From the certificate of division it appears that the Dixon, Peoria and Hannibal Railroad Company, was incorporated March 5th, 1867, that prior to February 11th, 1869, the road of said company was located in said township of Elmwood; that at the date last named, an election was called under the provisions of the charter of said company, to be held on March 16th, 1869, to determine whether said township would subscribe to the stock of said company and give its bonds for $35,000, the maximum amount permitted by law; that five days afterwards, to wit, on the 16th of February, 1869, notice was given of another election, not purporting to be in pursuance of said charter, to be held at the same time and place with that aforesaid, to determine whether said township would subscribe to the stock of said company, and issue the bonds for a further sum, over and above the amount authorized by law as aforesaid; that said first named election resulted in favor of subscribing said $35,000, and the second named election resulted in favor of an additional subscription of $40,000; that after both said elections were notified, and seven days before they were held, viz: on the 9th of March, 1869, the charter of said company was amended so as to authorize towns in which said road might be *thereafter* located, to vote and subscribe $100,000 to its capital stock. Also that thirty-two days after said election, viz: on the 17th day of April, 1869, the legislature passed a validating act, and that ten days thereafter, on the 27th of that month, the supervisor and town clerk issued the bonds and coupons, contemplated by both elections. It legalized and confirmed the subscription for $40,000 to the capital stock of the company over and above that for $35,000, which was confessedly legal and made in accordance with the provisions of the original charter. The bonds in suit are part of those issued for the greater sum, and the question is, whether they are binding on the town.

They have been the subject of litigation in Marshall *v.* Silliman, 61 Illinois, 218, and Wiley *v.* Silliman, 62 Id., 170. The last case involved the validity of the identical bonds in question here, but both were in all substantial particulars alike the only difference being that the act of March 9th, 1869, did not apply to the first case. They were bills in equity to enjoin the collection of taxes for the payment of interest, and the court decided that neither the law of March 9th nor the curative act of April 17th, gave any power to issue the bonds. In reaching that conclusion the opinion affirms that when the notice for the vote was posted, the charter of the company only authorized a subscription for $35,000, and that the notice under which the vote for $40,000 was taken, was a mere call for a special town meeting, signed only by twelve voters, which did not seek to follow the provisions of the charter, as, indeed, it could not do, since the power under them was already exhausted, and that it was an utterly void proceeding, and that law is disposed of in these words: "It is true that on the 9th of March, 1869, the legislature passed another act authorizing towns to subscribe $100,000, but a new notice was not given. The charter required twenty days' notice, and only seven intervened between the passage of the act and the vote."

It was insisted, however, that the curative act passed after the vote had been taken, gave validity to the bonds. On this position counsel placed their chief reliance, and to it the court directed its principal attention.

The act was direct and positive and left nothing to inference. It was intended so far as the legislature could do it, to make the bonds binding on the township, and collectible in the same manner, as if the subscription had been authorized by the charter, and voted for in accordance with its terms. The court held it to be a violation of the 5th section of the ninth article of the constitution of 1848, which declares "that the corporate authorities of counties, townships, school districts, cities, towns and villages, may be vested with power to assess and collect taxes for corporate purposes, such taxes to be uniform in respect to persons and property, within the jurisdiction of the body imposing the same." The decision was placed on the ground that this section having been intended as a limitation upon the law making power, the legislature could not grant the right of corporate taxation, to any but the corporate authorities, nor coerce a municipal corporation to incur a debt by the issue of its bonds for corporate purposes. In the opinion of the court the act was an effort to do both these things, as it attempted to confer the power of municipal taxation upon persons who were not by themselves, the corporate authorities in the sense of the Constitution, and to compel the town to issue its bonds for railroad stock, by declaring a said proceeding to be a valid subscription.

Counsel argued that the act might be treated as an authority to the supervisors and town clerk to issue the bonds without a vote of the people and cited, The Town of Keithsburg *v.* Frick, 34 Ind. 420, which recognizes that the legislature can constitutionally bestow upon the trustees of a town, the power if they think proper to exercise it, to subscribe for and take stock in a railroad company, without requiring the subject to be submitted to a vote of the people. The court adhering to the doctrine of that case, but distinguishing it from the one under consideration, said "that the town supervisor and clerk who issued the bonds in controversy, do not represent a township as the board of trustees represent an incorporated town, or the common council a city. The supervisor and town clerk are but a part of the corporation. They have no power of taxation, nor power of themselves to bind the city in any way," and cited Loovingston *v.* Wilder, 53 Id, 302, as authority on the subject. But even if these two officers could be recognized as the corporate authorities, the court observed, "that they cannot be said to have voluntarily incurred this debt in behalf of the town. The act gave them no discretion. It declared the subscription shall be binding and may be collected and left to the town authorities, only the ministerial function of executing the behest of the legislature."

The main doctrines of these cases were not new, but had been settled by the repeated adjudications of the Supreme Court, and that learned tribunal has given no decision in conflict with them.

In Howard *v.* The St. Clair Drainage Company, 53 Id., 130, the clause of the Constitution under consideration in Marshall *v.* Silleman, and Wiley *v.* Silliman, was construed to be a limitation upon the power of the legislature to grant the right of corporate or local taxation to any other persons than the corporate or local authorities of the municipality or district to be taxed. To the same effect are Hessler *v.* Drainage Company, 53 Id., 110, and Lovingston *v.* Wilder, Id., 302. The people ex rel., etc., *v.* The Mayor of Chicago, 51 Id., 30, decides that the legislature could not compel a municipal corporation, without its consent, to issue bonds or incur a debt for a merely corporate purpose.

So far as we can see, the only new point determined in the cases we have first cited, is that it is not competent for the legislature to single out the supervisor and town clerk, and confer on them powers which the Constitution limits to the corporate authorities as an aggregate body.

We are not called upon to vindicate the decisions of the Supreme Court of Illinois in these cases, nor to approve the reasoning by which it reached its conclusions; and if the questions before us had never been passed upon by it, some of my brethren who agree to this opinion, might take a different view of them. But are not these decisions binding upon us in the present controversy? They adjudge that the bonds are void, because the laws which authorized their issue, were in violation of a peculiar provision of the Constitution of Illinois. We have always followed the highest court of the State in its construction of its own Constitution and laws. It is only where they have been construed differently at different times, that in cases like this, we have adopted as a rule of action, the first decision, and rejected the last. This has been done on the ground that rights acquired on the strength of the former decisions, ought not to be lost by a change of opinion in the court. But where the construction has been fixed by an unbroken series of decisions, the Federal courts accept and apply it in cases before them. If a different rule were observed, it is not difficult to see that great mischief would ensue.

There has been no conflict of judicial opinion in Illinois, on the controlling question in this suit; but, on the contrary, settled uniformity, and as these concurring decisions of the court of last resort in that State, are grounded upon the construction of its Constitution and statutes, it is the duty of this court to conform to them.

The judgment is reversed, and new trial ordered.

HOPKINS & MORRISON and E. G. JOHNSON, of Peoria, for the Town of Elmwood.

WILSON & PERRY and PADDOCK & IDE, of Chicago, for the bondholders.

SUPREME COURT OF ILLINOIS.

OPINION FILED JAN. 21, 1876.

GOLDIE *v.* MCDONALD.

FILING AFFIDAVIT OF MERITS.—An affidavit of claim filed more than ten days prior to the commencement of the term at which the declaration is filed, will be regarded as having been filed with the declaration.

CERTIFICATE OF NOTARY AMENDABLE.—A certificate of a notary, in a foreign State, to an affidavit of claim, may be amended. The law presumes a defendant is a resident of the county in which he is served with process.

Opinion by SCOTT, C. J.

The amendments permitted to be made to the pleadings in this case, were all within the discretion of the court. An affidavit of claim filed more than ten days before the convening of the court, for the term at which the declaration is filed, will be regarded as having been filed "with the declaration," within the meaning of the statute on that subject. R. S., 1874, p. 779, sec. 37.

It was proper for the court to permit the additional certificate of the notary public to be filed, showing that under the laws of the State of Wisconsin, he had authority to administer oaths. The amendment to the certificate of the notary to the affidavit of claim, it being under his official seal, made it *prima facie* evidence under the statute, that the oath required by law to be made, was taken before such officer. R. S., 1874, Sec. 6.

Although allowed five days for that purpose, defendant filed no affidavit of merits with his plea, and hence, under the statute, it was properly stricken

from the files and judgment rendered against him as upon default.

It will be presumed defendant was a resident of the county in which he was served with process, within the meaning of the statute, under which plaintiff's damages were assessed, until, in some appropriate manner, it is made to appear from the evidence, he was not a resident of the county in which he was served, and in which the action was pending. R. S., 1874, p. 779, Sec. 37.

The judgment of the court below must be affirmed.

SUPREME COURT OF ILLINOIS.

OPINION FILED JANUARY 21, 1876.

TOWN OF PARTRIDGE *v.* JOHN SNYDER.

Appeal from Woodford.

APPEALS FROM JUSTICES—SUITS TO RECOVER FINES—BY WHOM APPEAL.

1. APPEAL SUIT TO RECOVER PENALTY.—That a suit to recover a penalty before a justice of the peace, is a civil and not a criminal proceeding, and an appeal from a judgment of a justice of the peace, in such a suit, may be taken to the Circuit Court by either party. That an appeal is allowed in such cases, under the general statute allowing appeals from justices of the peace, although the statute which prescribes the fine or forfeiture for the offense, is silent as to an appeal.

2. CIVIL PROCEEDINGS.—That suits for the violation of town or city ordinances are civil proceedings.

3. SUITS IN NAME OF TOWNSHIP—APPEAL BOND.—That in suits brought in the name of the town, the appeal bond should be executed by the supervisor, in the name of the town.—[ED. LEGAL NEWS.]

Opinion by SHELDON, J.

This was a proceeding commenced before a justice of the peace by the Town of Partridge, on the complaint of William Crank, one of the commissioners of highways of the town, to recover a penalty for obstructing a public highway. A trial was had, resulting in a verdict and judgment for the defendant. An appeal was taken to the Circuit Court, where, on motion of the appellee, the appeal was dismissed, from which judgment of dismissal this appeal was taken.

The main question presented is, whether an appeal lay in this case from the judgment of the justice of the peace to the Circuit Court.

The general statute in relation to justices and constables, (Rev. Stat., 1874, Ch. 79), confers jurisdiction upon justices of the peace "in all cases where the action of debt or assumpsit will lie, if the damages claimed do not exceed $200," and provides that, "appeals from judgments of justices of the peace to the Circuit Court, shall be granted in all cases except on judgment confessed."

In Edwards *v.* Vandemack, 13 Ill., 633, and Ward *v.* The People, Ib., 635, it was held that under a similar provision for an appeal in the former statute, this right of appeal did not apply to judgments rendered by justices of the peace in criminal prosecutions, for fines and penalties, for crimes or misdemeanors, and in the latter case it was decided that an appeal did not lie from the judgment of a justice of the peace for a penalty under the "act to prohibit the retailing of intoxicating drinks." Approved, April 18th, 1851.

This was in 1852. The provision of the former statute, then in force, granting jurisdiction, although similar, was somewhat different from that of the present statute, it being "for all debts or demands claimed to be due, in which the action of debt or assumpsit will lie."

After these decisions, the legislature, by an act approved February 9, 1853, granted the right of appeal from a justice of the peace, mayor of a city, or other officer, in all cases of fines and penalties.

This last law remained until the revision of 1874, when it was repealed. (Rev. Stat. 1874, p. 1019, Sec. 204), and no provision of a like nature re-enacted.

It is contended then, that the decision in Edwards *v* Vandemack, and Ward *v.* The People, apply here in full force, and govern and are conclusive against the right of appeal, in this case, from the justice of the peace. As to its comiug within the bearing of those decisions, it becomes important to inquire into the character of this proceeding, as to whether it is a criminal prosecution or for an offense criminal in its nature, or but a civil suit. The penalty sued for is under Sec. 58, of the act in relation to "Roads and Bridges," Rev. Stat. 1874, p. 921, which provides, that if any person shall obstruct a public road, etc., he shall forfeit for every such offense, a sum not less than $3 nor more than $10, and an additional sum for every day he shall suffer the obstruction to remain after notice to remove it, complaint to be made by any person feeling himself aggrieved. Various other penalties are imposed by the act. It provides, that all suits for the recovery of any fine or penalty under the act, shall be brought in the name of the town, etc., that all fines recovered under the provisions of the act shall be paid over to the commissioners of highways to be expended upon roads and bridges; and that justices of the peace shall have jurisdiction in all cases arising under the act, where the penalty does not exceed their jurisdiction.

In Webster *v.* The People, 14 Ill., 365, it was held, that actions of debt to enforce a statute penalty, are not necessarily criminal prosecutions; and an action of debt for the recovery of the penalty of $100 imposed by the statute for hawking and peddling without license, was there held not to be a criminal prosecution, either in form or substance. And as denoting it not to be such, it was remarked that it was not an offense at common law, nor indictable under the statute; that in form, it was an action of debt, and not a criminal prosecution; that it was not required to be brought and carried on in the name of the people of the State of Illinois, as all criminal prosecutions must be; that the violation of the statute for which the action was given was not made a misdemeanor; that no fine was inflictad, but simply a penalty imposed. And a contrast was drawn between that case, and the one of Ward *v.* The People; and as marking the latter as a criminal proceeding, it was dwelt upon, that the offense there, was made expressly indictable by statute, and a specific fine was imposed, which might be recovered either by indictment or as action of debt; that the statute had made the offense a misdemeanor, and although the fine might be recovered in a civil form of action, yet the offense was criminal in its nature. The features which were thus considered to mark the case of Ward *v.* The People, as a criminal action, or one of a criminal nature, will be found to be absent in the case at bar, and that it has belonging to it the circumstances which were held to denote the case of Webster *v.* The People to be, in contra-distinction from the former, but a mere civil suit.

In Ewbanks *v.* Town of Asheley, 36 Ill., 177, it was said: "At common law, a penalty given by statute might be recovered in either an action of debt or assumpsit, in any court of general jurisdiction. Nor should such a penalty be recovered in a criminal proceeding." It has repeatedly been held by this court, that a proceeding to collect a penalty for the violation of a town ordinance, is a civil suit. That such a penalty cannot be recovered in any criminal proceeding. Town of Jacksonville *v.* Black, 36 Ill., 507; Granbrier *v.* City of Jacksonville, 50 Id., 87; Hoyer *v.* Town of Mascoutah, 59 Ill., 137.

It is argued that the repeal in the revision of 1874, of the act of February 9, 1853, giving the right of appeal from the judgments of justices of the peace in cases of fines and penalties, conclusively shows the intention of the legislature that there should be no appeal in such cases. In that revision are numerous acts wherein penalties are imposed for the violation of their provisions, and jurisdiction in suits for their recovery is conferred upon justices of the peace, but there is granted no right of appeal unless the general law allowing appeals applies. It can hardly be supposed to have been the intention of the legislature to take away the right of appeal in all those cases. In the one act concerning "Railroads and Warehouses" in the Revised Statutes of 1874, may be found no less than nine different cases where penalties are imposed, and are recoverable before justices of the peace.

In section 94 of that act it is declared: "In all cases under the provisions of this act, the rules of evidence shall be the same as in *other* civil actions, except as herein otherwise provided," thus showing that the legislature regarded all these actions given in the act for penalties, as civil actions.

It may be, that the legislature in the repeal of the act of February 9, 1853, deemed it as needlessly cumbering the statute book—that the case was covered under the statute as now found, by the general provision for an appeal in *all* cases before a justice of the peace.

But whatever the legislative intention in such repeal, this is a civil action for the recovery of a penalty, and is not a criminal action, nor the case one of a criminal nature.

In the same statute, concerning justices of the peace, which gives them jurisdiction "in all cases where the action of debt or assumpsit will lie, if the damages claimed do not exceed $200," is the provision that "appeals shall be granted in all cases except on judgments confessed." This is a case of an action of debt or assumpsit for the recovery of a penalty; it plainly falls within the words of the general statutory provision, that "appeals shall be granted in all cases." And we do not know why the words should not be allowed to have their natural effect. If their generality is to have a limitation, it would seem, certainly, that they should embrace one of the cases which the same statute, in express terms, grants jurisdiction over, to justices of the peace. We are of opinion the right of appeal from the justice of the peace existed.

It is further insisted that appellant did not take any appeal from the justice of the peace to the Circuit court; and this because the appeal bond was executed by Crank, commissioner of highways of the town, instead of by the Town of Partridge. The bond should have been executed by the supervisors of the town in the name of the town. Gardner *v.* Town of Chambersburg, 19 Ill., 99. On leave for that purpose, appellant filed in the Circuit Court its appeal bond, executed in its name by the Supervisor of the town; and afterward on motion of appellee, the court dismissed the appeal.

In Hubbard *v.* Freer, 1 Scam., 469, it was said: "This court has frequently decided, that when an appeal bond is adjudged to be insufficient, the statute is imperative that the Circuit Court shall permit a good and sufficient bond to be filed; and in Waldo *v.* Averett, Ib., 489: "But if it is admitted that the bond was ever so defective, the court nevertheless erred in dismissing the appeal; it ought to have allowed the motion of appellant's to file a good bond." In Bragg *v.* Fessenden, 11 Ill., 544. "And whenever a party intends appealing, and makes such an attempt at the execution of a bond, that the officer authorized to approve it accepts the bond, it is not the design of the statute that the appellant should be prejudiced by any informality or deficiency of the bond." There, the agent of Bragg, attempted to take an appeal for the latter, from a justice of the peace by executing an appeal bond in the name of Bragg, on the 21st of July, 1849, without having any authority under seal to do so.

In November, 1849, Bragg executed and filed in the office of the clerk of the Circuit Court a power of attorney under seal, ratifying the act of the agent, in signing the appeal bond and taking the appeal. It was held that the bond filed had been made good by the ratification, although it was a long while after the expiration of the time for taking an appeal, and that it was error to dismiss the appeal for the insufficiency of the bond.

In Trustees of Schools *v.* Starbird, 13 Ill., 49, there was a judgment before a justice of the peace against the trustees of schools of a certain township. An appeal bond wes entered into by one of the trustees and approved by the clerk of the Circuit Court. It was held error to dismiss an application to amend the bond and to sustain a motion to dismiss the appeal; that the bond was defective because not executed by the corporation against which the judgment was rendered; but, that the court should have permitted the trustees to perfect the appeal by the execution of a bond obligatory on the corporation. It was said: "the trustees intended to take an appeal that would enable the corporation to have the case reheard, and for that purpose executed a bond which was approved and accepted by the clerk." The same may be said with regard to the action of Crank, the commissioner of highways here, and the approval and acceptance of his bond. The road and bridge act makes it the duty of the commissioners of highways to prosecute for all fines and penalties. Under the act, Crank, as commissioner of highways, had made the complaint in the case. The appeal purported, in the appeal bond, to be taken on behalf of the town.

Under the authorities cited, the allowance of the filing of the bond executed by the supervisor in the name of the town was clearly proper, and the appeal should not have been dismissed. The judgment will be reversed.

Judgment reversed.

CIRCUIT COURT OF COOK COUNTY, ILLINOIS.

OPINION, JUNE 5, 1876.

BEFORE MCALLISTER, WILLIAMS, ROGERS, BOOTH, AND FARWELL, JUDGES OF THE CIRCUIT COURT OF COOK CO., ILL.

WHO IS THE LEGAL MAYOR OF CHICAGO.

1. TERMS NOT EXTENDED.—The five Judges agree that Mr. Colvin's term, as Mayor, was not extended by the new charter.

2. MR. COLVIN'S TERM.—Three of the five Judges are of the opinion that Mr. Colvin has the right to hold over until his successor is legally elected and qualified, and that Mr. Hoyne's election was not a legal election.

3. ELECTION WITHOUT NOTICE, ETC.—Three of the Judges are of the opinion that the election for Mayor, at which Mr. Hoyne was elected, not having been called by the council, and no official notice of it having been given, that it was nugatory.

4. LEGALITY OF MR HOYNE'S ELECTION.—Two of the five Judges are of the opinion that Mr. Hoyne's election was legal, and that he is now the legal mayor of Chicago.

5. MAY CALL SPECIAL ELECTION.—Three of the five judges are of the opinion that the common council may call a special election to fill the vacancy in the office of Mayor.—[ED. LEGAL NEWS.]

Majority opinion by MCALLISTER, J.

This is a proceeding by information in the nature of a *quo warranto*, instituted by Harvey D. Colvin as relator, against Thomas Hoyne, the respondent, charging the latter with having usurped and intruded himself into the office of Mayor of the city of Chicago.

The questions raised rise upon demurrer to relator's replication. The pleadings are unnecessarily voluminous, and we shall not attempt an analysis of them. The material facts evolved are few and free from complication. At a regular election under a former charter of the city, held Nov. 4, 1873, the relator was duly elected Mayor. His term of office was two years from the 1st day of December of that year, and until his successor should be elected and qualified.

On May 3, 1875, said city became reincorporated by virtue of an election under a general law of the State, which went into force July 1, 1872. By section 3 of that act, it was provided as follows: "If a majority of the votes cast at such election shall be for city organization under the general law, such city shall thenceforth be deemed to be organized under this act; and the city officers then in office shall, therefore, exercise the powers conferred upon like officers in this act until their successors are elected and qualified." The position was taken by counsel for relator in argument, that by force of that provision of the act, and others prescribing the time of election and term of office for Mayor, the relator, who held the office at the time of the reorganization in May, 1875, has conferred upon him a term which will not expire until 1877. If this position is well taken, then it would follow, of course, that no mayor could be legally elected in April, 1876, without the previous resignation of relator, of which there is no pretense in the case.

It is the opinion of the majority of the court, including the writer of this opinion, that that position is not tenable. After a full and careful consideration of all the provisions of the statutes of 1872, we are brought to these conclusions: That the vote to re-organize under that act, *ipso facto*, wiped out the term of Mayor under the act of 1863, and it is upon this ground, although the term of office under the act of 1872, is in duration the same under the charter of 1863, yet its commencement and close are at different points of time. By the old charter the term begins on the 1st day of December, whereas, by Section 486, the law of 1872, it is prescribed that: "A general election for city officers shall be held on the third Tuesday of April of each year," and by Section 49, that "At the general election held in 1873, and biennial thereafter, a Mayor shall be elected by each city." These provisions are clearly inconsistent with the act of 1873, and by the expressed declarations of Section 6 of the act of 1872 are, by the latter, repealed and there is nothing contained in any other provision tending to show a contrary intention. The office of Mayor is not a constitutional office; it is like all other offices of a municipality, the creature of the statute, and the same power which made can

unmake or destroy. While the term under the former act was by the re-organization brought to a period, there is nothing in the statute of 1872 which, in the opinion of the majority of the court, can by construction be held to operate as a statutory investment of the Mayor in office at the time of the reorganization, with the term of office prescribed by the act under which the new incorporation was affected by the latter. The term of the office of Mayor commences from the day of general election in April, 1873, and in every two years thereafter. The re-organization took place in May, 1875. Now all there is upon the subject are the two lines at the close of Section 3, thus, "And the city officers then in office shall thereupon exercise the powers conferred upon like officers under this act." How long? Up to what time? Until the next general election for Mayor? No; but "until their successors shall be elected and qualified." This, in our view, means until a successor is elected and qualified under any power or authority conferred by that act, whether for a general or special election. The Mayor in office at the time becomes a Mayor *locum tenens*, as much as if the provision had said the comptroller then in office should exercise the powers and perform the duties of Mayor until the Mayor was elected and qualified.

The result of this view is that the term as such of the office of Mayor prescribed by the act of 1872 was not filled by the relator—that he had no term. His term for which he was elected was brought to a period by the reorganization, and the law which created it repealed by that failure, and the law under which it was accomplished He was nevertheless authorized to exercise the powers of the office, by the mere force of the statute, until his successor was elected and qualified. Such a declaration implies, of course, that a successor shall be legally elected. From this view it follows—and a majority of the court hold—that from the time of the reorganization in May, 1875, there was a vacancy as respects the term of the Mayor prescribed by the act of 1872. And we are now brought to the main question in this case. Assuming that there was a vacancy, was the supposed election of the respondent in April, 1876, under the provisions of the act of 1872, and the circumstances set forth in the record, a legal election, or was it altogether nugatory and void, for want of the requisite legal authority to hold it? In determining these questions we start with the assumption that there was a vacancy. Then it may be asked, what difficulties do you find in your way to the conclusion that the election held in April, 1876, when the respondent was the only candidate, was legal and valid? We answer, many and insuperable difficulties, if the city of Chicago is to be governed by law.

Section 15 is as follows: "Whenever a vacancy shall happen in the office of Mayor, when the unexpired term shall be one year or over from the date when the vacancy occurs, it shall be filled by an election." If, therefore, the vacancy occurred, as a majority of the court hold, at the reorganization, and taking into consideration the term, as prescribed by the act of 1872, the unexpired term was over a year, and could be filled, especially while it remained over a year, only by an election. Section 61 reads thus: "If there is a failure to elect any officer herein required to be elected, or the person elected should fail to qualify, the City Council or Board of Trustees may forthwith order a new election therefor; and in all cases when necessary for the purposes of this act may call special elections, appoint judges and clerks thereof, canvas the returns thereof, and provide by ordinance for the mode of conducting the same, and shall give notice of such special election, in which shall be stated the question to be voted upon, and cause such notices to be published or posted for the same length of time and in the same manner as is required in the case of a regular annual election in such cities or villages."

Now, instead of the City Council ordering or calling such an election for Mayor, it expressly refused to do so, and in the official notice of election for the general election in April, 1876, at which the supposed election of respondent was had, the office of Mayor was not included. So that the question is fairly raised, whether the election of the respondent in April, 1876, without any order, or call, or notice emanating from the City Council, is or can be held to be legal. A majority of the court, including the writer of this opinion, unhesitatingly holds that it is not.

The substance of the whole matter is this: although the relator was elected under a statute which prescribed his term of office to be two years, to commence on the 1st day of December, 1873, yet by the statute of 1872, if there was a majority vote in favor of being incorporated under that law, upon a legal submission to the electors of the municipality, his term, as prescribed by the former statute terminated; and thereafter he exercised the powers of his office only by virtue of the statute. His term by the former statute was gone, and he had none by the new. The City Council had the right to order an election to fill the unexpired term. Instead of doing so, they expressly refused, and the respondent was elected at a general election, without order or notice from the City Council. Now, what is the legal rule applicable to such a case? We understand the result of the authorities to be this: if the law provides for an election, and fixes the time, then, although it may impose upon certain officers the duty of giving notices, still, if not given, the time being fixed by law will be regarded as sufficient notices,and the election will be held valid, although such officers fail to give the notice directed Such, however, is not this case. The law, so far as it fixes the time, does so at another and different time from that at which the election of the respondent took place. It is true that the 48th section declares:

"A general election for city officers shall be held on the third Tuesday of April of each year." There were city officers to be then elected to which that would apply, but can any unprejudiced mind conclude that that section fixes the time for the election of mayor? Why, the very next section says: "At the general election held in 1873, and biennially thereafter, a Mayor shall be elected in each city." There is not a clause in the statute which can be tortured into the expression that if a vacancy occurs in the office of Mayor it may be filled at the next annual election. If such vacancy can be filled at all by an election, it can be only under sections 15 and 61. Section 15 declares: "Whenever a vacancy shall happen in the office of Mayor, when the unexpired term shall be one year or over from the date when the vacancy occurs, it shall be filled by an election."

Then to take the case out of the category of section 49, which provides for biennial elections after the general or April election of 1873, come the provisions of section 61, authorizing the city council to order special elections, and prescribing the manner of doing so. Here, as in a vast number of other instances, the city council is invested with a certain amount of discretionary power. This function of ordering or calling a special election, if exercised, is a part of the sovereignty of the State. It has been conferred by the State upon the body known as the city council, and upon nobody else. It has been given subject to certain restrictions and regulations. It therefore can be exercised only by the body and substantially in the manner prescribed by the act from which alone the power is derived. The electors of Chicago at large have no more authority to exercise it than the voters at large of Cook county. It never having been exercised by the body upon whom it was conferred, except by expressly refusing to order a special election, the votes cast for Mayor at the April election of 1876 were altogether nugatory.

Judge Cooly, in his reliable work upon constitutional limitations, gives the result of the authorities thus:

"In some other cases preliminary action by the public authorities may be requisite before any legal election can be held. If an election is one which a municipality may hold or not at its option, and the proper municipal authority decides against holding it, it is evident that individual citizens must acquiesce, and that any votes which may be cast by them on the assumption of right must be altogether nugatory. The same would be true of an election to be held after proclamation for the purpose, where no such proclamation had been made." Cooley's Constitutional Limitation, 603.

Judge Dillon, in his work on "Municipal Corporations," section 136, says: "Where it is discretionary with municipal authorities whether they will hold an election or not, votes cast at an unauthorized election are simply nullities. Elections fixed by law at a certain time and place may be legally holden,although notice has not been published *but if the time be not defined by statute, and is to be fixed by notice, the notice required is imperative.*"

It is too plain to justify one moment's discussion, that the act of 1872 nowhere fixes any time for an election for Mayor except that in section 49, which declares that "at the general election held in 1873, and biennially thereafter, a Mayor shall be elected in each city." This certainly does not fix the general election in 1876 as a time at which a Mayor may be elected. The very eminent and zealous counsel for the respondent, admitted upon the argument that the statute contained no other provision fixing the time, but they relied upon section 48, which declared that a general election for city officers shall be held on the third Tuesday of April each year; when the very next section declares that the election for Mayor shall be held biennially after such general election in 1873, which would, of course, exclude one at the general election in 1876. The term not being fixed by statute, the action of the city council fixing the time and giving the statutory notice was indispensable to a valid election.

The respectability of the respondent or the number of votes cast for him cannot affect the principle; it is as vital to an election under the circumstances as service of process and an opportunity for a day in court is to judgment. Counsel says there was an equivalent for the notice required by law. The fact that respondent was running for the office was notorious. Suppose it was. The trouble with the argument is that under the circumstances of this case the law can recognize no equivalent for the order and statutory notice. Suppose a judgment rendered against A B without service of process. If the defendant should move to set it aside for that reason, would any lawyer say that the plaintiff could defeat the motion by showing that the fact of the suit having been brought was notorious and several persons had in fact spoken to defendant about it? The difficulty with the judgment there would arise from the same principle as with the election in question without the order of the city council and the statutory notice.

In either case there would be simply a want of power of jurisdiction. The State having vested this municipality with a part of its sovereignty, and affixed to its exercise certain restrictions and regulations, it can be exercised only in the manner substantially as is appointed by the statute. The term of the office with its commencement and close is prescribed by the statute. According to the view of a majority of this court, that term has never been filled. From the reorganization to this time, there has existed a vacancy as respects that term. Of course, the unexpired term was more than a year from the date when the vacancy occurred, and by the provision of section 15, it could only be filled by an election. By virtue of the section just referred to as a vacancy, and the sixty-first section authorizing special elections by order of the city council upon notice, it was fully competent for the city council, in its discretion, to have ordered a special election to fill such vacancy. The council failing to so order, the relator, by force of the statute, was authorized to exercise the powers of Mayor until his successor should be elected and qualified. As no valid election could be held without the order of the city council, and the prescribed notice, the supposed election of respondent Hoyne was nugatory. The sixteenth section declares that "If the vacancy is less than one year, the city council shall elect one of its members to act as Mayor, who shall possess all the rights and powers of the Mayor,until his successor is elected and qualified." The next annual election would in that case necessarily be the biennial election before alluded to. Whether such an election from the body of the city council would be authorized under the circumstances of this case, is a question which has not been discussed. But from our examination of the statutes, we are inclined to the view that the vacancy can only be legally filled, even now, by an election ordered by the city council.

The conclusion arrived at by a majority of the court is, that the first fault in pleading is in respondent's pleas. His demurrer to the relator's replications, must, therefore, according to the established practice, be carried back and sustained to those pleas; and inasmuch as the facts cannot be changed by amendments, judgment of ouster against respondent must follow.

DISSENTING OPINION BY JUDGE BOOTH.

Judge Booth then read the following dissenting opinion:

I concur in the opinion of the majority of the court upon the question whether a vacancy in the office of Mayor existed upon the adoption of the act of 1872, but upon the main point in the case, whether the election of Mr. Hoyne to fill that vacancy is valid,I do not concur.

It seems very plain that it was never intended that by the adoption of this act the *term of office* of any city official should be extended beyond its original limit, but that the old officers should be simply retained *provisionally* in the discharge of their respective functions under the new act, and thus bridge over the interval until their successors for the discharge of those functions should be elected and qualified. Upon the adoption of the act, the *term of office* was at an end, and he became a mere *locum tenens*, holding the place, discharging its duties, waiting for his successor. This, in my judgment, is the fair meaning of the latter clause of Article 1, Section 3, of the act, and the only construction admissible with due respect for the letter and spirit of the constitution.

If, then, the decision of the court upon this preliminary question is correct, and a vacancy in the office of Mayor existed from the date of the adoption of the act on the 3d of May, 1875, it became the plain duty of the council to call an election to fill that vacancy. Article 2, Section 2, provides that "whenever a vacancy shall happen in the office of Mayor, when the unexpired term shall be one year or over from the date when the vacancy occurs, *it shall be filled* by an election." The official term of the Mayor, fixed by article 4, sections 1 and 2, commences on the third Tuesday of April, in the odd years, and extending for two years, so that the unexpired term was more than one year.

The right and duty of the people, therefore, to elect their Mayor on the third Tuesday of April, 1876, was unquestionable, and the official duty of the council to call an election for that purpose was equally clear. The question is thus distinctly presented, whether the neglect of their duty by that body has in this instance, under the law, deprived the people of Chicago of the most cherished right of American citizens,the right upon which all their other rights chiefly depend—that of electing their rulers. It is a question of grave importance, not only as it affects the pending issue, but in its future bearings. For if it be decided affirmatively, the wrong may be repeated, and the people are practically without a remedy.

A brief statement of the facts as they appear from the pleadings is necessary for a full understanding of the law of the case. In accordance with Article 4, Sec. 1 of the act, which provides that "a general election for city officers shall be held on the third Tuesday of April of each year," the common council called an election for all city officers required by this act to be elected by the people with the exception of the Mayor, purposely omitting the Mayor in the call, having previously, by vote, expressly determined to exclude that office. All the arrangements for holding a general election, including judges, clerks, polling places, were provided. If the council had performed their duty as required by law, and included the Mayor in the call, no question whatever could be raised as to the legality of his election, provided there was an existing vacancy, as this court has decided. The people, acting upon the assumption that they had the legal right to elect their Mayor, notwithstanding the refusal of the council to include him in the call, avail themselves

(*Continued upon page* 302.)

CHICAGO LEGAL NEWS.

Lex vincit.

MYRA BRADWELL, Editor.

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We call attention to the following opinions, reported at length in this issue:

NEGLIGENCE OF MUNICIPAL CORPORATION.—The opinion of the Supreme Court of the United States, by HUNT, J., holding that a municipal corporation is liable for an injury to an individual arising from negligence in the construction of a work authorized by it.

RAILROAD AID BONDS—A CLOSE CASE.—The opinion of the Supreme Court of the United States, by DAVIS, J., holding, under the facts of the case and the legislation of Illinois applicable to them, there existed no power and lawful authority to issue the bonds and coupons in controversy, so as to render them valid and collectible in the hands of the plaintiff below. The court passed upon several sections of the Illinois laws of 1869, relating to railroad bonds, and the decisions of the Supreme Court of Illinois construing said laws. It is stated, when the decisions of the highest court of a State will be followed by the Federal Supreme Court. The history of this case shows that the questions involved in it are not only important, but are questions upon which the most learned of Judges do not agree. Shortly after the passage of the act of Congress, providing that the amount in controversy requisite to entitle a case to be removed from the Circuit Courts to the Supreme Court of the United States, by appeal or writ of error, should be raised from $2,000 to $5,000, several suits brought upon coupons for interest, due on certain railroad bonds issued by the town of Elmwood and other towns, were tried in the United States Circuit Court for the Northern District of Illinois. All the suits involved the same questions, but in no one of them did the amount in controversy reach $5,000. These suits were tried before Judges DRUMMOND and BLODGETT, in June last. The Judges were divided in opinion as to the validity of the bonds, and judgment was rendered for the plaintiffs upon the opinion of Judge DRUMMOND, Judge BLODGETT dissenting. The case went up on a certificate of division of opinion between the Circuit and District Judges. In the Supreme Court, Judge STRONG delivered a dissenting opinion, in which Judges CLIFFORD and SWAYNE concurred.

AFFIDAVIT OF CLAIM—NOTARIES' CERTIFICATE AMENDABLE.—The opinion of the Supreme Court of Illinois, by SCOTT, C. J., holding that an affidavit of plaintiff's claim, filed more than ten days prior to the commencement of the term at which the declaration is filed, will be regarded as having been filed with the declaration; that a certificate of a notary public in a foreign State, to an affidavit of plaintiff's claim, may be amended; that the law presumes a defendant is a resident of the county in which he is served with process.

APPEALS FROM JUSTICES—SUITS TO RECOVER PENALTIES.—The opinion of the Supreme Court of this State, by SHELDON, J., holding that a suit to recover a forfeiture or penalty, before a justice of the peace, is a civil and not a criminal proceeding, and that an appeal from a judgment of a justice of the peace, in such a suit, may be taken to the Circuit Court by either party, on appeal; that an appeal is allowed in such cases, under the general statute allowing appeals from justices of the peace, although the statute which prescribes the penalty or forfeiture, is silent as to such appeal.

WHO IS THE LEGAL MAYOR OF CHICAGO.—The opinion of Judges MCALLISTER, WILLIAMS, ROGERS, BOOTH and FARWELL, of the Circuit Court of this county, as to who is the Mayor of Chicago. All five of the Judges agree that Colvin's term was not extended by the new charter. Three of the five judges are of the opinion that Mr. Colvin has the right to hold over until his successor is elected and qualified, and that Mr. Hoyne's election was not a legal election. Two of the five Judges are of the opinion that Mr. Hoyne's election was legal, and that he is now the legal Mayor of Chicago. Three of the Judges are of the opinion that there is a vacancy in the office of mayor, and that the common council have power to call a special election to fill it.

QUO WARRANTO.—The opinion of the Criminal Court of this county, by MOORE, J., holding that leave will not be granted to file an information in the nature of a *quo warranto* against a person who has been elected or appointed to an office, to test his right to such office, unless it is shown that he has taken possession of the office. In this case, Mr. Callaghan had been appointed to the office of town collector by the town board, and taken the oath of office, but the court held as he had not yet given his bond, that he had not usurped the office within the meaning of the statute, and refused to grant leave to file an information.

LIABILITY OF CLERK AND MASTER FOR MONEY LOANED.—The opinion of the Supreme court of Tennessee, by MCFARLAND, J., as to the liability of a clerk and master, who had loaned money and the security had failed.

THE HON. P. H. WALKER.—As we said some weeks ago it ought to be and would be, Judge WALKER was again, on Monday last, re-elected to the Supreme Bench, without opposition. The Judge owes his election to no party, no clique, no ring; but having performed his judicial duties for so many years, with the strictest honesty, and with distinguished ability, the people of his district, by re-electing him unanimously, have said, we respect your ability and appreciate your honesty. What can be a grander sight, than to see the faithful judge, worth but little more than his home, and depending on his salary for his own and his family's support, administering justice and deciding cases involving millions of dollars, "unawed by power, and uninfluenced by gain."

SUPREME COURT OF ILLINOIS.

On Tuesday of this week the Supreme Court met at Mount Vernon with a large number of lawyers in attendance. All the judges were present at the opening of the term except Judge WALKER.

On Wednesday, the court ruled in the case of The People *v.* Robert T. Lincoln et al., and The People *v.* Herman Lieb et al., being a petition for a mandamus, that leave must be obtained to file petitions, and that mandamus cases would be set for hearing at the next term, unless a public necessity required immediate attention.

The following named gentlemen, upon motion of Wm. S. Coy, were admitted to practice upon diplomas from the Bloomington Law School: Geo. L. Marlow, Charles F. Wertz, Joseph L. Colvin, Wm. P. McMurray, Lester M. Hall, Wm. D. Hayne, Richard A. Wade, Henry D. Spencer. Henry E. Averill, of Ohio, was upon the motion of the attorney-general, admitted to practice upon his license in the former state.

JUDGE UNDERWOOD.—In the afternoon the venerable Judge Gillespie, of St. Clair county, presented the following resolutions of the bar in respect to the late Judge Wm. H. Underwood:

The bar of the supreme court of the state of Illinois, assembled at the supreme court-room, at Mount Vernon, Ill., on Wednesday, the 8th day of June, 1876, on the occasion of the death of their brother, William H. Underwood, who died at his residence in Belleville, Ill., in testimony of their affection and esteem for him in life and their sense of the loss which the court and bar of the state and community at large suffer in his death, do adopt the following resolutions:

Resolved, That we find in the professional life and distinguished services of our deceased brother, both at the bar and as a representative in the legislative councils of the state, a career for our admiration, and that for the integrity and uprightness of his professional life, and for the estimable qualities that characterized him as a man, we hereby record our high appreciation, and unite in the hope that we may learn lessons of wisdom by the example he has left us.

Resolved, That we deeply and sincerely sympathize with the family of the deceased in the great bereavement they have sustained in the death of our departed brother.

Resolved, That the Hon. Gustavus Koerner and Hon. Jas. Gillespie be, and they are hereby requested to present these resolutions to the supreme court of the state of Illinois, now in session, with suitable remarks, and request the court that they be spread on the record, and that a copy of the same be transmitted to the family of the deceased.

Judge Gillespie, in presenting the resolutions, spoke very feelingly, and was listened to with interest. He was followed by ex-Gov. Palmer, who paid a glowing tribute to the memory of the deceased. Chief Justice Sheldon, in a few appropriate remarks, ordered the resolutions spread upon the minutes.

MR. JUSTICE BREESE spoke of the deceased in the most eloquent and touching manner as one of the purest of men the ablest of lawyers and best of citizens. On Thursday the court having appointed as a committee to examine students Messrs Coy, Barge, and Bryan, the class, containing forty-one candidates, was formed, and the examination proceeded with until 12 o'clock, when the court adjourned until 9 o'clock Friday morning.

At the opening of the court on yesterday morning Chief Justice SHELDON announced that the following applicants had successfully passed the examination of Thursday, and were entitled to license to practice: Jacob Abbott, James F. Asay, Samuel P. Avery, Marcus R. Bacon, Wm. H. Boyer, Presby G. Bradberry, John A. Brown, Ferdinand L. Copps, Rufus C. Carpenter, Wm. R. Curran, Sidney C. Eastman, Rudolph B. Forest, Alexander Flanigan, George R. Gill, Amos H. Gleason, Wm. H. Harry, Wallace Hickman, James Johnson, George B. Leonard, James H. Manner, James H. Martheny, Nicholas McConn, Edward McDonald, Henry M. Miner, Isaac J. Monser, Enmore L. Murphy, William R. Powers, Collins Pratt, Jefferson Rainey, Wm. R. Robertson, Adam Russell, Edward C. Springer, David Sullivan, Felix B. Tate, Jonathan Taylor, Thomas H. Turner, Charles M. Wallar, Wm. F. Whiting, Robert B. Shirley, Austin O. Sexton.

In the important mandamus from Cook county against Lieb, county treasurer, and Lincoln, supervisor, involving the question of Chicago bummerism, township organization, and the alleged crooked mode of the recent election in the South town, Mr. Justice Breese said that a majority of the court were of opinion the cases should be heard at the present term. Accordingly, by agreement of counsel, the court appointed Thursday next to hear the arguments.

The contested Madison county election case of Dale vs. Irwin, involving the right to the county judgeship, came up to-day on a petition for rehearing, which was overruled.

The Judges of the Circuit Court have appointed Maj. Horatio L. Waite, Master in Chancery in place of the late Hiram M. Chase. The term will expire in July. Maj. Waite is a member of the law firm of Barker, Buell & Waite, has been a practising lawyer here for a number of years, and is well known for his genial qualities as a gentleman, as well as for his learning and uprightness as a lawyer. Though, under the present statutes, the fees of a Master in Chancery are remarkably low, yet there were twenty-four applicants for the position, several of them occupying very enviable positions at the bar, so that a selection was not a little difficult. Major Waite will make an excellent and popular Master.

SUPREME COURT OF TENNESSEE.

NASHVILLE, JAN. 31, 1876.

JANE SUMMAR *v.* J. W. PAGE and Others.

LIABILITY OF CLERK AND MASTER FOR MONEYS LOANED—PROOF OF GOOD FAITH.

A party to whom C. & M. loaned money without security at the time, but afterwards took as security the partner of the borrower, and the parties soon afterwards failed, *Held*, the circumstances make a cause requiring proof showing clearly and satisfactorily the good faith of C. & M. in the transaction.

By the court, MCFARLAND, J.

The question before us is, whether or not there is error in that part of the decree below holding A. F. McFerrin, former clerk and master at Woodbury, liable for a fund loaned by him under the orders of the court, in the event the money cannot be collected from J. W. Page, to whom the money was loaned, and Milliken, his surety. As McFerrin alone has appealed, this is the only question.

It appears that Page, to whom the money was loaned, was the son-in-law of McFerrin; that he took no security at the time, but Milliken, a partner of Page in a distillery, afterwards signed the note—McFerrin presenting the note and urging him to do so. He had been previously spoken to on the subject by Page. McFerrin afterwards bought Page's property and gave it to his daughter, (Page's wife) giving Page a note for part of the price, which was transferred to another.

The circumstances make a case requiring proof on the part of McFerrin showing clearly his good faith in the transaction. This proof is wanting. Page proves, it is true, that he and Milliken were solvent at the time the note was given, but their sudden embarrassment and failure soon after is not satisfactorily explained. The law requires of a public officer of this character the utmost good faith, and this must appear satisfactorily.

It is said in argument that the money might have been made after judgment was taken upon the note, but for the interference of the complainant's solicitors, who would not agree to the issuance of execution; but this is not satisfactorily shown, and in fact the circumstances do not sustain this conclusion.

The decree against McFerrin was proper.

The fund originally belonged one-third to Ivory Summar, from whom complainant was divorced, and two-thirds to complainant and her children; but the record, we think, shows that Ivory Summar had received his full share, and the whole of the fund loaned to Page belonged to complainant and her children—that is, to complainant during her life and then to her children. The decree therefore should be so modified that instead of allowing complainant to recover the fund it will be paid into court and secured or loaned so as to give complainant the interest thereon and secure the body of the fund to her children.

To this end the cause will be remanded.

McFerrin will pay the costs of this court.

(*Continued from page* 300.)

of the arrangement for holding a general election of city officers, placed the respondent in nomination and elected him by a vast majority of all the votes polled. There is no pretense of any want of publicity, of any surprise, fraud or concealment in the conduct of the election. The respondent was nominated by one of the largest mass meetings ever held by the citizens of Chicago. Every voter on election day and before knew that he was a candidate for the office, and had the opportunity to express his preference for or against him at the polls. There is no question but that he was the choice of the people, although themselves, like the old Mayor, a provisional body, holding over only until their successor should be elected and qualified. The old council refused to canvass the votes for Mayor. The new council, elected together with the respondent, did make the canvass, and declared the result, and he is now the acting chief magistrate of the city by the will of the people fairly expressed at the polls.

Surely there should be some cogent reason founded on wise public policy, or some well settled rule of law, inexorable as fate, bending the understanding and conscience of the court to justify a decision which shall reverse the one thus made by the people, displace their chosen chief officer and restore to provisional authority of one of whom they have so clearly expressed the wish that he shall not rule over them. Cases of this character are apt to be *sui genesis*, each depending largely upon its own peculiar facts, and not easily reduceable to any uniform rules or principles. The elements of concealment, fraud, surprise, imposition, which figure so largely in many election cases, have no place here. There is no pretense that there was any unfair practice resorted to in order to secure the election of the respondent. or that all was not open or above board, All the safeguards which surrounded the exercise of the elective franchise were provided in this case. They operated as fully and completely to secure a full and fair expression of the will of this electoral body in the case of the respondent as in the case of any other candidate. It is safe to assert that no case can be found in the books where there were so many and so cogent reasons concurring in favor of the validity of an election, which the court has seen fit to set aside. Is there any sound reason in public policy, or any imperative rule of law which requires it to be drawn in the present instance? The question of any existing vacancy having been decided against the relator, his case must rest solely upon the omission or refusal of the common council to call the election. It is claimed, inasmuch as the office was to be filled for a fraction of a time larger than a year, the full term being two years, that a special election was necessary for the purpose, and that such election could be held only upon the call of the common council. Various cases have been cited in support of this position, and while it is doubtless the general rule that in order to fill a vacancy a special election must be called by the proper authority, with specification of time and place, and all needful arrangements for holding the same, yet there are exceptions to the rule, and I do not consider that the rule has application to this case at bar. This case is not within the reason of the rule laid down in the cases cited on behalf of the relator. Article 4, section 1, already cited, provides—a general election for city officers shall be held on the third Tuesday of April of each year.

SECTION 2. At the general election held in 1870, and biennially thereafter, a Mayor shall be elected in such city."

The language of Section 1, "a general election for city officers," is certainly broad enough to include the mayor, Nor is its scope confined, in my opinion, by the provision of the following section, that "at the general election held in 1873, and biennially thereafter, a mayor shall be elected in such city." It should be borne in mind that this act went in force on July 1, 1872, and the language employed in the section in question is the same as if it were intended by the Legislature that all cities should adopt the act in season to hold a general election on the third Tuesday of April, 1873. Yet nothing of the kind could possibly have been expected. It was not practicable for the city of Chicago to hold its general election in 1873 or biennially thereafter, since its adoption of the act was too late in 1875 to hold its general election that year. A full comparison thereof with the terms of this section is and has been from the first impracticable except in the case of those cities, if any, which adopted the act at a time sufficiently prior to the third Tuesday of April, 1873, to hold an election on that day. Why, then, should this section, which prescribes for cities adopting the act subsequent to April, 1873, the performance of an impossibility, be construed so as to limit the broad power contained in the first section, which is eminently beneficial and practicable to all? Is not sufficient scope been given to section two, if we hold that it was the intention thereby simply to make the term of office of mayor in all cities organized under the act throughout the State uniformly two years, commencing on the third Tuesday of April in the odd year, leaving untouched the provision in the first section for a "general election of city officers—mayor included—on the third Tuesday of April of each year," should occasion require? And in this connection should be borne in mind the provisions in section 2, article 2. "Whenever a vacancy shall happen in the office of mayor, when the unexpired term shall be one year or over from the date when the vacancy occurs, it shall be filled by an election.

How is a positive requirement that when there is a vacancy, and the unexpired term is a year or more, it shall be filled by an election? Such a vacancy existed in the present case, and a general election for city officers was at hand.

Was any further authority necessary in order to fill the vacancy? And was it in the power of the common council to set at naught the command of the statute, and defeat its obvious requirement by neglect or refusal to call the election? Was any special call necessary when the statutes had already provided the means of its fulfillment? To my mind the answer to those questions is obvious.

Some stress has been placed upon section 14 of article 4, which provides; "If there is a failure to elect any officer herein required to be elected, or the person elected shall fail to qualify, the city council or board of trustees shall forthwith order a new election therefor; and in all cases, when necessary for the purposes of this act, may call special elections, appoint judges and clerks therefor, canvass the returns thereof, and provide by ordinance for the mode of conducting the same; and shall give notice of such special election," etc. But if the views already stated are correct, though it was the plain duty of the common council to call the election, give notice, etc., yet their omission to do so did not affect its validity, since the election was not special within the meaning of this section.

If the claim of the relator under the various provisions of the act were less beset with difficulties than I think it is, the effects and consequences of the construction contended for in his behalf, in my judgment, should cause the court to hesitate before pronouncing in his interest. A construction which, in the event of a vacancy occurring [illegible] of a term, places it in the power of the council, if so disposed, practically to prevent an election of their chief magistrate for a period of nearly two years, is surely not to be favored. Nor is this confined to the case of a vacancy occurring in the office of mayor, for it applied equally to the case of aldermen. What is to prevent a political majority in the council from disfranchising a ward obnoxious to them for its party politics for a period of two years, if a vacancy occurs at the commencement of an aldermanic term? But if the construction is adopted favorable to the respondent, the longest period for which, in either case, an expression of the will of the elective body could be postponed, would be a fraction of a year. Believing, therefore, that a decision adverse to the claim of the relator would be in the interest of sound government and popular rights, will especially be opposed to that bane of American politics, corrupt rings, I have felt it my duty, for the reasons already stated, as well as others urged in argument on behalf of the respondent, to dissent from the opinion of the majority of the court on the main question in the case.

Judge Farwell then stated his view of the case as follows:

Inasmuch as this case is of great importance, it is probably due to myself and to the parties, that my views should be known on this question, as one of the members of this court. I agree with Judge McAllister and with Judge Booth upon the question as to whether by the law of 1872 the term of the then acting Mayor was extended to 1877. I am of opinion that that term was not extended, but that it is evident from the law itself that the term ceased, and that the acting Mayor under the old organization was merely an acting Mayor under the new law until his successor should be chosen and qualified. We being agreed upon that, the question then follows, What are the rights of the parties under the facts as stated? The old Mayor being a person merely filling the office, and discharging the duties for the time being without any right or holding any term not expired, it would have been proper for the common council, as soon as in their discretion it was proper, to call an election for this and other officers. They did not exercise that right. The time fixed by the law for a general election arrived. By the law itself, as we understand it, the then acting Mayor had no term; he was merely discharging the duties of an office, which was in the eyes of the law vacant. That being a general election, I am of opinion that the voters had a right to vote for Mayor at that election if no notice should be given; that it was the duty of the common council, not having called any special election before the coming general election, to have given notice that a Mayor would be voted for at that time, that that vacancy would be filled; but that they cannot, by failing to discharge their duty, either from intention or from ignorance, deprive the voters of the right which they have upon a general election to elect all officers who, with propriety and according to law, should be elected. The reasons which have been given by my brother, Judge Booth, cover substantially the case, and the views which I have on this subject, I therefore do not deem it necessary to say more.

Judge Rogers—Since Judge Farwell stated that he concurred in the dissenting opinion, I will say that Judge Williams and myself concur with Judge McAllister in the main question, that the election held last April for Mayor was an absolute nullity and nugatory. Speaking for myself, assuming that there was a vacancy, if Mayor Colvin was not entitled under the charter to hold his office until 1877, then I concur, and so does Judge Williams concur, in the reasoning of the opinion as read by Judge McAllister.

Egbert Jamieson, J. P. Root, W. C. Goudy and Judge Morse for Mr. Colvin, M. F. Tuley for Mr. Hoyne.

CRIMINAL COURT OF COOK CO., ILLINOIS.

OPINION FILED JUNE 2, 1876.

THE PEOPLE *ex rel.* MICHAEL EVANS *v.* BERNARD CALLAGHAN.

Application for Leave to File an Information in the Nature of a Quo Warranto.

QUO WARRANTO—WHEN LEAVE TO FILE INFORMATION WILL NOT BE GRANTED—WHAT CONSTITUTES A USER—PRACTICE.

1. PRACTICE.—The court states the practice under the statute, in *quo warranto* cases.
2. THERE MUST BE A USER.—That before leave will be granted to file an information in the nature of a *quo warranto*, it must be shown that the respondent has taken possession of the office.
3. USER.—The court states what constitutes a user.
4. WHEN OFFICER HAS NOT GIVEN BOND.—*Held*, in this case, where the respondent had been appointed town collector by the town board, and taken the oath of office, but had not given his official bond, that he had not, within the meaning of the statute, usurped the office, and that leave would not be granted to file an information.—[ED. LEGAL NEWS.]

The opinion of the court was delivered by MOORE, J.

The statute of this State provides, "that in case any person shall usurp, intrude into, or unlawfully hold, or execute any office or franchise * * the State's attorney * * at the instance of any individual relator, may present a petition to the court for leave to file an information in the nature of a *quo warranto*, in the name of the people, and if the court be satisfied that there is probable ground for the proceeding, the court may grant the petition and order the information to be filed, and process to issue (Rev. Stat., ch. 112. § 1).

This, however, is no new provision of law, our statute being a transcript of the English statute. It has ever been held that when the court is satisfied that probable ground for the proceeding exists, leave will be granted to file the information. But before such leave can be granted, the probable ground MUST BE SHOWN TO EXIST. The court must be satisfied that the probable ground for the proceeding exists. At this stage of the case, however, the case must not be tried upon its merits;—the court is now only to inquire if the probable ground is made to appear.

The petition in this case shows that the relator, Michael Evans, is, and for many years has been, a resident and legal voter in the town of South Chicago; that in 1875, he was duly elected collector of said town for one year, and until his successor should be elected and qualified; and that he was duly qualified and discharged the duties of said office until he was elected and qualified as his own successor; that an election was held on the 4th of April, in all things according to law, that at that election the proper number of officers to which said town was entitled to by law were elected, and that for the office of town collector 8,883 votes were cast, and that of them the said Evans received 4,273 votes; that one A. J. Galloway received 3,372 votes, and that one P. O'Brien received 1,338 votes, and that thereupon the town clerk declared that Evans was duly elected town collector of the town of South Chicago, and that he also declared the result as to the other town officers, which showed that the proper number of town officers were elected at said town meeting and election, and that a statement of the result of the election was duly recorded; that a certificate of his election was made and delivered to said relator on the 8th day of April, 1876, and that on the same day the said Evans took and subscribed the oath of office prescribed by the constitution, and filed the same in the office of the town clerk, according to law; that within the prescribed time, and according to law, the town clerk filed in the county clerk's office a list of officers elected for the town. The petition also shows that "whenever any town shall fail to elect the proper number of town officers * * it shall be lawful for the justices of the peace of the town, together with the supervisor and town clerk, to fill the vacancy by appointment, by warrant, under their hands and seals, and that the persons so appointed shall hold their respective offices during the unexpired term of the persons in whose stead they have been appointed, and until others are elected and appointed in their places;" that on the 15th of April, the justices of the peace in the said town, together with the supervisor and town clerk, held a meeting, and that then it appeared from the records that according to law, P. K. Ryan was elected supervisor, James Gleeson town clerk, Edward Phillips assessor, and the relator, Evans, collector; that thereupon it was determined by a majority to hear evidence in relation to said election, and that statements were made, which, it was claimed, tended to show that frauds had been committed at said election; that during the meeting Ryan resigned as supervisor, and Robert T. Lincoln was appointed in his place; that thereupon the meeting by a majority vote determined that there was a failure to elect, at the annual town meeting of the town of South Chicago on the first Tuesday in April, a clerk, supervisor, assessor, and collector, and that they would proceed to appoint such officers to serve until the election of town officers at the annual town meeting to be held on the first Tuesday in April, 1877; that a majority of said justices of the peace, together with said Lincoln, acting as supervisor, pretended to appoint one W. S. Carver town clerk, and W. B. H. Gray assessor, and one Bernard Callaghan collector of the town of South Chicago, upon the pretense that there was a failure to elect these officers at the annual town meeting held on the first Tuesday of April, 1876, and that therefore vacancies existed in said offices; that within the prescribed time thereafter the majority of said justices of the peace, and Lincoln, acting as supervisor, and said Carver, pretending to act as town clerk, issued to the said Callaghan a pretended warrant of appointment to the office of

said collector; that the same was delivered on the 17th of April, and that Carver, as clerk, made out and delivered to Callaghan a pretended certificate of such appointment, and that Callaghan thereupon on the 17th of April, 1876, accepted said pretended appointment, and took and subscribed the oath prescribed by the constitution as such collector, before an officer authorized by law, in that behalf, and filed the same with said Carver, as clerk, within the prescribed time, and that the said Carver filed in the office of the county clerk a list of the names of the pretended town officers so pretended to have been appointed within the time prescribed by law.

The petition claims that the appointment of Callaghan is void, and that since the 17th of April, 1876, he has been, and is, unlawfully usurping, intruding into, and unlawfully holding and pretending to execute the office of such collector. Wherefore, on the relation of said record, the petition asks for leave to file an information in the nature of a *quo warranto* against the said Callaghan, and asks for process, for answer, etc.

According to well settled practice, in this State and elsewhere, the defendant has produced and filed *ex parte* affidavits, controverting the probable ground relied upon by the petition. The proof thus made conduces to show that fraud was practiced at the election by persons other than Evans. This evidence is of such a character as entitles it to the highest consideration, and yet some of the most important witnesses may be mistaken in what they honestly believe, and state they saw. On the other hand, some of the witnesses who are introduced to sustain the view taken by the relator must know the truth; and if their testimony be true, then some witnesses introduced by the respondent must be mistaken. If the vault door was opened, as is claimed by the respondent, then those who claimed to be keeping watch must have known it. They say it was not so opened. It is not, however, necessary at this stage of the case to determine the truth. The petition need not make out an undoubted case, it must show only probable ground. If, at this stage of the case, doubt exists as to the rights of the parties, it should be resolved in favor of the relator. The invariable course is to allow the information to be filed when a question of law or fact is in dispute and doubtful. Leave to file the information is not granted as a matter of course, when asked, but depends upon the sound discretion of the court. It will, however, usually be granted where the right, or the fact on which the right depends, is disputed and doubtful. Bacon's Abr. Informations, (D); The People *v.* Sweeting, 2 Johns Rep., 184; The People *v.* Richardson, 4 Cowen, 102. This is the view maintained by the relator, and it is a view so well sustained by authority and precedent that it cannot, at this day, be questioned. If, then, this application depended only upon the question as to whether there was a fair election, or any election on the first Tuesday of April—if the application depends only on the question as to whether, at the time of the appointment by the town board, there was a vacancy in the office of town collector, it must be determined in favor of the application, and for the purposes of this motion, it must be determined, that, *prima facie*, the election was fair, and there was no vacancy, to be filled by appointment. If the *user* was averred and admitted, and no other question was raised at this stage of the case, then leave would be granted to file the information, in order that an issue of fact might be made and tried, and the right of the defendant to this office determined, either for or against him, as the truth might require.

The next inquiry that is to be considered is whether the *user* is averred? The essential parts of the petition have been set out at considerable length, in order that it might be seen what is averred. It is averred that the relator was duly and lawfully elected, and that he had qualified by taking the oath prescribed by the constitution. It is claimed for the relator that he has done all that the law requires of him up to this time. More than this is claimed. It is shown that he was the collector for 1875, duly elected and qualified; and that as such collector for 1875 he took the oath prescribed by the constitution, and gave the bond required by law, and discharged the duties of the office, and that he is the town collector until his successor is elected and qualified, and enters upon the discharge of his duties. The relator has done all that he can to take possession of and become incumbent of the office as his own successor. On the other hand, it is claimed that Callaghan has not been elected or appointed according to law, but that, without authority, he has been appointed by a majority of the justices of the peace of the town of South Chicago, together with the one who claims to act as supervisor and the one claiming to act as clerk. It is averred, in substance, that no vacancy existed, and that no right existed to make the appointment, and yet that the appointment was made without authority, and that the defendant took the oath in manner and form as prescribed by the constitution, and thereby indicated his determination to accept of the office, and so usurped and intruded into, and unlawfully holds the office of such collector. Is this usurping the office? Does this amount to an intrusion into the office? Do these averments show that the defendant holds the office? Has he executed any of the duties of the office? Has he *used* the office? To answer these questions it is necessary that the authorities cited by the learned counsel be examined. Thus it may be ascertained what constitutes a *user*.

"In case any person, against whom an information is filed, is adjudged guilty, the court gives judgment of ouster against such person from the office (Rev. Stat., ch. 112, sec. 6), and all authorities in relation to *quo warranto* go to the same extent. It is insisted from this as a beginning point, that a party cannot be ousted from that of which he has never had possession, and this view is not seriously controverted by the counsel representing the relator. Both admit that there must be a *user*, a possession, before there can be an ouster. Both admit that the usurpation, the intrusion into, or the unlawful holding or executing the office, must amount to an actual possession, an actual use, or there can be no ouster, and unless this state of case be presented by the petition, the request for leave to file the information must be denied. No case exists in which the information has been allowed to be filed by the court, where the party against whom it was applied for has not been in the actual possession of the office. The petition in this case is based upon the well recognized principles hereinbefore recited, and upon the well established rule in pleading, that it is not sufficient to aver that the defendant has accepted and usurped an office, without specifying the manner in which the usurpation has been made. Hence, it follows that the motion for leave to file the information must be denied, unless the actual possession—the actual *user* appears from the averments in the petition. (High on Ex. Remedies, secs. 627, 655, and notes and authorities there cited. The People *v.* Thompson, 16 Wendell, 656 and cases there cited; The People *v.* Tisdale, 1 Douglass, 61.) The petition relies upon the fact that the defendant has taken the oath prescribed by the constitution, as the act, the fact that constitutes *user*, that amounts to taking possession of the office.

In an early case it was held that a swearing in, though defective in law, yet being the act by which the party claimed to be a free burgess of a corporation, held a sufficient *user* to warrant an information in the nature of *quo warranto*. (Rex *v.* Tate, 4 East., 337; Rex *v.* Harwod, 2 East., 177.) The free burgess performs duties (amongst others) not unlike those of a county commissioner, or alderman of a city. He was not required to give bond, and was held to be in possession by simply taking the oath of office. The governor of a State, a judge of a court, and a member of the legislature simply take the oath of office, and are thereby inducted into office. The treasurer of a State, county, or city, like unto the sheriff of a county, in addition to the oath of office, is required to give bond, with approved surety, and cannot be inducted into office without such bond. Hence it is insisted that the case of Rex *v.* Tate does not sustain the position of the relator, inasmuch as a town collector must give bond, with surety. In the one case it was held that taking the oath made the party a free burgess, while it is claimed that the defendant does not become a collector *de facto* until he gives his bond, in addition to the oath. Before the information can be allowed, both in England and in this country, it has been held that it must be shown that the party is in office *de facto*, and it is not sufficient to say that the defendant has accepted the office. It is not sufficient to aver that the defendant admits and claims that he is in office, *user* in some way or other must be shown. (Regina *v.* Slatter, 11, ad. and el., 505; Rex *v.* Whitwell, 5 T. R., 85; Rex *v.* Ponsonby, Sayer's rep.. 245 b.; Regina *v.* Pepper, 7 A. and E., 745.) In this last recited case the party complained of had claimed to be a free burgess, and as such had voted for a member of parliament, which he could not have done but for the fact that he was a free burgess. This vote was expunged from the list of voters, and it was held that such voting did not amount to such *user* as would authorize the information. The court will deny the request to file the information, unless it appear that the defendant has *de facto* exercised the duties of the office. (Regina *v.* Armstrong, 34 E., L. and E., 288; Grant on Corporations, 410.)

If it be true that the party has done something that amounts to *user*, and then, after proceedings are commenced against him, he abandons the office, still the judgment will be for the ouster. But in all such cases there must have been an actual *user*. (High on Ex. Rem., sec. 754, and authorities there cited.)

It is held that there is a difference between accepting and acting.

If the party against whom the *quo warranto* is demanded, has acted, it is immaterial whether he has accepted or not. He may accept, and never intrude into the office; or he may even decline acting. In such case no harm is done but by acting he interferes and meddles with the interest of the public. (Cole's Crim. Infer., p. 185.)

There can be no question, but that the petition seeks the only remedy, if there be an evil to remedy. The remedy can be neither by mandamus nor injunction. (People *v.* New York, 3 Johns cases, 79; St. Louis Co. Crt. *v.* Spark, 10 Mo., 117.)

From these and very many other authorities, both English and American, it is found that the court will deny the request made for leave to file the information, unless it is made to appear that the defendant has taken actual possession of the office, and unless it appears that he has not merely accepted the office. He must have used the office, he must have done something, that manifests an actual *user*.

In this connection it must be ascertained what may be required by the law of this State. How is a town collector inducted into office? How does he take the possession of the office? What must he do in order that it may be said he is in the office, and that he is using the office?

"The person elected or appointed to the office of collector, before he enters upon the duties of his office, and within 10 days after he shall be notified of his election or appointment, shall take and subscribe the oath of office prescribed by the constitution, which shall, within eight days thereafter, be filed in the office of the town clerk." (Rev. Stat., chap. 139, art. 9, sec. 85). This oath is to the effect that he will faithfully discharge the duties of collector. If the office was like unto that of free burgess, or alderman, or county commissioner, or judge, and if nothing more was required, it is probable that such "swearing in" might be held to amount to an induction into office. By another section it is provided that neglect to take and subscribe such oath, shall be deemed a refusal to serve. (Sec. 86.) "Every person elected to the office of collector, *before he enters upon the duties of his office*, shall give the bond required by law." (Sec. 88.) "If any person elected to the office of collector shall not give such security and take such oath within the time limited for that purpose, such neglect shall be deemed a refusal to serve." (Sec. 89.)

The time of giving this bond and its requisites may be ascertained by reference to the chapter of the statute on revenue: "Every town collector, *before he enters upon the duties of his office*, and within eight days after he received notice of the amount of taxes to be collected by him, shall execute a bond with sureties to be approved, etc., in double the amount of such taxes, conditioned, for the faithful execution of his duties as such collector." (Ch. 120, sec. 133, p. 879.) The statute declares that the sheriff "before entering upon the duties of his office, he shall give bonds"—(Ch. 125, sec. 2)—and he "shall also before entering upon the duties of his office, take and subscribe the oath." If he fails to give the bond, or take the oath, the office shall be deemed vacant. In relation to the State treasurer, it is provided, "before entering upon the duties of his office he shall give bond." (Ch. 130, sec. 1.) It is further provided, "he shall, before entering upon the duties of his office, take the oath." The law makes similar provisions in relation to county treasurer. (Ch. 36, secs. 1, 2.) The like provisions exist in relation to the auditor of public accounts. (Ch. 15, secs. 1, 2.) It is claimed by the relator that the provision of the revenue law that provides for the bond does not require him to discharge well and faithfully the duties of his office, but that the bond is conditioned for the faithful execution of his duties as such collector, and that the prescribed form only provides that "he shall perform all the duties required as collector of taxes." But is any such inference to be drawn from the provisions of the bond? The office is but one. It may impose varied and dissimilar duties, and may require a bond for the faithful discharge of one kind of duties, and it may not require a bond in reference to other duties. Still all these duties are to be discharged by one and the same officer, and "before he enters upon the duties of his office—before he enters upon any of the duties of his office, he shall not only take an oath, but he shall also give a bond with surety. There are some other town officers who are not required to give bond. Before they enter upon the duties of their respective offices they shall take the prescribed oath only, and by taking the oath alone it may be that they enter into the use and possession of the office. But in relation to the office of town collector it is difficult to distinguish between the requirements for sheriff, auditor, treasurer and town collector. With each the law requires the bond, as well as the oath, before they enter upon the discharge of the duties of their respective offices; and yet it does not appear to be doubted but that the sheriff, the treasurer, and these others all fail to use and possess the office until they give the bond as well as take the oath. Before the collector enters upon the duties of his office, before he can use the office—before he can possess the office—before he can hold or execute the duties of the office, the collector must give the bond and take the prescribed oath. It is not pretended that the defendant has either given or offered to give any bond required by law. The defendant may yet be deemed to have refused to serve as collector, as it has been found from the statute "that if he does not give such security and take such oath within the prescribed time, such neglect shall be deemed a refusal to serve." If he thus neglects, then no harm results to anyone, and no one has any wrong of which to complain; "such neglect shall be deemed a refusal to serve"—that is to say, such neglect shall amount to a failure to possess or use the office.

From all these considerations—from the fact that the information cannot be allowed unless there be a *user* by the defendant, and from the fact that there can be no *user* until the party shall have given the required bond, and until he shall have taken the prescribed oath, therefore, it follows that no cause of complaint exists as against the defendant. The prayer of the petition in this behalf for leave to file an information in the nature of a *quo warranto* in the name of the people of the State of Illinois is denied.

Immediately after the rendering of the decision, the counsel for the relator asked for an appeal, which was granted, and the petitioner was allowed twenty days in which to file his appeal bonds.

MELVILLE W. FULLER for Relator.

HERRICK, TULEY & SWEET for Callaghan.

THE CHICAGO BAR ASSOCIATION.

The regular monthly and last meeting of the Chicago Bar Association prior to the summer vacation of the courts, was held on last Saturday afternoon at their rooms. President McCagg presided. The minutes of the preceding meeting were read by Frederic Ullman Secretary

of the Association. The next regular business in order was the report of the treasurer, which was submitted by Treasurer Quick, showing the following exhibits:

RECEIPTS.

Balance reported at meeting of April 1	$1,027 69
Dues received for 1875	15 00
Dues received for 1876	280 00
Total	$1,322 69

DISBURSEMENTS.

By bills paid since last report	$ 167 35
Balance on hand	1,155 34
Total	$1,322 69

The report was placed on file.

THE SUMMER VACATION.

Mr. W. C. Goudy, from the committee appointed at a previous meeting to confer with the judges of the various courts in regard to the summer vacation, reported that the judges had decided to take a recess during the coming months of July and August, they doing chamber business only. The month of September would not be included in the vacation, although it was decided that any member of the profession who should be necessarily engaged in attendance upon the Supreme Court of the State during that month would be excused, and practically the month would be included in the vacation term.

CALL OF THE DOCKETS.

At a former meeting of the association a committee was appointed to confer with the federal judges in regard to the call of the docket in the federal courts. Mr. W. H. King reported in behalf of that committee, that the matter was not considered at the meeting of the various judges, although the federal judges were present.

Mr. Bond desired to call the attention of the association to the equity calendar in the federal courts, and mentioned the delay before trial could be arrived at. He thought some protection was necessary for home attorneys from foreign attorneys. Mr. Sleeper referred to the system adopted by Judge Moore in disposing of the chancery business in the Cook county superior Court, and remarked that it doubled the business if the two chancery judges on the circuit side, and intimated that the courts could conduct their business with greater facility with the co-operation of the bar; he thought some arrangement might be made in this matter that would result beneficially to all interested. Following these views, Judge E. A. Otis offered the following resolution:

Resolved, That the committee having in charge the matter of consulting with the judges of the United States Circuit court as to a call of the calendar, be requested to confer with the judges of the Circuit court hearing chancery causes, and urge upon them the adoption of a practice in relation to the call of their dockets similar to that adopted by Judge Moore in the superior court. And also to see the judges of the United States courts and urge the adoption of the practice of a chancery calendar and call as above indicated.

On motion, Messrs. Otis, Sleeper and McCoy were added to the committee, and the resolution of Judge Otis was carried.

RESIGNATION OF MR. LOCKWOOD.

Mr. H. W. Jackson tendered the resignation of Mr. Joseph D. Lockwood as a member of the board of managers, and stated that this action was owing to the impaired health of Mr. Lockwood.

The resignation was thereupon accepted.

RECEPTION OF CHIEF JUSTICE WAITE.

Mr. Jackson also stated to the meeting that, as the former secretary of the association, he was requested to interview Chief Justice Waite some months ago, as he passed through Chicago to attend a meeting of the board of directors of the Soldiers' Home at Milwaukee, of which he was a member, as to his pleasure at receiving a reception at the hands of the Chicago Bar Association. This he had done, and the chief justice intimated that upon his next visit to Milwaukee he would be pleased to accept of the courtesies of the association during his stay in Chicago. He therefore moved that Secretary Ullmann be instructed to correspond with Judge Waite, in order to ascertain at what time he expected to be again in the city, so that suitable preparations could be made for the reception of their anticipated guest. The secretary was thereupon instructed in accordance with the motion.

HIRAM M. CHASE.

President McCagg referred in a touching manner to the death of the late lamented Hiram M. Chase, a member of the association, and said that it would be only proper that some action should be taken in regard to his death. They knew there were many acts during his life-time that endeared the deceased individually to his associates, and there was more than one member of the bar who could lay a chaplet upon the grave of their deceased brother. It would be a source of pleasure to his widow to know that some such action had taken place.

Mr. W. H. King thought the association should take the same action upon the death of one of its members as did the legal profession at a late meeting held at the Law Institute in regard to the death of Mr. Chase, and, therefore, he would move that a committee be appointed to draft resolutions expressive of their manifold regrets for the demise of Brother Chase.

Mr. Black suggested that inasmuch as the vacation was so near at hand the association would not have the time to pass upon these resolutions when drawn, therefore he would move, as a substitute, that the committee be authorized to draft a brief memorial to the memory of the dead, and a copy be presented to his family; also that the same be enrolled upon the books of the association. The substitute was accepted and passed, the chair reserving the appointment of the committee to some future but early day, in order that it might ascertain who of the association were most intimately associated with Mr. Chase in his life.

JUDGE DRUMMOND'S PORTRAIT.

The regular business being disposed of, Mr. McCagg referred to the life like portrait of his honor Judge Drummond, of the United States circuit court, that adorned their rooms, and which had lately been presented to them.

He said:

It gives me great pleasure to call the attention of the members present to the portrait of Judge Drummond, recently presented to the association. It evidences, as it hangs on our walls, the appreciation in which his brethren, the men who by daily contact with him know him best, hold the distinguished judge who has so long adorned the bench of this country; their esteem and regard for him, and their recognition of the probity and judicial knowledge which has marked his long career.

It serves also to show that the bar is not unmindful of the value of such an example, and that kindly relations exist between the two. It is a large measure of power that is committed to a judge—perhaps the only approach to a despotism known to our government. To so wield it as to commend it, is high praise. To be able to say that it has been so wielded—that no thought of prejudice or injustice has entered into the minds of those men who, day by day, must see their own convictions overruled—is not only praise to the judge, but shows a willingness to criticise fairly, to exercise, so far as may be, a dispassionate judgment, which is creditable to the members of our profession. For both it evidences both.

The thanks of the association are due to the gentlemen through whose kindness it has become the property of the association, and to Judge Drummond for consenting to sit for it.

Mr. S. A Goodwin followed Mr. McCagg with a beautiful tribute to the integrity of Judge Drummond, and a vote of thanks was extended to the gentlemen who had presented the picture of the great and eminent jurist to the association.

The meeting then adjourned till the first Saturday in September next.

LVI. NEW HAMPSHIRE REPORTS.

We are under obligations to Hon. JOHN M. SHIRLEY, official reporter, for advance sheets of the LVI. Volume of New Hampshire Reports, from which we take the following head-notes:

STATUTE OF FRAUDS—PAROL AGREEMENT TO CONVEY LAND.

Gordon v. *Gordon*.—*p.* 183.

The plaintiff being indebted to H. L. G., husband of the defendant, conveyed to him certain real estate, with the parol agreement that he would reconvey to the plaintiff upon payment of the debt. H. L. G. died without having reconveyed the premises. After his death, the plaintiff, for the purpose of restoring the legal title to himself, entered into a parol agreement with the administrator of the deceased, and with the defendant, by the terms of which he was to be allowed a debt of $4,042.16 against the estate of the deceased: the administrator was to obtain license and sell the premises. The plaintiff was to bid off the same at $5,000, being the amount allowed the plaintiff against the estate, with $957.84 more still due from the plaintiff, according to the parol contract, for a reconveyance; and the defendant at the same time agreed by parol to convey her right of dower to the plaintiff. The administrator obtained license, and sold the premises to the plaintiff for $5,000, who paid $957.84 to the administrator (being the difference between $5,000 and $4,042.16), and received from him a deed of the premises. The administrator accounted for said sum as assets belonging to the estate. The defendant refused to convey her right of dower to the plaintiff, but demanded and caused the same to be set out to her. The plaintiff brought this suit to recover one-third part of said sum of $5,000. *Held*, that the plaintiff could not recover.

HIGHWAY—APPEAL—LAYING OUT, WHEN INVALID—WAIVER.

Underwood v. *Bailey*.—*p.* 187.

Where a condition is affixed to the laying out of a highway for the accommodation of a person applying therefor, any land-owner, or other person aggrieved and appealing from such laying out, may take advantage of the illegality resulting from the imposition of such condition, notwithstanding the individual for whose benefit the highway was laid out is willing to assent to such imposition.

In such a case, the party aggrieved will not be regarded as having waived his objections, by a neglect to give notice of or specify them at the first term of court to which the report of the commissioners upon his appeal was returned.

REMOVAL TO FEDERAL COURT — PETITION FOR, WHEN ENTERTAINED.

Chandler v. *Coe*.—*p.* 184.

In accordance with the provisions of the revised statutes of the United States, enacted June 22, 1874, and the subsequent act of congress of March 3, 1875, a cause will not be removed from a State court to the Circuit court of the United States, unless the petition for such removal be filed in the State court before or at the term at which said cause could first be tried, and before the first trial thereof.

Such petition will not, therefore, be entertained, when filed in the State court after a verdict in the cause has been rendered, notwithstanding the verdict may have been set aside for error and a new trial ordered.

THE RAILWAY PASSENGER DUTY.—The whole question of the railway passenger duty is now being considered by a Select Committee of the House of Commons, but (says the *Law Times*) it is well to call attention to the case of North London Railway Company v. The Attorney-General (34 L. T. Rep. N. S., 297), which we reported last week. It appears that the House of Lords affirmed the judgment of the Court of Exchequer—that the duty is payable in respect of third-class trains not stopping at all stations—but affirmed that judgment for different reasons. The judgment of the Court of Exchequer proceeded on the very slight distinction between signal and market stations on the one hand, and general stations on the other, and held that the dispensing power of the Board of Trade as to stoppage could only be exercised with reference to stations of the former character. The House of Lords takes a wider view, and holds that the dispensing power of the Board cannot be exercised as to stoppage at all. Lord Hatherley observes, that to give such a dispensing power to the Board of Trade would be to "say that there are a certain number of persons residing along the line who shall have no benefit from the cheap trains whatever." The decision is an important one at the present juncture, and will probably lead, at least, to an alteration in the form of the law. The judgments contain no remarks on the policy of the tax, and the alleged unfairness of it in the case of companies who give a certain proportion of third-class passengers far better accommodation than the Cheap Trains Act was intended to secure for them.

SCOTCH LAW COURTS.—Most people know the irreverent and slovenly way in which the oath is administered to English witnesses. The witness hurries up to the box, and while judge and jury and the spectators are chatting and rustling in a pause of the business, the clerk of the court hands him a small Bible, which he holds in his right hand. The officer then recites his mumbled formula—"The evidence you shall give to the court and jury, touching the matter in question, shall be the truth, the whole truth, and nothing but the truth. So help you God!" The witness, without uttering a word, ducks his head and puts his lips to the Bible cover, unless he is cunning and ignorant enough to evade the ceremony by kissing his thumb. Now, in Scotch courts the proceedure is far more dignified and impressive. When the witness appears, the judge himself rises from his seat, and raising high his right hand, looks fixedly on the offerer of the evidence, who, as instructed, also raises high his right arm, and looks the judge in the face. The judge, then, amid general silence, calls the witness to say aloud after him—"I swear by Almighty God to speak the truth, the whole truth, and nothing but the truth!" No paltry symbol is added to the simple solemnity of this declaration, which appears likely to be far more binding on the conscience of him who makes it before the judge, and in the silence of the crowded court. —*Leisure Hour*.

UNWISE PUBLICITY.—Any remarks on the extraordinary case *sub judice*, in which murder or conspiring to compass death is alleged, would, of course, be illtimed and reprehensible; but we (*Lancet*) cannot refrain from a passing censure of the restless way in which pseudo-medical suggestions are placed before the public. It is quite within the range of possibility that some weak-minded persons without the wit to detect the gross absurdity of statements—remarkable chiefly for their grotesque ignorance—contained in certain letters which have been printed in evidence, may be induced to practice the supreme folly indicated. Whether this contingency actually occurs is unimportant to the point to which we call attention, namely, the inexpediency—we had almost said the lawlessness—of this custom of publishing anything and everything that appears in court as "evidence." The procedure evinces a strange disregard of public safety.

INTERESTING TO ARTISTS.—A judgment of great interest to artists has just been given by the Tribunal of Correctional Police at Bruges, in Belgium, and afterwards by the Court of Appeal at Ghent. The painter Carolus had prosecuted a picture-dealer of Brussels, named Flevez, for offering for sale a copy of the artist's work, "The Departure of the Newly-married Couple," on which the signature of J. Carolus had been imitated. The price demanded was 2,000f. The tribunal decided that a dealer who purchased a picture has a right to have it copied, with the signature, if the painter in selling it has not stipulated to the contrary, and that there would be no fraud unless the reproduction was sold as the original. That verdict was confirmed by the Court of Appeal.

TRADE-MARKS.—Mr. Sampson Lloyd, M. P., has addressed a letter to the Foreign Office, on behalf of the Chambers of Commerce, asking that provision should be made in all treaties of commerce that protection should be given to all British trade-marks, and the following reply has been received: "I am directed by the Earl of Derby to state that provision has been made in all treaties of commerce recently concluded between this country and foreign powers, and that communications are now taking place between her Majesty's Government and the Swiss Government, with the view to secure more effectual protection in Switzerland for British trade-marks.—I am, &c., T. V. LISTER."

CHICAGO LEGAL NEWS.

SATURDAY, JUNE 17, 1876.

The Courts.

UNITED STATES SUPREME COURT.

No. 856.—OCTOBER TERM, 1875.

JOHN WARREN and J. KEARNEY WARREN, Plaintiffs in Error,
v.
SHERIDAN SHOOK, late Collector of Internal Revenue.

In Error to the Circuit Court of the United States for the Southern District of New York.

INTERNAL REVENUE—WHO IS A BANKER—WHO IS A BROKER. WITHIN THE MEANING OF THE REVENUE LAWS—WHO LIABLE TO PAY A SPECIAL TAX.

This case was tried upon the following agreed statement of facts:

First. "That the plaintiffs, from the first day of April, 1865, to the first day of May, 1866, were copartners in the city of New York, doing business under the firm name of 'John Warren & Son.'"

Second. That during such time the plaintiffs, as such copartners, had a place of business in the thirty-second collection district of New York, where credits were opened by the deposit and collection of money and currency subject to be paid or remitted upon draft, check, or order, and where money was advanced and loaned by plaintiffs on stocks, bonds, bullion, bills of exchange and promissory notes, and where stocks, bonds, bullion, bills of exchange, and promissory notes were received by plaintiffs for discount and sale.

Third. That during the period aforesaid, the said plaintiffs, as such copartners, duly paid the special tax imposed upon them as bankers, in accordance with the provisions of the seventy-ninth section of the act of Congress entitled "An act to provide internal revenue to support the government," etc., approved June 30th, 1864.

Fourth. That during the period aforesaid the defendant was collector of internal revenue for the said thirty-second collection district of New York.

Fifth. That during the period aforesaid the plaintiffs bought and sold stock and gold, both of their own property on their own account, and also upon commission for other parties.

The sales in question were of three kinds:

First. Sales of their own property.

Second. Sales of gold, stocks, bonds, bullion, etc., transmitted to them by their correspondents, and the same or the proceeds drawn against; in some of which cases the sales of the transmitted property were made immediately, and the proceeds at once applied to the payments of drafts so drawn; and in others of which the drafts were accepted or paid; and the gold, stock, etc., were held for a better market, or to await further orders, and in the meantime stood as their security for their advances, and to provide reimbursement therefor. In other cases there were no actual advances, but the property held for sale, and, when sold by order of the customer, the proceeds were placed to credit, subject to draft.

Third. Sales of stock made in pursuance of an arangement for what is called carrying stocks on a margin, wherein they, upon a deposit with them of a per centage on the amount of the stocks, advance money and purchase stock for the dealer or speculator, (who dealt in hope of making a profit by the rise in the market price), and held the same subject to his order to sell, and finally sold the same for his account as to profit and loss. These transactions were conducted in the name of the plaintiffs, the name of the customer not being disclosed to those to whom the stocks were finally sold.

Upon these purchases and sales they charged and received for their customers the usual commission for purchasing and selling stocks for account of others, and the tax imposed and paid to the United States on the sales were also charged to such customer. If the transaction showed a profit, it was paid to the customer, with a return to him of the cash or security held as a margin. If the transaction resulted in a loss, the amount of such margin returned to the customer was correspondingly reduced.

Sixth. That during the period aforesaid the assessor of internal revenue for the said district assessed monthly against the said plaintiffs, the tax of one-twentieth of one per centum on stock, securities, gold, etc., provided for by the ninety-ninth section of the act aforesaid, to be paid by brokers, and bankers doing business as brokers, and assessed such tax against the plaintiffs alike upon the securities, stocks, bulion, etc., sold by them on commission for others, and upon those owned by said plaintiffs and sold by them upon their own account.

Seventh. That at the times of the said several assessments so made by said assessor, the plaintiffs protested against their liability to pay and against the right of the said assessor to impose or assess the said tax of one-twentieth of one per centum, or any other sum whatever, upon the value of the stocks, gold, or securities owned by said plaintiffs and sold by them upon and for their owu account, and not upon commission or for others.

Eighth. That the assessment-roll containing said assessment was transmitted to the said defendant as such collector, and the said defendant as such collector demanded from said plaintffs the whole sum so assessed against them by said assessor as and for the said tax, and the plaintiffs were compelled to pay, and did pay under protest to the said defendant as such collector, the said tax upon the whole amount of their sales during said period, including sales made on their own account as aforesaid.

Ninth. That the amount of such payments so made by the said plaintiffs, with the dates thereof, are correctly set forth in the schedule hereto annexed, marked "A," the first column in such schedule showing the whole amount of such tax paid at the respective dates therein indicated; and the second column showing the portions of said several payments which were for taxes upon sales made by plaintiffs upon their own account and not upon commission, and which plaintiffs seek in this action to recover.

Tenth. That about the third day of December, 1870, the plaintiffs duly appealed pursuant to law and the regulations of the Treasury Department, made in pursuance thereof, to the Commissioner of Internal Revenue, from the assessment and collection of said taxes, imposed upon said plaintiffs, upon sales made by them upon their own account, and claimed by them to be erroneously and illegally assessed against and collected from them. And the said commissioner, on the 24th day of May, 1871, and less than six months before the commencement of this action, rendered his decision upon said appeal adversely to these plaintiffs.

No further evidence was offered by either party.

Thereupon the counsel moved the said court that judgment be entered for the defendant, and said plaintiffs' counsel moved that judgment be entered for the plaintiffs.

After argument and deliberation, the court decied the said motion of said plaintiffs' counsel, whereupon the said counsel for the plaintiffs did then and there duly except thereto.

The court then directed that judgment be entered for the defendant; to which direction and conclusions of law of the court upon the foregoing facts set forth in said direction, the said plaintiffs' counsel then and there duly excepted.

B. K. PHELPS, for the plaintiffs in error.

EDWIN B. SMITH, Asst. Atty.-Gen., for the defendant in error.

Mr. Justice HUNT delivered the opinion of the court.

The plaintiffs were licensed brokers in the city of New York. They also bought and sold gold and stocks for others upon a commission paid to them for that service. On their own account they also dealt largely in gold and stocks. They have paid the taxes imposed by the revenue laws upon bankers. The government agents have now imposed upon them and collected the taxes chargeable by law upon brokers. This includes the tax of one twentieth of one per cent. upon sales made by the plaintiffs on their own account, as well as upon sales made for others. It is to this that the plaintiffs object, and the present action is brought to recover back such taxes.

The questions would seem to be—

1st. Do the transactions specified make the defendants brokers within the meaning of the revenue laws?

2d. Are licensed bankers, who also do business as brokers, liable to the additional tax imposed upon brokers?

3d. More precisely, are the plaintiffs liable to pay taxes upon sales made on their own account as well as when made for others?

Section 110 of the act to provide internal revenue, etc., approved June 30, 1864, (13 U. S. Stat. at Large, 277,) imposes a duty of one-twenty-fourth of 1 per cent. each month on deposits, one twenty-fourth of 1 per cent. each month on the capital, one-twelfth of 1 per cent. each month on the circulation, and an additional one-sixth of 1 per cent. on certain specified excess of circulation, to be paid by "any bank, association, company, or corporation, or person engaged in the business of banking, beyond the amount invested in United States bonds."

Section 79 subdivision of the same act, (13 U. S. Stat. at Large, p. 251,) provides "that bankers using or employing a capital not exceeding the sum of $50,000 shall pay $100 for each license," and for every additional $1,000 of capital $2, and that "every person, firm, or company, and every incorporated or other bank having a place of business where credits are opened by the deposit or collection of money or currency, subject to be paid or remitted upon draft, check, or order, or where money is advanced or loaned on stocks, bonds, bullion, bills of exchange, or promissory notes, or where stocks, bonds, bullion, bills of exchange, or promissory notes are received for discount or sale, shall be regarded a banker under this act."

The same section 79, subdivision 9, as amended by the act of March 3, 1865, (13 U. S. Stat. at Large, p. 252, 472,) provides "that every person, firm, or company, except such as hold a license as a banker, whose business it is, as a broker, to negotiate purchases or sales of stocks, exchange, bullion, coined money, bank notes, promissory notes, or other securities for themselves or others, shall be regarded as a broker under this act; provided, that any person holding a license as a banker shall not be required to take out a license as a broker," and it further provides that "brokers shall pay fifty dollars for each license."

The 99th section of the same act provides (13 U. S. Stat. at Large, 273) "that all brokers and bankers doing business as brokers, shall be subject to pay the following duties and rates of duties upon the sales of merchandise, produce, gold and silver, bullion, foreign exchange, uncurrent money, promissory notes, stocks, bonds, and other securities, as hereinafter mentioned, etc., that is to say, upon all sales and contracts for sales of stocks and bonds, one-twentieth of one per centum on the par value thereof, and of gold and silver, bullion and coin, foreign exchange, promissory notes, or other securities, one-twentieth of one per centum on the amount of such sales and of all contracts for sales."

The sections we have quoted furnish satisfactory definitions of the business of a banker and of that of a broker. "Every person, etc., having a place of business where credits are opened by the deposit or collection of money or currency, subject to be paid or remitted upon draft, check, or order, or where money is advanced on stocks, bonds, bullion, bills of exchange, or promissory notes, or where stocks, bonds, bullion, bills of exchange, or promissory notes, are received for discount or sale, shall be regarded as a banker under this act."—(§ 79, sub. 1.)

Having a place of business where deposits are received and paid out on checks, and where money is loaned upon security, is the substance of the business of a banker.

By the same section, sub. 9, a broker is defined to be one whose business it is to negotiate purchases or sales of stocks, exchange, bullion, coined money, bank notes, promissory notes, or other securities for himself or for others. Ordinarily, the term broker is applied to one acting for others, but the part of the definition which speaks of purchases and sales for himself, is equally important as that which speaks of sales and purchases for others. All parts of the definition are qualified by the words "whose business it is." Thus, if A. B. has ten thousand dollars which he desires to invest, and purchases United States stock, or State stock, or any other securities, he does not thereby become a broker. Nor if he owns ten thousand dollars of U. S. stock which he wishes to sell to raise money to pay his debts, or because he is not satisfied with six per cent. interest, is he thereby made a broker. It is only when making sales and purchases is his business, his trade, his profession, his means of getting his living or of making his fortune, that he becomes a broker within the meaning of the statute. Nor is it believed that a sale by one doing a banking business only, of a security received by him for the repayment of a legitimate loan, would make him a broker and subject to the tax. This would not be deemed an act of brokerage, either under the statute or upon general principles of law. When it is his business, the statute properly holds all such acts, whether in the name of himself ostensibly or in the name of others, as the acts of a broker. The danger and the facility for evasion of the statute, furnish excellent reasons for the adoption of this provision.

The contention of the plaintiffs is, that because they hold a license as bankers, they are not liable to the duty of one-twentieth of one per centum on sales made on their own account This is based upon the words of § 79, sub. 9, that all persons, &c., except such as hold a license as bankers, shall be liable to this duty on sales made for themselves as well as others, and upon the further suggestion that section ninety-nine does not contain the words "for themselves and others." We agree with the statement of Mr. Justice Grier in Fisk *v.* U. S., 3 Wall., 445, that the idea of Congress would have been better expressed, if the words "for themselves or others" had been inserted in section ninety nine, rather than where they are now found. Still we find no difficulty in reaching the conclusion that the tax in this case was properly imposed.

The intent of Congress to subject to taxation all sales made by those engaged in the business of brokers, is plain enough. When it was said (§ 99) "that all brokers and bankers doing business as brokers, shall be subject" to the duties specified, it was intended to encompass the entire class of persons engaged in the business of buying and selling stocks and coin. Brokers were included by name and by definition. Bankers would not so certainly be embraced by the definition given in section 79, subdivision one. To meet this possible exception, it was enacted. that when bankers should do the business of brokers, they should be subject to the duty specified. In this manner brokers technically, and bankers doing the business of brokers, were made liable to the duty. If the right to tax bankers upon sales made for themselves rested on the seventy-ninth section alone, a plausible argument could be made in the plaintiff's favor, arising from the words "except such as hold a license as a banker." But when we read in section ninety-nine, "that all brokers and bankers doing business as brokers" shall be subject to the tax, and consider the statutory definition of a broker, the plausibility of the argument ceases.

We have carefully considered the cases of U. S. *v.* Fisk, 3 Wall, 445; U. S. *v.* Cutting, Ib., 441, and Clark *v* Gilbert, 5 Blatch., 330, but do not deem it necessary to comment upon them in detail.

The judgment is affirmed.

UNITED STATES SUPREME COURT.

No. 150.—OCTOBER TERM, 1875.

G. W. HARTMAN *v.* BATES COUNTY.

In Error to the Circuit Court of the United States for the Western District of Missouri.

TOWNSHIP RAILROAD AID BONDS—WHEN VOID.

1. CONSTITUTIONAL RESTRICTION.—The restriction in the Constitution against the issuing of railroad aid bonds, applies as well to townships as to counties, cities and towns.

2. THE RECITALS IN THE BONDS.—That sufficient notice of the objections to the validity of the bonds, stated in the opinion, is contained in the recital of the bonds.

3. CONSOLIDATION OF COMPANY.—The court states the effect of the consolidation of a railroad to which a subscription has been granted, with another road.—[ED. LEGAL NEWS.]

Mr. Justice BRADLEY delivered the opinion of the court.

This is an action brought to recover

the amount due on certain coupons attached to bonds of Bates county, Missouri, issued at the request and on account of Mount Pleasant township, in said county, in payment of a subscription on behalf of the township to the capital stock of the Lexington, Lake and Gulf Railroad Company. The subscription was made under a law of Missouri, called the "Township Aid Act," passed in 1868, by which, on the application of twenty-five tax-payers and residents of any township for election purposes in any county, the county court may order an election to be held in such township to determine whether, and on what terms a subscription to any railroad to be built in or near the township shall be made; and if two-thirds of the qualified voters of the township, voting at such election, are in favor of the subscription, the County court shall make it in behalf of the township, and if bonds are proposed to pay the subscription, the court shall issue such bonds in the name of the county, but to be provided for by the township. It is contended that this law is repugnant to the 14th section of article 11 of the Constitution of Missouri, adopted in 1865, by which it is declared that "the general assembly shall not authorize any *county, city, or town* to become a stockholder in, or to loan its credit to, any company, association, or corporation, unless two-thirds of the qualified voters of such county, city, or town, at a regular or special election to be held therein, shall assent thereto." Now, the law of 1868, only requires the assent of two-thirds of the qualified voters who vote at such election. This is certainly a broad difference; and if the constitutional restriction extends, by implication, to townships as well as to counties, cities and towns, an election not conforming to the requirements of the constitution, would be invalid, and confer no authority to make a subscription. The petition in this case only alleges that two-thirds of the qualified voters voting at the election voted in favor of the subscription, which does not satisfy the demands of the Constitution. The question therefore arises whether townships are within the restriction of the constitutional provision. A township is a different thing from a town in the organic law of Missouri, the latter being an incorporated municipality, the former only a geographical subdivision of a county. As said in the State *v.* Linn County Court, 44 Mo., 510, "it has no power by itself to make independent contracts or to become bound in its separate capacity. The law has not invested it with that power. It forms an integral part of the county and the county to a certain extent controls and acts for it." That the framers of the Constitution intended to require the assent of two-thirds of all qualified voters of a "county, city or town," as a prerequsite to a subscription to a railroad or other company, and did not intend the same thing with regard to townships, seems almost absurd. It was undoubtedly supposed that every case was provided for. The 13th section of article 11 declared that the credit of the State should not be given or used in aid of corporations; the 14th section then imposes the restriction referred to with regard to counties, cities and towns. This specification embraced every political organization which could be supposed capable of making a subscription. To contend that the mere subdivisions of counties into townships enabled the legislature to defeat the constitutional provision is to ignore the manifest intention and spirit of that instrument. It cannot be possible that it was intended to restrict the legislature as to counties and not to restrict it as to mere sectional portions of counties. Had counties alone been mentioned there might have been no restriction as t cities and towns, because they are separate and distinct organizations, corporate in character and often clothed with legislative functions. But in Missouri, in 1865, when the Constitution was adopted, a township had no corporate character, but, as before stated, was a mere geographical section of a county, partitioned off for purposes of local convenience in the matter of elections and a few other things. They had no power to act as corporate bodies. If the legislature could clothe these geographical portions of a county with power to subscribe to stock companies at all, it certainly could not set at naught the constitutional requirement of the people's consent thereto.

The court below did not decide the case on this ground, probably in consequence of certain decisions of the State courts which were deemed inconsistent with it. But we are not aware of any decisions of those courts, which hold that the constitutional restriction in question could be ignored with regard to townships any more than with regard to counties, cities or towns.

Another objection to the validity of the subscription for which the bonds were given in this case is, that the township voted a subscription to one company, and the county court subscribed to another. This is sought to be justified on the ground that the former company became consolidated with another, thereby forming a third, to whose stock the subscription was made. This consolidation was effected under a law of Missouri authorizing consolidation and declaring that the company formed from two companies should be entitled to all the powers, rights, privileges and immunities which belong to either, and it is contended that this provision of the law justified the County court in making the subscription without further authority from the people of the township But did not the authority cease by the extinction of the company voted for? No subscription had been made. No vested right had accrued to the company. The case of The State *v.* Linn County Court (44 Mo., 504), only decides that if the County court refuses to issue bonds after making a subscription, a mandamus will lie to issue them. There the authority had been executed and a right had be come vested. But so long as it remains unexecuted, the occurrence of any event which creates a revocation in law will extinguish the power. The extinction of the company in whose favor the subscription was authorized worked such a revocation. The law authorizing the consolidation of railroad companies does not change the law of attorney and constituent. It may transfer the vested rights of one railroad company to another upon a consolidation being effected; but it does not continue in existence powers to subscribe for stock given by one person to another, which, by the general law, are extinguished by such a change. It does not profess to do so, and we think that it does not do so by implication.

As sufficient notice of these objections is contained in the recitals of these bonds themselves to put the holder on inquiry, we think there is no error in the judgment of the Circuit court, and it is therefore affirmed.

D. W. MIDDLETON, C. S. C. U. S.

UNITED STATES SUPREME COURT.

OPINION FILED MAY. 8, 1876.

WILLIAM BURDELL et al. *v.* AUGUSTUS DENNING et al

In Error to the Circuit Court of the United States for the Southern District of Ohio

DAMAGES FOR THE INFRINGEMENT OF A PATENT RIGHT.

1. IN CASES WHERE PROFITS ARE THE MEASURE.—In cases where profits are the proper measure, it is the profits which the infringer makes, or ought to make, which govern, and not the profits which plaintiff can show that he might have made.
2. PROFITS—ACTION AT LAW.—That profits are not the primary or true criterion of damages for infringement in an action at law. That rule applies mainly to cases in equity, and is based upon the idea that the infringer shall be converted into a trustee, as to those profits, for the owner of the patent which he infringes.
3. SALES OF LICENSES.—That the court has repeatedly held that the sale of licenses of machines or of a royalty established, constitutes the primary and true criterion of damages in an action at law.
4. CONTRACT CONSTRUED.—The court construes the instrument offered in evidence, and finds that it was a contract, and not revokable.
5. EVIDENCE.—That it was competent to introduce the receipt showing the payment of money after the commencement of the suit—not for the purpose of defeating the action, but to reduce the damages.—ED. LEGAL NEWS.]

Mr. Justice MILLER delivered the opinion of the court.

The plaintiffs in error were plaintiffs in the Circuit court in an action for an infringement of the patent of A. B. Wilson, for a feeding device in sewing machines. They recovered a judgment for $125, but insist that they were entitled to a much larger judgment, of which they were deprived by the rulings of the court in the progress of the trial.

The objections to these rulings will be considered by us under three heads, to which all the assignments of error relate.

1. As to the measure of damages.

Evidence was given tending to prove that plaintiffs had advertised to sell their machines, and had actually sold a shop-right to use one of them for $12.50, and has given a verbal license to another person to use an old machine in his house for $5, but afterwards refused to sell or license for Franklin county, and told defendants they desired to retain the use of the machine as a close monopoly. Evidence had also been given as to profits made by defendants. On this testimony they asked the court to instruct the jury that "this testimony was not sufficient to change the rule of damages from the profits which plaintiffs would have made if they had not been embarrassed by the interference of the defendants, to a mere license price, because they do not establish a customary charge for the right to use the invention in Franklin county," which the court refused.

There are two sufficient objections to this prayer:

1. In cases where profits are the proper measure, it is the profits which the *infringer* makes, or ought to make, which governs, and not the profits which *plaintiff* can show that *he* might have made.

2. Profits are not the primary or true criterion of damages for infringement in an actiou at law. That rule applies eminently and mainly to cases in equity, and is based upon the idea that the infringer shall be converted into a trustee, as to those profits, for the owner of the patent which he infringes—a principle which is very difficult to apply in a trial before a jury, but quite appropriate on a reference to a master, who can examine defendant's books and papers, and examine him on oath, as well as all his clerks and emyloyees.

On the other hand, we have repeatedly held that sales of licenses of machines or of a royalty established, constitute the primary and true criterion of damages in the action at law.

No doubt, in the absence of satisfactory evidence of either class in the forum to which it is most appropriate, the other may be resorted to as one of the elements on which the damages or the compensation may be ascertained, but it cannot be admitted, as the prayer which was refused implies, that in an action at law the profits which the other party might have made is the primary or controling measure of damages. (Packet Company *v.* Sickles, 19 Wall., 617.)

2. A paper was introduced in evidence by defendants, signed Sarah Burdell, authorizing H. Crary, for the full term of four years, to sell, use, and grant to others the right to use in said county of Franklin, A. B. Wilson's sewing machines. It was agreed that the paper should have the same effect as if signed by Wm. Burdell and the other plaintiff in whom the title was when it was executed. It is too long a paper to insert here, but will be given verbatim by the reporter, and its true construction is the foundation of the alleged error of the court in admitting it, and also in admitting a receipt given to the defendants by Crary for the use of four of he machines for which they were sued.

It is claimed that the instrument is but a power of attorney, revocable at the pleasure of the maker, and that it was so revoked before the receipt given in evidence was executed by Crary.

But we are of a different opinion. We think the instrument is a contract. That Crary acquired rights under it for four years, which, whether he may have so acted or not as to enable plaintiffs to have it rescinded or set aside in a suit in chancery, could not be revoked at their mere volition; and that these rights were such that his receipt for the use of the four machines mentioned in it was a valid acquittance of any claim for the same thing by plaintiffs in this suit.

It is said that the court erred in admitting the receipt in bar of the action, because it was executed after the suit was brought and could not be so used without a special plea setting it up.

The fallacy of this argument consists in assuming that it was introduced as a bar to the action. It was only used to reduce the amount of the recovery and not as a complete bar, and as it excluded from the computation of damages only four machines, out of a larger number, it was admissible under the general issue, or any other form of plea which left the amount of recovery in dispute.

We see no error in this branch of the case.

3. The defendants introduced also the following paper, and gave evidence of an assignment by Lowe to Singer & Co., and of a license from Singer & Co., to defendants:

"In consideration of the sum of eighty dollars, to me paid by J. Payne Lowe, the receipt whereof is acknowledged, I do hereby assign, transfer and set over unto the said Lowe, his representatives and assigns, the exclusive right to use, and sell to others to be used, in the county of Franklin, in the State of Ohio, Singer's patent sewing machines, as mentioned in the patent granted to Isaac M. Singer, dated August 12th, 1851, together with the right to have the said machines delivered to be used, or sold to be used, in said county of Franklin, in the State of Ohio.

"And I hereby covenant that I have good right to make the assignment aforesaid.

"In witness whereof I have hereunto set my hand and seal, this 4th day of February, A.D. 1857.

"Wm. Burdell. [Seal.]"

Evidence was also given tending to show that the machines called Singer machines, used by the defendants, were made as Singer's machines had always been made.

And after all the testimony was closed the plaintiff asked the court to instruct the jury that the license of Burdell to J. Payne Lowe, of the 4th of February, 1857, did not authorize him, and those deriving rights under that license, to use in the machine known and called Singer machine, in said county of Franklin, the feeding device patented to A. B. Wilson, which the court refused to give, but did charge the jury that the said license authorized the said Lowe and all claiming title from him, to use in Franklin county the Singer machine, with a feeding device operating upon the principle and plan of that patented to Wilson; to which refusal of the court to charge as asked, and to the said charge as given, the plaintiffs then and there excepted.

In defense of this ruling it is said that Burdell never had any interest in the Singer patent, that the instrument called the Singer machine, which was in use when Burdell made the above assignment to Lowe, was a Singer machine with the Wilson feeding device, and that as Burdell did own the patent for this device, what he intended to assign was the right to use the Singer machine *with that* device. It is certainly true that in constructing a written instrument, it is necessary and admissible to look to all the surrounding circumstances of the transaction which are necessary to discover its meaning. And it may be admitted that if the facts above stated were conceded to be true, it would follow that the reasonable construction of the contract would be such as the court held it to be. The refusal of the court to give the instruction asked by counsel for plaintiffs was, therefore, justifiable.

But these facts were not conceded by plaintiffs. Nor does the bill of exceptions say that they were proved. It says nothing at all about Burdell's interest, or want of interest, in the Singer patent; and in regard to use of the Wilson feeding device in the Singer machine, it says no more than that there was evidence *tending* to prove that it had always been so used in all these machines.

If these things were not proved, then there was no ground for the construction of the contract given by the court, and whether they were proved or not, was a matter for the jury and not for the court to decide. The jury may not have believed the witnesses, or if believed, may not have found their testimony established what the bill of exceptions declares it tended to prove. The court, therefore, in telling the jury peremptorily, on this testimony, that the license to Lowe did authorize him to use the Singer machine with a feeding device operating upon the principle and plan of that patented by Wilson, took away from the jury the right to weigh that testimony. If the judge had said that *if they believed these facts to be established*, then the license to Lowe authorized the use of the Wilson device in the Singer machine, we would affirm the judgment, but because he, in this respect, assumed a function which belonged to the jury, and for that reason alone, the judgment must be reversed and a new trial awarded.

U. S. CIRCUIT COURTS, SIXTH JUDICIAL CIRCUIT.

(Ohio, Michigan, Kentucky and Tennessee.)

Before Hon. FLAMEN BALL, Register.

In re JOHN K. BOOTH, Bankrupt.

ARE FUNDS BELONGING TO A BANKRUPT'S ESTATE, IN THE HANDS OF AN ASSIGNEE IN BANKRUPTCY, SUBJECT TO A LOCAL TAXATION.

We publish below the decision of the Hon. Flamen Ball, Register in Bankruptcy for the Second District of Ohio, (the former law-partner of the late Chief Justice Salmon P. Chase), on an apparently new question, namely:—whether the funds belonging to a bankrupt's estate are subject to local taxation, and must be listed for that purpose by the assignee. The opinion of Register Ball is fully indorsed by Judge Swing, United States Judge for the Southern District of Ohio, and the question was not taken to a higher tribunal, both parties being satisfied with the correctness of the decision of Register Ball.

The facts of the case are as follows:

On the 7th day of January, 1876, the Treasurer of Hamilton County, Ohio, made proof of and filed a claim for taxes for the year 1875, alleged to be due to the State of Ohio from Samuel P. Cary, assignee of the bankrupt, John K. Booth. The tax bill prepared by the County Auditor amounts to $723.96, which is claimed as the tax for the year 1875, chargeable upon moneys of the estate in the hands of the assignee at a valuation of $29,169.

On the 10th of January, 1876, the assignee, acting in pursuance of the thirty-fourth general order in bankruptcy, of the Supreme court of the United States, filed his petition with Register Ball, praying for an order for the re-examination of said claim, and a day was assigned for the hearing of said petition, of which due notice was given to the County Treasurer, and on the 1st day of February, 1876, the County Auditor, by Mr. Cappeller, the Tax-omission Clerk, and the County Treasurer, by Mr. Logan, his attorney, appeared before the Register; Mr. Carey, the assignee appearing in person.

BALL, Register.

From the testimony produced in the cause, I find established the following state of facts:

Captain Booth was adjudicated a bankrupt in this court, July 18, 1874 The property of which he was then possessed consisted of several steamboats and barges, a house and a lot of land in Cincinnati, and a small amount of outstanding debts due him. In October of that year, the assignee, by order of this court, made sale of the boats and barges and also of the real estate, and deposited the whole proceeds to his credit, as assignee, in the First National Bank of Cincinnati, in pursuance of the order of this court; and out of this fund, by virtue of another order of court, he paid to the County Treasurer all the taxes due the State of Ohio on the real and personal property of the bankrupt, as provided for by section 5101 of the Revised Statutes of the United States (Section 28, Bankrupt Act). A portion of those proceeds, amounting to $19,445, remained in bank until after the annual assessment in April, 1875, and was then held by this court, subject to the termination of a complicated litigation which had arisen between various claimants, who asserted divers and conflicting liens upon the fund, which litigation was not ended so as to enable the court to distribute the fund to its various owners until November, 1875. The assignee, who resided at College Hill, in Millcreek Township, in said county, but whose law office was in Cincinnati, in listing in April, 1875, his personal property for taxation, did not include this fund or any part of it, "as it was not within the control of this petitioner, but was in the custody of this court for the purpose of distribution among the creditors of the bankrupt when the proper lienholders were ascertained." The Auditor of the county, however, ascertaining this fact, caused the fund to be listed as personal property of the assignee in Cincinnati, adding to it the penalty of fifty per centum imposed by the law of Ohio against such persons as "shall make a false return or shall evade making a return."

Upon this state of facts the following questions arise:

First.—Is this fund so in the custody of this court, through its officer, subject to taxation under the laws of Ohio?

Second.—If so liable, is the assignee guilty under the circumstances of making a false return, or of evading making a return?

Third.—If the fund be taxable, shall it be listed as property in Cincinnati, or in College Hill, in Millcreek Township?

The Tax Law of Ohio subjects to taxation, among other things, all moneys and credits, and it defines the terms "money" or "moneys" to mean "and include gold and silver coin and bank-notes in actual possession of solvent banks, and every deposit which the person owning, holding in trust or having the beneficial interest therein, is entitled to withdraw in money on demand."

Under the revised instructions by the Auditor of State to township assessors, it is provided that "all gold and silver coin, bank-notes and deposits with banks or persons, payable on demand, are moneys, and must be returned as such whether in national bank notes or greenbacks,"

Is this fund, therefore, "moneys payable on demand" within the meaning of the Tax Law and the instructions just quoted? The assignee is an officer of this court. He is required by the bankrupt act to "deposit all money belonging to the bankrupts in some bank in his name, as assignee, (Revised Statutes of the United States, Section 5059; Section 17, Bankrupt Act,) and by General Order 28 this court is required to designate in each district a National Bank "in which all moneys received by assignees or paid into court in the course of any proceedings in bankruptcy shall be deposited." The rule further provides "that no moneys so deposited shall be drawn from such depository, unless upon a check or warrant signed by the clerk of the court, or by an assignee, and countersigned by the judge of the court, or one of the registers designated for that purpose, stating the date, the sum, and the account for which it is drawn."

Under these rules these funds were deposited by the assignee in the First National Bank of Cincinnati, where they were held by the court, and subject alone to the control of the court. The assignee could not withdraw a dollar of it, except by the special order of the court. Such a fund comes neither within the letter nor the spirit of the Tax Laws of Ohio, and is not such a fund as the assignee was required by those laws to list for taxation as a trust fund in his hands payable on demand.

The bankrupt law (Rev. Stat. U. S, Sec. 5101, Sec. 28 of the original act), provides "that all debts due to the State in which the proceedings in bankruptcy are pending, and all taxes and assessments made under the laws thereof," shall be entitled to priority of payment next after the costs and expenses of the bankruptcy and all debts and taxes due the United States; and that provision has been strictly complied with by this court in directing the assignee to pay all the taxes assessed upon the real and personal property of the bankrupt, and from which the fund in controversy was derived. But it is claimed by counsel for the treasurer that inasmuch as that fund received the protection of the laws of Ohio after it came to the hands of the assignee, it, in common with all other taxable property in the State, should bear its proportion of the burden of taxation. This is true enough as a general proposition of law applicable to all property receiving the protecting care of the State government. But this is not such a case. From the moment the fund came into the possession of this court, that moment it ceased to be under the protecting care of the government of the State. It passed into the custody of a court of the United States, under and by virtue of the laws of the United States, and was, therefore, necessarily under the sole protection of the government of the United States. No State court and no officer of the State had any control over it or any power to interfere with it. "The sovereignty of the United States and of a State are distinct and independent of each other within their respective spheres of action, although both exist and exercise their powers within the same territorial limits." (Alleman *v.* Booth, 21 How. R., 506, per Taney, C. J.)

Such portions of that fund as were decreed to belong to the citizens of Ohio, constituted "credits" within the meaning of the Tax Laws of Ohio, which those citizens were required to list for taxation in their annual returns, and it is to be presumed that those citizens performed their duty in making such returns; if not, it is not too late for the auditor to have such omissions corrected, as he has attempted to do in the case now before the court.

The view I have taken of the first proposition renders it unnecessary for me to consider the two others.

I shall therefore order that the claim of the treasurer filed in this cause be expunged.—*The Cincinnati Law Bulletin.*

U. S. DISTRICT COURT, DIST. OF MASSACHUSETTS.

OPINION MAY 22, 1876.

Ex Parte H. BECKER, et al,
In re C. H. NORTH, et al.

BANKRUPTCY—COMPOSITION—CONTRACT—DAMAGES FOR FAILURE TO DELIVER—MEASURE OF.

1. COMPOSITION—BREACH OF CONTRACT. — The creditors and debtors submitted to the court the question, what damages should be proved against the assets for an admitted breach of contract. A case between the parties had been tried in the Circuit Court, resulting in a verdict for the creditor plaintiffs for $1,250, but being dissatisfied with the rule of damages laid down at the trial, they filed a bill of exceptions, which had been allowed. Since the trial the defendants became insolvent, and have offered a composition to their creditors, which the plaintiffs in this case are willing to accept for such sum as they could recover at law.

2. DAMAGES FOR BREACH OF CONTRACT.—The general rule is, that the damages for a breach of a contract to deliver goods, is the difference in price of that precise kind of goods at the time and place of performance.

3. WHERE GOODS ARE BOUGHT FOR FOREIGN MARKET.—That it results from the cases cited, that, not that the foreign market is to rule, but that if the domestic buyer cannot indemnify himself by buying the article in the home market, he may have his actual loss, whether that happens to be more or less, and whether it is measured by a domestic or foreign standard.—[ED. LEGAL NEWS.]

The creditors and debtors respectively submitted to the court the question, what damages should be proved against the assets for an admitted breach of contract. A case between the parties had been tried in the Circuit court, resulting in a verdict for the plaintiffs, the creditors, for $1,250 and interest, but being dissatisfied with the rule of damages laid down at the trial, they had filed a bill of exceptions which had been allowed. Since the trial the defendants have become insolvent, and have offered a composition to their creditors, which these plaintiffs are willing to accept for such sum as they could recover at law.

The contract was that the defendants should deliver a large quantity of pork of a certain description and quality at Boston, free on board a steamer or sailing vessel during the month of March, to be shipped to Antwerp at a stipulated freight; and they wholly failed to perform this contract. The plaintiffs, who were merchants in New York, claimed to recover the difference between the contract price, and the market price in Antwerp, at the end of March, or some later time, which would give them $5,628; and the defendants admitted a liability for the difference in price at Boston. Correspondence which passed between the parties before and after the breach was submitted *de bene*, and contained some statement, concerning a loss by re-sale, but such loss was not proved, nor relied on by the plaintiffs.

J. T. BARRETT, for the creditors.

N. MORSE & W. E. L. DILLAWAY, for the debtors.

LOWELL, J. The distinctions adopted on this subject are very nice, and this case comes near to some that are on each side of the line. The general rule is that the damages for a breach of contract to deliver goods, is the difference in price of that precise kind of goods at the time and place of performance. That rule would give the plaintiffs only the sum awarded by the jury under the instructions of the court. If Boston is to be regarded as the place of performance. It is argued by the plaintiffs that when goods are known to be bought for a particular market, and the seller agrees to forward them to that market, the latter becomes the place of performance or, if not, it becomes the place whose market price is to govern the damages. A passage from Addison On Contracts (7 Lond. Ed. 1875) p. 473, is cited to the effect that if a foreigner orders goods in England to be forwarded to a foreign market for sale and the seller knows of this purpose and undertakes to forward the goods, but neglects so to do, the measure of damages is the difference between the contract price and that of the foreign market. The cases cited by Mr. Addison do not sustain this proposition, but I agree to its correctness, as I understand it. The distinction between the case supposed and this case is that the foreigner has no means of indemnifying himself until it is too late; he is not in England nor bound to be there, and the market price there is of no consequence to him, he has a right to go and meet his goods in the foreign country, or to await them there, if it is his own country and his loss arises not only out of the breach of the contract to sell, but also of that to forward the goods. Such a case was Bell *v.* Cunningham, 3 Peters, 59, cited by the plaintiffs; where a correspondent abroad being ordered by a merchant here to ship certain goods to Havana, by a certain vessel, shipped something else and it was held the damages were to be ascertained at Havana.

In the many cases against carriers who have undertaken to deliver goods at a certain place, of course the damage is to be ascertained at that place.

Here, both parties were contracting at home and the goods were to be delivered at Boston, on board ship, to be sure; but the contract was divisible, and the plaintiffs would have a clear right to revoke that part which required them to be shipped, and to say, "We will take the goods in Boston and pay the full price." If, then, it had happened that the price had risen here and fallen in Antwerp, so that the plaintiffs would have made a large loss by the shipment, would they not have had the right to offer to take the goods here, and if delivery was refused, to insist on the measure of damages which the defendants now insist on? I think so. And the rule must be the same for both parties, and under both contingencies, excepting that if the plaintiffs still desired the goods for shipment, he may recover any increased charges, such as freight and insurance, in addition to the increased price.

Of the two cases cited by Mr. Addison one was against a carrier for non-delivery at A., and of course the damages were suffered at that place. The other is Borries *v.* Hutchinson, 18 C. B, (N. S.) 445. In that case two material facts were found: 1st. There was no market price in England; 2d. The seller knew that the buyer bought to sell again; and the court allowed, not the difference of market price in the two places, but the actual profit of the re sale. A very recent case in England, later even than the last edition of Addison, was decided on the authority of Borries *v.* Hutchinson. It was this: the seller knew that the buyer was to ship the goods to a foreign country; and upon the breach, there being no market price for such goods in England, and no such goods to be had, the buyer purchased in England such goods as were most like them, and thus filled his sub-contract, and was allowed the increased price of those goods above the contract price. Hinde *v* Liddell, L. R., 10, 2 B., 265. It results from these cases; not that the foreign market is to rule, but that if the domestic buyer cannot indemnify himself by buying the article in the home market, he may have his actual loss, whether that happens to be more or less, and whether it is measured by a domestic or a foreign standard, if this loss was such, as, by reason of notice or contract, the parties may be presumed to have contemplated. I understand, too, that in the last case the court considered that a notice that the goods were for shipment, was equivalent to notice of a re-sale, or at least of an intent to sell again. In this case no evidence has been given of actual loss; no evidence of a re-sale; of a rise in freights or insurance; of the lapse of a season in the trade; of anything peculiar in the circumstances. The naked facts are presented, of a market price here and a higher market price in Antwerp; and on that showing I say there is no rule of law and no decision known to me or cited in argument that takes it out of the ordinary doctrine of the difference between the market price in Boston, and the contract price. Two American decisions were cited: Messmore *v.* N. Y. Shot and Lead Co., 40 N. Y., 422; Merrimack M'f'g Co., *v.* Quintard, 107 Mass, 127. In the former the defendant undertook to furnish in New York bullets of a certain kind and quality, and was informed that they were ordered to fill a particular contract with the State of Ohio; it was held that the plaintiffs might recover their actual loss in Ohio. In the second, coal was to be delivered in Pennsylvania for use in the plaintiff's factory in Massachusetts, and was delivered, but of inferior quality and later

than the contract required, and the damages in Massachusetts were allowed. The latter of these cases is a good illustration of the proposition above cited from Addison, because the plaintiffs had no agent at Philadelphia to inspect or accept the coal. In neither of these cases was it proved or admitted that the plaintiff had an opportunity to recoup himself by buying the article at the market price of the day, at the time and place of the breach; but the contrary is to be clearly inferred from the facts of both those cases.

I do not mean to say that the plaintiffs here might not have recovered not only the considerable sum they ask for, but much more, if the facts were that they had suffered more. This decision rests upon the simple ground that evidence of a market price in Boston makes out *prima facie* the measure of damages claimed by the defendants, and that the plaintiffs should go further and show, if they can, that they have necessarily lost more in this particular case. That such additional loss is proved, was or should have been within the contemplation of the parties, is perhaps sufficiently shown by the agreement to ship the goods to Antwerp; but it is not proved, and in the mode the case is presented I have the right to infer that it was incapable of proof, though mentioned in some of the plaintiff's letters.

One word more to prevent misapprehension. It was said that the defendants had prevented the plaintiffs from shipping other goods by promising to make the shipment after the regular time of performance. I do not think the letters of the plaintiffs give any consent to a postponement. They insist throughout that they shall hold the defendants for full damages. But supposing that there was a postponement, the rule of damages would be the same at the end of the extended time as before; and for the reasons already given I cannot find that any other damage was suffered at that or any time.

Debt admitted for $1,250 and interest.

THROUGH the kindness of S. W. PACKARD, of the Yankton bar, formerly of this city, we have received the following opinion:

SUPREME COURT, DAKOTA TERRITORY.

B. E. WOOD et al., *v.* A. J. BANGS et al.

Appeal from District Court for Bon Homme County

CONTRACT TO BUILD A COURT HOUSE—WHEN A COURT OF EQUITY WILL ENJOIN THE ACTS OF TOWN OR COUNTY OFFICERS—WHO MAY FILE THE BILL.

1. WHEN ACTS OF BOARD WILL BE RESTRAINED.—The court states under what circumstances a court of equity will interfere, by injunction, to restrain the acts of a corporation, or the acts of a administrative officer or board.
2. WHEN INJUNCTION WILL NOT BE GRANTED.—That an injunction will not be granted to restrain the doing of an act which is unlawful and irregular, unless substantial and positive injury will result from a refusal to grant the writ. That an injunction will never be granted when it will be productive of hardship, oppression or injustice, or public mischief.
3. THE CONTRACT TO BUILD THE COURT HOUSE.—That, even conceding that the commissioners exceeded their authority in entering into a contract to build a court house, without having the question submitted to a vote of the people, the county needing a court house, and the contract being for a low price and for the advantage of the county; and to have it declared void would also work injury to the contractors. The court refuses to entertain a bill for an injunction, and to have the contract declared void.
4. WHO MAY BRING SUIT.—That persons having no interests except that which is common to all taxpayers, cannot maintain a suit in equity to set aside the acts of town or county officers.—[ED. LEGAL NEWS.]

Opinion by BARNES, J.

BARTLETT, TRIP & WOOD, for appellant.

MOODY & CROMER and SPINK, for respondents.

This action is brought by the plaintiffs, residents and tax payers of Bon Homme county, against the defendants, Bangs, Zitker and Donley, as County Commissioners of Bon Homme county, George J. Rounds, treasurer of said county, A. M. English and H. H. Calhoun, as contracting parties for the building of a court house for Bon Homme county, and W. A. Burleigh and A. J. Faulk, persons having purchased and holding county orders issued to English and Calhoun on said court house contract, and by them transferred to Burleigh and Faulk.

The plaintiff asks that a certain contract, made between the commissioners on the part of the county and English and Calhoun, the contractors for the building of the court house, be set aside, amended, and declared void, that the county warrants issued in pursuance of that contract and in the hands of Burleigh & Faulk, be returned and cancelled, the same having been issued without authority of law, and that the treasurer Rounds be perpetually enjoined from paying warrants issued in payment for building the court house. The court below refused the demands of the plaintiffs, and judgment was entered for the defendants. From that judgment the plaintiffs appeal. The first question to be considered is this: Under what circumstances will a court of chancery interfere by injunction to restrain the acts of a corporation, or the acts of an administrative officer or board?

An injunction will not be granted to restrain the doing of an act which is unlawful and irregular unless substantial and positive injury will result from a refusal to grant the writ. See High on Injunctions, sec. 9.

An injunction will never be granted when it will be productive of hardship, oppression or injustice, or public or private mischief. See 9 Wisconsin, 166.

The court of equity will not interfere or restrain the execution of a deed for land sold for taxes, on the ground that the tax proceedings were irregular or void, unless it further appears that the tax proceedings are inequitable, and that it would be against equity and good conscience to refuse the writ. See U. S. Digest, sec. 6, vol. 1, new series, and cases there cited; 14 Wis., 618. See also Pettibone *v.* The Milwaukee & LaCrosse R. R. Co., 14 Wis., 443. In the case just cited, the court uses this somewhat significant language: "The inconvenience which would result from an injunction adds great weight to the reason for refusing it." The granting or refusing an injunction rests in the sound discretion of the court and will never be granted when productive of hardship, oppression or public mischief. Injunctions will not be granted when the benefits secured by it to one party is of but little importance, while it will operate oppressively and to the great annoyance and injury of the other party, unless the wrong complained of is so wanton and uprovoked in its character as properly to deprive the wrong doer of the benefit of any consideration as to its injurious consequences. 20 New Jersey (1869) page 530. An injunction will not be granted when the injury complained of is slight compared to the inconvenience to the defendant and the public, that would result from the granting the injunction, 20 New Jersey, 435. But perhaps the strongest case bearing on this question is that of Kneeland *v.* The City of Milwaukee, 15 Wisconsin, 414. The legislature of Wisconsin passed a law allowing the railroad corporations to pay a certain per centage upon their earnings each year to the State treasurer, in lieu of all taxes, State, county and municipal. This mode of taxation had been followed for a number of years when the present case was before the court, the court declared the act of the legislature void as being in conflict with the provision of the State constitution, which provides that taxation shall be equal, and both the Chief Justice and Justice Paine in unmistakable language declare that whatever the consequence of their decision may be, they being satisfied that the law referred to was in violation of the provisions of the constitution, they must and will so declare it. It was soon discovered that that decision would unsettle and make void a large proportion of the assessments and collection of taxes in the State for several years past, that the confusion, embarrassment and litigation that would flow from it would be disastrous. They therefore ordered a re argument of the case, and while adhering to their former expressed opinion that the law was unconstitutional, yet in view of the disastrous consequences that must follow their decision, they reverse that decision, and thus allow the wrongful, unequal and inequitable tax to be collected, and this, too, solely upon the ground that granting the plaintiff that which the court says he was equitably entitled to, would work a great hardship to the public generally.

I will now consider the facts in this case, and for the purpose of this argument and that only, will assume that the county commissioners exceeded their authority, and will also assume for the purpose of this argument that the plaintiffs, as tax payers, unitedly have a right to maintain this action.

From the facts disclosed in this case it appears that by an act of the legislature of the territory two terms of the District court are required to be held in Bon Homme county each year.

It further appears that the county has no court house nor place for holding court, or transacting county business, nor is there any place at the county seat, that can be procured by the county for that purpose. The law makes it the duty of the commissioners to provide a place for holding court and the transaction of other county business. The law also authorizes them to make contracts for the erection of county buildings and also to make contracts for the repair of the same whenever necessary. From these facts it clearly appears that there was a pressing if not an imperative necessity for action on the part of the county commissioners.

Recognizing this necessity they assembled at their usual and accustomed place of meeting, they cause public notice to be given that proposals will be received for the building of a court house. Proposals are submitted to them, are duly examined by them, and the fact disclosed that the defendants, English & Calhoun, are the lowest responsible bidders and to them is awarded the contract for building the court house. The plaintiffs it appears, or some of them, are present at these meetings and enter their objection or protest against the action of the board (now we will not stop to enquire whether these plaintiffs feeling aggrieved by the action of the commissioners, should not have appealed from that decision and whether that was not the proper and only remedy) but we examine the action of the commissioners for the purpose of noting the fact that they appear to have acted in good faith, an important consideration in an equity proceeding.

It further appears that the contract was made with the defendants, English & Colhoun, to build the court house for the sum of three thousand three hundred and thirty-three dollars, that that sum was to be paid in county warrants. It also appears conclusively that it was worth in cash to build the court house the sum which the defendants, English & Calhoun, received, or were to receive in warrants. And it appears with equal clearness that these warrants were in part worth not to exceed fifty cents on the dollar. I think too, it also appears from the evidence that the defendants, Burleigh & Foulk, being solicitors for this improvement, purchased these county warrants of English & Calhoun and paid their face or par value. Be this as it may, the fact nevertheless appears that Bon Homme county have their court house at about one half its value. When we reduce the warrants in which payment for the improvements have been made to a cash basis. From this statement it will be at once seen that the building of the court house has not depreciated the value of county warrants.

It should now be observed that the defendants, the commissioners in contemplation of law represent all the residents, the tax payers and freeholders of their county, that they thus represent the plaintiffs, who being tax payers have no interests that is not an interest in common with all tax payers.

Assuming, therefore, that the commissioners exceeded their authority in entering on a contract on the precise terms of this contract, or assuming even that this contract is void, the question of the building of the court house not having been submitted to a vote of the electors, the fact is nevertheless clear that the commissioners have so discharged their duty that the tax payers of the county have secured the building of a court house absolutely and indispensably necessary for the county, and on terms exceedingly advantageous to the taxpayers, the plaintiffs included.

I thus reach the conclusion that the plaintiffs suffer no loss, present or prospective, by refusing the injunction asked for, that, on the contrary, it is clear the defendants would suffer irreparable loss and injury by setting aside and declaring void the contract for the building of the court house and granting the injunction asked for.

But another and equally important question is this: Can persons having no interest except that which is common to all the taxpayers, maintain a suit in equity to set aside the acts of town or county officers? A leading case, and one that seems to me to be decisive of this question is the case of Doolittle *v.* The Supervisors of Broome County, 18 N. Y., 155. The opinion is by Justice Denio. The object of this suit was to obtain a judgment declaring null and void a certain act of the board of supervisors of Broome county, by which that board divided the former town of Chenango into three towns, to be called respectively Chenango, Binghampton and Port Craine. The plaintiffs, seventeen in number, representing themselves to be and to have been for more than four months residents and freeholders of that part of the town of Chenango which by the act of the board of supervisors was sought to be erected into a separate town by the name of Port Craine. They state that they commence the action on behalf of themselves and all other persons who have an interest with themselves in restraining the organization of the new towns. The court say, "The first question is this—have the plaintiffs such an interest as will enable them to maintain this action? This raises a question of much importance, which, if it be now doubtful, ought to be definitely settled. It is not pretended that the plaintiffs have any interest which is not in common with all resident freeholders of the proposed new town of Port Craine. The grievance is that they are all threatened to be subjected, for the purpose of local administration to a jurisdiction not created according to law. This will affect not only the other freeholders besides the plaintiffs, but all the inhabitants of that local district whether they are freeholders or not.

Assuming that the proceedings under which the new towns is proposed to be organized was void, as claimed by the plaintiffs, no private interest of the plaintiffs has been invaded, and no injury peculiar to them is threatened. The Court further say, the acts of the Supervisor has no bearing on the plaintiff's individual interest.

Whatever concerns they may have in the question belongs to them only as citizens and members of the community. If this action can be sustained, then any tax-paying citizen may compel the public authorities to litigate in the courts the acts of any administrative board or officer in the State; and thus proceedings of this kind can only be perfected by the judgment of the court of final appeal. Every person may legally question the constitutional validity of any act of the legislature which affects his private rights, but if a citizen may maintain an action for such a purpose in respect to his rights as a voter and tax-payer, the courts may regularly be called upon to revise all laws that may be passed. They may, at the instance of any tax-payer, be required to injoin the Comptroller from drawing warrants on the treasurer, and that officer from paying them, in every case where it may be considered that the law authorizing the expenditure was passed without constitutional authority. The State tax of 1855 was lately impeached upon plausible grounds, as having been unconstitutionally enacted. This was done by a direct proceeding of the Attorney-General, against the board of Supervisors, but upon the plaintiff's position in this case, the State and county officers might be compelled to litigate the questions of constitutionality with every tax payer, and thus the fiscal business of the State would be transacted mainly with the courts. The law in my judgment does not afford such an opportunity for excessive litigation. No private person or number of persons can assume to be the champions of the community, and in its behalf challenge the public officers to meet them in the courts of justice, to defend their official acts.

In the case of Hale *v.* Cushman, 6 of Met., 425, a town in Massachusetts had passed a vote to pay certain expenses which the plaintiffs, who were legal voters, and who together were liable to pay more than one half of all the taxes to be assessed on the inhabitants of the town, claimed to be illegal—they filed a bill to injoin the payment; the bill was dismissed upon the ground above recognized. This, too, is an elementary principle. Blackstone says: "It would be unreasonable to multiply suits giving a man a separate right of action for what

(*Continued upon page* 310.)

ance; that where goods are bought for a foreign market, it does not follow that the foreign market is to rule; but if the domestic buyer cannot indemnify him-

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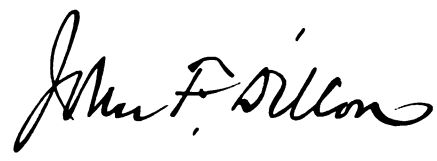

(*Continued upon page* 310.)

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Lex vincit.

MYRA BRADWELL, Editor.

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We call attention to the following opinions, reported at length in this issue:

BROKER—INTERNAL REVENUE.—The opinion of the Supreme Court of the United States, by HUNT, J., as to the liability of bankers or brokers to pay a special tax under the revenue laws, upon sales made by them.

RAILROAD AID BONDS.—The opinion of the Supreme Court of the United States by BRADLEY, J., construing the provision of the Constitution relating to the authority of cities, towns and counties to subscribe for railroad stock, or to issue bonds in aid of such roads.

PATENT—INFRINGEMENT—DAMAGES.—The opinion of the Supreme Court of the United States by MILLER, J. As to the proper rule for estimating the damages for the infringement of a patent, The Cincinnati *Law Bulletin* says: "This case is an instance of the delays of justice so frequently complained of. It was commenced in the Circuit Court of the Southern District of Ohio, 15 years ago. Of the eminent lawyers originally engaged in the case, on the side of the plaintiff, two—Thom. Ewing, Sr., and H. Hunter, of Lancaster, O., died years ago; and Judge Coffin alone remains. Of the three attorneys of the defendants, one—S. S. Fisher is dead, Judge Alphonso Taft is the present Attorney-General of the United States, and A. F Perry is the only one left in practice. How it will be with the evidence at the new trial to which the case has been remanded, may become a serious question. Besides, there are four or five other cases commenced simultaneously with this case, pending in our Circuit Court, that have been continued from year to year there, many years awaiting the final result of this case. In view of these facts, the general complaint of the great delay in carrying cases to a final decision in the United States Supreme Court must appear just."

TAXATION—BANKRUPT'S ESTATE.—The opinion of REGISTER BALL, of the Sixth Judicial Circuit, whether funds belonging to a bankrupt estate, in the hands of an assignee in bankruptcy, are subject to local taxation.

COMPOSITION—BREACH OF CONTRACT—DAMAGES—FOREIGN MARKET.—The opinion of the United States District Court for the District of Massachusetts, by LOWELL, J., in a case where the parties who had committed the breach of contract, had failed, and proposed a composition to their creditors, and the question was what damages should be allowed against the assets for an admitted breach of contract. The court states the general rule to be that the damages for the breach of a contract to deliver goods, is the difference in price of that precise kind of goods at the time and place of performance; that where goods are bought for a foreign market, it does not follow that the foreign market is to rule; but if the domestic buyer cannot indemnify himself by buying the article in the home market, he may have his actual loss, whether that happens to be more or less, and whether it is measured by a domestic or foreign standard.

INJUNCTION AGAINST OFFICER OR BOARD.—The opinion of the Supreme Court of Dakota, by BARNES, J., stating under what circumstances a court of chancery will interfere by injunction to restrain the acts of a corporation, or the acts of an administrative officer or board, and who may file a bill for that purpose.

NOTES TO RECENT CASES.

FOREIGN INSURANCE COMPANY — CERTIFICATE.

The Supreme Court of Pennsylvania in Thorne *v.* Travelers' Ins. Co., 33 *Leg. Intel.*, 185, held that a foreign insurance company which had not complied with the act of 1868, could not recover against the sureties of an agent for his malfeasance; that the certificate of the auditor-general is not absolutely conclusive evidence of a previously existing but terminating agency.

CHATTEL MORTGAGE — AFTER ACQUIRED PROPERTY.

The United States District Court of Massachusetts in Brett *v.* Carter, 22 *Int Rev. Rec.*, 152, held that a mortgage of chattels which permits the mortgagor to continue in possession and to sell the goods in the ordinary course of business, is not void *per se*; that whether there is a fraud in the particular case is a question of fact; that in Massachusetts a mortgage of after acquired chattels is valid; that the decision of the Supreme Court of that State in Moody *v.* Wright, 13 Met., 17, where the opposite doctrine is held, dissented from.

Recent Publications.

THE LAW OF ADOPTION IN THE UNITED STATES, AND ESPECIALLY IN MASSACHUSETTS. By William H. Whitmore, A. M. With an Appendix, Containing the Massachusetts Act of 1876. Albany: Joel Munsell. 1876

This is a neat little volume of 112 pages. Its contents are sufficiently set forth in the title page, given above.

REPORTS OF CASES ARGUED AND DETERMINED IN THE SUPREME COURT OF JUDICATURE OF THE STATE OF INDIANA, with Tables of the Cases Reported and Cases Cited, and an Index. By James Black, Official Reporter. Vol. L. Containing the cases decided at the May Term, 1875, not published in Volume XLIX, and cases decided at the November Term, 1875. Indianapolis: Journal Company, printers and binders, 1876

Mr. Black takes rank among the first reporters. His volumes are always neat in appearance. The opinions are very carefully prepared. His head notes are skillfully constructed and in as few words as practicable give the points decided by the court. In this volume are quite a number of important cases, among them the case of the State *v.* Wilson, where, on an indictment for murder, after the jury had been deliberating of their verdict for thirty-two hours, and after they had answered and there was no probability of their agreeing upon a verdict, the court discharged the jury without the presence of the defendant, he being confined in jail, *Held*, that such discharge might be pleaded in bar of a further prosecution. In Sumner et al. *v.* Beeler it is held that ministerial officers and other persons are liable for acts done by them under an unconstitutional and void enactment of the legislature, and, in an action against them for damages, they cannot justify under such enactment.

CASES DETERMINED IN THE UNITED STATES CIRCUIT COURTS, FOR THE EIGHTH CIRCUIT. Reported by John F. Dillon, the Circuit Judge. Volume III. Davenport, Iowa: Day, Egbert & Fidlar. 1876. Sold by E. B. Myers, Law Bookseller, Chicago.

This, the third volume of the series, commences with cases decided in 1874, and concludes with cases of this year. An appendix to the volume contains the "whisky cases" of the United States against Ulrich, McDonald, McKee and Babcock. In these cases, a number of new and important questions are passed upon, and now that there are so many indictments against parties for conspiracy to defraud the government of its revenue, these are of more than usual interest to the profession. Judge DILLON is not only an upright and talented Judge, but an excellent reporter. His reports are fully equal to any other series in the United States. His head-notes are concise and clear, his statements short, and the opinions, when delivered by himself, always able. The notes of the learned Judge, to the opinions, are exceedingly valuable. He not only cites from the regular series of reports, but from the various leading periodicals of the country, which places these opinions within the reach of a large number of lawyers who would not otherwise be able to obtain access to them. A list of the acts of Congress construed in the opinions, is given at the commencement of the volume. The great variety of legal questions arising in this circuit, make this series one of the most valuable of the Federal court reports.

HON. J. D. WARD.—We are glad to announce that the indictment found against Mr. Ward, in the United States Court for this district, was brought to a sudden termination on Tuesday by the government entering a *nolle prosequi*. The government by voluntarily dismissing the case on its own motion, admits that it has no case against Mr. Ward and never had. We have been acquainted with him for more than twenty years, first as a young attorney, then as alderman, and for many years as an able and faithful State Senator; afterwards, as Congressman and more recently as United States Attorney in the very court in which he was indicted. Mr. Ward filled the different official positions to which he was elected with marked ability and has always been considered an honest and faithful officer. His many friends will rejoice to learn of the ending of the proceedings without subjecting him to the cost and vexation of a trial.

SETTING ASIDE WILLS.—The Supreme Court of Pa., in Cauffman *v.* Long, 33 *Leg. Int.*, 212, say the growing disposition of courts and juries to set aside last wills and testaments, and to substitute in lieu thereof their own notions as to what a testator should do with his property, is not to be encouraged. This suggestion of the court is timely. It is getting too common to contest wills and have them set aside on false evidence, and for light and trivial reasons.

BUT FEW WOMEN IN THE PENITENTIARY.—There are fifteen hundred and eighty-five convicts in the Illinois Penitentiary, and of these only nineteen are women. There being full as many women in Illinois as men, would it not be well for our law makers, and those who administer justice, to learn what causes so many more men to be sent to the penitentiary than women?

MRS. ABRAHAM LINCOLN.

On Thursday afternoon Mr. Edwards of Springfield, a brother-in-law of Mrs. Abraham Lincoln, filed in the County Court of this county a petition signed by her praying that the management and care of her estate which was taken from her one year ago by order of the same tribunal might be restored to her. Mr. Swett appeared in court. The conservator, Robert T. Lincoln, made no objection to the proceedings, and waived the ten days' notice required by statute.

The petition was as follows:

STATE OF ILLINOIS, COOK COUNTY—In the County Court—To the June term, A. D. 1876—To the Hon. M. R. M. Wallace, Judge of the County Court of the county of Cook, State of Illinois—Your petitioner, Mary Lincoln, respectfully represents unto your Honor that on the 14th day of June, at the June term of 1875 of the County Court, in and for said county, that Robert Lincoln, whom your petitioner prays may be made defendant to this petition, was appointed under the provisions of Chapter 86 of Revised Statutes of said State, now in force, her conservator. Your petitioner showeth to your Honor that she is a proper person to have the care and management of her own estate. Your petitioner therefore prays that her said conservator may be removed, and that your Honor may enter an order fully restoring her to all the rights and privileges enjoyed by her before her said conservator was appointed, and that her said conservator may be required to restore to her all the money, estate, title, and pension papers, United States bonds, leases, and all other effects with which he is chargeable as her conservator.

MARY LINCOLN.

Ninian W. Edwards was the first witness called, and testified as follows:

Mrs. Lincoln has been with me for nine or ten months, and her friends all think she is a proper person to take charge of her own affairs. That she is now in such condition that she can manage her own affairs. She has not spent all that she was allowed to spend during the last year, and we all think she is in a condition to take care of her own affairs.

The case was then given to the jury, which, after being absent long enough to attach their respective signatures to a verdict, reported that Mrs. Lincoln was able to manage and control her estate.

After the above action was had, the conservator, Robert T. Lincoln, filed his report, accompanied by an inventory of the property of Mrs. Lincoln placed in his hands on the 14th of June, 1875 It showed that in cash there was $1,029 25; United States stocks and bonds $58,000; personal obligation of conservator, $8,875; lace curtains, $549.83; wearing apparel and personal jewelry, $5,000; other items, $7.936.17, making a total of $81,390.25. The report covering the period between May 19, 1875, and June 15, 1876, showed that the conservator's receipts had been $11,140.35, and the disbursements $6,875.97 for Mrs. Lincoln's personal expenses, and $4 264 38 for investment in United States bonds. The report was approved, and upon the conservator presenting the receipt of Mrs. Lincoln to the Court for the amount found to be in his hands, he will be discharged.

Under our statute after a conservator is once appointed, a proceeding will not be entertained for his discharge except for neglect, etc., until one year from his appointment. In this case the proceedings were instituted in one year and a day after the date of the conservator's appointment.

LAWYERS' DIRECTORY.—Mrs. Lambkin has anticipated the regular city directory some weeks, and published upon a large card a Lawyers' Directory, containing the names and addresses of the Chicago lawyers, judges, masters in chancery, justices of the peace, and constables. It is furnished for $1.00, and should be in every lawyer's office in the city.

(*Continued from page* 308.)
damnifies in common only with the rest of his fellow citizens." Book 4, 167. See also 16 Howard, Term Reports, 512 and 137; 19 How., 525, and 35 How., 82; 27 N. Y., 348; this case refers to the decision in 18 N. Y., 157, and expressly approves the same.

In Newcomb *v.* Horton, 18 Wisconsin, 566, the plaintiff sues on behalf of himself and other tax-payers of a school district to prevent the collection of a tax to pay a certain judgment fraudulently obtained, and to cancel the judgment. The first objection is in substance, that the respondent could not bring this action in his own behalf, and on behalf of several tax payers of the school district that there is no common right or common interest of those persons in the property affected by the tax; that the tax is upon and against the individual property of each tax payer; and that if there is any injury, it is an injury to the property and rights of each tax payer alone, and not an injury affecting a common right or interest, and this objection must prevail.

There is no general or common interest affected by the assessment and tax in the case. The property is owned in severalty, and each tax payer may sue alone, and obtain ample relief. So far as his rights and property are concerned, there is no necessity for one tax payer to unite another with him in a suit for this purpose. It is true, selling land for an illegal or void tax would be injurious to all persons whose property was sold. But this does not prove that one tax payer may bring this suit for himself and others. Their rights and interests are entirely distinct, and one tax payer may obtain complete relief without making another a party.

From a careful examination of all the cases I have been able to find, I am satisfied that the doctrine enunciated in the above cases is sound, and may be safely followed.

It occurs to me that in holding to the contrary (holding that two or more tax payers may unite in one action) is to assume that because the same state of facts exist as touching each of the tax payers, and because the same defense may be interposed in each case, that that constitutes a united and joint interest. That cannot be true. But to authorize two or more tax payers to unite in the same action, it must appear that the lien, if created, or the tax, if collected, would be collected from property owned in common. There is still another consideration, not to be lost sight of, which I will only allude to, namely, that generally a party that comes into court asking for equitable relief, must first restore that which he has received from the defendants.

It may be said that these plaintiffs have received nothing from the defendants—that answer will not suffice; the tax payer has in fact received the labor, material and money of the defendants, English & Calhoun, and if these plaintiffs now represent the tax payers of Bon Homme county, and as such seek to set aside and avoid the contract under which English & Calhoun performed valuable services, and expended their money, then these tax payers must do that which is equitable.

I come now to the consideration of the only remaining question which I regard as important in this case. Section 27, chapter 4, Laws of 1869, gives the county commissioners authority and power to erect and repair court-houses, jails, and other county buildings, and expressly authorizes them to make contracts for that purpose. Section thirty-one of the same chapter authorizes an appeal from the decisions of the commissioners upon all matters properly before them, by any person aggrieved, to the District Court of the county. Section thirty-four provides that all appeals taken from the decision of commissioners shall be docketed as other causes pending therein, and the same shall be heard and determined *de novo*. Section thirty-five provides that the District Court shall render final judgment, and cause the same to be executed, or the District Court may send the same back to the commissioners with an order how to proceed, and require the board to comply with the order, by mandamus or otherwise. Here, then, is a plain, simple, sensible, cheap and adequate remedy given by statute to all persons aggrieved by the action and decisions of the board of commissioners.

The record in this case discloses the fact that the plaintiffs well knew of the action of the commissioners, they were in fact present and protested, as appears of record, against the action and demonstration of the board.

If they were dissatisfied it was their duty to have pursued the remedy given by statute.

Here is a plain statute empowering the commissioners to build a court house, and the same statute gives all parties aggrieved by the decision of the commissioners the right of appeal. It seems hardly necessary to cite authorities in support of this position, that where a statute confers upon public officials authority to do an act and then the same statute points out the remedy secured or given to all parties aggrieved that the party aggrieved must pursue his legal or statutory remedy, and that such aggrieved party has no standing in a court of equity.

See 15 Wallace, 227. This is the language of the court. It has been insisted by the counsel for the appellant that there is a complete remedy at law, and that the bill must therefore be dismissed. Such must be the consequence if the objection is well taken.

In the jurisprudence of the United States the objection is regarded as jurisdictional, and may be enforced by the court though not raised by the pleadings nor suggested by the counsel. See also 2 Black., 551, and 15 Wallace, 373, and cases there cited.

We are therefore unanimously of the opinion that so much of the preliminary injunction as remains in force should be dissolved, and that this action be dismissed.

THE USE OF EXTRINSIC EVIDENCE TO SUPPLEMENT OR CONTROL DOCUMENTS OF TITLE.

[From the London *Law Times.*]

LORD ST. LEONARDS *v.* SUGDEN AND OTHERS.

The leading case of Lord St. Leonards *v.* Sugden and others, has not only been to the public the *cause celebre* of the present year, but it has called professional attention to the extent to which courts of justice will allow extrinsic or, as some writers loosely call it, parol evidence to supplement as testimony of intention, or as a settlement of controversy, to control the most solemn of all documents, viz., the last will and testament of one deceased.

Accustomed as we have been for many a year to turn over the pages of Sugden's Practical Treatise on the law of Vendors and Purchasers of estates, of his exhaustive work on Powers, of his skilful comment on the Real Property Statutes, and his authoritative treatise on the Law of Property as administered by the House of Lords; versed as we were in the reports in the Irish Courts by Lloyd and Goold, Drury and Warren, Drury, and Jones and Latouche, which contained the lucid, comprehensive, and decisive judgments of the great conveyancer, author, and chancellor, it was with a feeling of disappointment, if not consternation, that we first heard it alleged that he had left behind him an invalid last will and testament. But as the Lord Chief Justice Cockburn, when presiding in the court of Appeal, in Lincoln's Inn, remarked, the legal and the judicial mind revolts from the idea that on such a point of business any fault can be attributed to Lord St. Leonards. Nevertheless, an important failure in the documentary evidence was caused by the absence unexplained of a codicil to the will, and what is most important to the lawyer, the want was supplied by extrinsic evidence of the declarations and intentions of the testator, so that probate has actually been granted of a portion of a will not in existence, or at least not produced. Seeing that it is reasonable when persons have deliberately signed or otherwise properly executed definite contracts in writing, last wills and testaments, or deeds of "grant, livery, partition, or exchange of corporeal interests, and of grant, assignment, or surrender of those that are incorporeal" to presume that they meant such instruments to be the solemn and only evidence of their intentions, seeing that it is the interest of the public that such instruments should be upheld and litigation ended; seeing also that for the pure administration of justice the courts have held it necessary, in order to prevent similar dealing, to make it one of the fundamental rules of evidence that the best evidence must be produced, unless exceptional circumstances exist, it seems not a useless task to enumerate what these exceptional circumstances are in each class of documents, and to discuss the latest decisions thereon.

In cases where written contracts are in issue, extrinsic evidence may relate to their variation, rescission, or novation, on the ground of mistake, surprise, or fraud, or it may be used in suits for specific performance, though with greater freedom by defendants than plaintiffs. Where wills and last testaments give rise to controversy, this species of evidence is admissible for the following purposes:—(1) to identify the document referred to by a will or codicil, in order to its incorporation therewith; (2) to ascertain the time of an alteration or interlineation; (3) to remove latent ambiguities; (4) to show that particular lands were acquired by the testator after signing his will; (5) to rectify mistakes; (6) to evince the *animus revocandi* in ambiguous acts; (7) to recover the contents of a will, wholly or partly lost; (8) to rebut and fortify equitable presumptions. Where deeds are the matter of inquiry, this evidence is available to prove that they were delivered as escrows, the nature of the condition, its performance and breach (Rym *v.* Campbell, 6 E. & B. 370). It is also good where fraud is the ground of a claim for cancellation or surrender. Seeing that the great case of Lord St. Leonards *v.* Sugden, is not only the most recent, but is a very important authority as to the admission of this secondary evidence, we will take last wills and testaments first.

1.—INCORPORATION OF DOCUMENTS.—Lord Eldon. in Smart *v.* Prujean (6 Ves. 565), was of opinion that in order that a testamentary paper duly executed might incorporate another, it must refer thereto as a written document then existing, in such terms that it may be ascertained. This opinion was adopted by the Judicial Committee of the Privy Council, in Allen *v.* Maddock (11 Moo. P. C. 454), where they held that a reference in a will might be in such terms as to exclude parol evidence, as where it is to papers not yet written, or where the description is so vague as to be incapable of being applied to any instrument in particular, but that the authorities seemed clearly to establish that where there is a reference to any written document described as then existing, in such terms as to be capable of being ascertained, parol evidence is admissible to ascertain it.

In Allen *v.* Maddock, the Privy Council held that an unattested paper, which would have been incorporated in an attested will or codicil executed according to the Statutes of Frauds, is now in the same manner incorporated, if the will or codicil is executed according to the requirements of the Wills Act (1 Vict. c. 26, s. 9), and that where the reference is such as to render the unattested paper capable of identification, parol evidence is admissible.

Of Allen *v.* Maddock it is sometimes said the principle will not be extended (see Re Greeves, 7 W. R. 86). but still the case is good law. It was approved, and its principles explained, by Sir Cresswell Cresswell, in Straubenzee *v.* Mouck (8 Jur. N. S. 1159), where that able judge said: "In Habergham *v.* Viniers (2 Ves. Jun. 204), it was held that the testator's intention to incorporate any particular document with his will must be gathered from the will itself. In Allen *v.* Maddock the court went further, and held that the identity of the document to be incorporated might be ascertained by the evidence of the surrounding circumstances, such evidence being only used in aid of the construction of what was written." In the case before him A inclosed and sealed up in an envelope two sheets of paper, on which she had in writing expressed her wishes as to the disposal of certain moneys belonging to her, and also of her jewelry and other personal effects. These papers were not duly executed. On the inner side of the envelope she wrote as follows: "It is my wish for my dear husband to administer the moneys, and for the smaller bequests dear B will attend to them." This memorandum was signed by the deceased in the presence of two witnesses. The only surviving witness deposed that after the execution two sheets of paper similar to those found therein were placed and sealed up in the envelope by the deceased, but that she could not further identify them. There was evidence that the envelope had been opened after the execution. Sir C. Cresswell held that the reference in the paper A was not to another document, as being then in existance, and that the reference was not sufficiently distinct to enable the court to identify any document at all. Secondly, that it was not proved at what time the papers B and C were enclosed in the envelope, and the mere fact of their being found there afforded no presumption that they were the documents the deceased intended to refer to in the paper A. He accordingly pronounced against the papers being admitted to probate. In In the goods of Stewart the will referred to a list of papers. The evidence showed that the list was made before a codicil confirming the will. The list as incorporated was admitted to probate. In In the goods of Pascall (19 L. T. Rep. N. S. 366; L. Rep. 1 P. & M. 606), the testator by will desired that instructions previously given by him the same day to an attorney's clerk should be carried out. The instructions were oral, but the clerk had at the same time made short notes of them in the testator's presence. Probate of the notes was refused. The rule was approved by Sir J. P. Wilde in In the goods of Mary Sunderland (14 L. T. Rep. N. S. 741, and L. Rep. 1 P. & D. 198). There the testatrix by her will bequeathed the residue of her property "save and except such articles of furniture as shall be ticketed or described in a paper in my own handwriting to show my intention regarding the same." As the will did not describe the lists as then existing parol evidence that they had been shown to her legal adviser, and to the witnesses who attested a codicil, was excluded Sir J. P. Wilde remarked, "If the court were at liberty to turn to independent sources of information and investigation, the question whether she intended those papers to form part of the will independently of the language in which she is supposed to have referred to them, there is abundant parol evidence to satisfy the court that the testatrix did intend these lists to form part of her will." But after consideration, he was of opinion that the court was not at liberty to enter into that question, and to receive that parol evidence.

2.—ALTERATIONS AND INTERLINEATIONS. Cooper *v.* Borhett (4 Moo. P. C. C. 419; 10 Jur. Rep 93) laid down the presumption that alterations in a will were made after execution. In Williams *v.* Ashton (1 J & H. 115), Lord Chancellor Hatherley, then Vice Chancellor Wood, expressed the rules somewhat differently, saying, "I do not think it is quite a correct mode of stating the rule of law to state that alterations in a will are presumed to have been made at one time or another. The correct view, as enunciated in the case of Doe *v.* Palmer (16 Q. B. 74) is that the onus is cast upon the party who seeks to modify the terms of a will to give some evidence from which a jury may conclude that the alterations in the will were made before execution. In In the goods of H. H. Sykes (28 L. T. Rep. N. S. 143), Sir John Hannen said, "Stated as the rule generally is, the presumption is that alterations were made after execution, but that presumption may be rebutted by declarations made before execution, but not after. Doe *v.* Palmer (sup.) is an authority for that." The case of Lord St. Leonards *v.* Sugden shows that the authority of Doe *v.* Palmer, as to the non-admission of a declaration made after the will, is overruled. It is also to be remarked that Re Cadge (L. Rep. 1 P. & M. 113) is in favor rather of Lord Hatherley's way of stating the general presumption, than that commonly adopted.

Colonel Sykes left a will with many interlineations and erasures; by one of them a Dr. Sykes was appointed executor. Before re-publishing his will by a codicil, the testator mentioned the appointment of Dr. Sykes. Sir J. Hannen admitted evidence of this declaration, and granted him probate.

(*To be Continued.*)

THE UNION COLLEGE OF LAW.

CLOSING EXAMINATIONS AND GRADUATION EXERCISES.

The graduating exercises closed last week, and were in every respect gratifying to the friends of the two institutions under whose auspicies the law

college is controlled. Thirty-three juniors were examined for admission to the senior class of next year, of whom twenty-five were admitted, viz.: George A. H. Baker, Charles O. B. Brockway, Hamlet Collamore, E. F. Dunne, R. P. H. Durkee, F. H. Follansbee, H. E. Hadley, W. A. Hornsburger, Frank Hills, A. C. Leland, John McKeough, S. M. Meek, C. B. Morrison, A. C. Merritt, N. A. Partridge, J. F. Rhodes, L. M. Trumbull, James H. Tait, Mr. Underwood. James C. Worrall, F. Walker, C. H. Webster, and M. W. Webster.

In the senior class of the present year sixty-three students received instruction, of whom fifty-two were examined for diplomas. These are Louis Allen, of Carlyle, Ill.; Benjamin R. Burroughs, of Edwardsville, Ill.; Rufus W. Bellamy, Charles A. Berdel, F. B. Eisen Bockius, Charles W. Butterfield, Albert W. Brickwood, John T. Barrow, Clarence A. Burley, William F. Congan, Geo. N. W. Carroll, Wallace L. Dewolf, Thomas B. Drake, Edward F. Goiton, Dwight W. Grave, Adrian C. Honore, Arnold Heap, Robert M. Ireland, Martin O. Lewis, Hempstead Washburne and James H. Ward of Chicago, Illinois. Nathaniel Brown, of Prospect Park; William F. Congan; Albert G. Crawford, of Pittsfield, Ill.; LeFavour F. Campbell, of Macomb, Ill.; Benjamin H. Chapman, of Raymond, Ill.; George B. Chapin, of DeWitt, Ill.; William Y. Chamberlain, of Yellow Spring, Green county, O.; A. Lee Doud, of Gardner, Ill.; William M. Farmer, of Vandalia, Ill.; Thorn H. Harden, of Pontiac, Ill.; Ezra A. Helm, of Sycamore, Ill.; Addison W. Hastie, of Galesburg, Ill.; Silas E. Kelsey, of Lisbon, Ill.; William L. McGarry, of Evanston, Ill.; William R. Nicholson, of Prince Edward's Island, Can.; Franklin C. Peatt, of Warren, Ill.; Zach. W. Taylor, of Bloomington, Ill.; Charles S. Frank, of Caledonia, Minn.; William W. Rathburn, of Swedona, Ill.; Alfred R. Rich, of Metamora, Ill.; William H. Steward, of Shipman, Ill.; Henry C. Stearns, of Watseka, Ill.; James M. Scott, of Sterling, Ill.; Eric Winter, of New York City; Charles H. Wooster, of Amboy, Ill.; Robert M. Wing, of Lisbon, Ill.; James R. Williams, of Carmi, Ill.; George W. Wilbur, of Belvidere, Ill.; Kimball Young, of Mattoon, Ill.; and David L. Zook, of Goshen, Ind.

The examination was conducted chiefly by the Faculty, assisted by Mr. James P. Root and Edward Roby. The Hon. Thomas Hoyne, Chairman of the Board of Management of the College, James L. High, and other lawyers, being present at portions of the examination. The entire senior class exhibited a high standard of excellence.

The programme of the commencement exercises consisted in the reading of essays, of which there were six, and for which there was a prize of $50 offered by H. O. Horton, for the best essay upon a legal topic The judges of the essays were Hon. I. N. Arnold, Judge R. H. Forrester, and James L. High. Judge Doolittle presided over the exercises, and Hon. Thos. Hoyne, chairman of the executive committee, was present. There was a large number of students in attendance, and much interest was manifested in the proceedings. The first essay was read by A. D. Rich, who was awarded the Horton prize. It is as follows:

UNANIMITY IN THE JURY.

Hallam calls the requirement of unanimity in jury trials, "that preposterous relic of barbarism." It is my purpose to inquire whether, in "these days of grace and rascality," our juries, in the State courts at least, should not be permitted, under proper restrictions, to return as their verdict the opinion of an adequate and proper majority. To discuss the subject properly, it seems almost necessary to review the conditions under which the prevailing rule of unanimity originated, in fact the history of the jury itself; but the limits imposed in respect to time forbid only the briefest allusions.

In the first place, the so-called jury systems of the various nations of Europe, seem to have differed from the moderu English jury particularly in the following points: The number often varied from twelve; unanimity was not usually required; the juries were in all cases, judges as well of the law as of the fact, the position of the chief officer connected with the court, by whatever name he was known, was simply that of president, or "moderator of the meeting;" while the trial itself partook more of the character of a modern arbitration. The doctrines of compurgation, wager of law, and a system of "legally appointed witnesses," with duties similar to those of our subscribing witness, figured largely in the early formation of the English jury. The early Britons suffered the hardships of repeated invasion and the tyranny of foreign races, kings and freebooters.

Each change in the government brought new customs, new laws, new languages. With William the Conqueror came the new and oppressive doctrines of the federal system; and the early Norman kings, conscious of the injustice of their claim to the English throne, sought to pacify dissatisfaction and to attach a liberty-loving people to their interests, by numerous concessions and the establishment of various wise and wholesome laws; and among them the trial by jury.

With the establishment of the Grand Assize by Hen. II, the English jury seems to have first taken its distinctive feature as the proper tribunal of fact alone.

The jury examined no extrinsic evidence, but based their verdict upon their individual knowledge of the facts in the case, and, while their number must be *not less than twelve*, if they failed to agree, the assize was *afforced*, that is, others were added, until the composition of the jury was such that twelve of them could agree upon a verdict; so that in common with the practice of compurgation, a verdict under such circumstances simply determined the number of witnesses, or the amount of evidence the policy of the law required to establish a *conclusive presumption* of fact, and judgment was rendered upon this presumption. As soon as the jury began to consider evidence other than their own, the practice of *afforcement* was rendered impracticable, and, with the final abandonment of this custom, unanimity was regarded a necessity. Again, when we consider the history of the struggle between the king and parliament in reference to the royal prerogative; when judges were appointed to further the interests of the king in whatever manner necessary; the extreme barbarity of criminal prosecutions in general, especially those for political offences and the sin of witchcraft; the bloody details of State Trials and Parliamentary impeachments, we seem forced to assent to the assertion that to no one human institution of the past does the world owe so much for the preservation of civil and religious liberty as to trial by jury; and the very life of the system itself was the rule of unanimity.

Under such conditions of oppression and ignorance was the English jury gradually developed, and it was while contemplating rather the struggles of the past, than the possible needs of the future, that the founders of our Republic gave such weight and prominence to this "palladium of liberty." While our entire system of government is radically different, the structure of our courts and their administration of justice is scarcely less different. Our judges hold their offices for definite periods, are appointed by the people, responsible only to the people, and err, if at all, in the interests of the people. The tendency is strong, especially in popular governments to mitigate the force of all rules that seem, under any circumstances, to bear heavily upon the individual; and popular sympathy is apt to be with him, who, for the time being, seems most to need it; and a question frequently presenting itself is, whether this tendency, though good in itself, may not be carried too far in the structure of our jurisprudence, in our administration of justice and in the formation of our statute law? The latitude now allowed the prisoner in criminal cases is proportionally wide as it formerly was restricted; and the "benefit of a doubt" is made to "hide a multitude of sins" and shield a multitude of sinners.

Treason, as a crime, either against State or national authority is here practically unknown, while the number of crimes punishable with death is reduced from *one hundred and sixty-four* in the time of Blackstone, to *one* in some States, to *none* in others.

The rules of evidence have been reduced to the nicest precision. Instead of the crown advocate eagerly quizzing the prisoner and torturing every statement into evidence against him, our prisoner is protected in every possible way against the prosecuting attorney, and is allowed by law every privilege and help in his defence that innocence even can ask. In a word, few, if any of the original reasons for the rule of unanimity remains either in criminal or civil cases, while there are many reasons for a change.

The boast of the common law system of pleading was its tendency to reduce the controversy to one plain issue readily comprehended by the average juryman. Their civil litigation related chiefly to questions concerning real estate, wherein the issues were usually clear and well defined; while on the contrary, our systems of pleading fail to secure the same degree of precision, and our litigation, arising out of an almost infinite variety of commercial and other interests, continually presents questions that only experts can comprehend; yet, we require each of twelve men chosen without discrimination, if properly chosen, and not likely to be above the average degree of information or mental capacity, to weigh carefully all the intricate and conflicting points of evidence, whatever the issues to which the evidence may relate, and finally to all arrive at the same result. When, from any reason whatever, one juror fails to agree with the rest, he may candidly think it his misfortune to be thus pitted against "eleven of the most unreasonable men in the kingdom;" yet, as a matter of course, the trouble, expense and delay of a new trial must necessarily ensue. No stronger reason exists for the reluctance which the best citizens of a community feel against performing what is termed jury duty, than the fact that, even could their number be composed entirely of competent men—which is practically out of the question—it would frequently be impossible to arrive at a verdict at once unanimous, and still satisfactory to each.

Again, how often is unanimity rather apparent than real, and purchased only at the sacrifice of truth. Jurors are sworn to render their verdict in accordance with their individual opinions as to the value of the evidence before them, and, to accede to any other opinion is to violate their oaths; yet how often is the verdict the result of compromise and concession—a patched up affair, and not the real opinion of any? How often, too, does the verdict depend upon the opinion of the juror who, from any reason, good or bad, wields the greatest influence among his fellows.

Again, in many cases involving questions relating to damages, there is frequently no better way of arriving at a unanimous verdict than by a kind of a "hotchpot" proceeding, by which the average opinion of the whole respecting the amount, constitutes the verdict, or the basis of it; and if, before they resort to this, they shall have discussed the merits of the case among themselves, which is all the law contemplates in any case, they may, to use the expression of the stock broker, be divided into *bulls* and *bears;* and, in that case, it lies in the power of one or two to make the unanimous (?) verdict either much more or much less than is adequate or just, thereby laying the foundation for a new trial or an appeal. Forsyth, in summing up a discussion of this question pertinently asks: "Since, then, the chances against a real unanimity are very great, and the temptation to apparent unanimity is strong, ought a rule to be maintained, the tendency of which is to bring about such results?"—(Trial by Jury, 207.)

As to civil trials, he answers the question in the negative, but in criminal cases, on account of the more disastrous consequences that may possibly follow an error, it is thought by many, and he among them, that the rule should still be retained; because, for some reason hardly apparent, it is said the opinion of the twelve is much less liable to be erroneous than the united opinion of nine or ten or any other number, without regard to the motives that may influence the dissenting jurors. Some one has said with truth that an innocent man charged with crime would often choose to be tried by the court, if the law would permit, while a guilty one, seldom or never; each regarding a jury trial as usually conducted, much less liable to do him justice than no jury at all. The innocent man, too, will select an intelligent jury—the best he can get—while with the guilty one the reverse is true; and, however guilty he may be, with the assistance of able counsel, such as money will always procure, the proper selection of one or more jurors by the skillful use of challenges, the proper manipulation of the evidence, either when given or in the address to the jury, or perhaps, by adroitly leading the court itself into some error if an acquittal is not obtained, a disagreement may be secured or some other ground laid for a new trial or appeal; and, as a rule, with every delay the prospect of an ultimate acquittal grows better. It is a terrible thing to even risk the execution or imprisonment of an innocent man for the crime of another, and it is said with great force that, until sufficient evidence is produced to convince the entire jury, no one should be placed in such jeopardy; but the difficulty is that no possible degree of evidence can convince the juror who is there not to be convinced, and there is usually little practical difficulty in securing at least one such juror. On the other hand, it is quite as fearful to contemplate that homicides and murders, not to speak of the infinite number of lesser crimes, should be of daily occurrence and punishments so rare And while the want of a unanimous verdict may sometimes justly spare the prisoner, in a far greater proportion of cases does the acquittal of those who clearly deserve punishment imperil the public safety, and endanger the lives, property and honor of the innocent by the encouragement it gives to the vicious. Besides, a verdict of conviction is hardly ever conclusive, but the prisoner will always have a new trial and the protection of the Supreme court when entitled to it; and in ninety-nine cases out of a hundred, upon any adequate ground, he can as a last resort obtain either a commutation of his sentence or a pardon from the governor. It is far more easy to protect the prisoner from the error or vindictiveness of the jury than to protect the public against the incompetency or corruption of the jury.

It is perhaps well said that the rule of unanimity has grown with the growth and strengthened with the strength of the system itself, and having long stood the test of time and filled its purpose well, there is a halo of veneration about it that ought to protect it from innovation; yet it may be further said that a mode of trial developed hundreds of years ago may, in its strictly original form, be no better adapted to our altered circumstances than is a system of pleading, or of real estate law, both of which have undergone numerous modifications and have been improved thereby.

The objection that in capital cases, as a measure of precaution, the verdict ought to be unanimous, derives the most of its force from the remembrance of the bloody times of the Star-Chamber Commission, and is equally applicable as an argument for the abolition of capital punishment altogether, and undoubtedly had its effect in causing the provision of our statute which leaves the death penalty to the discretion of the jury. I would not change the statute in this respect, but, out of abundant caution, would still require a unanimous verdict to inflict death; but in all other cases let three-fourths, or some other number less than all, be competent to return a verdict.

But the strongest argument I have met for the retention of the rule of unanimity is, that it necessitates a thorough consideration of each case; that the views of each individual of the jury must be considered by all the rest; that the evidence will be scanned from every point, and hastily formed verdicts rare. Aside from the remarks heretofore made in reference to the practical working of the system, the only way that occurs to me of meeting this argument—and I think it on the whole fully adequate—is to provide that in no case shall a verdict other than unanimous be received, until the jury shall have had ample time to fully consider the case in all its bearings, the minimum of this time to be fixed by law, and to be increased in the discretion of the court. This is no fancy provision. It has long been the custom in Scotland, and in various governments on the continent, and has been repeatedly urged in the English Parliament.

Although it has been intimated that the entire abolition of the right to trial by jury in criminal cases, might contra-

vene the spirit of the Federal Constitution, yet, since the various decisions upon the scope of the early amendments to that instrument, the proposed change would hardly be held to contravene its provisions; and though it might necessitate an alteration of our State Constitution, that should not be considered a very serious objection.

To recapitulate: With scarcely an exception, the requirement is contrary to the spirit of our civil institutions, it being required, as it occurs to me, in but one other instance—the execution of certain powers. Ours is a land of majorities. The laws are made and repealed, the courts instituted and abolished, and the judges, of the State, courts at least, both elected and impeached by majorities. The final decision upon the constitutionality of a law, and the rights of parties under it, is determined by a bare majority. Though the fundamental law of the land, in one sense, may be said to have been originally established by the unanimous consent of the people then concerned, yet it is amended, it has been upheld and vindicated, and provides under certain exigencies for its temporary suspension and the substitution of military rule, by the requisite majorities. We intrust our most sacred and vital interests to the watch and ward of the majority or to its representatives, no matter who compose that majority, or how it is obtained; yet we tie our hands and give to those who abuse their trust, perfect immunity if they shall be able, by any means, to procure one to sit in judgment on their case and say, "I forbid." Fraud, peculation and open robbery are practiced in every branch of the public service. Our system of requiring pecuniary bonds from public officers, too frequently results only in visiting penalties upon those whose greatest fault is too implicit confidence in the integrity of men; for the corrupt, defaulting officer, when caught and prosecuted, too often hides himself, both from the public and his bondsmen, behind the jury. It is upon rocks like these that republics founder. The requirement of unanimity would not exist to day, either in England or America, but for the Star-Chamber trials of Great Britain; and whatever revolutions are yet to sweep over us, the world will never again see sustained, for any length of time, a similar tribunal. And as the memory of those times fades, let us hope for a more reasonable procedure in trials by jury.

"The Ethics of the Legal Profession," by Mr. Charles S. Trask, was a logical, labored production. He treated upon the subject of the morality of the bar, and denounced in strong terms the tendency of many young lawyers to prostitute the profession by lending themselves as willing tools to the basest of schemes and schemers. He spoke of the many mushroom so-called lawyers who sprang into existence in a night, without any pretense whatsoever to preparatory training, and essayed to push themselves into the ranks of the legitimate practitioners of the law, and, with brazen effrontery, sought to aspire to notoriety, if not reputation, without a scintilla of a foundation to work upon. Mr. Trask's essay partook largely of a religious and moral tone throughout. The essayist took the ground that the lawyer could be true to his client and yet be true to his manhood and dignity. If he could successfully blend the two, he would attain to the highest dignity ever accorded to man.

Mr. Arnold Heap followed with an essay on "Husband and Wife." He wished his audience to go back with him to the early period of the Saxons, and view the condition of the woman in that period. Man might disfranchise, but he never could legislate her out of existence. Time had been when he who took to himself a wife owned and possessed her, and all the goods and chattels which she brought to him. He was likewise made responsible for all her debts. He became liable for all her responsibilities before marriage, and if she wished to recover money or property due her before marriage, her husband might either join with her in a legal proceeding, or he might prosecute a claim on his own account. This was for a long time the common law. The law aforesaid also allowed the husband to beat his wife for certain offenses, with a whip or with his fists; for other offenses the husband was permitted to inflict slighter chastisements. To offset these heavenly privileges, the husband was held individually responsible by law for the conduct of his wife; he had complete control over the effects and person of his wife. Mr. Heap proceeded, in his well-written essay, to expound the technicalities of the law to the remainder of his class in a manner which testified to his knowledge of his subject, and his familiarity with these nice law points. He is considered as one of the first in his class, and will no doubt make his mark in the noble profession which he has selected.

Next came Mr. James R. Williams, with an essay on "The Doctrine of Uses." This subject, he said, would not be regarded with a great deal of interest by persons who had not studied the matter fully, but it was full of interest to those who had bestowed time and thought upon it. He explained the origin of the subpœna, and the administering of the oath. His essay was an extremely long one, and he maintained his ground by means of numerous quotations and references, displaying thereby an abundant amount of hard study, research, and a thorough understanding of the law points covered by his theme.

Mr. George W. Wilbur instructed his hearers upon the subject of "Eminent Domain," in a strong essay, which was filled with erudition. This young gentleman possesses the gift of a fine voice, coupled with an admirable presence.

The closing essay was by Mr. W. W. Rathburn, on "The Feudal System in England." He explained the theory of the federal system from a legal standpoint, and in doing this he gave a great deal of history that was highly interesting.

After the reading of the essays, the prize, a check for $50 from O. H. Horton Esq., was by the unanimous decree of the judges, awarded to Mr. Albert R. Rich, as having the best written essay, and treating the subject in the most masterly manner.

The following is the report of the judges:

To the Honorable, the Faculty of the Union College of Law:

GENTLEMEN: The undersigned, having been designated by your body as a committee to examine the various essays submitted by members of the graduating class competing for the Horton prize, beg leave to submit the following as their report.

Sixteen essays have been submitted for examination, the author's names being withheld, and the essays being designated respectively by the letters of the alphabet from A to P inclusive. We desire to give expression to our sense of the high degree of merit displayed in all of the essays submitted, many of which exhibit a familiarity with the subjects discussed, as well as an originality of thought and a vigor of expression which would do credit to older members of the profession. In this view we regard them as equally creditable to their respective authors, and to the faculty and corps of instructors under whose tuition these gentlemen have been prepared for the bar. In view of the high merit of all the essays presented, the only regret entertained by your committee in the discharge of their duties, is that they have but one prize to award. All of the essays have been carefully read and their comparative merits thoroughly weighed and discussed by the committee, and it is our unanimous conclusion that the essay marked "B," entitled, "Unanimity in the Jury," occupies the first rank, and that its author is clearly entitled to the Horton prize.

Your committee, having been also requested to designate six of the essays exhibiting most merit, for the purpose of being publicly read at the graduating exercises of the class, would report the following as, in their opinion, entitled to such distinction:

B. "Unanimity in the Jury."*
L. "Eminent Domain."
H. "Husband and Wife."
C. "The Ethics of the Legal Profession."
I. "The Doctrine of Uses."
P. "The Feudal System in England."

In concluding their labors, the committee desire to congratulate the profession and the public, that we have, in Chicago, a law school which is already taking rank with the oldest and best schools in the country, and whose graduates exhibit by their high scholarship and professional attainments the best possible commentary upon the thorough and efficient course of instruction which is here pursued.

All of which is respectfully submitted.

ISAAC N. ARNOLD,
JAMES L. HIGH,
R. H. FORRESTER, } Com.

* The authors of the above essays respectively were as follows:

"Unanimity in the Jury," Albert R. Rich, of Metamora, Ill.

"Eminent Domain," Geo. W. Wilbur, of Belvidere, Ill.

"Husband and Wife," Arnold Heap, of Chicago, Ill.

"The Ethics of the Legal Profession," Chas. S. Trask, of Caledonia, Minn.

"The Doctrine of Uses," James R. Williams, of Carmi, Ill.

"The Feudal System in England," W. W. Rathburn, of Swedona, Ill.

Judge Booth then announced that he had the honor of reading the list of graduates upon whom the faculty had the honor of conferring the degree of bachelor of laws. The chair accompanied the reading of the names, 50 in number, with a few remarks, upon sending the young men out into the world, after which the diplomas were informally presented to the graduates by Mr. V. B. Denslow.

At the close of the proceedings, Mr. David L. Zook, in behalf of the class, came forward, and, with an appropriate speech, presented a photograph of all the graduates, by Brand, to Judge Booth, as a mark of the esteem in which he was held by the members.

LVI. NEW HAMPSHIRE REPORTS.

We are under obligations to the Hon. JOHN M. SHIRLEY, official Reporter, for advance sheets of the LVI. Volume of New Hampshire Reports, from which we take the following head-notes:

INTEREST ON LEGACY — CONSTRUCTION OF WILL AND CODICILS—CUMULATIVE LEGACIES.

Rice v. *Boston Port and Seaman's Aid Society.*—*p.* 191.

The rule in this State is, that a pecuniary legacy, payable generally, without designation of any time of payment, is payable at the end of one year from the death of the testator, without interest; and that if not then paid, it bears interest after the expiration of the year.

Considerations which should govern the court in determining whether legacies given in separate testamentary instruments are cumulative or substitutionary, discussed.

A. R., in her will, named the defendants among a number of other benevolent societies to whom she gave $5,000 each, and, in a codicil executed about a year afterwards, named them in another list of other benevolent societies to whom she also gave $5,000 each. *Held*, (Smith, J., dissenting), that, under the circumstances shown at length in the case, the second bequest should be regarded as substitutionary for the first.

PRACTICE—REFERENCE OF CAUSES.

Gray v. *White Mts.* (*N. H.*) *Railroad.*—*p.* 182.

An order was made by the Circuit court, sending an appeal from an assessment of land damages by the railroad commissioners and selectmen to a referee for trial; but no action was taken under the order by reason of exceptions which were transferred to this court. Before the exceptions were reached for decision here, the statute was amended by excluding such cases from its operation. *Held*, that the order of reference should be rescinded.

LEGAL ALBUMS FOR THE CENTENNIAL.—C. D. Mosher of 951 Wabash Avenue, has produced the most beautiful and artistic photographs of the prominent men of Chicago we have ever seen. His photographic and historic patent albums for families, churches, colleges, members of the bar and ministers, are a new feature. One page is devoted to the photograph of a person the next to a brief sketch, giving the leading events of his life. Mr. Mosher has devoted two of these albums to the bench and bar. The first volume was sent to the centennial some weeks ago, the second as soon as completed will follow it. The first volume contains the photographs and sketches of the following judges and members of the bar:

Sidney Breese, John Dean Caton, Thomas Drummond, H. W. Blodgett, Erastus S. Williams, John A. Jameson, Joseph E. Gary, W. H. McAllister, Henry Booth, Wm. W. Farwell, John G. Rogers, Samuel M. Moore, Martin R. M. Wallace, Lambert Tree, James R. Doolittle, Norman B. Judd, Robert Hervey, Van H. Higgins, Corydon Beckwith, Joseph P. Clarkson, M. F. Tuley, Charles Carrol Bonney, J. M. Walker, Lyman Trumbull, E. G. Asay, S. A. Goodwin, Charles H. Reed, John Van Arman, Wirt Dexter, Thomas Hoyne, Elliott Anthony, Hamilton N. Eldridge, I. N. Stiles, Leonard Swett, L. L. Bond, James B. Bradwell.

Judge David Davis, Gov. Beveridge and Hon. Lyman Trumbull head the list in the second volume. Members of the bar visiting the centennial and examining these albums will feel almost as if they were surrounded by their friends attending a bar meeting in Chicago.

THE ILLINOIS PRESS ASSOCIATION AND THE RAILROADS.—The Illinois Press Association held its annual meeting at Joliet last week. Its session occupied three full days. The members of the Association visited the Penitentiary, the Stone Quarries, the Iron and Steel Works, and other places of interest. On the eve before their departure they were entertained by the citizens with a banquet and ball. There was a very large attendance this year. The Association passed resolutions expressing its appreciation of the courtesies it had received from the city, citizens and railroads of the State. Of all the railroads, none, have extended to the Association more courtesies than the Alton and St. Louis and the Baltimore and Ohio. While the Association was in session, Mr. McMullen, General Superintendent of the former road, telegraphed to President Rounds that he would place at the disposal of the President a train to take the members to the city. The Association expressed its thanks to the worthy and efficient Superintendent by telegraph. The following resolutions relating to the Baltimore and Ohio road were passed:

WHEREAS, The Baltimore and Ohio Railroad Company having, in the spring of 1874, extended to this Association the courtesy of a free train from Chicago to Washington, Baltimore, and return, enabling us to make one of the most pleasant excursions ever enjoyed by this Association, and

Whereas, Mr. C. M. Wicker, Gen'l Agent of the line at Chicago, in a recent courteous communication to the officers and Executive Committee, while deprecating the fact that under the recent action of the Louisville Railroad Convention this company cannot deviate from the transportation rates there made, he will be glad to furnish, on proper notice, a special train and special conductor, and afford every possible facility for a pleasant excursion.

Be it Resolved, That this Association extends to the Baltimore and Ohio Railroad its sincere thanks for past courtesies, and to Mr. C. M. Wicker, especially, its general agent at Chicago, for his courteous communication and generous proposal therein made.

Resolved, That while it is not deemed advisable at this time to make arrangements for a general excursion of the Association, yet those of its members who visit the Centennial will bear in mind the kind courtesies before alluded to, and endeavor to reciprocate them by our individual influence and patronage, esteeming it, as we do, to be one of the most pleasant, safe and satisfactory routes in visiting the Centennial and the East.

Resolved, That this resolution be spread upon our minutes, and that the president and secretary furnish Mr. C. M. Wicker with a copy of the same.

CHICAGO LEGAL NEWS.

SATURDAY, JUNE 24, 1876.

The Courts.

UNITED STATES SUPREME COURT.

GREGORY *v.* MCVEIGH.

FEDERAL QUESTION—WRIT OF ERROR TO STATE COURT—HIGHEST COURT OF STATE.

1. Where, by the laws of a State, an appeal can be taken from an inferior court of the State to the highest court of the same, and that leave has been refused in any particular case, in the regular order of proceeding—the refusal not being the subject of appeal—a writ of error, if there be a "Federal question," as it is called in the case, properly lies under section 709 of the Revised Statutes, to the inferior court, and not to the highest one.

2. A Federal question exits when, in a suit by a person who seeks to recover property, on the ground that a judgment and execution on it by a court of the United States, interpreting a staute of the United States, has deprived him of the property in violation of the first principles of law, the defendant sets up a title under that judgment and execution, and the decision is against the title so set up.

Chief Justice WAITE delivered the opinion of the court.

The motion to dismiss this cause for want of jurisdiction is denied.

"A final judgment or decree in any suit, in the highest court of a State in which a decision in the suit could be had," may in a proper case be re-examined in this court. Revised Statutes, § 709.

The Court of Appeals is the highest Court in the State of Virginia. If a decision of a suit could be had in that court, we must wait for such a decision before we can take jurisdiction, and then can only examine the judgment of that court. If, however, the suit is one of which that court cannot take jurisdiction, we may re-examine the judgment of the highest court which, under laws of the State, could decide it. Downham *v.* Alexandria, 9 Wallace, 659.

The Court of Appeals has revisory jurisdiction over the judgments of the Corporation Court of the city of Alexandria, but parties are not permitted, in the class of cases to which this belongs, to take such judgments there for review as a matter of right. Leave for that purpose must first be obtained. Two modes for obtaining this leave are provided. One by petition to the Court of Appeals itself, and the other by petition to a judge thereof. If the petition is presented to a judge and he denies it generally, without more, it may be again presented to the court. But if the judge to whom the application is made "shall deem the judgment, &c., plainly right," and reject it on that ground, if the order of rejection shall so state, no other petition shall afterwards be presented to the same purpose. (Code of Virginia, 1873, chapter 178, § 10.) The parties are left free to present their petitions to the court or to a judge thereof, as they may find it most convenient or desirable.

It has long been settled that if a cause cannot be taken to the highest court of a State except by leave of the court itself, a refusal of the court upon proper application made to grant the leave, is equivalent to a judgment of affirmance, and is such a final judgment as may be made the basis of proceedings under the appellate jurisdiction of this court. (Railroad Co. *v.* Railroad Co., 13 Howard, 80.)

In the present case, the Court of Appeals has no power to review the judgment of the court below. It cannot even entertain a motion for leave to proceed. A judgment has been rendered by the highest court of the State in which a decision can be had. The Court of Appeals has never, in fact, had jurisdiction. A suit cannot be taken there, except upon leave, and that leave has, in the regular order of proceeding, been refused in this case. From this refusal there can be no appeal. Everything has been done that can be to effect the transfer of the cause. The rejection of a petition by one judge does not prevent its presentation to another. Here the petition has been presented to each and every one of the judges and they have all rejected it because the judgment was "plainly right." Thus the doors of the Court of Appeals have been forever closed against the suit, not through neglect, but in the regular order of proceeding under the law governing the practice.

We think, therefore, that the judgment of the Corporation Court of the city of Alexandria, is the judgment of the highest court of the State in which a decision of the suit could be had, and that we may re-examine it upon error.

Without stopping to discuss the other question presented by the motion, it is sufficient to say that we think the case involves the consideration of a Federal question. The proceeding in the District Court was under the authority of the United States and its validity is drawn in question.

Motion to dismiss denied.

U. S. CIRCUIT COURT, N. D. OF ILLINOIS.

JUNE 19, 1876.

BANKRUPTCY—SALE OF PERSONAL PROPERTY—POWER OF COURT TO SET ASIDE—RIGHTS OF PURCHASERS—NOTICE—SUPERVISORY JURISDICTION—RIGHT TO GRANT A SUPERSEDEAS—REPLEVIN IN STATE COURT.

On Saturday, June 3d, the arguments of counsel were heard before the Hon. DAVID DAVIS, Associate Justice of the Supreme Court of the United States, in the Chambers of Judge DRUMMOND, on the motion for a supersedeas from the decision of Judge Drummond, of the United States Circuit Court, to the Supreme Court, in the matter of the possession of the dredging machinery and property of the bankrupt firm of Fox & Howard. It will be remembered that Judge Blodgett confirmed, some months ago, the sale of this property for $40,500, to Conro & Carkin, and subsequently Judge Drummond reversed the action of Judge Blodgett, and decreed the right of possession to Crane & Hodgkins, the original bidders, directing that the former account to the latter for the profits arising therefrom during the time they have used it. An application was thereupon made for an appeal to the Supreme court, which was refused by Judge Drummond, who intimated, however, that if they thought an appeal would lie from his decree, where it was made under the supervisory jurisdiction given the Circuit court by the bankrupt law, they could present the matter before Judge Davis. Therefore, when Judge Davis was in Chicago on the 3d inst., the matter was fully presented to him and he took it under advisement. Prior to this, however, the property was taken, on a writ of replevin issued by the Supreme Court of Cook County, from the possession of Conro & Carkin, on giving bonds in $80,000. This was done after the decision of Judge Drummond.

On Monday, June 19th, the parties assembled in Judge Drummond's chambers to receive the decision of the associate justice. Judge Davis said this case presented no difficulty for him when it was first heard, but he had since then turned the matter over in his mind a good deal, and the first impressions he had about it had been confirmed. The only point that was argued and that he had considered at all, was whether there was such a question growing out of the exercise by the district court of its summary jurisdiction, as ought to be reviewed by the Supreme court. He had come to the conclusion when he had heard the case, and reflection had convinced him that he was right, that the case ought to go to the Supreme court for its opinion. He did not want to express any opinion as to whether the District court had jurisdiction in this case or not. It all turned on this point in his opinion. Nor had he read the evidence with a view to ascertaining anything in relation to the merits of the transaction. A good deal could be said on both sides of that question. It was one of great importance, and he knew of no decision in this country, either by the District court or by the United States Circuit court, that exactly met it. In his own opinion there were grave doubts whether the District court had summary jurisdiction of this matter; and, although, as he had stated before, he had no fixed opinion upon that question, yet he thought it was right to the party, under the rules applicable to all courts granting a writ of supersedeas, to be allowed to take the case to the Supreme court. He did not wish to go on and give his opinion at all. Although he had a strong opinion as the case exists now, he did not wish to give any at all upon the question, reserving himself free, when the case shall be argued in the Supreme court, in order to pass upon it. It was very certain that the question was one that ought to be passed upon by the Supreme court. If the Supreme court was of opinion that the District court had summary jurisdiction in this matter, the case, of course, would be dismissed. If, in the judgment of the Supreme court, the District court had not the summary jurisdiction which was invoked, then the case might be retained there, and could be disposed of at that time. Had there not been so much feeling on this subject he would have had no doubt that this was a proper case to take to the Supreme court. He did not believe it was the intention of congress to give the District court exclusive jurisdiction in anything. It was neither his duty nor pleasure to pass upon any questions passed upon by the Circuit or District courts except what had been brought up here to be determined now. If there was any question about this case at all, with reference to the court granting a supersedeas, there was no question that when Mr. Cooper, on behalf of Crane & Hodgkins, made an application for a writ of replevin, he was guilty of a gross contempt of court. The question as to whether these parties have been in contempt or not was for the District and Circuit courts to determine. Thereupon Judge Davis directed Clerk Bradley to draw up the supersedeas, in order that he could sign it. Considerable side discussion ensued between Mr. Cooper, Mr. Ayers, and Judge Davis regarding the matter. Judge Davis said that inasmuch as the property had been replevied from Conro & Carkin, contracts made, and the season pretty well advanced, he was of the opinion that it would be about the proper thing to place the property in the hands of a receiver until the matter could finally be disposed of. The great difficulty, he said, existed in the bad feeling between the respective parties; it was entirely wrong to go into the State court for the purpose of obtaining the property in question when it was in the bankruptcy court of the United States. That, however, was a matter, he said, between Judges Drummond and Blodgett. He thought there was not a spirit of compromise manifested by either side. This piece of litigation is becoming quite interesting, and where it will end 'tis impossible for the wisest to say. The United States Supreme court will not meet before October, hence there will be considerable time for the parties interested to bring about a compromise in the matter.

WE are under obligations to C. S. VARIAN, U. S. Attorney at Carson City, for the following charge:

U. S. DISTRICT COURT, NEVADA.

JUNE 13, 1876.

THE UNITED STATES *v.* ADOLPH WAITZ, Register of the United States Land Office, etc.

THE DUTY OF U. S. LAND REGISTERS—FEES—EXTORTION—CANNOT ACT AS ATTORNEYS IN MATTERS BEFORE THEMSELVES.

The indictment was for extortion of money as U. S. Land Register. The prosecution was conducted by C. S. Varian, Esq. Hon. C. E. DeLong was counsel for the defendant. The charges upon which the trial was based are that Mr. Waitz received $200 for obtaining a patent, and that this fee was in excess of the amount he was entitled to receive as Register of the Land Office. The main facts, we believe, were not denied, but the plea of the defendant was that the money was paid to him as an attorney. The case of the guilt or innocence of the defendant of the charges preferred would seem to depend upon whether or not he could lawfully act as attorney in a case, the proceedings of which were to be conducted before him as U. S. Land Register. The case is very fully stated by Judge Hillyer in his charge to the jury, the principal portion of which is here given:

Section 5481 provides that "every officer of the United States who is guilty of extortion, under color of his office, shall be punished by fine," etc.

It is important at the outset that the jury should have, and bear in mind, a clear definition of the offense of extortion with which the defendant is charged.

Extortion, then, is thus defined: It is the unlawful taking by any officer, by color of his office, of any money or thing of value that is not due to him, or the taking of any money or thing of value, by color of his office, in excess of what is due him, or before it is due to him.

The fees of the Register of the land office are prescribed by law, and it is a general rule that no public officer may lawfully take any other fees or rewards for doing anything relating to his office than such fees as some statute in force gives him.

The statute law of the United States allows the following compensation to Registers:

First. A salary of $500 a year.

Second. A commission of one per centum on all moneys received at the Receiver's office of his land district.

Third. A fee of five dollars for filing and acting upon each application for mineral lands.

Fourth. A fee of 15 cents per hundred words for writing done in the land office in establishing claims for mineral land.

Their compensation for one year, including salary, commissions and fees, shall not exceed 3,000 dollars.

It is further enacted that upon satisfactory proof that a Register has charged or received fees or other rewards not authorized by law, he shall forthwith be removed from office.

He is also required to administer all oaths required by law or the instructions of his department, connected with the entry and sale of public lands without charging, or receiving directly or indirectly any fee therefor.

From all these provisions of the law it is plain that the compensation of a Register of the land office is definitely fixed by the statutes of the United States, and that it is not lawful for him to charge or receive any other fees or rewards directly or indirectly, for doing anything relating to his office of Register.

It is the aim of the law maker in fixing the fees of a public officer to give him what will be sufficient to pay for doing the duties required of him. It will rarely or never happen that every thing which it is the duty of the officer to do is set down in the fee bill. But a salary, or commission, or fee is given him which will make the office sufficiently remunerative, in the judgment of the legislators. For those items for which a fee is fixed the officer must take the sum given, and the applicant must pay it and be content. Those duties for which no fee is set down in the law must still be performed by the officer without charge, or rather are regarded as covered by the salary. The commissions or fees given for other matters.

In the next place, it will be advisable to ascertain as clearly as may be what the duties of a Register are in reference to these applications for mineral lands, and then, having a knowledge of his duties and his lawful fees, you will be able, I trust, without difficulty, to come to a right decision upon the main question in this case, viz.: whether money was taken by the defendant from the prosecutrix for the execution of his official duty, when either no fee was due for the service, or when a less one was due than he took.

By section 2478 of the U. S. Revised Statutes, the Commissioner of the General Land Office, under the direction of the Secretary of the Interior, is authorized to enforce and carry into execution by appropriate regulation, this statute in relation to mineral lands. He has made these regulations, and I will now call your attention to some of them.

From these instructions you will see that the duties of Register extend over, and have relation to, everything that is done, from filing the application until the papers are sent to Washington with his and the Receiver's opinion on them. It is true he is not bound to draw up the paper called an application, but if he does he can lawfully charge but 15 cents a folio of 100 words for writing it. So as to other affidavits.

As I have already stated, for doing anything pertaining to his official duties he must take such fee as the statute gives him. If the statute gives him none he must still do the duty and take no fee as in the case of applicants in land cases.

It is not denied that the defendant took a larger sum of money from Mrs. Grandona than he was entitled to as Register, but his plea is that the money

was taken as an attorney's fee, not as a Register's fee.

This plea of the defendant has received much consideration on my part, and the result is, that I consider it perfectly clear and so charge you, that the defendant while Register could not lawfully act as attorney for any applicant for a patent whose application was filed, and the proceedings on which were to be conducted before him and in his office.

Many of the duties of the Register are of a judicial character and require the exercise of his impartial judgment. He should see that no fraudulent claim is enforced against the government. He has to pass upon the regularity of all the proceedings, and how can he do this impartially if he is the paid attorney of either party before him?

But if this thing might lawfully be done, a more serious evil would result from the power it would give the officer to obtain money from those who were compelled to come to him as Register.

If the jury believe from the evidence that Mrs. Grandona paid the defendant 200 dollars, or other sum, for getting her patent, and that this sum was paid defendant as well for the execution of his official duties as doing some other things relating to the getting of the patent, and that there was no specified portion of it taken as compensation or fee for the one or the other, and that the sum taken was in excess of his legal fees, then the taking of the money was extortion.

The compensation of the Register is fixed by law, as well as his duties; citizens are compelled to go to him to make an application for a patent, and hence it is of great importance that his fees should be fixed with precision, so that he may have no excuse for taking excessive fees or imposing upon the ignorant. For this reason the legislature have fixed the fees of the Register, so that each citizen may know what he has to pay. But the Register cannot lawfully engage himself to an applicant to do all that may be necessary to get a patent, and charge a gross sum for his services, covering his legal fees and those he is not entitled to as Register. And the reason is that in so doing he puts himself on unfair ground toward the applicant. Some of the services he is bound to apply to the Register for, because no one else can do them. Hence to allow him to take a sum in excess of his legal fees under the name of attorney's fee, would be in effect the placing of every applicant for a patent in the power of the Register.

The jury could not agree, and were discharged. They stood six for acquittal, and six for conviction.

SUPREME COURT OF PENNSYLVANIA.

SMITH *v.* THE CITY OF PHILADELPHIA. SMITH'S APPEAL.

Error to the District Court of Philadelphia County.

MUNICIPAL CORPORATION—NEGLIGENCE—LIABILITY OF CITY IN A CLAIM FOR LOSS OF WATER FROM FREEZING OF THE WATER MAINS—MEASURE OF DAMAGES.

Upon a claim for damages arising from a deficient supply of water:

Held, That the plaintiff could recover only the water rent for the time during which the supply was deficient, and not for loss of rents of the premises.

Semble, That water is supplied by the city under a license which is paid for, and not under a contract.

Action on the case by Jacob K. Smith against the city of Philadelphia for damages resulting from the loss of tenants and rents, loss of the benefit of payment by tenants for mains, water permits and water rents, and for expense of repairing pipes, attachments, etc., in consequence of the freezing of water mains, negligently laid by the defendants in the street upon which certain houses of plaintiff were situated. The court instructed the jury that the plaintiff could not recover for the loss of rents, but only the actual amount of the water rents or sums paid by the owner of the houses to the city for the liberty of drawing off the water from the city mains, and using the same for the time during which the supply was deficient, which instruction was the specification of error.

Jos. W. HUNSICKER for plaintiff in error.

A municipal corporation is liable like an individual; and the measure of damage is actual loss sustained, which reasonably includes the loss of tenants, etc.

Shearman and Redfield on Negligence, §§ 120-137; Mersey Docks *v.* Gills; Same *v.* Pierce, 11 H. C. L., 686; Western Savings Fund *v.* City of Philadelphia, 7 Cas., 185; Addison on Torts, 731; Lacour *v.* City of New York, 3 Duer's Rep., 406; City of Pittsburgh *v.* Grier, 10 Harris, 54; Pottstown Gas Co. *v.* Murphy, 3 Wright, 263.

Robert N. Wilison, assistant city solicitor, (with whom was C. H. T. Collis, city solicitor), for defendant in error.

The supplying of water is discretionary with the city; therefore, where the circumstances complained of as working an injury, are the same as if the work had not been undertaken, it is not liable.

Wharton on Negligence, sec. 264; Carr *v.* Northern Liberties, 11 Casey, 324; Grant *v.* The City of Erie, 19 Sm., 420: City of Atchison *v.* Challis, 9 Kan., 603; Mills *v.* City of Brooklyn, 32 N. Y., 489.

The maxim *causa proxima non remota spectatur*, is applicable. Penna. R. R. *v.* Kerr, 12 Sm., 353.

THE COURT.—The claim here is not for damages arising from the bursting of the water pipes laid by the city, but for the loss of the water caused by the bursting of the pipes leading to the plaintiff's houses, from the action of frost. The real claim is for the loss of the water, and this will not implicate the city in any loss beyond the consideration paid for its use by the water rents, and these were allowed. The introduction of water by the city into private houses is not on the footing of a contract, but of a license which is paid for.

PER CURIAM. Judgment affirmed.

U. S. CIRCUIT COURT, E. D. OF VIRGINIA.

THE UNITED STATES *v.* A DISTILLERY AT PETERSBURG.

Error to the District Court.

The seizure, by the order of an Executive officer of the Government, of the books kept by a distiller, in obedience to the requirements of the statute, does not exclude them from use as evidence under the provisions of section 860 of the Revised Statutes, concerning private books and papers.—[ED. *Internal Revenue Record.*

Opinion by WAITE, C. J.

Section 3303 of the Revised Statutes provides that every distiller shall from day to day make, or cause to be made, in a book or books to be kept by him in such form as the Commissioner of Internal Revenue may prescribe, certain specified entries recording in detail his transactions at the distillery. Section 3304 then provides that these books "shall always be kept at the distillery, and be always open to the inspection of every revenue officer . . . and whenever required shall be produced for the inspection of any revenue officer."

On the first day of November, 1875, the collector of internal revenue for the second collection district of Virginia, acting under special authority for that purpose from the Commissioner of Internal Revenue, seized the distillery, which is the subject matter of this action, for a violation of section 3257 of the Revised Statutes, and with it took possession of the books kept upon the premises pursuant to the requirements of section 3303.

At the trial of this suit in the District court, the United States, to maintain the issue on their part, offered these books in evidence, but the claimants objected to their admissibility, upon the ground that they had been obtained from the distillers by means of a judicial proceeding. This objection was based upon section 860 of the Revised Statutes, which is as follows:

"No pleading of a party, nor any discovery or evidence obtained from any party or witness by means of a judicial proceeding in this or any foreign country, shall be given in evidence, or in any manner used against him or his property or estate, in any court of the United States in any crimiual proceeding, or for the enforcement of any penalty or forfeiture; Provided, that this section shall not exempt any party or witness from prosecution and punishment for perjury committed in discovering or testifying as aforesaid."

The District Court sustained the objection and excluded the evidence. To this ruling the United States excepted in due form upon the record, and the first question presented for our consideration arises upon that exception.

The books of a distiller, kept in obedience to the requirements of the statute, are, so to speak, *quasi* records. They are intended for use as much by the government as the distiller. They constitute part of the machinery which the law has provided for the enforcement of the revenue laws. Their object is to furnish the government with evidence of the daily business of the distillery, and with the means of detecting frauds. They are to be preserved two years for that purpose, and are to be produced for the inspection of the proper Government officials whenever demanded. They are, in a sense, part of the distillery itself, and as much subject to inspection and use for the purpose of securing the payment of the revenue as the building or any part of the fixtures or apparatus. False entries therein, or an omission to make such entries as the law requires, or a refusal to produce them upon proper demand, will subject the distillery to forfeiture.

The possession of the books in this case was not obtained by means of any judicial proceeding. The seizure was not by virtue of any warrant issued by a court or judicial officer, but upon an order of one of the executive departments of the Government, made in the legitimate exercise of its powers for the enforcement of the laws. The books were taken because found on the premises in the place where the law required they should be kept for the purposes of evidence to be consulted and considered by the Government. They were no more excluded by this statute from use as evidence, on account of the manner in which they were obtained, than were the tubs or other apparatus seized at the same time.

This case is entirely different from that of the United States *v.* Hughes (21 Int. Rev. Record, '76), decided by Judge Blatchford in the Southern District of New York. There the warrant of seizure was issued by a judge and made returnable to the court (14 Statute, 547, sec. 2). The evidence obtained consisted exclusively of private books and papers, which were in no sense whatever public. They were excluded because they had been obtained under a warrant issued in a judicial proceeding by a judge to a marshal, returnable with the papers, etc., to the judge for his judicial action. Here, as has been seen, the books were public books, kept for the purposes of evidence, and intended for use as well by the Government as the distiller. The United States have the right to demand their production without judicial process for all purposes connected with the revenue liabilities of the distillers or the distilleries.

We think the District Court erred in excluding the testimony, and the judgment must for this reason be reversed. It is unnecessary now to consider any other questions presented by the record, as upon another trial, with additional evidence, the Court may be able to find the facts more specifically and definitely than they appear in the present record.

The case is remanded for a new trial.

SUPREME COURT OF TENNESSEE.

JANUARY TERM, 1876.

J. D. EASLEY, Trustee, *v.* JOHN G. TARKINGTON.

TRUST ESTATE—RENTS AND PROFITS.—Where the deed makes no stipulation in regard to the rents and profits, and contains no waiver of the right of redemption in the event of sale by the trustee, and the maker remains in possession, he and not the trustee, is entitled to the rents and profits until foreclosure.

SUPREME COURT—DECREE—MATTERS NOT ADJUDICATED—MISTAKE.—Where the decree of the Supreme Court contains an adjudication of a question neither involved in the litigation nor discussed in the opinion, the court will treat so much of the decree as a mistake apparent on the face of the record, and at any time after final judgment it may be corrected or expunged. Such a decree not binding on the Chancer Court.—[ED. *Commercial and Legal Reporter.*

SNEED, J., delivered the opinion of the court.

The complainant as trustee in a deed of trust executed by defendant Tarkington, brought this bill on the 29th Sept., 1871, against the said Tarkington to recover the rents of the land conveyed for the then current year, and to secure the same attaches the crop grown upon the premises that year. The bill alleges that defendant Tarkington executed a deed of trust on the land for the benefit of divers creditors, on the 12th of July, 1865, and that he has continued in possession of the same ever since, and was in possession at the time of the filing of this bill. That complainant had instituted proceedings to have said trust foreclosed, and that the said proceedings were, at the time of the filing of this bill, pending upon appeal in this court. The complainant claims that he is entitled to the rents and profits of the land after the expiration of the time fixed in said deed, one year from the date thereof, when authority was given him by the deed to sell the land. The defendant admits the execution of the deed, admits his continued possession as charged, but denies that the complainant is entitled to the rents and profits of the land as claimed.

The deed is exhibited with the bill, and is in the ordinary form of a conveyance in trust for creditors, with authority in the trustee to sell at the expiration of one year, if the debts be not paid. The deed has no stipulation whatever in regard to the rents and profits, and contains no waiver of the right of redemption in the event of a sale by the trustee. It seems that pending this litigation in the court below, the case of Swanson & Gray *v.* Tarkington et al, was decided in this court. This case is reported, 7 Heisk., 612. The bill in that case was filed by the complainants, who are the postponed creditors in the deed, against the trustee, the maker of the deed, and certain preferred creditors, to enjoin the sale for the benefit of said preferred creditors, on the ground that their debts were not valid debts against the defendant Tarkington; and to have the land subjected to the payment of the debts of complainant. This relief was denied them. But the question of rents and profits was not involved in that litigation, and the opinion of this court makes no reference whatever to that question.

But in the preparation of the decree of this court in that case, after the questions really at issue were disposed of these words were included in the decree that "the deed conveyed a good title to the land, to the trustee Easley, and the right on the part of said Easley to the possession and the rents and profits thereof from the 12th day of July, 1866." This decree was entered about the 28th Feb., 1872, and the complainant in the present bill thereupon took a transcript of said decree and opinion, and produced the same in the court below and upon its authority insisted that the question of rents and profits involved in this case was adjudicated in that.

SUPREME COURT OF NEW HAMPSHIRE.

TO APPEAR IN LVI. NEW HAMPSHIRE.

Bennett v. Danville.

WHEN A COURT OF CHANCERY WILL ORDER TREES TO BE CUT AND LAND TO BE CLEARED.

CUSHING, C. J. From the cases of Delapole *v.* Delapole, 17 Ves., 150; Bewick *v.* Whitfield, 3 P. Wms., 267; Tooker *v.* Annesley, 5 Sim., 235; Hussey *v.* Hussey, 5 Mad., 44, cited in Tooker *v.* Annesley, and Waldo *v.* Waldo, 7 Sim., 261, I infer that it is an ordinary exercise of the powers of a court of chancery to order timber trees to be cut. The vice-chancellor, Sir Launcelot Shadwell, in Tooker *v.* Annesley, said, "I apprehend that the principle upon which the court acts in directing timber to be cut, in cases like the present, is not the personal benefit of the parties, but the benefit of the estate itself—the inheritance."

In this country, where it so often occurs that it is necessary to cut off the wood and timber in order to make the land fit for cultivation, it may be that the inquiry before the master would take a somewhat wider range than in the English practice. In Chase *v.* Hazelton, 7 N. H., 171, it was held that clearing land, which the jury finds to be bad husbandry, is waste; from which I infer that by the law of New Hampshire the clearing of land may be necessary as a part of good husbandry, and for the benefit of the inheritance.

The matter should be referred to a master to report whether any of the trees, either from their situation in regard to other trees, or from their being decayed, ought, for the benefit of the estate, to be cut. I think, also, that it would be within the spirit of the cases to extend the inquiry in this country to the point, whether, for the sake of fitting the land for cultivation, the benefit of the estate requires it to be cut.

If it should turn out that, on the report of the master, there should be an order by which any of the land should be cleared or any of the timber sold, it will then be time enough to consider

what shall be done with the money ob tained from the sale.

LADD, J., and FOSTER, C. J., C. C., concurred.

LVI. NEW HAMPSHIRE REPORTS.

We are indebted to JOHN M. SHIRLEY, official Reporter, for advance sheets of the LVI. Volume of his Reports, from which we take the following head-notes:

DIVORCE—SIGNING OF LIBEL.

Daniels v. Daniels.—p. 219.

If a libel for divorce is not actually signed by the libellant, the signature must be written in her presence and by her direction, in order to answer the requirements of the statute.

QUO WARRANTO—IRREGULARITY IN ELECTIONS—ACQUIESCENCE.

Cate v. Furber.—p. 224.

Upon a petition for a writ of *quo warranto*, to inquire by what right a person holds the office of prudential committee of a school district, the writ will be denied when it appears that the petitionee was elected without objection, upon the mistaken understanding of the voters that there had been no election upon a prior balloting, although it turns out that in fact another person was elected, who, at the same meeting, being ignorant of his election, disqualified himself from holding the office by accepting another incompatible therewith, and that all the voters acquiesced therein.

EVIDENCE—OPINIONS OF NON PROFESSIONAL WITNESSES — INSANITY — PRACTICE — RIGHT TO OPEN AND CLOSE.

Hardy v. Merrill.—p. 227.

Non-professional witnesses, who are not subscribing witnesses to a will, may testify to their opinions in regard to the sanity of the testator, when founded upon their knowledge and observation of the testator's appearance and conduct. Boardman *v.* Woodman, 47 N. H., 120; State *v.* Pike, 49 N. H., 399, and State *v.* Archer, 54 N. H., 468, upon this point, overruled.

The party who affirms that a will was duly and legally executed, has the burden of proof, and the accompanying duty of opening, and the right to close, no matter in what form the issues for trial may be drawn.

UNITED STATES CIRCUIT COURT, N. D. OF GEORGIA.

In re SMITH,

Before Hon. W. B. WOODS, Circuit Judge,

CONSTITUTIONAL LAW — AMENDATORY BANKRUPT ACT OF 1873—EXEMPTIONS.

1. ACT OF 1873 CONSTITUTIONAL.—The amendatory bankrupt act of 1873, (17 Stat., 577), which enacts "that the exemptions allowed the bankrupt, etc.," shall be the amount allowed by the Constitution and laws of each State, respectively, as existing in the year 1871; and that such exemptions be valid against debts contracted before the adoption and passage of such State Constitution and laws, as well as those contracted after the same, and against liens by judgment or decree of any State court, any decision of any such court rendered since the adoption and passage of such Constitution and laws to the contrary notwithstanding," is *uniform* and hence constitutional.

Argument 1. A bankrupt law which adopts the exemption from execution prescribed by the laws of the several States, is uniform so far as such exemptions are concerned. The exemptions may differ widely in different States, but still the rule is uniform, namely, to subject to the payment of the bankrupt's debts all his property not exempted by the law of the State wherein he resides.

Argument 2. Congress may adopt the State laws at a particular date, in reference to exemptions, and the legislation is uniform, although the laws in some of the States may afterwards be repealed by the legislature, or declared null by the courts.

2. PRESUMPTION IN FAVOR OF CONSTITUTIONALITY.—In passing upon the constitutionality of an act of Congress, all the presumptions are in favor of the law, and the courts will not pronounce a law unconstitutional, unless its incompatibility be clear, decided and inevitable.

PEEPLES & HOWELLS, for petitioner.
BOYNTON & DESMUKE, *contra.*

WOODS, Circuit Judge.—This is a petition filed to reverse a decree of the district court in bankruptcy.

The facts of the case appear from the pleadings and evidence to be as follows: John W. A. Smith was adjudged a bankrupt by the District court in the Northern District of Georgia, on the 3d day of June, A. D. 1873. At the date of the adjudication the petitioner was the judgment-creditor of the bankrupt in the sum of $———. The judgment bore date prior to the 21st day of July, 1868, when the present constitution of Georgia went into effect, and was a lien upon the real estate of the bankrupt.

By an act passed prior to and in force in 1864, and in force when the debt due to petitioner was contracted, and which remained in force until the adoption of the constitution of 1868, there was allowed to the head of a family, as a homestead, exempt from execution, fifty acres of land for each of his children under sixteen years of age.

By the constitution of 1868, and by an act of the legislature, passed Oct. 3d, 1868, to carry the constitutional provision into effect, there was allowed to the head of a family a homestead of realty, exempt from execution, of the value of $2,000 (in specie).

The judgment of the petitioner against the bankrupt was duly proven and allowed as a debt against his estate prior to the 30th of June, 1874. On that day, the assignee in bankruptcy set off to the bankrupt his homestead, according to the provisions of the act of 1864, namely: ninety acres of land, that being fifty acres and five acres in addition thereto for each child of the bankrupt under sixteen years of age. The bankrupt claimed that he was entitled to have assigned to him the homestead allowed by the constitution of 1868, and the act of Oct. 3d, 1868, to wit: realty to the value of $2,000 (in specie). He therefore filed with the register his objections to the assignment made by the assignee. The register referred the question thus raised with his opinion thereon, sustaining the objections of the bankrupt against the assignment, to the district judge, who also sustained the objections of the bankrupt, and held that he was entitled to have his homestead set off, under the provisions of the act of Oct. 3d, 1868, notwithstanding the fact that the debt of the objecting creditor was contracted and the judgment therefor, a lien upon the realty of the bankrupt, before the change in the homestead law.

To review and reverse this decree of the District judge, is the purpose of the petition.

The case turns upon the constitutionality of the act of Congress approved March 3, 1873, entitled "An act to declare the true intent and meaning of the act approved June 8, 1872, amendatory of the general bankrupt law. 17 Statute, 577, Rev. Statute, sec. 5045. This statute enacts, "that the exemptions allowed the bankrupt * * * shall be the amount allowed by the constitution and laws of each State, respectively, as existing in the year 1871, and that such exemptions be valid against debts contracted before the adoption and passage of such State constitution and laws, as well as those contracted after the same, and against liens by judgment or decree of any State court, any decision of any such court rendered since the adoption and passage of such constitution and laws to the contrary notwithstanding."

To put the question clearly in view, it must be stated that after the adoption of the constitution of 1868, and the passage of the act of Oct. 3, 1868, to carry the exemptions provided for by the constitution into effect, the Supreme court of Georgia at its January term, 1873, in the case of Jones *v.* Brandon, 48 Ga., 593, decided that the provisions of the constitution and of the law, as far as they increased the exemption of property from execution, as against debts contracted before their adoption, was in conflict with that provision of the constitution of the United States which declares "No State shall * * pass * * any law impairing the obligation of contracts (Constitution of the U. S., Art. 1, Sec. 10,) and were, therefore, null and void. The same decision had, in effect, been previously made by the Supreme court of the United States in the case of Gunn *v.* Barry, 15 Wallace, 610. It follows from this state of the law, as declared by the courts, that when the assignee undertook to set off the homestead of the bankrupt on the 30th of June, 1873, he was not authorized to set apart, as against Whitefield's Adm'r, any greater amount of realty than was authorized by the act of 1864, except as he derived his authority from the act of Congress of March 3, 1873, above cited. In other words, there was no valid and operative State law by which the bankrupt could claim that he was entitled to a homestead of the value of $2,000 (in specie) as prescribed by the constitution and law of 1868.

The question, therefore, whether the act of Congress, March 3, 1873, is constitutional, is vital to the decision of this case.

The objection to this act is not that it impairs the obligation of contracts, for Congress is not prohibited by the constitution from passing such a law. Evans *v.* Eaton, Peters C. C. 328; Sallerbe *v.* Matthewson, 2 Peters, 330; Bloomer *v.* Stalley, 5 McLean, 158. Besides the power expressly given to Congress "to establish uniform laws on the subject of bankruptcies throughout the United States," implies the power to impair the obligation of contracts. Stephens *v* Griswold, Wall. 603; The Legal Tender Cases, 12 Wall. 457.

The ground of objection is that the law is not uniform as required by the constitution of the United States. In my judgment, a bankrupt law which adopts the exemption from execution prescribed by the laws of the several states is uniform so far as such exemptions are concerned. The exemptions may differ widely in different states, but such an act would apply a uniform rule, namely, to subject to the payment of the bankrupt's debts all his property not exempted by the laws of the state wherein he resided. Upon this ground the original provision of the bankrupt, which adopted the state exemption laws in force in 1864, was declared to be uniform. *In re* Beckerford, 1 Dillon, 45.

But it is said that the act of 1873 does not adopt the exemption laws as they exist in the states, but gives effect to all those which were upon the statute books of the states in 1871, even though some of them may have been declared unconstitutional, invalid and inoperative by the state courts; that the operation of the act of Congress is therefore not uniform, because in some states the exemption allowed by the state laws is followed, while in others exemptions are permitted which the state laws, as interpreted by the courts, do not allow.

The same objection would apply to the original bankrupt act of 1867. That declared that the exemptions allowed by the state laws in force in 1864 should be allowed under the bankrupt act. The constitutionality of this provision has never been declared, and yet, before the 3d of March, 1867, the date of the bankrupt act, many of the states might have altered, amended or repealed the exemption laws which were in force in 1864. Doubtless many of them did so before the passage of the act of 1873. Yet the bankrupt act of 1867 undertook to give effect, not to the exemption laws as they existed at its passage, and as they might be thereafter altered or amended, but as they existed in 1864. So, if the original act was uniform, the amendment of 1873 must be uniform.

Congress has undertaken to say tha, all exemptions in force at a certain date by laws of the state, shall have effect under the bankrupt act. I think this sufficiently meets the requirement of uniformity, and that, to make the law uniform it was not necessary to enact that the bankrupt act should follow the shifting legislation of the states on the subject of exemptions, or the decisions of the state courts.

Thus the bankrupt act of 1867 continued the exemptions that were in force in Georgia in 1864, although those exemptions had been repealed and new ones established by the act of October 3, 1868.

Suppose the bankrupt act of 1867 had declared that all exemptions by the state law in force at the date of its passage should have effect under the bankrupt act. That would clearly be a uniform enactment. Would it cease to be such and become unconstitutional merely because the legislature of a state had, at a subsequent time, amended its exemption laws, or the courts of another state had declared its exemption laws unconstitutional? I think it would not. In other words, I think Congress may adopt the state laws on the statute books of the state, at a particular date, in reference to exemptions, and that the legislation is uniform, although the laws in some of the states may afterwards be repealed by the legislature or declared null by the courts.

I am advised that a different view of the subject has been taken by the United States Circuit Court for the Eastern District of Virginia, *in re* Deckert 1 American Law Times and Reports, 326, in which case the chief justice of the supreme court pronounced the opinion. But, in passing upon the constitutionality of an act of Congress, all the presumptions are in favor of the law. While, therefore, disposed to yield great weight to this high authority, I cannot forget that in the opinion of the Congress of the United States this law is constitutional, and that the highest judicial authority has said that the courts ought not to pronounce a law unconstitutional unless its incompatibility be clear, decided and inevitable. Fletcher *v* Peck, 6 Cranch, 87; Dartmouth College *v.* Woodward, 4 Wheat. 625; Livingston *v.* Morse, 7 Peters, 663.

While I admit that the argument against the constitutionality of this act is plausible and persuasive. yet I cannot say that it is entirely convincing; it does not make the unconstitutionality of the act clear, decided and inevitable.

Resolving doubts, therefore, in favor of the law, I must decline to declare it unconstitutional, and I must affirm the decree of the district court.—*The Central Law Journal.*

OUR thanks are due JOHN CONOVER, of the law firm of Conover & Hirklin, of Galatin, Missouri, for the following opinion:

SUPREME COURT OF MISSOURI.

MAY TERM, 1876.

ELIZABETH L. SWEANY et al. *v.* J. H. MALORY et al.

Appeal from Clinton Circuit Court.

ADMINISTRATOR'S SALE—WIDOW'S DOWER—WHEN SHE WILL BE ESTOPPED FROM CLAIMING DOWER.

1. WHEN WIDOW ESTOPPED.—That if the dower is guilty of fraudulent practices, in inducing the purchaser to take the estate under a belief that she waives her right to dower, she will be estopped from afterwards setting up her claims.

2. WHEN WIDOW PRESENT AT SALE AND ASSENTING.—That, where the administrator put up the real estate of the deceased for sale, representing that it was free from incumbrance, and that he would make a perfect title, and the widow of the deceased was present and assented to it, and stated that it would be sold free from her claim of dower, and the purchaser bought on such representations; *held*, under the facts in evidence, that the widow was estopped from afterwards claiming dower in the premises so sold.—[ED. LEGAL NEWS.]

Opinion by WAGNER J.

This was a suit brought by plaintiff formerly widow of George Mallory, deceased, for the assignment of dower in the real estate of which her late husband died seized and possessed.

The defendants in their answer alleged that in his lifetime George Mallory mortgaged the land (in which mortgage plaintiff Elizabeth joined, relinquishing her right of dower) to secure the payment of a debt of one thousand dollars, and died leaving the debt unpaid; that the holder of the debt and mortgage obtained a judgment thereon in the Circuit Court against George Mallory's Administrator for the sum of about thirteen hundred dollars, and foreclosing the equity of redemption to the said lands. Afterwards the Administrator obtained an order from the Probate Court for the sale of the real estate, and in pursuance of that order he exposed the same for sale to the highest bidder; that the administrator caused the absolute title to be sold, including the dower of the plaintiff, who was present at the sale and assented to the same, and admitted that the sale was absolute and free from her claim of dower, and that the purchaser would acquire an absolute title free from any claim of dower on her part; that one of the defendants, Ray, relying on the assent and admissions of the plaintiff, was induced to purchase the said real estate in good faith and for full value, at the price of one thousand seven hundred and eighty-two dollars and fifty cents, and that he received a deed for the same; that out of the purchase money the amount due on the mortgage and judgment was paid, and that defendant went into possession of the lands and made valuable and lasting improvements on them, for which reasons the plaintiff should be estopped from claiming dower in the premises.

The answer further claimed that defendant was entitled to be subrogated to all the rights of the mortgagee.

All the above recited and foregoing parts of the answer were stricken out as constituting no defense, and the defendant excepted.

The Court then proceeded and had dower assigned.

In the case of Jones *v.* Bragg, 33, Mo. 337, it was held that the doctrine of subrogation was not applicable to a case like that.

The only question then presented for our consideration is whether the matters

alleged in the answer constitute an estoppel.

In his treatise on dower, Mr. Scribner says: "It is a point upon which the authorities are generally agreed, that if the doweress is guilty of fraudulent practices in inducing the purchaser to take the estate under a belief that she waives her right to dower, she will be estopped from afterwards setting up her claims. (2 Scrib. on Dower, p. 251.)

Numerous cases are referred to by the author, which support the doctrine laid down in the text.

In Doughey *v.* Topping (4 Paige, 94), where real estate of a decedent was sold by an administrator and administratrix, under a surrogate's order, in which estate the administratrix was entitled to dower, and in the terms of sale it was stated that a clear and satisfactory title would be given, and the purchaser paid the full value of the premises, under a belief that he was obtaining a perfect title, it was held that the silence of the administratrix as to her claim of dower, was such a fraud upon the purchaser as to preclude her from afterwards setting up such claim against him or his assigns. In determining the case, the Chancellor remarked as follows: "As the administratrix joined in the report of the sale to the surrogate, she must have been present at the sale, either personally or by her agent, and must have seen the written terms of the sale in which it was stated that the purchaser was to have a clear and satisfactory title. It was the brewery, and the lot on which it stood, and not merely the decedent's interest therein, for which a clear and satisfactory title was to be given to the purchaser, and that necessarily excluded the idea that the purchaser was to take the property encumbered with a right of dower, which had then become vested by the death of the husband. It, therefore, seems to be impossible that any of the parties could have supposed the purchaser was to take the property at its full value, and yet that the claim of dower was not to be relinquished. As the defendant must have known that Vassar was paying his money under a supposition that he was getting a perfect title, if Mrs. Topping did not intend to part with her dower, conscience required her to speak, and silence under such circumstances, was such a fraud upon the purchaser as to prevent her from afterwards making her claim for dower in the premises."

In Snurley *v.* Wright, 2 Ohio, 506, a widow was present at a sale of her husband's lands by his administrator, and consented that the sale might be made free from her claim of dower. The purchaser relying upon this promise, bid off the property at a much larger sum than he would otherwise have paid. A bill for dower afterwards brought by the widow was dismissed. The court, in disposing of the case, said: "It is a well-established principle in equity, that if a person having a right to an estate, permit or encourage a purchaser to buy it of another, the purchaser shall hold it against the person who has the right, and the rule prevails even against *feme coverts* and persons under age. It is contended on the part of the complainants, that the acts and declarations of Mrs. Smiley, at the time of the sale of the lots in question, ought not to bar her of the aid of a court of equity, because she was at that time ignorant of her rights; nor can they be considered as a fraud upon the purchaser, as he had notice of her title. It is unnecessary to consider whether a person having legal title to lands, who encourages the sale by another, shall be permitted to show his ignorance of that title to the prejudice of a *bona fide* purchaser for a valuable consideration. As we are clearly of the opinion that the evidence does not prove Mrs. Smiley's ignorance of her rights at the time of the sale by the administrator * * * If she had not, in fact, relinquished her right of dower, her standing by, permitting the property to be sold free of dower, without asserting her claim, was calculated to deceive and defraud the purchaser, and did induce him to pay a much larger sum for the property than he would otherwise have given. He believed that she had relinquished her dower, and acted upon this belief. To permit her to assert her title to dower against a *bona fide* purchaser for a valuable consideration, who was induced by her to purchase, because she has never executed any formal act of assignment or release of her dower, would be to aid her in the commission of fraud."

So in Ellis *v.* Dedy (1 Cart. Ind. 561) which was a proceeding for dower, the defendant pleaded in bar, that the guardian of the heirs of the deceased husband obtained an order for the sale of the lands in which dower was claimed; that the widow was present in Court and concurred in the application for the order; and that the premises were sold to the defendant, the widow receiving a portion of the purchase money in payment of her rights of dower. He further averred that the widow was present at the sale and heard the Commissioners represent that the purchaser would receive a title free from all claims, and concurred therein, and gave no notice of any claim upon the estate. It was held if the matters so alleged were true, the petitioner was estopped from asserting a right of dower.

Many more cases might be cited to the same effect, but is unnecessary.

Now, the allegations in the answer are, that the administrator put up the real estate for sale, representing that it was free from incumbrance and that he would make a perfect title; that the plaintiff was present and assented to it, and stated that it would be sold free from her claim of dower, and that, relying upon the representations of the administrator, and the assent and declarations of the plaintiff, defendant purchased and paid full value for the premises. If these averments are true, they will undoubtedly stop the plaintiff from prosecuting the claim. She was at the time a *feme sole* laboring under no disability; and to permit her to recover in the face of these facts would be enabling her to perpetrate fraud upon the purchaser. The Court erred in striking out the answer, and the judgment will be reversed and the cause remanded.

All the judges concurring except Judge Vories, who is absent.

DAVID WAGNER.

SUPREME COURT OF MICHIGAN.

APRIL TERM, 1876.

Abstract of opinions from the *Michigan Lawyer*.

WILLS—HANDWRITING—FORGERY—PHOTOGRAPHIC COPIES—EVIDENCE—COMPARISON OF WRITING—PAPERS NOT IN THE CAUSE—SIGNATURES—OPINIONS—JURORS—EXPERTS.

In the matter of the will of *Alfred Foster*. Error to Oakland Circuit.

A. C. BALDWIN for contestants.
M. E. CROFOOT for proponents.
Opinion by CAMPBELL, J.

The proponents of the will proved its execution by the two subscribing witnesses, whose testimony was direct and positive to all the requisites of a valid will. The contestants proposed to furnish the jury with photographic copies of the will, but the court declined to permit it. A witness named Toms was called to testify concerning Foster's handwriting, and having produced a note and mortgage which he asserted to have been signed by Foster, the court refused upon application to allow these papers to be used before the jury for purposes of comparison. Permission to have the jury take the original will to their room to compare its body with the signature was refused, no application having been made by the jury, and the opposite counsel declining to assent unless the jury desired to see it.

Held, 1. That if the photographic copies had been given to the jury, with proper precautions as to their identity and correctness, it might not perhaps have been error; yet it is not always true that every photographic copy would be safe on any inquiry requiring minute accuracy, or that all photographs are absolutely faithful resemblances, since it is quite possible to tamper with them, and an impression which is at all blurred would be very apt to mislead on questions of handwriting where forgery is claimed; but that whether or not it is permissible to allow such documents to be used, their use can never be compulsory; that the original and not the copy is what the jury must act upon, and no devise can be properly allowed to supersede it.

Held, 2. That the refusal to require the jury to take the original will to their room when they had not desired it was not contrary to law or practice; that the purpose avowed in this cause of having the jury use the document to look for resemblances between the body and the signature and thereby to infer forgery, indicates some danger in permitting it, since it would involve a jury room inquest upon facts that should only be determined on evidence given in open court, and would in effect allow the suspicions and surmises of men who, in many instances, would be incompetent to give their opinions as witnesses upon the subject, to fix the rights of parties by their fanciful notions of resemblances or differences; that while juries can and undoubtedly must use their judgments more or less concerning documents laid before them, yet the law presumes they will act on testimony chiefly, if not entirely; and that when the genuineness of the documents is involved, opinions gathered by inspection and comparison by the jury stand much in the same light as would their statements to each other of ordinary facts of which they had personal knowledge relative to the issue before them.

Held, 3. That while opinions of experts are necessarily received and may be valuable, yet this kind of testimony is at best but a necessary evil, and that every degree of removal from personal knowledge, in the case of signatures or handwriting, into the domain of what is sometimes called with great liberality scientific opinion, is a step towards greater uncertainty, and the science which is so generally diffused is of very moderate value; that when subjected to cross-examination it may be reduced to the minimum of danger, but in a jury room, without any check or correction, it would be very dangerous indeed.

Held, 4. That the question of allowing papers not otherwise in the case to be received and proved for purposes of comparison was disposed of in this State in Vinton *v.* Peck, 14 Mich., 287, where it was held that testimony of handwriting might be based on papers in the cause, but that when to the danger of hasty and perhaps biased opinions is added the disputed genuineness of papers produced and the difficulty of producing all that might be of use for comparison on both sides, the risk is too great to justify the reception of such means of proof; and that the fact that an English statute has allowed the reception of documents satisfactory to the court, does not satisfy this court that their former judgment was erroneous or that a change would be desirable.

Judgment affirmed, with costs.

ENGLISH COURT OF QUEEN'S BENCH.

THURSDAY, FEB. 17, 1876.

(Before BLACKBURN and LUSH, JJ.)

RANDALL *v.* NEWSON.

NEGLIGENCE—MANUFACTURER'S LIABILITY—MEASURE OF OBLIGATION AS TO SOUNDNESS OF GOODS SUPPLIED—LATENT DEFECT.

A manufacturer is bound to use reasonable skill and care in supplying any article, to ascertain that that article is fit for the purpose for which it has been made, but he is not bound to supply an article that shall be absolutely fit for such use; and, therefore he is not responsible for any damage arising from a latent defect.

This action was brought by the plaintiff to recover damages from the defendant for having supplied a pole for a phaeton carelessly and negligently, and made of such bad and improper wood, that by reason of that it broke, and the plaintiff's horses ran away and sustained very serious injury.

The plaintiff is a solicitor practising in, London, and the defendant is a carriage manufacturer carrying on business at 30 New Bond street. It appeared that in the month of August, 1874, the defendant sold to plaintiff a Stanhope phaeton for a pair of horses. The carriage was used twice or thrice a week up to 16th Oct., 1875, on which day the plaintiff was driving to Wimbledon. The horses were driven at the rate of about six miles an hour. While driving along the level road the near horse started or stopped suddenly at a puddle of water upon which the sun was shining brightly at the time. When he pulled up short the pole immediately broke, and the carriage came against him, whereupon he kicked and plunged in such a way as to injure both himself and the other horse; the carriage was also considerably damaged.

At the trial which took place at Westminster before Archibald, J., and a special jury, a great amount of scientific evidence was given as to the quality of the pole, and also as to the nature of the wood of which it was made. Finally, the questions put to the jury were as follows:

1. Was the pole reasonably fit and proper for the use of the carriage? Answer: We are of opinion it was not.

2. Was there any negligence on the part of the defendant in supplying the pole? Answer: No.

3. What is the amount of the damages? Answer: £3 (the price of a new pole).

Upon these findings, Sills (with him Cave, Q. C.) moved to have the verdict entered for the defendant.

Gates, Q. C. and Pollock, contra.—This case is a totally different one from Readhead *v.* The Midland Railway Company (16 L. T. Rep. N. S. 485; 36 L. J. 181, Q. B.; L. Rep. 2 Q. B. 412). The object there was to put carriers of passengers on the same footing as carriers of goods. Railway companies are on a different footing to manufacturers, for the latter impliedly warrants that the article he supplies, is in fact, absolutely good. The question of latent defect was not raised at the trial, but the defense was that the accident arose from the conduct of the horses, and not from any defect at all in the pole. That there is an obligation on the part of a manufacturer to supply a thing fit for the use for which it is intended is determined by Jones *v.* Bright (5 Bing., 533), and by Brown *v.* Edington (2 M. & G. 279). In giving judgment in the case of Jones *v.* Just (18 L. T. Rep. N. S. 208; Law Rep. 3 Q. B. 107; 37 L. J. 89, Q. B.), Mellor, J., says, cases which bear upon the subject do not appear to be in conflict, and he goes on to divide them into five classes. In the fourth class, he says, "arise cases, where a manufacturer or a dealer contracts to supply an article which he manufactures, or produces, to be applied to a particular purpose, so that the buyer necessarily trusts to the judgment or skill of the manufacturer or dealer; there is in that case an implied term or warranty that it shall be reasonably fit for the purpose to which it is to be applied." Again, in the Civil Code of New York, sect. 883, there is the rule that a maker of an article is liable for any latent defect produced in its manufacture. Upon all these authorities the defendant must be held liable in this case.

Sills was not called upon to reply.

BLACKBURN, J.—Since Readhead *v.* The Midland Railway Company (*ubi sup.*) has been decided as it has been, judgment in this case, in my opinion, ought to be for the defendant. There is an obligation on a person who supplies goods to another that the articles should be reasonably fit for the purpose for which it is intended, and this rule applies equally to the person who supplies it, whether he be manufacturer or not. Before that decision I was of a different opinion. I thought that the article supplied should be sufficient for the purpose in fact, and that the policy of the law imposed upon the person who supplied the article an absolute duty to supply a sufficient one, and I thought the cases supported that view. But now, by the decision in the above mentioned case, both in this court and in the Exchequer Chamber, all due and proper care is all that is now required. It has been argued that in this case there was no suggestion of a latent defect—if you mean that there was no hole or anything of that kind—there was no evidence; but if the pole broke from no perceptible defect, then it must have broken from some latent defect that could not have been discovered by reasonable skill and care. I find that the attention of the jury was very distinctly drawn to that, and they find that it was latent, so that it could not be discovered by reasonable care and skill. Judgment must be entered for the defendant.

LUSH, J., concurred.—No doubt what the jury intended to find was that the wood was not fit for making into a pole, and, in the second place, no one could find out that it was unfit until the pole broke, and that, in my opinion, brings the case within the decision in Readhead *v.* The Midland Railway Company (*ubi sup.*)

Solicitors for plaintiff, Brundrett, Randall, and Govett.

Solicitor for defendant, Fredk. Taylor.

CHICAGO LEGAL NEWS.

Lex vincit.

MYRA BRADWELL, Editor.

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We call attention to the following opinions, reported at length in this issue:

WRIT OF ERROR TO STATE COURT—FEDERAL QUESTION.—The opinion of the Supreme Court of the United States, by Waite, C. J., as to when a writ of error lies from the United States Supreme Court to a State Court, what is to be regarded as a Federal question within the meaning of the United States statute, and what is to be considered the judgment of the highest court of a State.

BANKRUPTCY—SALE OF PERSONAL PROPERTY—SUPERSEDEAS.—The brief note to a decision of Judge Davis, Associate Justice of the United States Supreme Court, upon granting a supersedeas in a case in bankruptcy to remove it for review from the Circuit to the United States Supreme Court.

U. S. LAND REGISTER—FEES—EXTORTION.—The charge of Judge Hillyer, of the United States District Court for Nevada, as to the duties of a United States Land Register, what fees he may charge, when he will be guilty of extortion, and holding that he cannot act as attorney in matters before himself. This charge states the correct doctrine. Officers should perform their duties for the fees given by statute. The law does not allow them to make their own schedules of fees. There is a tendency in officers, at the present day to charge for some service in matters before them which they claim is not official service. This is only an indirect way of trying to make extortion in office respectable.

ACTION AGAINST CITY—FREEZING OF WATER MAINS—DAMAGES.—The opinion of the Supreme Court of Pennsylvania, in action against the city of Philadelphia to recover damages for the loss of water, caused by the bursting of the pipes leading to the plaintiff's house, from the action of the frost.

SEIZURE OF DISTILLER'S BOOKS—EVIDENCE.—The opinion of the United States Circuit court for the Eastern district of Virginia, by WAITE, C. J., holding that the seizure by the order of an executive officer of the government, of the books kept by a distiller, in obedience to the requirements of the statute, does not exclude them from use as evidence under the provisions of section 860 of the Revised Statutes, concerning private book and papers.

TRUST DEED—RENTS AND PROFITS.—The opinion of the Supreme Court of Tennessee, by SNEED, J., holding that where a trust deed makes no stipulation in regard to the rents and profits, and contains no waiver of the right of redemption in the event of sale by the trustee, and the maker remains in possession; he and not the trustee is entitled to the rents and profits until foreclosure.

ORDERING TREES TO BE CUT.—The opinion of the Supreme Court of New Hampshire by CUSHING, C. J., stating under what circumstances a court of chancery will order trees to be cut and land to be cleared.

AMENDMENT TO BANKRUPT LAW OF 1873—The opinion of the United States Circuit Court, Northern District of Georgia, by DODGE, J., construing the amendment to the bankrupt act of 1873.

DOWER,—WHEN WIDOW WILL BE ESTOPPED FROM CLAIMING.—The opinion of the Supreme Court of Missouri by WAGNER, J., holding that when a widow, who is present at an administrator's sale of her husband's real estate, and hears the administrator represent that the land will be sold and that there is no incumberance on it, and assents to it, that she will be estopped from afterwards asserting her claim for dower in the real estate so sold.

NEGLIGENCE—MANUFACTURER'S LIABILITY.—The opinion of the English Court of Queen's Bench Division, as to the liability of a manufacturer for damages arising from a latent defect in an article made by him.

NOTES TO RECENT CASES.

BANKRUPTCY—ASSIGNMENT OF ALL DEBTOR'S PROPERTY.

The English Court of Appeal, in *ex parte* King, 34 L. T. Rep. N. S., 466, held where a debtor assigns all his property to a creditor to secure a past debt as well as a fresh advance, the fresh advance, if a substantial one, prevents the assignment from being an act of bankruptcy, just as effectually as the omission of a substantial part of the debtor's property from the assignment would do; that it depends upon the circumstances of each case whether the advance is substantial or not.

APPOINTMENT OF RECEIVER ON GIVING SECURITY—EXECUTION CREDITOR.

The English Court of Appeal, in Edwards *v.* Edwards, 34 L. T. Rep. N. S., 472, held, where on a motion for a receiver an order is made that a person named in the order, upon his giving security, be appointed receiver, the appointment takes effect only from the date of the chief clerk's certificate that the security is perfected. Therefore where, after such an order, and before the receiver so appointed had perfected his security, an execution creditor who had not received notice of the appointment, put the sheriff in possession of the goods over which the receiver was appointed: *Held*, reversing the judgment of Malins, V. C., that the execution creditor was entitled to the goods.

REMOVAL TO U. S. COURT—RE-HEARING IN STATE COURT.

The Supreme Court of Iowa, in McKinley *v.* Chicago & N. W. R. R. Co., 10 Western Jurist, 343, held, where a judgment has been reversed in the Supreme Court of the State, the cause remanded, and a *procedendo* therefor duly issued and filed in the State court, and the cause had been removed under the act of 1875 to the United States Circuit Court, and thereafter, and within the sixty days allowed therefor, a petition for a re-hearing was filed in the Supreme Court: *Held*, that the cause was still pending in the Supreme Court, and a motion to dismiss the petition for a re-hearing should be overruled.

PROFESSIONAL MANNERS.—We have frequently remarked in these columns, "that if Judges did their duty, there would never be an ill-mannered bar." It is a fact, that the keeping of the manners of the bar is with the Judges. When lawyers so far forget their duty to the Court and their clients, as to leave their case and abuse each other in court, they should at once be made to feel the power of the court in a mild but firm manner. We are glad to note the fact that Judge MCADAM, of the Marine Court in New York, recently administered a merited rebuke to two legal functionaries who were contesting a case before him. The Judge's attention was called to a document left for his signature, when the words "shyster," "pettifogger," and "fraud," reached his ears in the excited tones of the pleaders, who forgot the respect due to the court and to each other. The gavil of the Judge coming down heavily, called them to order, and the Judge in a determined manner said:—"If members of the learned profession of the law are to be permitted in a court of justice to call each other "shyters," "pettifoggers," and such like opprobrious terms without rebuke from the court, it may probably lead to the suspicion that such ungentlemanly, unprofessional and undignified conduct meets its approbation. To effectually remove all such suspicions, I wish it to be understood for all time hereafter, that any member of the bar so far forgetting his manners as to indulge in such impropriety, will be disciplined by the court, not only by fine but by imprisonment. This court can be enlightened only by legal argument made with deliberation and judgment, and lawyers unable to furnish such aid to the court had better employ others who can. The court will take into consideration the nature and amount of the punishment to be imposed, and will see that its order is literally enforced."

Recent Publications.

REPORTS OF CASES AT LAW AND IN CHANCERY ARGUED AND DETERMINED IN THE SUPREME COURT OF ILLINOIS, by Norman L. Freeman, Reporter. Volume LXIX. Containing additional cases submitted at the September term, 1873. Printed for the *Reporter*, Springfield, 1876.

This volume is in the usual style of the series. It contains 135 cases, of these 75 are affirmed, and 60 reversed. There are no *per curiam* opinions or cases of original jurisdiction in the volume. In 7 cases there are dissenting opinions. The opinions delivered by Chief Justice Breese affirm the judgments below in 12, and reverse them in 9 cases. Those delivered by Walker, J., affirm them in 11, and reverse them in 5 cases. Those delivered by McAllister, J., affirm them in 7, and reverse them in 9 cases. Those delivered by Scholfield, J., reverse them in 10, and affirm them in 10 cases. Those delivered by Scott, J., affirm them in 12, and reverse them in 8 cases. Those delivered by Sheldon, J., affirm them in 10, and reverse them in 12 cases. Those delivered by Craig, J., affirm them in 12, and reverse them in 9 cases. We give the names of the judges who tried the cases in the courts below, and how they were disposed of in the Supreme Court: E. S. Leland, 7 affirmed, 3 reversed; Joseph E. Gary, 10 affirmed, 7 reversed; Josiah McRoberts, 4 affirmed, 4 reversed; Wm. A. Porter, 8 affirmed, 3 reversed; T. D. Murphy, 3 affirmed, 2 reversed; Lambert Tree, 5 affirmed, 5 reversed; E. S. Williams, 3 affirmed, 1 reversed; Henry Booth, 4 affirmed, 3 reversed; Peoria Circuit Court, 1 affirmed; C. B. Lawrence, 1 affirmed; W. W. Farwell, 4 affirmed; W. W. Heaton, 1 affirmed, 5 reversed; S. L. Richmond, 2 affirmed; S. Wilcox, 1 affirmed, 4 reversed; John G. Rogers, 4 affirmed, 3 reversed; Cook Circuit, 2 reversed; A. A. Smith, 6 affirmed, 6 reversed; C. H. Wood, 5 affirmed, 3 reversed; R. G. Montony, 1 reversed; S. D. Puterbaugh, 1 affirmed, 3 reversed; Superior Court of Cook Co., 1 affirmed, 2 reversed; Thomas F. Tipton, 1 affirmed, 3 reversed; Wm. Brown, 3 affirmed, 1 reversed; Jesse O. Norton, 1 reversed.

SUPREME COURT OF ILLINOIS.

Opinions were filed in the clerk's office, at Mt. Vernon, on Monday last, in the following cases:

93. Burleigh Ralls *v.* Isabella Ralls et al.; appeal from Randolph. Reversed and remanded.
163. Peter Gisler *v.* George Welsel; appeal from Madison. Affirmed.
124. Adolph Mulhelson et al. *v.* William Lane; appeal from Washington. Reversed and remanded.
76. Hugh R. Morton *v.* Matthew Rainey; appeal from Marion. Affirmed.
33. Thos. W. Williams et al., *v.* Bayard Chalfont; error to Marion. Reversed and remanded.
134. William T. Ditch et al., executors, *v.* Andrew Vollhardt; appeal from Monroe. Affirmed.
154. Marion Mussey *v.* William Lappin; appeal from Clay. Affirmed.
147. Louis W. Moore, sheriff, *v.* Amos Atkins; appeal from Madison. Affirmed.
11. John Jones et al. *v.* John W. Noley; error to Randolph. Affirmed.
49. Rockford, Rock Island and St. Louis Railroad *v.* John Delaney, administrator; error to St Clair. Reversed and remanded.
21. A. W. Paul et al. *v.* The People ex rel.; error to Randolph. Reversed and remanded.
208. James Harrington et al. *v.* Manystors of Manystors et al.: error to Edwards. On re-hearing, affirmed.
106. James Pursley *v.* Wm. A. Forth; appeal from Clay. Affirmed.
71. Hallem & Barnes *v.* Harriet W. Means, for appeal from Marion. Affirmed.
128. D. Obschutz et al *v.* Halliday et al; appeal from St. Clair. Affirmed.
100. George W. Hall et al. *v.* C. Barnes; appeal from Marion. Affirmed.
92. St. Louis, Vandalia and Terre Haute Railroad Company *v.* Francis B. Holler; appeal from Fayette. Affirmed.
92. Asaph Norwin et al. *v.* Gabriel S. Jones, administrator; appeal from Randolph. Affirmed.
101. Illinois Mutual Fire Insurance Company *v.* Archdeake & Russell: Appeal from Alton city court. Affirmed.
35. Gibson et al *v.* Gibson: error to Marion Reversed and remanded.

THE USE OF EXTRINSIC EVIDENCE TO SUPPLEMENT OR CONTROL DOCUMENTS OF TITLE.

[From the London *Law Times.*]

2.—ALTERATIONS AND INTERLINEATIONS.

(*Continued from page* 310.)

In Lord St. Leonards *v.* Sugden, Doe *v.* Palmer was expounded and applied. Lord Chief Justice Cockburn was of opinion that, speaking generally, the declarations of deceased persons are admitted in evidence as exceptions to the rule requiring the best evidence, because they are the declarations of persons having peculiar means of knowledge, for testators must be taken to know the contents of their wills. In Doe *v.* Palmer, such declarations were admitted to rebut the presumption of interlineation. They are admissible to rebut the presumption of revocation *animo revocandi*. Morally, such statements are entitled to weight. If admitted for two purposes, why, asked the Lord Chief Justice, should they not be admitted as to lost contents, there being an equal degree of knowledge and an equal absence of motive to speak untruly? As to subsequent statements, he afterwards said, Doe *v.* Palmer and Quick *v.* Quick (3 Swa. & Trist.) do cause a difficulty, but in his opinion there was no real difference to adopt. Such a rule would tend to anomalies. The statement in Doe *v.* Palmer, excluding subsequent declarations, was an *obiter dictum*, and therefore not binding. Quick *v.* Quick was a direct authority, but he and the other judges of the Court of Appeal felt bound to overrule it. Lord Justice Mellish, while agreeing with the court that probate ought to be granted of the lost part of the will, differed as to Doe *v.* Palmer and Quick *v.* Quick, which latter case he was not prepared to say was bad law. There was, he thought, a material difference between statements made before and after the execution of the will. He did not doubt the wisdom of establishing a new exception to the rule requiring the primary evidence, but he thought that was for the legislature, not for the judges to do.

In Guardhouse *v.* Blackburn, (14 L. T Rep. N. S. 69; L. Rep. 1 Prob. 115), Sir

J. P. Wilde cited with approbation the lauguage of Mr. Justice Williams on Executors, vol. 1, p. 313. "In a court of construction, when the factum of the instrument has been previously established in the Court of Probate, the inquiry is almost closely restricted to the contents of the instrument itself, in order to ascertain the intentions of the testator. But in the Court of Probate the inquiry is not so limited, for there the intentions of the deceased as to what shall operate as and compose his will, are to be collected from all the circumstances of the case taken together. They must, however, be circumstances existing at the time the will was made." Neither Guardhouse *v.* Blackburn nor the citation from Mr. Justice Williams, were alluded to by the Court of Appeal, but as to the exclusion of declarations subsequent to the execution of the will, they must be considered to have lost their authority. In respect of the necessity of extrinsic evidence to justify them, interlineations differ from alterations in a will. In *In the goods of Ann Cadge* (L. Rep. 1 P. & D. 543) a will contained several unattested interlineations, most of them of single words, each of which was required to complete the sentence to which it belonged. They were apparently written with the same ink at the same time as the rest of the will, but at the time of execution the body of the will was covered up by the testator, so that the witnesses could not see whether the interlineations were there or not. Lord Penzance held that the court was not bound to presume that these interlineations were made after execution, and included them in the probate.

3. LATENT AMBIGUITIES.

When the Right Hon. Sir James Wigram first laid before the public his seven propositions respecting the admission of extrinsic evidence in aid of the interpretation of wills, it might well be feared that the author had not occupied a position which could give him so clear a view of the entire subject as would enable him to make each proposition consistent with every proposition that complete treatise ought to contain. Time has dissipated these fears, and the editor of the edition published soon after the premature decease of the eminent Judge, could justly boast that the seven propositions not only embraced but exhausted the theory of the rules examined, though he might lament that the most entire assent to a canon of exposition in the abstract, by no means insured its just application to the facts of each particular case, and that an undue degree of laxity in this latter respect might, it was conceived, be detected in certain of the reported decisions. We refer to the authority of a great master in the law of extrinsic evidence in relation to wills, not only because the celebrated case of Lord St. Leonards *v.* Sugden (34 N. T. Rep. N. S. 372) has confirmed or established a new canon as to the use of such evidence in the granting of probate of a lost will, but because the Lord Chief Justice, in his lucid judgment, founded a great portion of his argument upon the principles contained in Sir James Wigram's seventh proposition. Cheney's Case (5 Coke, 68), and Altham's Case (2 Coke 155*a*) show that even before the Statute of Frauds it was a general rule not to admit parol evidence to control what appeared on the face of a deed or will.

Lord Chief Justice Kenyon held in Lord Walpole *v.* Eearl of Cholmondeley, (7 T. Rep. 138) that parol evidence may be admitted to explain a latent ambiguity in a will or deed. But where a devisee made one will in 1752, and another in 1756, without disposing of his personalty or appointing executors by either, and by a codicil (reciting that by his said will of 1752) he had made no disposition of his personalty, disposed of it and appointed executors, it was held that there was no latent ambiguity so as to admit parol evidence to show that the testator intended by his codicil to confirm the will of 1756, and not to republish that of 1752.

In Lord St. Leonards *v.* Sugden, the Lord Chief Justice made the following remarks upon Doe *v.* Hiscocks. He considered it not only the great authority as to the admission of parol evidence to explain latent ambiguities. Its principle was also a justification for the use of such evidence to supply the contents of a lost will. He thought the observations of Chief Baron Abinger, as to the mischief of excluding such evidence, were applicable in the case before them. If verbal declarations and drafts were admissible in the one case, the prior instructions, declarations of intention and other extrinsic evidence of the will, were admissible in the case before them. The replication might be made that declarations as to execution were not admissible; but the rejoinder was that it required the statute to exclude them.

In Doe *d.* Hiscocks *v.* Hiscocks (5 Mee & Wels. 363) the Lord Chief Baron Abinger thus laid down the law: "The object in all cases is to discover the intention of the testator. The first and most obvious mode of doing this is to read the will as he has written it, and collect his intention from his words. But as his words refer to facts and circumstances respecting his property, and his family, and others whom he names or describes in his will, it is evident that the meaning and application of his words cannot be ascertained without evidence of all those facts and circumstances. To understand the meaning of any writer, we must first be apprised of the persons and circumstances that are the subjects of his allusions or statements; and if these are not fully disclosed in his work, we must look for illustrations to the history of the times in which he wrote, or to the works of contemporaneous authors. All the facts and circumstances, therefore, respecting the persons or property to which the will relates are undoubtedly legitimate, and often necessary evidence to enable us to understand the meaning and application of his words. * * But there is another mode of obtaining the intention of the testator, which is by evidence of his declarations of the instructions given for his will and other circumstances of a like nature, which are not adduced for explaining the words or meaning of the will, but either to supply some deficiency, or remove some obscurity, or to give some effect to expressions that are unmeaning or ambiguous" So far his Lordship's statement of the law is perspicuous and sound. He then continues: Now there is but one case in which it appears to us that this sort of evidence of intention can properly be admitted, and that is where the meaning of the testator's words is neither ambiguous or obscure, and where the desire is, on the face of it, perfect and intelligible; but from some of the circumstances admitted in proof, an ambiguity arises as to which of the two or more things, or which of the two or more persons (each answering the words in the will), the testator intended to express. It appears to us that in all other cases parol evidence of what was the testator's intention ought to be excluded upon this plain ground, that his will ought to be made in writing; and if his intention cannot be made to appear by the writing explained by circumstances, there is no will.

(To be Continued.)

STATE CONSTITUTIONS AND RELIGION.

BY SAMUEL T. SPEAR, D. D.

[From the N. Y. Independent.]

The several states of the Union exist and operate under written constitutions, which, subject only to the Constitution of the United States, form their supreme law. All of these constitutions, while substantially similar in the powers of government and the manner of their distribution, contain provisions relating to religion, designed for the most part, to protect the religious liberty of the people against encroachments by governmental agency. Some of the provisions, however, found in the constitutions of some of the states are exceptions to this statement and to the general character and scope of the constitutions of the American states. They appear as inconsistencies and deformities, and also vestiges of ideas once entertained, but now generally obsolete.

The constitution of New Hampshire (Part I, section 6) furnishes one of these exceptions, in empowering "the legislature to authorize from time to time the several towns, parishes, bodies corporate, or religious societies within this state to make adequate provisions, at their own expense, for the support of public *Protestant* teachers of piety, religion and morality"; and, also, in providing (Part II, sections 14, 29, 42) that "every member of the House of Representatives . . . shall be of the *Protestant* religion"; that "no person shall be capable of being elected a senator who is not of the *Protestant* religion"; and that "no person shall be eligible to the office of Governor unless he shall be of the *Protestant* religion." The legislature is here authorized to grant to the towns, parishes, bodies corporate, or religious societies within that state the compulsory power of taxation for the support of *Protestant* teachers of religion. The constitution also establishes a religious test as a qualification for the office of representative, senator and governor.

The constitution of Pennsylvania (Article I, Section 4) declares that "no person who acknowledges the being of a God and a future state of rewards and punishments shall, on account of his religious sentiments, be disqualified to hold any office or place of trust or profit under this commonwealth." This immunity against disqualification does not, by its very terms, apply to those who deny the existence of God, or deny a future state, or deny the doctrine of rewards and punishments in that state. All such persons it leaves exposed to the liability of a religious test by the will of the legislature, and protects only those who acknowledge the doctrines recited.

The constitution of North Carolina (Article VI, section 5) provides that "all persons who shall deny the being of Almighty God" "shall be disqualified for office." The constitution of South Carolina (Article XIV, section 6), of Mississippi (Article XII, section 3), and of Tennessee (Article IX, section 2), contain a similar provision, with the extension of the exclusion in the last of these constitutions to any person who denies a "future state of rewards and punishments." The constitution of Maryland (Declaration of Rights, sections 36, 37) declares that no person, "otherwise competent," shall "be deemed incompetent as a witness or juror on account of his religious belief, *provided* he believes in the existence of God, and that under his dispensation such person will be held morally accountable for his acts and be rewarded or punished therefor either in this world or in the world to come," and also declares that "no religious test ought ever to be required as a qualification for any office of profit or trust in this State, *other* than a declaration of belief in the existence of God." These provisions are religious tests, and, as Judge Cooley, in his "Constitutional Limitations" (p. 468) remarks, "show some traces of the old notion that truth and a sense of duty are inconsistent with skepticism in religion." They exclude persons from office on religious grounds. Maryland has quite an extended religious belief as a qualification to be a witness or perform the duty of a juror.

So, also, some of the State Constitutions exclude clergymen, priests, and teachers of any religious sect from civil office. The Constitution of Delaware (Article VII., Sec. 8,) provides that "no ordained clergyman or ordained preacher of the Gospel of any denomination, shall be capable of holding any office in the State, or of being a member of either branch of the legislature while he continues in the exercise of the pastoral or clerical functions." The Constitution of Kentucky (Article II., Section 27), declares that "no person while he continues to exercise the functions of a clergyman, priest, or teacher of any religious persuasion, society, or sect * * shall be eligible to the General Assembly." The Constitution of Maryland (Article III., Section 11,) says that "no minister or preacher of the Gospel or of any religious creed or denomination * * * shall be eligible as senator or delegate." The Constitution of Tennessee (Article IX., Section 1,) declares that "no minister of the Gospel or priest, of any denomination whatever, shall be eligible to a seat in either house of the legislature." These are examples of constitutional exclusion of persons from the exercise of civil functions on account of their ecclesiastical character and office, and, so far, examples of proscription on religious grounds. The reason of the exclusion and the fact itself involve the practical results of a religious test.

These provisions are the exceptions, rather than the general rule, in the Constitution of the American States. The great mass of these Constitutions exclude religious tests and qualifications to hold office or to perform any civil duty or exercise any political or civil right or privilege; and also exclude the power to levy taxes for the support of religion, and guarantee to each person the full enjoyment of the rights of a religious conscience within the limits of decency and public order. It would be tedious to go through the whole list of provisions that secure these results, and, hence, a few examples must suffice.

The Constitution of Illinois, (Artticle II., Section 3), declares that "the free exercise and enjoyment of religious profession and worship, without discrimination, shall forever be guaranteed, and no person shall be denied any civil or political right, privilege, or capacity on account of his religious opinions," and that "no person shall be required to attend or support any ministry or place of worship against his consent, nor shall any preference be given by law to any religious denomination or mode of worship." The Constitution of Iowa (Article 1, Sections 3, 4), declares that "the General Assembly shall make no law respecting an establishment of religion or prohibiting the free exercise thereof; nor shall any person be compelled to attend any place of worship, pay tithes, taxes, or other rates for building or repairing places of worship, or the maintenance of any minister or ministry. No religious test shall be required as a qualification for any office or public trust, and no person shall be deprived of any of his rights, privileges, or capacities, or disqualified from the performance of any of his public or private duties, or rendered incompetent to give evidence in any court of law or equity, in consequence of his opinions on the subject of religion." The Constitution of Michigan (Article IV., Sections 39, 41), declares that "the legislature shall pass no law to prevent any person from worshipping Almighty God according to the dictates of his own conscience, or to compel any person to attend, erect, or support any place of religious worship, or to pay tithes, taxes or other rates for the support of any minister of the Gospel or teacher of religion. The legislature shall not diminish or enlarge the civil or political privileges and capacities of any person on account of his opinions or belief concerning matters of religion." The Constitution of New Jersey, (Article I., Section 4), provides that "no religious test shall be required as a qualification for any office or public trust, and no person shall be denied the enjoyment of any civil right merely on account of his religious principles." The Constitution of Oregon (Article I., Sections 3, 4, 6), says: "No law shall, in any case whatever, control the free exercise and enjoyment of religious opinions or interfere with the rights of conscience. No religious test shall be required as a qualification for any office of trust or profit. No person shall be rendered incompetent as a witness or juror in consequence of his opinions on matters of religion, nor be questioned in any court of justice touching his religious belief to affect the weight of his testimony."

Similar provisions more or less full, are found in the constitutions of most of the other States, and in all the States there are constitutional restrictions designed to protect the rights of a religious conscience against encroachment by legislative power.

Some persons are conscientiously averse to bearing arms; and in many of the States we find constitutional provisions granting them an exemption from this service. Thus the constitution of Indiana (Article XII, section 6) says: "No person conscientiously opposed to bearing arms shall be compelled to do militia duty; but such person shall pay an equivalent for exemption, the amount to be prescribed by law." The constitution of Alabama (Article X, section 1) says: "All citizens of any denomination whatever who, from scruples of conscience, may be averse to bearing arms shall be exempt therefrom, upon such conditions as may be prescribed by law." Provisions of the same general character occur in the constitutions of many of the other States.

So also some persons are conscientiously opposed to taking a legal oath, and, hence, provision is made that they may simply affirm, as the equivalent of an oath. On this point the constitution of Missouri (Article II, section 12) says: "If any person shall declare that he has

conscientious scruples against taking an oath or swearing in any form, the said oath may be changed into a solemn affirmation and be made by him in that form." The constitution of Indiana (Article I, section 8) says: "The mode of administering an oath or affirmation shall be such as shall be most consistent with and binding upon the conscience of the person to whom such oath or affirmation may be administered." Like provisions are found in the constitutions or statutes of other States.

Some of the state constitutions expressly prohibit the appropriation of any funds or property for religieus or sectarian uses. Thus the constitution of Illinois (Article VIII, section 3) says: "Neither the general assembly, nor any county, city, town, township, school district, or other public corporation, shall ever make any appropriation or pay from any public fund whatever anything in aid of any church or sectarian purpose, or to help support or sustain any school, academy, seminary, college, university, or other literary or scientific institution controlled by any church or sectarian denomination whatever; nor shall any grant or donation of land, money, or other personal property ever be made by the state or any such public corporation to any church or for any sectarian purpose." The constitution of Missouri (Article IX, section 10) contains a similar provision. The constitution of Indiana (Article I, section 6) declares that "no money shall be drawn from the treasury for the benefit of any religious or theological institution." The constitution of Oregon (Article I, section 5) provides that "no money shall be drawn from the treasury for the benefit of any religious or theological institution, nor shall any money be appropriated for the payment of any religious service in either house of the legislative assembly." The constitution of Michigan (Article IV, section 40) declares that "no money shall be appropriated or drawn from the treasury for the benefit of any religious sect or society, theological or religious seminary, nor shall property belonging to the state be appropriated for any such purposes." The constitution of Minnesota (Article I, section 16) and that of Wisconsin (Article I. section 18) contain a similar provision.

Looking, then, at these various constitutional provisions as a whole, and as indicating the general policy of the American States in regard to religion, Judge Cooley, in his "Constitutional Limitations" (chapter xiii), says that "those things which are not lawful under any of the American constitutions may be stated thus:"

1. "Any law respecting an establishment of religion." 2. "Compulsory support, by taxation or otherwise, of religion." 3. "Compulsory attendance upon religious worship." 4. "Restraints upon the free exercise of religion according to the dictates of the conscience." 5. "Restraints upon the expression of religious belief."

"These," he adds, "are the prohibitions which in some form of words are to be found in the American constitutions, and which secure freedom of conscience and of religious worship. No man in religious matters is to be subjected to the censorship of the State and the State is not to inquire into or take notice of religious belief, when the citizen performs his duty to the State and to his fellows." He also says that "it is not toleration which is established in our system, but religious equality." The exceptions to this principle referred to and illustrated by citations in the commencement of this article, he treats as exceptions not often put into practice, and by no means representing the general character of our American State constitutions. They are, rather, the relics of ideas once prevalent, but now for the most part discarded in this country. They are, moreover, generally found in the older constitutions, and not in those of more recent date. The American people have out-grown the doctrine of religious tests and that of taxation for religious purposes. The tendency of public thought has been toward a complete severance of church and State.

Mr. John Norton Pomeroy, in his "Introduction to Municipal Law," (p. 292), states as follows the general theory in regard to religion on which our national and State constitutions are built:

"The theory of our national and State constitutions is that the State, as an organic body, has nothing whatever to do with religion, except to protect the individuals in whatever belief and worship they may adopt; that religion is entirely a matter between each man and his God; that the State, as separated from the individuals who compose it, has no existence except in a figure; and that to predicate religious responsibilities of this abstraction is an absurdity. Whatever, then, the State does, whatever laws it makes touching religious subjects, are done and made not because the State is responsible, but simply that the people may be secure in the enjoyment of their own religious preferences. Public labor is forbidden by law on Sunday, not because the State, as such, respects the sacredness of the day or attempts to enforce its observance; but because a large portion of its worthy citizens do regard the day as sacred and employ it for public and private worship, and have a right to be protected in the quiet use of the time for these purposes. So far as the State is concerned, the laws forbidding public labor on Sunday stand on exactly the same footing as those forbidding disorderly houses, public intemperance, and all other acts which disturb the peace."

Reasoning from these principles, Mr. Pomeroy says: "Indeed, although the people composing our body politic are doubtless as much impressed with Christian ideas as those of any other nation, our governments, both State and national, by ignoring the whole subject, can hardly be called Christian." This is undoubtedly the truth. Neither Christianity nor any other religious system forms any part of the Constitution of the United States. The same is true of the State constitutions, as a general fact. The exceptions are such as were specified in the first part of this article; and even these exceptions are limited to a few particulars and in practice are mostly obsolete.

The all-pervading principle, then, of our American constitutions is that the State, as such, has nothing to do with religion, beyond affording to the people protection in the enjoyment of their religious rights, and that, too, with no discrimination among them. It is difficult to see how a state established upon this principle, and for reasons of State policy, conducting a school system at the public expense, can make that system the instrument of religious instruction or worship in any form. It manifestly cannot do so without contradicting the fundamental law of its own organic life.

RESTRAINTS ON ALIENATION.

Recent decisions in the Vice-Chancellor's courts have thrown great difficulty in the path of those who are called on to advise whether in a given case a restraint on alienation is to be treated as a condition subsequent, and, therefore, repugnant and void, or as a conditional limitation defining the duration of the period for which an estate or interest is to be enjoyed by the donee, and, therefore, valid. To assist in the discrimination between condition on the one hand, and conditional limitation on the other, we have been accustomed to adopt the rule as laid down by the late Lord Justice Turner, when Vice-Chancellor, in Rochford *v.* Hackman (9 Hare, 581)—to which, as being too long for quotation, we refer our readers—and from which it appears that the intention of the testator is to be collected from the whole of his will; first, as to the extent of interest primarily given; and, secondly, as to the extent and events in which that interest is defeated, and that if, on the whole will, it appears that a life interest is not to continue beyond the event of alienation it ceases accordingly, and that a gift over is not necessary to the operation of the cesser proviso on the original interest. This being, as we say, the true rule, we will now look at the case of Hunt-Foulston *v.* Furber, before Vice-Chancellor Hall on the 20th ult., shortly stated in the Weekly Notes for the 3rd inst. There, a testatrix bequeathed £20,000 stock to be laid out by her trustees in the purchase from the Commissioners for the reduction of the National Debt, in the name and for the benefit of S. F. Hunt, of an annuity for his life, and there was a direction that he should not be entitled to the value of his annuity in lieu thereof, and that if he should sell, mortgage, pledge, or anticipate the annuity, the same should cease and form part of the testatrix's residuary estate. The trustees purchased an annuity accordingly, and the annuitant having contracted to sell the same the purchaser objected to complete, on the ground that the annuitant was not absolutely entitled. The Vice-Chancellor, however, held that he was.

It will be noted that there was in the case this peculiarity, viz., that the trustees of the testatrix were entirely to divest themselves of all control over the annuity, which was to be purchased in the name and for the benefit of the annuitant. The annuitant, therefore, was intended to have complete legal control over the annuity, and could probably have made a good title to a purchaser without notice, even if the cesser proviso had been, as we say it was, a valid one, since it could scarcely have been allowed to operate as against him. This we may concede; but it goes a very little way indeed to support the proposition necessary to the Vice Chancellor's decision, viz., that the annuity itself was not in equity, and as between the annuitant and the residuary legatee, intrinsically subject to and charged with the liability to pass from the annuitant to the residuary legatee in the event of alienation.

We are utterly unable to see the repugnancy on which the Vice Chancellor's decision is founded, and we do see very plainly indeed that the testatrix's clearly expressed intention is utterly defeated by that decision. It also appears to us that the view taken by Sir C. Hall is incompatible with the decision of Vice-Chancellor Malins, only six days before, in Hatton *v.* May, (Weekly Notes, May 20), in which he distinctly and emphatically adhered to the principles enunciated by him in Power *v.* Hayne (L. Rep. 8 Eq, 262), where he declined to follow the case of Day *v.* Day (1 Drew 569) before Sir R. T. Kindersley. With the principles so laid down by Sir R. Malins we entirely agree, and are strongly induced to believe, that though Hunt-Foulston *v.* Furber may be distinguished from Hatton *v.* May, it cannot on any sound or comprehensive principle be differentiated from the last-named case. —*The London Law Times.*

SUPREME COURT OF IOWA.

NOTES TO RECENT OPINIONS.

TAX-SALE.

Where land was sold for taxes in 1861, and the deed could have been made in 1864, but the holder of the tax-certificate never obtained a deed for the land: *Held*, That after eleven years have elapsed from the time when the deed could have been obtained, the presumption is, that the purchaser has abandoned his rights to obtain the deed, and those purchasing the land of the owner may presume such abandonment. They would be authorized to purchase and pay for the land upon this presumption, and a purchaser at a tax-sale could not afterwards take a deed thereon and defeat the title thus acquired.

VENDOR'S LIEN.

The doctrine of vendor's lien is well established in this State. Aside from the intervening rights of purchasers without notice, the execution of a conveyance does not affect the existence of a lien. It attaches to the estate as a trust equally, whether it be conveyed or only be contracted to be conveyed. If, however, the rights of innocent purchasers have attached, of course such purchaser cannot be affected by the lien.

HUSBAND AND WIFE.

In an action against a railroad company for damages for injuries to a married woman: *Held*, That the husband may recover for such losses of services of the wife, caused by the injury, as are sustained by him, but the wife herself cannot recover for such loss of services. The husband could also recover from the defendant for expenses incurred by him on account of medical attendance and other proper care for the comfort and recovery of his wife.

FRAUDULENT CONVEYANCE.

Where a party conveyed his property to his sons, for a certain sum of money, and for the support of himself and wife for the remainder of their lifetime: *Held*, That such conveyance was fraudulent as to creditors, as a party cannot place his property beyond the reach of his creditors, and still retain to himself the benefits of it.

SETTING OUT FIRE.

The statute forbids any person from setting out any fire on the prairie or timbered land, by which any one's property is injured, and makes him liable in damages, etc.: *Held*, That the statute does not include the setting out of any fire in a *cultivated field.*

CAPITAL STOCK OF CORPORATIONS.

The unpaid subscription to the capital stock of a corporation is a trust-fund for its general creditors. The stockholder is liable to a creditor to the extent of the unpaid installments on the stock owned by him. As between the stockholder and a creditor, the stock shall be considered paid only to the extent of the fair value of the property conveyed, and that, for the balance, the stockholder shall be held individually liable, in the event of his failure to point out corporate property subject to levy. The record of a deed is no constructive notice to a person proposing to trust a corporation, that its capital stock had peen paid up in full by a conveyance of a certain amount of land.

CITY SOLICITORS.

As the duties of a City Solicitor are not prescribed by statute, he may perform such duties as are prescribed by ordinance. If, in a case where the interests of the city required his services, even where such services were not prescribed by ordinance, and he acts with discretion and renders the city a service, he is not regarded as acting without authority, and he will be entitled to compensation for his services.

HOMESTEAD.

The homestead is liable for the debts contracted prior to its occupation as such, and the date of contracting the debt is the test when the liability attached rather than that of the rendition of the judgment against the owner thereof. The new homestead is liable for the debt contracted or the purchase of the old homestead, where there was simply an exchange of homesteads; in such case, the liability of the old homestead for the purchase money to be paid for it, is simply transferred to the new homestead. The assignment of the note given for the purchase money of the real estate carries with it the lien of the vendor, and all the equities and remedies the latter would have had if he had never parted with the debt. Where a homestead is to be sold on execution for the purchase-money, the lien of the judgment relates back to the time of contracting the debt by the operation of the law, and such lien can be enforced by general execution.

STOCK-TRESPASSING.

Under Chap. 26, Statutes of 1870, it is enacted that "The owner of any stock trespassing upon improved lands of another shall pay to the owner of the land so damaged the actual amount of damage sustained. The person who is in possession of the land so trespassed upon may distrain any trespassing stock, and retain the same in some safe place at the expense of the owner thereof, until the damages are paid: *Held*, That the above law was in force without a submission to the vote of the county; and the owner, also, under the above statute is liable for damages committed, whether the premises trespassed upon were inclosed with fences or not.

CHATTEL MORTGAGE.

Where the defendant mortgaged two cows, and the plaintiff allowed him to retain possession of them, and the mortgage was duly recorded; but afterwards the defendant sold two calves of eighteen months old, the increase of the cows, and the mortgage did not specify the increase of the cows; *Held*, That the purchaser of the calves taking them without notice, either actual or constructive, the sale to him was a valid sale, and the mortgage cannot cover them.

JURISDICTION.

A Justice of the Peace has no jurisdiction to try an action on an account in which the defendant in the suit is a resident of another county; and the appearance of the defendant in such a case does not confer jurisdiction.

ABUTTING LOTS.

The amount of any judgment obtained against the city on extra work done on the streets can be assessed on the abutting property, provided the work was authorized by proper officers.

NEGLIGENCE.

Where a person was employed about a threshing machine, and he was injured, without his fault or negligence, by the

tumbling-rod not being boxed and properly covered as required by statute: *Held*, That the person so injured, can recover for such injury from the owner of the machine.

CONVEYANCE.

Where a conveyance was obtained by fraud from the grantor, and afterwards the lands passed into the hands of an innocent purchaser in good faith, without notice of the fraud, the title to such lands is valid in their hands.

The court has also decided the vexed question of John Rogers' "nine small children, and one at the breast," which has vexed Christendom for many years. A lease contained the following: "And the party of the second part, for and in consideration of the rentage and leasing aforesaid, is to pay as rent to the party of the first part, . . . and in addition thereto, as part rent, is to board the said party of the first part and his family, consisting of two adult persons": *Held*, That the defendant was to board three persons,—two in addition to the first party. Under this ruling, John Rogers had ten children.

XVI. KANSAS REPORTS.

Head notes to cases to appear in 16th Kansas, from W. C. Webb, Reporter.

SALE OF PERSONAL PROPERTY—CHANGE OF POSSESSION.

W. Perry Phillips *v.* Vick Reitz.—Error from Johnson county.

BREWER, J.

1. To support a sale of personal property where there is no change of possession, as against a creditor or subsequent purchaser, proof of good faith is as essential as proof of a sufficient consideration.

2. A continuance of possession by the vendor is evidence of a want of good faith as well as of a want of sufficient consideration. It does not raise a presumption of law that the sale is fraudulent and void, but simply one of fact, which may be overborne by other testimony. Like the possession of recently stolen property it casts upon the party the duty of explaining the possession, and may, if unexplained, become conclusive evidence against the sale.

3. Knowledge of facts sufficient to excite the suspicions of a prudent man and put him upon inquiry, is as a general proposition equivalent to knowledge of the ultimate fact.

4. If a party knows of the fraudulent intent of a vendor and buys with that knowledge, he is not a *bona fide* purchaser for he is knowingly helping the vendor to accomplish the fraud and do the wrong.

SERVICE OF SUMMONS—RECITAL IN RECORD MORTGAGE—BANKRUPTCY.

Lewis Orun and Abbie E. Orun *v.* The Merchants National Bank of Fort Scott, Kansas, and the Missouri River, Fort Scott & Gulf Railroad Company.—Error from Crawford County.

VALENTINE, J.

1. Where the court below finds that a sufficient service of summons was had upon the defendant and renders a judgment against him, and there is nothing in the record brought to the Supreme Court which shows that no such service was in fact had, or that the defendant did not make a voluntary appearance in the case, and it does not appear that the whole of the record has been brought to the Supreme court: *Held*, That although it may not appear affirmatively from the record brought to the Supreme court, except as above stated, that any such service or appearance was in fact made, still it will not be presumed from such a record, for the purpose of reversing the judgment of the court below, that the judgment was rendered without a sufficient service of summons or appearance.

2. The defendant owed a large sum of money to a National Bank. To partially secure the payment thereof he gave a mortgage to the bank on some property owned by him in Chicago, Illinois. There was a prior lien of $2,000 on the Chicago property which the defendant agreed to pay. Five hundred dollars of the same became due; and the bank, in order to save and protect its own lien on said Chicago property, and at the request of the defendant, paid said sum of $500, and then took the note and mortgage now sued on for that amount on property situated in Crawford county, Kansas: *Held*, That the taking of the last mentioned mortgage is not a violation of the National Banking Law, and that the mortgage is not void.

All the justices concurring.

IMPANNELING A JURY—OBJECTIONS TO.

John Lane *v.* Wm. Scoville et al.—Error from Atchison county.

BREWER, J.

1. Where, at the time of impanneling a jury, a party knows of the disqualifications of a juror, and fails to challenge him on account thereof, he will not be permitted thereafter to raise the objection.

2. Where a juror is called and upon his *voir dire* testifies that he has no knowledge of the case, a party is ordinarily justified in resting on such testimony.

3. Where there is no reason to suspect the juror who has thus testified, a party is, though there has been a previous trial, under no obligations to examine the record of such trial to ascertain whether the juror did not serve upon such trial, nor is he ordinarily chargeable with gross negligence or laches in forgetting the fact of such service.

All the justices concurring.

COMMON CARRIER—DELIVERY OF GOODS—REASONABLE TIME.

The L. L. & G. R. R. Co. *v.* W. H. H. Maris. — Error from Montgomery county.

BREWER, J.

1. The extraordinary liability of a railroad company as carrier of goods extends not merely to the termination of the actual transit of the goods to the place of destination, but also until the consignee has a reasonable time thereafter to inspect the goods and remove them in the usual hours of business and in the ordinary course of business.

2. This reasonable time is not a time varying with the distance, convenience or necessities of the consignee, but is such time as would enable a person living in the vicinity of the place of delivery, in the usual course of business, and within the ordinary hours of business, to inspect the goods and take them away.

3. Where goods are permitted by the consignee to remain eight days in the depot of the company at the place of delivery, that is more than a reasonable time, and if the goods are then lost or destroyed without any negligence on the part of the carrier, it is not responsible.

4. After the expiration of such reasonable time the carrier is responsible, not as carrier, but only as warehouseman, and for ordinary negligence.

5. Where the carrier and shipper by special contract stipulate for notice without any limitations or conditions the reasonable time for removal commences from the time of the notice and not from that of the arrival of the goods.

6. Where after a stipulation for notice, without any agreement as to the form or conditions thereof, the carrier gives notices with a condition written thereunder that the liability of the carrier terminates upon the arrival of the goods, and the consignee receives such notices without objection and continues his shipments over the road: *Held*, that this was equivalent to a construction by the parties and binding upon both that the agreement for notice was simply for the accommodation of the consignee and without extending the extraordinary liability of the carrier.

All the justices concurring.

NOTE OF CORRECTION FROM MR. EDWARDS.

Editor State Journal:

After having made my statement to the jury in Chicago, in Mrs. Lincoln's case, in consequence of the judge having asked me to speak louder, I repeated substantially what I had previously stated. This accounts for the repetition in the statement published in the papers. The statement over my signature was read in the presence of Robert Lincoln. I at first objected to sign it because it contained the repetitions, but did so under the supposition that it was for his private use, intending to substitute in lieu of it another in my hand writing. It was read to me in a low voice, and as I was about to leave, in haste to send a second dispatch to Springfield. I had no idea that it was intended for publication or I never would have signed it, and especially without my reading it. I was not surprised that the editor of the Chicago *Times* stated that "it rather *singularly* contained a number of repetitions." By request of Mrs. Lincoln, her sister and a number of her friends, I wrote and presented the petition, signed by her, asking to be restored to all her rights; and stated substantially that we all believed that she was capable of managing her own affairs, and that she was a proper person to have the care, management and custody of her property,—and might have added that no one could have managed an estate better than she has managed hers, both previous to and since the death of her lamented husband.

N. W. EDWARDS.

PROPERTY IN LETTERS.

In the famous scene in the House of Representatives concerning the letters written by Mr. Blaine to Mr. Fisher, and which Mr. Mulligan having got in his possession, had threatened to publish. Mr. Blaine said:

"I claim that I have the entire right to these letters, not only by natural right, but on all the precedents and principles of law. The man who held them in his possession held them wrongfully, and the committee which attempted to take these from this man for use against me proceeded wrongfully."

Mr. Knott, the Chairman of the Judiciary Committee, said:

"I take this occasion to say that, so far as these letters were concerned they were legally the property of Mr. Fisher, and were legally in the possession of his bailee, Mr. Mulligan, and that Mr. Blaine had no more right to their possession than I had."

Mr. Hunton, Chairman of the Sub-Judiciary Committee, said:

"I claim that according to the well-settled principles of law, those letters belonged to Warren Fisher from the time that he received them until he delivered them to Mr. Mulligan, and from that time forth Mr. Mulligan was entitled to the ownership of them. Mr. Blaine had no more property in these letters than he had to my watch, or in any other piece of my property."

The question whether there is any property in letters constituting ordinary private correspondence, and, if so, in whom it vests, is not a new one. It has been considered in about a dozen cases in the English and American courts. In 1741, the poet Pope successfully sought the aid of a court to restrain the unauthorized publication of letters which he had written to Swift. Later, the famous letters written by Lord Chesterfield to his son, were the subject of litigation; and more recently in this country, Judge Story decided a controversy concerning letters written by Washington.

Since Pope's time, the doctrine has been well established in the English courts, and has been adopted in this country, that the writer of a letter has a property in it after it has passed into the hands of the receiver, and may prevent the latter from publishing it, or making of it any other use not within his implied privileges as receiver. This right is not based on considerations of policy or social ethics, but is purely one of property existing at common law. There are doubtless circumstances in which the wrongful publication of a letter by the receiver would be restrained by equity as a breach of implied confidence. But where the right has been recognized, it has been on the sole ground of property.

The theory has been advanced in the English courts, but has met with little favor, that the writer has a property after transmission only in letters of literary value. This absurd doctrine was adopted by the New York Court of Chancery, in 1841 and 1848, but was scouted in the United States Circuit Court by Judge Story, who emphatically declared "that the author of any letter or letters (and his representatives), whether they are literary compositions or familiar letters, or letters of business, possess the sole exclusive copyright therein; and that no persons, neither those to whom they are addressed, nor other persons, have any right or authority to publish the same upon their own account, or for their own benefit." And in 1855, Judge Duer, pronouncing the unanimous judgment of the full bench of the New York Superior Court, after an elaborate review of the authorities, affirmed the doctrine so clearly expounded by Judge Story, and held "that every letter is, in the general and proper sense of the term, a literary composition," which cannot lawfully be published by the receiver, or any third person, without the consent of the writer, except for purposes of vindication. This doctrine, which is the sound one, may now be regarded as settled.

While the writer has this general property in, and control over his letters after transmission, there is one case in which he has not the power to prevent publication by the receiver; and this is where he has made unjust charges against the receiver, or imputations upon his character. In this case the publication of the letter may be necessary to the vindication of the receiver; and the law gives him the right to publish it for such purpose, notwithstanding the protests of the writer. But this is merely a special or qualified property (if it be a right of property at all) in the letter; it is a personal right or privilege, and is not transferable. It cannot, therefore, rightly be exercised by a third person who has obtained the possession of the letters or copies, either with or without the consent of the receiver.

In all the adjudicated cases on this point, the object of the writer was simply to prevent the publication or other unwarranted use of his letters, and the extent to which the courts have gone is to declare that the writer's property is in the contents of the letter, without expressly deciding to whom belongs the material on which the letter is written. The important question then remains whether the writer has any lawful means of regaining possession of a letter after it has passed into the hands of the receiver. This question has not arisen in any reported case. It must therefore be determined on general principles and analogies, and not by precedent. Much can be said to show that the property in the material, as well as in the contents, with the exception above noted, remains in the writer. At any rate, it is clear that a third person can acquire no proprietory title to a letter except through the writer.

E. S. DRONE.

THE RECENT BANKRUPT ACT.

Below will be found the exact status of the Bankrupt Act, as approved by the President, after its having passed both Houses.

It relates exclusively to cases commenced in the Territories prior to June 22, 1874.

"SECTION 1. That in all cases in bankruptcy commenced in the Supreme courts of any of the Territories of the United States prior to the twenty-second of June, 1874, and now undetermined therein, the clerks of the said several courts shall immediately transmit to the clerks of the District courts of the several districts of said Territories all the papers in, and a certified transcript thereof, all the proceedings had in each of said cases; and the said clerks of the District courts shall immediately file the said papers and transcripts as papers and transcripts in the said Districts courts.

"SECTION 2. That the clerks of the said several Supreme courts shall transmit the papers and transcripts provided for in section one of this act, in each case, to the clerk of the District court of the district wherein the bankrupt or bankrupts, or some one of them resided at the time of the filing of the petition in bankruptcy in said case; and as soon as the said papers and transcript in any case shall have been transmitted and filed, as herein provided, the District court in which the same shall have been so filed shall have jurisdiction of the said case, to hear and determine all questions arising therein, and to finally adjudicate and determine the same in all respects as contemplated in other bankruptcy cases by the act entitled 'An act to establish a uniform system of bankruptcy throughout the United States,' and approved March second, 1867, and amendments thereto."

BANKRUPTCY—PROOF OF DEBT—NOTARY PUBLIC.—Among our new bankruptcy blanks we have a blank for proof of debt, prepared expressly for notaries public.

CHICAGO LEGAL NEWS.

CHICAGO, JULY 1, 1876.

The Courts.

UNITED STATES SUPREME COURT.

OCTOBER TERM, 1875.

HUMBOLDT TOWNSHIP, Plaintiff in Error, *v.* LONG, et al.

In Error to the Circuit Court of the United States for the District of Kansas.

VALIDITY AND NEGOTIABILITY OF TOWN BONDS—RIGHTS OF BONA FIDE HOLDER.

Irregularities in the issue of town bonds in aid of railroads do not affect their validity in the hands of a *bona fide* holder, provided the original legislative authority to issue them is constitutional, and the bonds recite that they were issued in pursuance of such authority. Miller, Davis, and Field, JJ., dissenting.

The negotiability of town bonds in aid of the construction of a railroad, is not affected by the recital that the bonds were issued "for the construction of the same through said township." The construction of the road is not a condition on which the payment of the bonds depends.

Mr. Justice STRONG delivered the opinion of the court.

The first question certified from the court below is whether the bonds to which the coupons in suit were attached are negotiable bonds, such as to entitle the plaintiff to the rights of a *bona fide* holder of negotiable paper taken in the ordinary course of business before maturity.

They are certificates of indebtedness to the railroad company, or bearer, each for one thousand dollars, lawful money of the United States, payable on a day certain, with interest at the rate of seven per cent., payable annually on the first day of January in each year, at a specified banking-house, on the presentation and surrender of the respective interest coupons thereto annexed. If this were all, there could be no doubt of their complete negotiability. But it is said the subsequent language of the certificates controls the absolute promise, and shows that payment was to be made only on a contingency. This is argued from the recital contained in the instrument and from what follows it. We quote: "This bond is issued for the purpose of subscribing to the capital stock of the Fort Scott and Allen County railroad, and for the construction of the same through the said township, in pursuance of and in accordance with an act of the legislature of the State of Kansas, entitled 'An act to enable municipal townships to subscribe for stock in any railroad, and to provide for the payment of the same, approved February 25, 1870;' and for the payment of the said sum of money and accruing interest thereon, in manner aforesaid, upon the performance of the said condition, the faith of the aforesaid Humboldt township, as also its property, revenue and resources is pledged." Relying upon this clause of the certificate, the township contends that the construction of the railroad through the township was a condition upon which the payment was agreed to be made.

We think, however, this is not the true construction of the contract. The construction of the road as well as the subscription for stock were mentioned in the recital as the reasons why the township entered into the contract, not as conditions upon which its performance was made to depend. It was for the purpose of subscribing, and to aid in the construction of the road that the bond was given. The words "upon the performance of the said condition," cannot then refer to anything mentioned in the recital, for there is no condition there. A much more reasonable construction is that they refer to a former part of the bond, where the annual interest is stipulated to be payable at a banker's "on the presentation and surrender of the respective interest coupons." Such presentation and surrender is the only condition mentioned in the instrument. But that stipulation presents no such contingency as destroys the negotiability of the instrument. It is what is always implied in every promissory note or bill of exchange, that it is to be presented and surrendered when paid. As well might it be said that a note payable on demand is payable upon a contingency, and therefore non-negotiable, as to affirm that one payable on its presentation and surrender is for that reason destitute of negotiability.

The next question certified is, whether the bonds are invalid because of the fact that the election was held within less than thirty days after the day of the order calling for it.

The act of the legislature under which the bonds purport to have been issued (passed in 1870) is the act under which the bonds considered in the case of Marcy *v.* The Township of Oswego were issued. We held in that case that by its provisions the board of county commissioners, who caused the bonds to be issued, were constituted the authority to determine whether the conditions of fact, made by the statute precedent to the exercise of the authority granted to execute and issue the bonds, had been performed, and that their recital in the bonds issued by them was conclusive in a suit against the township brought by a *bona fide* holder. In so ruling we but decided what had often before been decided, and what ought to be regarded as a fixed rule. Applying it to the solution of the question now before us, it is plain that the bonds are not invalid, because all the notice of the popular election was not given which the legislative act directed. The election was a step in the process of execution of the power granted to issue bonds in payment of a municipal subscription to the stock of a railroad company. It did not itself confer the power. Whether that step had been taken or not, and whether the election had been regularly conducted, with sufficient notice, and whether the requisite majority of votes had been cast in favor of a subscription and consequent bond issue, were questions which the law submitted to the board of county commissioners and which it was necessary for them to answer before they could act. In the present case the board passed upon them and issued the bonds, asserting by the recitals that they were issued "in pursuance of and in accordance with the act of the legislature." Thus the plaintiff below took them, without knowledge of any irregularities in the process through which the legislative authority was exercised, and relying upon the assurance given by the board that the bonds had been issued in accordance with the law. In his hands, therefore, they are valid instruments.

The third question certified is answered by what was decided in the case of Marcy *v.* The Township of Oswego, to which we have already referred. There is no essential difference between this case and that. The assessment rolls of the township may have been proper evidence for the consideration of the board of county commissioners when they were inquiring what the value of the taxable property of the township was, but the bonds are not invalid in the hands of a *bona fide* holder by reason of their having been voted and issued in excess of the statutory limit, as shown by the rolls. Whatever may be the right of the township as against those who issue the bonds, it cannot be set up against a *bona fide* holder of the bonds that the amount issued was too large, in the face of the decision of the board, and their recital that the bonds were issued pursuant to and in accordance with the act of 1870

The judgment of the Circuit court is affirmed.

Mr. Justice Miller dissenting.

We have had argued and submitted to us during the present term some ten or twelve cases involving the validity of bonds issued in aid of railroads by counties and towns in different States.

They were reserved for decision until a late day in the term, and the opinions having been delivered in all of them within the last few weeks, I have waited for what I have thought proper to say by way of dissent to some of them until the last of these judgments are announced, as they have been to-day.

I understand these opinions to hold that when the constitution of the State or an act of its legislature imperatively forbids these municipalities to issue bonds in aid of railroads or other similar enterprises, all such bonds issued thereafter will be held void. But if there exists any authority whatever to issue such bonds, no restrictions, limitations or conditions imposed by the legislature in the exercise of that authority can be made effectual if they be disregarded by the officers of those corporations.

That such is the necessary consequence of the decision just read, in the cases from the State of Kansas, is too obvious to need argument or illustration. That State had enacted a general law on the subject of subscriptions by counties and towns to aid in the construction of railroads, in which it was declared that no bonds should be issued on which the interest required an annual levy of a tax beyond one per cent of the value of the taxable property of the municipality which issued them.

In the case under consideration, this provision of the statute was wholly disregarded. I am not sure that the relative amount of the bonds, and of the taxable property of the towns is given in these cases with exactness, but I do know that in some of the cases tried before me last summer in Kansas it was shown that the first and only issue of such bonds exceeded in amount the entire value of the taxable property of the town as shown by the tax list of the year preceding the issue.

This court holds that such a showing is no defense to the bonds, notwithstanding the express prohibition of the legislature. It is therefore clear that so long as this doctrine is upheld it is not in the power of the legislature to authorize these corporations to issue bonds under any special circumstances, or with any limitation in the use of the power, which may not be disregarded with impunity. It may be the wisest policy to prevent the issue of such bonds altogether. But it is not for this court to dictate a policy for the States on that subject.

The result of the decision is a most extraordinary one. It stands alone in the construction of powers specifically granted, whether the source of the power be a State constitution, an act of the legislature, a resolution of a corporate body, or a written authority given by an individual. It establishes that of all the class of agencies, public or private, whether acting as officers whose powers are created by statute, or by other corporations or by individuals, and whether the subject-matter relates to duties imposed by the nation, or the State, or by private corporations, or by individuals, on this one class of agents, and in regard to the exercise of this one class of powers alone, must full, absolute, and uncontrollable authority be conferred on them or none. In reference to municipal bonds alone, the law is that no authority to issue them can be given, which is capable of any effectual condition or limitation as to its exercise.

The power of taxation which has repeatedly been stated by this court to be the most necessary of all legislative powers, and least capable of restriction, may by positive enactments be limited. If the Constitution of a State should declare that no tax shall be levied exceeding a certain per cent. of the value of the property taxed, any statute imposing a larger rate would be void as to the excess. If the legislature should say that no municipal corporation should assess a tax beyond a certain per cent., the courts would not hesitate to pronounce a levy in excess of that rate void.

But when the legislature undertakes to limit the power of creating a debt by these corporations which will require a tax to pay it in excess of that rate of taxation, this court says there is no power to do this effectually. No such principle has ever been applied by this court, or by any other court, to a State, to the United States, to private corporations or to individuals. I challenge the production of a case in which it has been so applied.

In the Floyd Acceptance Cases, 7 Wall., 666, in which the Secretary of War had accepted time drafts drawn on him by a contractor, which, being negotiable, came into the hands of *bona fide* purchasers before due, we held that they were void for want of authority to accept them. And this case has been cited by this court more than once without question. No one would think for a moment of holding that a power of attorney made by an individual cannot be so limited as to make any one dealing with the agent bound by the limitation, or that the agent's construction of this power bound the principal. Nor has it ever been contended that an officer of a private corporation can, by exceeding his authority, when that authority is express, is open, and notorious, bind the corporation which he professes to represent.

The simplicity of the device by which this doctrine is upheld as to municipal bonds, is worthy the admiration of all who wish to profit by the frauds of municipal officers. It is, that wherever a condition or limitation is imposed upon the power of those officers in issuing bonds, they are the sole and final judges of the extent of those powers. If they decide to issue them, the law presumes that the conditions on which their powers depended existed, or that the limitation upon the exercise of the power has been complied with, and especially and particularly if they make a *false recital* of the fact on which the power depends in the paper they issue, this false recital has the effect of creating a power which had no existence without it.

This remarkable result is always defended on the ground that the paper is negotiable, and the purchaser is ignorant of the falsehood But in the Floyd Acceptance cases this court held, and it was necessary to hold so there, that the inquiry into the authority by which negotiable paper was issued was just the same as if it were not negotiable, and that if no such authority existed it could not be aided by giving the paper that form. In county bond cases it seems to be otherwise.

In that case the court held that the party taking such paper was bound to know the law as it affected the authority of the officer who issued it. In county bond cases, while this principle of law is not expressly contradicted, it is held that the paper, though issued without authority of law, and in opposition to its express provisions, is still valid.

There is no reason, in the nature of the condition on which this power depends in these cases, why any purchaser should not take notice of its existence before he buys. The bonds in each case were issued at one time, as one act, of one date, and in payment of one subscription. All this was a matter of record in the town where it was done.

So, also, the valuation of all the property of the town for the taxation of the year before the bonds were issued is of record both in that town and in the office of the clerk of the county in which the town is located. A purchaser had but to write to the township clerk or the county clerk to know precisely the amount of the issue of bonds and the value of the taxable property within the township. In the matter of a power depending on these facts, in any other class of cases, it would be held that before buying these bonds the purchaser must look to those matters on which their validity depended.

They are public, all open, all accessible. The statute, the ordinance for their issue, the latest assessment roll. But in favor of a purchaser of municipal bonds all this is to be disregarded, and a debt contracted without authority, and in violation of express statute, is to be collected out of the property of the helpless man who owns any in that district.

I say helpless advisedly, because these are not *his* agents. They are the officers of the law, appointed or elected without his consent, acting contrary, perhaps, to his wishes. Surely, if the acts of any class of officers should be valid only when done in conformity to law, it is those who manage the affairs of towns, counties and villages, in creating debts which not they but the property owners must pay.

The original case on which this ruling is based, is Knox County *v.* Aspinwall, 21 How. 544. It has, I admit, been frequently cited and followed in this court since then, but the reasoning on which it was founded has never been examined or defended until now. It has simply been followed. The case of The Town of Coloma *v.* Eaves, decided a few days ago, is the first attempt to defend it on principle that has ever been made. How far it has been successful I will not undertake to say. Of one thing I feel very sure, that if the English judges who decided the case of The Royal British Bank *v.* Torquand, on the authority of which Knox County *v.* Aspinwall was based, were here to-day, they would be filled with astonishment at this result of their decision.

The bank in that case was not a corporation. It was a joint-stock company in the nature of a partnership. The action was against the manager as such, and the question concerned his power to borrow money. This power depended, in this

particular case, on a resolution of the company. The charter, or deed of settlement, gave the power, and when it was exercised, the court held that the lender was not bound to examine the records of the company to see if the resolution had been legally sufficient.

This was a private partnership. Its papers and records were not open to public inspection. The manager and directors were not officers of the law, whose powers were defined by statute, nor was the existence of the condition on which the power depended, to be ascertained by the inspection of public and official records made and kept by officers of the law for that very purpose. In all these material circumstances that case differed widely from those now before us. It is easy to say, and looks plausible when said, that if municipal corporations put bonds on the market, they must pay them when they become due. But it is another thing to say that, when an officer, created by the law, exceeds the authority which that law confers upon him, and in open violation of law issues these bonds, the owner of property lying within the corporation must pay them, though he had no part whatever in their issue, and no power to prevent it.

The latter is the true view of the matter. As the corporation could only exercise such power as the law conferred, the issuing of the bonds was not the act of the corporation. It is a false assumption to say that the corporation put them on the market. If one of two innocent persons must suffer for the unauthorized act of the township or county officers, it is clear that he who could, before parting with his money, have easily ascertained that they were unauthorized, should lose rather than the property-holder, who might not know anything of the matter, or if he did, had not power to prevent the wrong.

Mr. Justice Davis and Mr. Justice Field concur with me in this opinion.

UNITED STATES SUPREME COURT.

OCTOBER TERM, 1875.

HENRY M. NEBLETT *v.* J. E. MACFARLAND.

Appeal from the Circuit Court of the United States for the District of Louisiana.

FRAUDULENT CONVEYANCES—RETURN OF CONSIDERATION.

Mr. Justice HUNT delivered the opinion of the court.

The allegation of error in this case is confined to a single point. In his brief, the counsel for the appellant says: "The court erred in not making the payment of our bond a condition precedent to the reconveyance of the plantation, as set forth in our motion for a new trial; and on this ground, and from this point of the decree, do we appeal and ask for relief."

The action was brought to set aside the conveyance of a plantation in Louisiana, made by Macfarland to the appellant, Neblett, upon the allegation that the conveyance was obtained by the fraudulent acts and representation of Neblett and his father.

The only consideration given or professed to be given by Neblett for the conveyance, was the cancellation of a certain bond for the sum of fourteen thousand four hundred sixty-four 51-100 dollars, executed by Macfarland to Sterling Neblett, the father, and alleged to be the property of Henry Neblett.

The court below adjudged the transaction to be fraudulent, directed the execution of a deed reconveying the property, and ordered the return and re-delivery of the bond for $14,464.51, unaffected by any indorsement of credit or payment thereon, and the same, with the mortgage made for its security, to retain the same lien thereon and the same force and effect as if the deed had not been made or any cancellation of the bond taken place.

The complaint now made is that, instead of directing a return of the bond in specie, as a condition for the return of the land, the court should have directed the payment of the amount of money secured thereby.

In cases of this character the general principle is that he who seeks equity must do equity; that the party against whom relief is sought shall be remitted to the position he occupied before the transaction complained of. The court proceeds on the principle that as the transaction ought never to have taken place, the parties are to be placed as far as possible in the situation in which they would have stood if there had never been any such transaction. Bellamy *v.* Sabine, 2 Phillips R. (Eng. Ch.) 425; Samy *v.* King, 5. H. & L., 627; West. Bank of Scotland *v.* Addie, L. R., 1 Scotch App. Cas. 145; Gatley *v.* Newell, 9 Ind. 572; Johnson *v.* Jones, 13 Sm. & M., 580; Kerr on Fraud, 335, 343. This is, no doubt, the general rule.

We do not, however, perceive that the principle will benefit the complaining party in this suit.

1. He is restored here to his property that he had and parted with when he received his deed, to wit, his bond and mortgage. If he had paid $14,500 in money and received in return only a bond for the like amount, of doubtful security and impaired by the lapse of time, he might well have complained. But he paid no money. He surrendered a bond against an insolvent debtor who had left the country, and a mortgage upon an estate abandoned by the owner, and in relation to which the Nebletts, father and son, make the most bitter complaints of its insufficient security.

In his letter of September 29, 1869, Henry Neblett says: "Your deed lay in the hands of your uncle as an escrow. * * * I have hesitated whether to abandon the place or to struggle to save something by borrowing a large sum and risk of forced culture in latitude 30½." Sterling Neblett, the father writes: "If Mendoza be correct, as he just advised, that there are numerous debts and some judgments against Mossland (the plantation in question), liens on the property that Henry nor I did not know of, the trust deed on record at St. Martins gives the only protection against them. * * * Henry is absent, and has long been the true owner of James Edmunds' bond. I thought of you if interested and my deed to Henry could arrange matters. But alas! so far unsuccessful—debts to others, less and less probability of buying the Bruossade bonds. * * How much money will you provide Henry, if he decides to go?"

The letter of the same person, of February, 1869, is filled with the accounts of the embarrassments and difficulties, of the depreciation of the estate, the claims for taxes, judgments, and general creditors. Among other things, he says, "I know Henry would let you have his debt (the bond in question) for fifty cents on the dollar."

We are not able to say, nor is it very material to know, whether these statements were false and fraudulent, or whether the security was really so inadequate as is here represented. Whether good or bad, he receives now the same security that he then gave to his vendor. It would be a perversion of justice to give him the full amount in money for a security then worth but fifty cents on the dollar. If, on the other hand, it was then an adequate security, it is the same now.

But, 2d. It is no objection to a restoration of property received on a fraudulent sale, that it has fallen in value since the date of the transaction. Blake *v.* Morrell, 21 Bervan, 613: Veazie *v.* Williams, 8 How., 134, 158. Nor if the property is of a perishable nature is the holder bound to keep it in a state of preservation until the bill is filed. Scott *v.* Perrin, 4 Bibb., 360; Kerr, 337.

A party seeking to set aside a sale of shares is not bound to pay calls on them to prevent forfeiture after filing his bill. Same author. Nor is it fatal to his right of rescission that some of the shares have been thus perfected.

We have no means of knowing whether there can be a defense made to the bond, arising from the statute of limitations. It would seem that when the bond has been so recently adjudged by the court, to be a subsisting security, and to be a lien upon the plantation directed to be reconveyed, the party in substance redelivering the bond as a condition of obtaining such reconveyance, that a defense of this character could not be a good one. But of this the appellant must take his chance. If the bond has become thus impaired, it is no worse than the loss of a perishable article, or the forfeiture of shares during the litigation. These circumstances do not alter the rule of law. In Gatley *v.* Newell, *supra*, it is said: "The party defendant is not bound to rescind until the lapse of a reasonable time after discovering the fraud. Hence the parties cannot be placed in *statue quo* as to time."

Parties engaged in a fraudulent attempt to obtain a neighbor's property are not the objects of the special solicitude of the courts. If they are caught in their own toils and are themselves the sufferers, it is a legitimate consequence of their violation of the rules of law and morality. Those who violate these laws must suffer the penalty.

The judgment was right and must be affirmed.

U. S. CIRCUIT COURT OF OHIO.

BRICE *et al. v.* ELLIOT.

U. S. REVISED STATUTES §§ 934-3224—PROPERTY DISTRAINED UNDER AUTHORITY OF THE REVENUE LAWS IRREPLEVIABLE.

Demurrer to plea.

This was an action of replevin to recover the possession of fifty-two barrels of high wines, to which the plaintiffs claimed ownership by purchase from F. Bergenthal & Bro.

The amended plea of the defendant set forth that he was Collector of Internal Revenue for the first district of the State of Pennsylvania at the time and before this suit was brought, and that he held possession of the property under the revenue laws of the United States, by virtue of a levy duly made by him for tax due the United States, alleged to be owing by Bergenthal & Brother.

To this plaintiffs demurred, assigning for cause that the property was not taken for a tax due by the plaintiffs.

This action is in violation of the acts of Congress, and is intended to prevent the collection of taxes.

Revised Statutes, §§ 934 3224.

Purdon's Dig., 1226, Sec. 4.

O'Rielly *v.* Good, 42 Barb., 521.

Delaware R. R. *v.* Prettyman, 17 Int. Rev. Rec., 101.

Pullan *v.* Kinsinger, 11 Int. Rev. Rec., 197.

Stiles *v.* Griffith, 3 Yeates, 83.

Pott *v.* Old Wine, 7 Watts, 173.

The court, MCKENNAN, Cir. J., gave judgment for the defendant upon the demurrer, saying that the Acts of Congress (Rev. Stat., § 934), explicitly declares that property taken or distrained under authority of the revenue law shall be irreplevinable, and that the form of action of replevin is taken away from persons claiming property so taken or distrained.

Our thanks are due JACOB FORSYTH, for the following opinion:

UNITED STATES CIRCUIT COURT, D. OF INDIANA.

MAY TERM, 1876.

CAROLINE M. FORSYTH and JACOB FORSYTH *v.* JOHN SMALE, et al.

THE BOUNDARIES OF LAND BORDERING ON A NON-NAVIGABLE LAKE.

1. BOUNDARY OF LAND BORDERING ON STREAM.—That the law upon the subject of the survey of land bordering upon navigable and non-navigable streams, is that the navigable streams are to remain navigable; that the land covered by the water is not to be sold. The acts of Congress require that these streams shall always remain navigable as public highways; and in relation to streams not navigable, the law has always been that the purchaser takes the land to the center of the stream.

2. THE CASE OF A NON-NAVIGABLE LAKE.—This is the case of a non-navigable lake, not of a stream, and, so far as the court can judge from the statement made in the pleadings, that does not change the principles of the case as stated.

3. WHERE THE LINE IS MEANDERED ON STREAM.—That there seems to be no reason for taking this case out of the general rule, where land is purchased bordering upon a non-navigable stream, and where the line is meandered upon the stream for the purpose of quantity, and the stream is intended as the boundary of the land. That the government did not intend to exclude from the operation of the grant made to the purchaser, any land between the meander line and the water.—[ED. LEGAL NEWS.

Opinion by DRUMMOND, J.

We will state the views that we have taken of this case, as it is presented in the pleadings.

The question comes up on a demurrer by the defendants to the complaint—it being an action of ejectment to recover from the defendants some land, in what is called Lake George, in the county of Lake, in this State.

According to the statement contained in the complaint, Lake George is a body of water about two miles long, north and south, and about three-quarters of a mile wide, east and west; the depth of the lake is not stated in the pleadings. It is called a non-navigable lake, and it is said that for many years after the survey was made by the United States, in 1835, the lake had no outlet. The plaintiffs are owners of the title from the government, of two tracts of land on the east side of the lake, called lots No. 3 and 4, being parts of fractional section 18, in township 37 north, range 9 west, the western boundary of section 18 being most of it in the lake, certainly that part of it immediately west of lots 3 and 4.

Proceeding south on the shore line of the lake, the plaintiffs are owners of parts of section 19, which extend to the southern boundary of the lake; they are also the owners of parts of sections 24 and 13, extending around the lake by its south boundary, and north on its western boundary, so as to include the land immediately opposite lots 3 and 4. The plaintiffs are thus the owners as alleged, of all the land bordering the lake east and west, as well as south, that is to say, south of a line produced west on the northern boundary of lot 3, so as to cross the lake, and it would include all south of that, and on both sides of the lake, as the property of the plaintiffs. The complaint admits that when the survey was made, the lines were run, not upon the water's edge of lots 3 and 4, but they were run in the usual way, for the purpose of ascertaining the quantity of land, and from point to point near the boundary of the lake.

The complaint alleges that the defendants claim that the boundaries did not include whatever land was left west of Lots three and four, between the meander line and the lake. It is insisted, however, on the part of the plaintiffs, that this meander line was run simply for the purpose of ascertaining the quantity of land, and not to exclude from that quantity the land between the meander line and the lake.

The complaint produces and makes part of the pleading, two plats, copies of the government survey, according to which it appears that the western boundary of Lots three and four was the lake. There is no land shown on the west between the meander line and the lake, but the lines are run from the eastern boundary of section 18, and of lots three and four to the lake, and it is admitted, extending the lines thus surveyed and as marked in rods they would not reach the lake; but this is not shown upon the surveys produced in evidence; on the contrary, as before stated the western line of lots three and four appears to be the lake. There is no gore or tongue of land represented on lot three at all, according to this survey, but the water line is represented to be the ordinary varying line of the lake. The declaration alleges that there is a gore or strip of land extending from lot three in a south-westerly direction into the lake, and it is in relation to that gore or strip of land that this controversy arises.

Defendants are in possession of that land, and the plaintiffs claim it for the reason as they allege, that whatever land is there is a part of lot three; at any rate so far as the northern line of lot three, when produced west, would describe the boundary of that gore or strip of land. The complaint says nothing about the condition of the lake at the time of the survey, whether it is the same now or at the time the suit was brought, as it was at the time of the survey. Whether any changes have taken place in the condition of things does not appear.

The first question to be determined is, whether the boundaries of lots three and four did extend to the lake, or whether, on the other hand, they did not include more or less of land which might be left between the meander line and the lake, and, I think, upon the face of the pleadings as they stand when connected with the maps, we must assume that the boundaries extended to the lake.

It seems to me that the principles which are decided by the Supreme Court of the United States in the case of the Railroad Company against Schurmeir, which is referred to by the counsel on both sides, and reported in 7 Wallace 272, must to a great extent control this case. That was a case where there was a tract of land surveyed on the Mississippi River; a meander line was run, outside of which was the tract of land in controversy in the case, which was claimed by the railway company, by virtue of a grant from the government to the State of Minnesota, but which was also claimed by the party who had entered the land

bounded by the river. That line was run just as this was, with a meander line upon the river, and the party purchased the land of the government as so much land, and took his patent for it, and the question was, whether the patent included the land outside of the meander line, and which was sometimes covered with water and sometimes bare. The Supreme Court held that the patentee had the better right to the land because his patent covered the land in controversy. The meander lines were run for the purpose of ascertaining the quantity of land, but the intention of the government was to leave the river as the boundary of the land, and the court says:

[Here the court read from 7 Wallace, in the case of Railway Company *v.* Schurmeir, 286–289.]

Now these principles are strictly applicable to this case, and, in accordance with the facts of this case, the only difference is, the court was there speaking of a navigable river, in this case it appears that the lake, so far as we know anything about it, is non-navigable. But why should that, by any possibility, exclude the plaintiffs from the operation of the principle? One would think that, so far from having that effect, it might be brought within the rule of law in relation to non-navigable streams. The law upon the subject of the survey of land bordering upon navigable and upon non-navigable streams is, that the navigable streams are to remain navigable; that the land covered by the water is not to be sold. The acts of Congress require that these streams shall always remain navigable as public highways; and in relation to streams not navigable, the law has always been that the purchaser takes the land to the centre of the stream, as is stated by the Supreme Court in the case of the Railway Company against Schurmeir. So that, as to navigable streams, the purchaser takes the land only to the border of the stream, with the right, of course, to make improvements upon the stream, as wharves, just as can be done in water-courses where the tide ebbs and flows. This is the case of a non-navigable lake, not of a stream, and the question is, whether that changes the principles of the case as stated. So far as we can judge from the statement made in the pleadings, it seems to me that it cannot. In the argument of this case a great many facts have been stated of which the court can take no judicial notice. For example, it is stated that the government, in many cases of these non-navigable lakes, has regarded the land covered by the water as still belonging to the government, and has had it surveyed, and has sold it in several instances. Some cases in Missouri are referred to in the statutes, and another on the Calumet river, in Illinois and Indiana. We do not undertake to lay down any absolute rule upon the subject. We do not say but that circumstances might change the principle applicable to such a case as this, but if it be true, as we have the right to assume upon the pleadings that it may be, or is, that the physical condition of this lake has not substantially changed between the time of the survey and the time when this suit was commenced, then it seems clear that the plaintiffs, in obtaining the titles to lots three and four would have the right to include within the boundary of their land, as that which was sold by the government, all of the extension into the lake.

Whether or not this was the effect of a gradual accretion upon the land, or of some sudden cause, all we can judge from is the facts as they appear from the pleadings. As this lake is only three quarters of a mile wide, it may be doubtful whether the same rule ought to be applicable to this case as to a larger lake, which, owing to the cultivation of the country or other cause, might dry up gradually or suddenly. For example; the plaintiffs being the owners of all the land on the east and west and southern boundaries of this lake, suppose that there is a gradual withdrawal of the lake, and the bed of the lake bordering upon the plaintiff's land should become dry land, what is to prevent the principle of accretion from operating in such a case as this, where the lake is only three quarters of a mile wide? Ought there to be any difference in this case from that of a non-navigable stream, so called? Is not this within the spirit of the Act of Congress? Whether that would be true of a large body of water where the water gradually or suddenly retired, it is not necessary to decide. It might be supposed in such case that the Government did not intend to convey the land covered by the water, but that perhaps is not necessary to be decided in this case. Neither do I feel inclined to decide absolutely as to the rights of the parties in this case.

It may be that if the facts were all known to us, if the changes which had occurred since the time of the survey and the sale, and the time when this suit was brought were known, we might take a different view of the case. But as far as we can at present see, there seems to be no reason for taking this case out of the general rule, where land is purchased bordering upon a non-navigable stream, and where the line is meandered upon the stream for the purpose of quantity, and the stream is intended as the boundary of the land. The uniform rule as to the description of lands in deeds is that the great natural object is to govern, and courses and distances are to yield to the object. The great natural object here was the lake or the water, and the plat shows that the western line of lots three and four was intended to be the water, and we conclude that the government did not intend to exclude from the operation of the grant which was made to the purchaser, any land between the meander line and the water, so without actually deciding what may be the ultimate rights of the parties, we must hold that the demurrer is not well taken, and must be overruled.

BAKER, HORD & HENDRICKS, for plaintiffs.

HARRISON, HINES & MILLER, for defendants.

DISTRICT COURT, DISTRICT OF NEBRASKA.

THURSTON *v.* THE UNION PACIFIC RAILROAD COMPANY.

Gamblers may be excluded from travel on railway trains if they are seeking to use the trains to ply their vocation, and are not traveling upon lawful and legitimate business.

It was alleged, and not denied, that plaintiff had purchased from the road, for fifty cents, a ticket for crossing the river on the transfer train, and that when the train was about starting he attempted to board it, but was prevented. He also purchased for ninety cents from the company a ticket good for another road, but was forcibly ejected from the train and was obliged to remain in Omaha several days before he could safely get away, for which he asked $5,000 damages. The defendant admitted that the necessary force (but no more) was used to prevent his entering the train. It was claimed that he had been for years a notorious gambler, and was then engaged in traveling on the defendant's road for the purpose of plying that calling, and was about to enter the train for that purpose. This the plaintiff denied. Upon the question whether the defendant has the right to exclude gamblers from its trains.

DUDLEY, J., charged the jury:

The railway company is bound as a common carrier, when not over crowded, to take all proper persons who may apply for transportation over its line, on their complying with all reasonable rules of the company. But it is not bound to carry all persons at all times, or it might be utterly unable to protect itself from ruin. It would not be obliged to carry one whose ostensible business might be to injure the line; one fleeing from justice; one going upon the train to assault a passenger, commit larcency or robbery; or for interfering with the proper regulations of the company; or for gambling in any form; or committing any crime; nor is it bound to carry persons infected with contagious diseases, to the danger of other passengers. The person must be upon *lawful* and *legitimate* business. Hence defendant is not bound to carry persons who travel for the purpose of gambling. As gambling is a crime under the state laws, it is not even necessary for the company to have a rule against it. It is not bound to furnish facilities for carrying out an unlawful purpose. Necessary force may be used to prevent gamblers from entering trains, and if found on them engaged in gambling, and refuse to desist, they may be forcibly expelled.

Whether the plaintiff was going upon the train for gambling purposes, or whether from his previous course, the defendant might reasonably infer that such was his purpose, is a question of fact for the jury. If they find such to have been the case, they cannot give judgment for any more than the actual damage sustained.

After the ticket is purchased and paid for, the railroad company can only avoid compliance with its part of the contract by the existence of some legal cause or condition which will excuse it. The company should in the first case refuse to sell tickets to persons whom it desires and has the right to exclude from the cars, and should exclude them if they attempt to enter the car without tickets. If the ticket has been inadvertently sold to such person and the company desires to rescind the contract for transportation, it should tender the return of the money paid for the ticket. If it does not do this, plaintiff may under any circumstances recover the amount of his actual damage, viz: what he paid for the ticket, and perhaps, necessary expenses of his detention.

In this case the jury rendered a verdict for actual damages ($1.74) and costs, the company not having tendered the money.

WE are under obligations to R. S. TUTHILL, City Attorney, for the following opinion:

CIRCUIT COURT OF COOK COUNTY, ILLINOIS.

OPINION, JUNE, 1876.

JOHN W. CONNETT *v.* THE CITY OF CHICAGO.

CHANGING ACTION FROM ASSUMPSIT TO CASE—STATUTE OF LIMITATIONS, WHEN IT COMMENCES TO RUN.

1. WHEN STATUTE COMMENCES TO RUN.—Where a husband commenced an action of assumpsit against the city of Chicago, in June, 1874, to recover damages for injuries to his wife, caused by a defective sidewalk in 1869, and in March, 1876, by leave of the court, changed his action from assumpsit to case, *held*, on the statute of limitations being pleaded, that for the purpose of determining whether the action was barred or not, the suit was to be regarded as commenced at the time when the action was changed from assumpsit to case.

2. EXPENSES FOR DOCTORING, ETC., WILL NOT PREVENT STATUTE FROM RUNNING.—That the injuries to the plaintiff's wife constituted the ground for the action, and the right of action accrued at the time of the injury: from that time to the change of the action into case, was more than five years, and it was consequently barred by the statute of limitations; and the fact that the plaintiff had expended money in curing his wife of the injury, within the five years, would not prevent the statute from running, although, if the action was not barred, such items would be a proper subject for damages.—[ED. LEGAL NEWS.]

Opinion by MCALLISTER, J.

John W. Connett brought an action of assumpsit in the Circuit court of Cook county, June 17, 1874, against the city of Chicago, and declared on the common courts in assumpsit. There was a bill of particulars added to the declaration, the first item of which was $150 cash paid to Mrs. Johnson for attendance upon Mrs. Connett while recovering from injuries received by reason of defective sidewalk in said city. In March, 1876, finding out probably that he had misconceived his action, his attorney upon motion obtained leave of the court to change the cause of action from assumpsit to *case*, and thereupon filed a declaration against the city of Chicago, charging the latter with negligence in respect to keeping the sidewalk upon Centre Avenue in safe and secure condition and suffering it to be out of repair, in consequence of which, Emily Connett, his wife, while walking thereon September 6, 1869, and in the exercise of ordinary care, was thrown down, fell and was injured, alleging that in consequence of said fall, and injury so caused as aforesaid, said Emily Connett, said wife of said plaintiff, was made sick and helpless, and required and needed the care and attention of nurses and physicians," etc. Then, after setting out the special damages, plaintiff claimed damages to the amount of $1,500. To this new declaration, the defendants pleaded: 1. Not guilty. 2. Specially the statute of limitations, viz.: that the cause of action in the declaration mentioned did not accrue at any time within five years next, before the time when plaintiff changed his cause of action from assumpsit to *case*. 3. The statute of limitations generally that the supposed cause of action did not accrue to plaintiff at any time within five years next before the commencement of the suit. To the second plea, the plaintiff demurred, and on the first and third took issue. The court sustained the demurrer to the second plea, and the case was tried on the issues formed by the other pleas and replications thereto, such trial resulting in a judgment in favor of plaintiff for $1,500. The defendants having appealed to the Supreme court, the parties, by their counsel, entered into a stipulation to submit the case to me, to determine the following questions: Was the defendant's second plea a good plea in bar, and does the evidence sustain the third plea in bar of plaintiffs action? If the decision shall be in favor of defendants, the plaintiff shall release said judgments; if in favor of plaintiff, then the appeal taken by the city, shall be withdrawn.

I am of opinion that the second plea of defendant to which the court sustained the demurrer, was a good plea in bar, and that the demurrer should have been overruled. The plaintiff's action as originally commenced was assumpsit, and belonged to the class known as actions *ex contractu*, and can be maintained only where the cause of action arises out of contract.

When the plaintiff applied and obtained leave in March, 1876, to change his action, he thereupon changed it from an action *ex contractu* to one of another class known as an action *ex delicto*, applicable only to *torts* or wrongs; and under which, the plaintiff can never recover for a mere breach of contract as under the former class. In making this change of actions the plaintiff virtually and necessarily discontinued his action *ex contractu*. Suppose he had changed from what it was, to an action on the case for slander. A cause of action for slander could, under no circumstances, be made a ground of recovery in assumpsit; no more could one for a tortious breach of duty by a municipal corporation, which is the ground of the recovery set out after the change was made. Now when the change is made, what has become of the action of assumpsit? Can it be said to exist even in contemplation of law? No. It is discontinued. It is as if it had never been begun. Before the act of 1872, a plaintiff finding he had misconceived his action, as here, would be compelled to dismiss and bring a new suit. But by the provisions of the statute, the change may be made without being put to that trouble and delay. By virtue of the statute the court retains jurisdiction of the person, while the change is effected. But the legal effect, so far as the statute of limitations is concerned, is the same. The suit is from the time of the change to be deemed as then brought upon the new cause of action. But it has been decided by the Supreme court of this State, that when a new cause of action is introduced into the declaration by a mere amendment, bringing another subject matter, though belonging to the same class as the other causes of action, such new causes of action will be subject to the pleas of the statute of limitations the same as if the suit had been brought solely upon it at the time of the amendment. Ill. Cent. R. R. Co. *v.* Cobb, Christy & Co., 64 Ills., 140. This case is entirely conclusive of the question under consideration. Nor is it in any wise affected by the bill of particulars added to the original declaration. Such bill of particulars is no part of the declaration, and any good lawyer would know, if called upon to defend, that the plaintiff would be bound, in order to recover under the original declaration, to show a contract on the part of the city to pay the expenses thus specified.

The other point submitted is equally clear for the appellant. The case shows that the injury to Mrs. Connett occurred September 6, 1869. The legal ground upon which a husband may recover for an injury to his wife arising from the tortious act or omission of another, is the marriage relation, and the loss of the service and society of his wife as a consequence. It is a rule supported by the general current of authority, that the statute of limitations begins to run only from the time when the right of action accrued. When the wife became injured by reason of the sidewalk being in a bad and unsafe condition through the negligence of the city, and she was thereupon rendered sick and helpless, as is alleged, the right of action accrued to her husband, and he could have brought his action immediately and maintained it. On the trial he could have shown expenses for doctoring and nursing necessarily incurred, if set out in his declar-

ation, down to the time of the trial. Kerns *v.* Schoonmaker, 4 Ohio, 331, and authorities there cited. Bank of Hartford *v.* Waterman, 26 Conn., 344.

It appears that plaintiff relied upon the fact of incurring such expenses within the five years to take the case out of the statute of limitations. There is no doctrine or principle known to the law which would sustain that position. Such expenses are mere special damages which are the natural, though not the necessary, result of the injury, and are required to be stated as such in the declaration. In Argall *v.* Bryant, 1 Sandford (N. Y.) 98, it was held that the cause of action for the negligent or unskilful performance of a work or duty accrues at the time the act complained of is done, and not when the consequent injury happens to the plaintiff. Now here in the case under consideration, the negligence of the city and the consequent personal injury to plaintiff's wife, constitute the gravamen of the action, so that the right of action accrued at the time of the injury; from that time to the introduction of that cause of action into the case, was more than five years, and it was consequently barred by the statute of limitations. My decision is thus far in favor of the city upon all the questions submitted.

TULEY, STILES & LEWIS for plaintiff.

EGBERT JAMIESON & R. S. TUTHILL for the city.

OUR thanks are due J. Q. WING, of the Monticello, Iowa, bar, for the following opinion:

SUPREME COURT OF IOWA.

JUNE TERM, 1876.

NANCY JEWETT *v.* LOREZ WANSHURA.

Appeal from Jones County District Court.

ACTION BY WIFE FOR SELLING LIQUOR TO HUSBAND—SETTLING WITH ONE OF SEVERAL—SEPARATE ACTION—INTOXICATING LIQUOR.

1. INTOXICATING LIQUOR.—The court construes the various sections of the Iowa statutes, defining what are intoxicating liquors.

2. FOR SELLING INTOXICATING LIQUORS.—That Section 1557 gives a remedy for injuries caused by the sale of intoxicating liquor. Section 1539 classes wine and beer as intoxicating liquors, when sold to a person intoxicated, or in the habit of getting intoxicated; hence, Section 1557 gives a remedy for injuries caused by such sales of wine or beer.

3. WHEN SETTLING WITH ONE DOES NOT RELEASE OTHER.—When the drunkenness complained of consists not of a single fit of intoxication, contributed to by two or more, the action is not joint but several, and each is only liable for the injuries produced by his own acts; and in such a case, settling with one does not release the others.

4. WIFE CONSENTING TO SALE—INFERENCE.—The plaintiff's husband was an habitual drunkard; the plaintiff forbade the sale of liquor to her husband, and a day or two after, it is claimed, she came to the saloon in company with her husband, and in his presence, as defendant claims, directed him to sell her husband all the liquor he wanted. The only reasonable inference from such conduct is, that the act of plaintiff was under coercion or restraint, and the jury had a right to find from the testimony, that defendant drew the reasonable inference from the facts which he knew, and hence that he had knowledge that the plaintiff did not act voluntarily.—[ED. LEGAL NEWS.]

This action was commenced against defendant and eight others, under Section 1557 of the Code, to recover damages for selling intoxicating liquors to plaintiff's husband when he was intoxicated and when he was sober, thus causing him to become intemperate and drunken, and injuring her in her property and means of support. The defendant filed a motion that plaintiff be required to state more specially whether said defendants each kept a separate saloon, and whether each at his own saloon, by himself and independently of the others, sold to plaintiff's husband as alleged. Afterwards, the plaintiff elected to dismiss all the defendant's except Wanshura, who filed an answer denying all the allegations of the petition. Pending the trial, the defendant filed an amended answer, alleging that the plaintiff authorized and requested the defendant to sell ale and beer, wine and liquor to her husband.

Subsequently, the defendant filed a second amended answer, alleging that plaintiff commenced an action against H. Babbe and John Rueger, charging them with the commission of the same acts, and at the same time, constituting the wrongs and injuries imputed to defendant; that she has fully settled with said Babbe and Rueger, and acknowledged satisfaction for the alleged injuries, and that by reason thereof plaintiff is barred from further proceeding with this suit.

There was a jury trial, resulting in a verdict for the plaintiff for $10,000, and $2,000 exemplary damages.

Motion for a new trial overruled. Judgment upon the verdict.

Defendant appeals.

M. W. HERRICK and J. L. PETERS, for appellant.

J. Q. WING and A. J. MORRIS, for appellee.

DAY, J. I. The court refused to direct the jury: "That unless you find from the evidence that the defendant sold the said S Jewett intoxicating liquors other than ale or beer, within the time specified in the plaintiff's petition, the jury will find for the defendant." And in substance insisted that since the adoption of the Code of 1873, which took effect September 1, 1871, parties may recover for injuries sustained from intoxication, produced by reason of the sale of beer, ale and wine to persons intoxicated, or who are in the habit of becoming intoxicated, the same as for injuries sustained from drunkenness produced by any other intoxicating liquor. The defendant excepted to this action of the court, and now assigns it as error.

Section 1583 of the Revision, which is Section 1, Chapter 143, Laws of 1858, and substantially the same as Section 1555 of the Code, provides that "wherever the words intoxicating liquor" occur in this act, or the act to which this is amendatory, the same shall be construed to mean all spiritous and vinous liquors: *provided*, that nothing in this act shall be so construed as to forbid the manufacture and sale of beer, cider from apples, or wine from grapes, currants or other fruits grown in this State."

Whilst the law stood thus, Section 2, Chap. 47, Laws of 1872, Section 1557 of this Code was enacted. This provides that "every wife, child, parent, guardian, employer or other person, who shall be injured in person or property, or means of support, by any intoxicated person, or in consequence of the intoxication, habitual or otherwise, of any person, shall have a right of action in his or her own name, against any person who shall by selling intoxicating liquors, cause the intoxication of such person, for all damages actually sustained, as well as exemplary damages."

It may be conceded that this section authorizes a recovery of damages only for a sale of such intoxicating liquors as the law prohibits. It must be conceded however, that the limiting of intoxicating liquors to spiritous and vinous liquors is purely arbitrary, for it is a matter of general knowledge and observation, that malt liquors are in fact intoxicating. The law standing thus, Section 1539 of the Code was enacted. This, in substance, provides that it shall be unlawful for any person to sell any spiritous or other intoxicating liquors, including wine or beer, to any intoxicated person, or to any person who is in the habit of becoming intoxicated. The effect of this is to superadd to the arbitrary classification of intoxicating liquors, beer and wine, though manufactured from grapes or other fruits grown in this State, if the same be sold to persons intoxicated or in the habit of becoming intoxicated. Section 1557 gives a remedy for injuries caused by the sale of intoxicating liquors. Section 1539 classes wine and beer as intoxicating liquors, when sold to a person intoxicated or in the habit of becoming intoxicated. Hence, Section 1557 gives a remedy for injuries caused by such sales of wine or beer, and the court, in the action under consideration, did not err. The case of Worsley *v.* Spurgeon et al., 38 Iowa, 465, relied upon by appellant, is not in point. The question of selling to a person intoxicated, or in the habit of becoming intoxicated, was not presented in that case.

II. The court instructed the jury as follows: It appears from the original petition, as well as from the evidence in the case, that others were selling intoxicating liquors to the husband of the plaintiff during the time complained of, and it appears that she has settled and compromised her claim for damages against some of them.

These settlements by the plaintiff do not, in a case of this character, operate as a discharge of those not settled with. When the drunkenness complained of consists not of a mere simple fit of intoxication, contributed to by two or more, the action is not joint, but several, and each is only liable for the injuries produced by his own acts. It is proper, however, to consider whether the defendant, if liable at all, is liable for all the injury complained of. If others sold him liquors which contributed to produce drunkenness, which led to idleness and squandering of his property to the injury of plaintiff, each party contributing to the injury is liable for the injury which he alone did."

The giving of this instruction is assigned as error. The evidence introduced by plaintiff covered a period of two years. In LaFrance *v.* Kreuger, Dec. term, 1875, Western Jurist, 1874, p. 29, we held that a joint action does not lie for injuries sustained as alleged plaintiff's petition. When a joint action does not lie, each party must be liable for the injury which he occasioned, and as a corollary a settlement with one does not bar an action against another.

As intimately connected with this question, see Woolhealther *v.* Risley, 38 Iowa, 486; Kearney *v.* Fitzgerald, at the present term.

III. The evidence shows that plaintiff's husband became a confirmed drunkard, and that he visited the saloons almost daily. The plaintiff forbade the defendant selling liquor to her husband. A day or two thereafter plaintiff and her husband went to defendant's saloon, plaintiff's husband called de endant out, telling him his wife wanted to see him, and defendant claims that plaintiff then countermanded the previous order and directed him to sell her husband whatever he wanted. The plaintiff claims that she authorized defendant only to sell her husband a glass of beer occasionally. The plaintiff proved that she was counselled to retract the order by the threats of her husband that he would abandon her and take from her, her child. Knowledge of the threats were not brought home to the defendant. The court instructed the jury, "The defendant denies the alleged sales, and also insists that for a part of the time the plaintiff herself, authorized the sale of liquors to her husband. If the plaintiff did direct the defendant to sell what beer he wanted, and the defendant in good faith supposed that such request was made of her own free will, there is no liability for any sales made under those circumstances. But if you find from the evidence that the defendant knew that Jewett was an habitual drunkard, and knew that the wife only requested the sales to be made under the restraint of her husband and to keep peace with him, then the defendant is not excused if he did sell to the husband and make him drunk." The objection urged to this instruction is that there is no evidence that defendant knew that plaintiff acted under the restraint of her husband. That there is no direct evidence of this fact, is conceded. But knowledge consists of two kinds of facts which are unmistakably established, and the necessary conclusions or inferences from such facts. If it should be proved that a gun loaded with ball, was fired vertically into the air, a jury would be authorized to find from such testimony that the ball went up and came down, although no one testified that he saw it go in either direction.

They would so find because it is a law of nature that the fact proved produces the other results found. Now it is a law of human nature, not as absolute and unvariable as the physical law above named, but still a law, that a wife would not ordinarily, unless under restraint, request liquor to be sold to a husband who is an habitual drunkard, and especially is this so when she has so far manifested her disapprobation, as to go to a saloon and forbid such sale. Plaintiff's husband was an habitual drunkard and must have been known to defendant to be such. Plaintiff forbade the sale of liquor to her husband. A day or two thereafter she came to the saloon in company of her husband, and in his presence, as defendant claims, directed him to sell her husband all the liquor he wanted. The only reasonable inference from such conduct, is that the act of plaintiff was under coercion or restraint. The jury had a right to find from the testimony that defendant drew the reasonable inference from the facts which he knew, and hence that he had knowledge that plaintiff did not act voluntarily.

IV. It is urged that the verdict is excessive. We think not. Plaintiff's husband has become a confirmed drunkard, has abandoned a lucrative business in which he was earning five dollars a day, and has squandered a valuable property. If the verdict had been larger we could not have disturbed it.

Affirmed.

ENGLISH PROBATE COURT.

MAY, 1876.

JAMES and Others *v.* SHRIMPTON and Others.

WILL REVOKED BY MARRIAGE—REVIVAL BY CODICIL—DESTRUCTION OF CODICIL—MISTAKE AS TO EFFECT OF DESTRUCTION.

The testator made a will and afterwards married. Immediately after the marriage he executed a codicil to the will, making provisions for his wife, and in all other respects reviving, ratifying and confirming the will. Upon his wife's death he destroyed the codicil, being under the belief that the will would still remain operative.

The court held that the codicil was not destroyed *animo revocandi*, and granted probate of both will and codicil.

The plaintiffs propounded the will and codicil of John James, of Leamington, Warwickshire. The will was executed in 1871, the testator being at that time a widower. In 1872 he was again married and on the same day (after the marriage) he executed what purported to be a codicil to the will of 1871, making a provision for his wife, and containing the words, "In all other respects I revive, ratify, and confirm my said will." His wife predeceased him, and he then destroyed the codicil, the will alone being found after his death. The case was tried without a jury. The due execution and attestation of the codicil were proved, and evidence was given of its contents. The defendants did not oppose the grant of probate.

DR. SPINKS, Q. C., and C. A. MIDDLETON, for the plaintiffs.

SEARLE, for the defendants.

May 23.—HANNEN, P.—The material facts in this case are as follows: The deceased had made a will before his marriage. On the day of his marriage he executed what purported to be a codicil to his will, making provision for his wife, and in other respects reviving, ratifying, and confirming the will. On his wife's death he destroyed the codicil, and the question for me to determine is whether the physical destruction of the codicil, which had revived the revoked will, left the latter inoperative. I concluded, from the evidence given, that it was not his intention to leave the will inoperative, but that his idea was that, having been once revived, it would remain in force, notwithstanding the destruction of the codicil, and I was asked to grant probate of both the will and the codicil, on the ground that the latter was not destroyed *animo revocandi*. In all cases where an instrument is destroyed by a testator, the court must consider the condition of his mind as to the effect of the destruction. As I conclude that the physical destruction of the codicil took place without any intention of making the will inoperative, and under a misconception of the facts, and of the effect of the proceeding, I hold that the testator did not do the act *animo revocandi*, and I shall allow probate of both will and codicil.

Solicitors for the plaintiffs, JENNER & DYKE.

Solicitors for the defendants, DEACON, SON, & ROGERS.

GRIEVANCES OF EAST INDIA LAWYERS.—A lay contemporary, in dealing with what it calls "Indian grievances," observes: "Another man with a grievance was a Mohammedan barrister from Bombay. This gentleman has been in legal practice for six years in the presidency. Wishing to have the privilege of taking his talents and experience to another part of India, he found that he could not do so unless he made the journey to England and ate dinners at the Temple for three years. This is a harder case than that of the Irish law students, for he has had to relinquish a position as an employed practitioner, and during his period of exile must excommunicate himself altogether from friends as well as clients." It certainly is a hardship upon the natives of India, that in order to secure a call to the bar, they should be obliged to take up their residence in England for three years.—*Law Times.*

It was in Omaha. A lawyer was addressing the judge, and the judge was eating peanuts and reading a novel. The lawyer bore it some time, and then angrily remarked: "I suppose I am entitled to claim the attention of the court?"—"Well, sir," retorted the judge, "the court has long suspected you, and will do its duty the first chance it gets."

CHICAGO LEGAL NEWS.

Lex vincit.

MYRA BRADWELL, Editor.

CHICAGO, JULY 1, 1876.

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We call attention to the following opinions, reported at length in this issue:

VALIDITY OF TOWN BONDS—RIGHTS OF BONA FIDE HOLDERS.—The opinion of the Supreme Court of the United States by STRONG, J., holding that irregularities in the issue of town bonds in aid of railroads do not effect their validity in the hands of a *bona fide* holder, provided the original legislative authority to issue them is constitutional, and the bonds recite that they were issued in pursuance of such authority; that the negotiability of town bonds in aid of the construction of a railroad is not affected by the recital; that the bonds were issued "for the construction of the same through the township"; that the construction of the road is not a condition upon which the payment of the bonds depend.

FRAUDULENT CONVEYANCE—RETURN OF CONSIDERATION.—The opinion of the Supreme Court of the United States, by HUNT, J., as to the duty of a party asking to have a fraudulent sale set aside, to restore the consideration, and in what condition it must be.

PROPERTY DISTRAINED UNDER REVENUE LAWS.—The opinion of the United States Circuit Court in Ohio, by MCKENNAN, J., holding that the action of replevin is taken away from persons claiming property taken or distrained under authority of the revenue law.

BOUNDARY LINE ON NON-NAVIGABLE LAKE.—The opinion of the United States Circuit Court for the district of Indiana, by DRUMMOND, J., stating the law for defining the boundary line where land is purchased bordering upon a non-navigable lake, and where the line is meandered upon the lake for the purpose of quantity. This opinion was delivered upon demurrer. The final opinion of the learned Circuit judge will be awaited with much interest, as there are thousands of acres of land in the western States, the title to which depends upon the proper solution of the questions raised in this case.

EXCLUDING GAMBLERS FROM THE CARS.—The charge of the United States District court for the district of Nebraska, by DUDLEY, J., as to the power of a railway company to exclude gamblers from traveling on their cars.

CHANGING ACTION FROM ASSUMPSIT TO CASE—STATUTE OF LIMITATIONS.—The opinion of the Circuit Court of this county, by MCALLISTER, J., holding, where a husband commenced an action of assumpsit against the city of Chicago in June, 1874, to recover damages for injuries caused by a defective sidewalk, in 1869, and in March 1876, by leave of the court, changed his action from assumpsit to case, that on the statute of limitations being pleaded, for the purpose of determining whether the action was barred or not, the suit was to be regarded as commenced at the time the action was changed from assumpsit to case; that the fact the plaintiff had expended money within the five years, for the purpose of curing his wife of the injury, would not prevent the statute from running. The question decided in this case by the learned Judge, is an important one. The case was appealed to the Supreme Court, but by stipulation of the parties, the appeal was abandoned, and the case submitted to Judge McAllister, with the agreement that his opinion should be final. The plaintiff, in this case, is a well known citizen of Chicago. Soon after the opening of the Illinois and Michigan canal, he became popular with the traveling public as the captain of a packet boat. He figured extensively in politics. Some years ago he was admitted to the bar of the Supreme Court, and was for several years employed in the law department of the city.

SALE OF INTOXICATING LIQUOR TO HUSBAND.—The opinion of the Supreme Court of Iowa, by DAY, J., construing the statutes of that State defining what are to be regarded as intoxicating liquors, under what circumstances a wife may sue a saloon keeper for selling her husband intoxicating liquor, and, if several saloon keepers sell intoxicating liquors to an habitual drunkard, when the wife may sue one alone and when the action must be joint. The court holds that when the facts are such as not to require the action to be joint, that the wife settling with one of the saloon keepers does not release the others. This is an opinion which will be of value to the profession in States where there is a similar liquor law to that in Iowa. Some of the questions in this case have, we believe, never been decided before.

REVOCATION OF WILL.—The opinion of the English Court of Probate deciding some interesting questions relating to the revocation of a will, and the revival of a will by a codicil.

HOMESTEAD—LIEN—RESIDENCE.—The opinion of the Supreme Court of Nebraska, by MAXWELL, J., holding that after a judgment has been recovered against him, a debtor cannot prevent the enforcement of the lien thereby created on his real estate, by moving thereon and occupying it as a homestead.

NOTES TO RECENT CASES.

REMOVAL OF CAUSE.

The U. S. District Court, District of La., in Watson *v.* Bondurant, 3 Cent. Law Journal, 398, held where an execution issued by a State court, has been enjoined by that court at the suit of a citizen of the same State, the cause may, under the act of March 3d, 1875, be removed into the Federal court, if the party issuing the execution be a citizen of another State.

PROTEST FEES.

The Supreme Court of Kansas held, in Wooley et al. *v.* Van Volkenburgh, 3 Cent. Law Journal, 399, that protest damages are recoverable only when protest is legally necessary to fix the liability of some party to the note. Protest is not necessary to hold a guarantor, and therefore protest damages cannot be recovered in a suit by the payer of a note against the maker and guarantors.

BONDED WAREHOUSE—TRANSFER OF GOODS IN BOND.

In the case of the U. S. *v.* McCullogh, 22 Int. Rev. Rec., 202, Judge BLATCHFORD held that dealers in foreign as well as in domestic spirits are subject to the requirements of the 45th section of the Acts of 1868, and are obliged to keep the books therein provided, and, in so far as they can, to make the entries therein specified. That under this act and under the warehouse act, the bonded warehouse in which the liquor dealer stores his goods is to be regarded as his premises for the purposes of the suit before the court, the warehouse becoming, by the transfer of the goods in bond, the premises of the vendor instead of the vendee.

DAMAGE DONE BY SHIP TO REALTY ABROAD.

The English Court of Appeals on appeal from the Admiralty Division, *in re*, the Moxham, 34 L. T. Rep. N. S. 559, held that the question of the liability of ship owner, proceeded against in the English Admiralty Court, for an injury done by his ship to a pier projecting into the sea, but attached to the soil of a foreign country, is governed by the *lex loci* and not by English law.

LAWYERS IN CONGRESS.—An exchange says: "There are forty thousand lawyers in the country, one hundred and ninety-eight of whom are in Congress. There are two million five hundred thousand farmers and only eighteen of them in Congress." There is a growing disposition with some newspapers, and with the mass of the people, to find fault because there are so many lawyers in official positions. In the state and national governments, lawyers always have, and always will, exercise a controlling influence in the governmental affairs of this nation and the states which comprise it. It is proper that they should do so. Their whole lives are devoted to the science of law, and as a consequence they are better qualified than any other class of men, to make and administer the laws. Would any one claim that an agricultural fair, held exclusively by lawyers, who never owned an acre of land or planted a hill of corn in their lives, would be a success? The farmers should not array themselves against the lawyers, but be willing that they should take the lead in making and administering the laws. We would not be understood as saying that all our law-makers should be lawyers. We would have farmers, and the various trades and professions represented in Congress and in our State legislatures, but we would have a controlling influence in the hands of the legal profession. They are more conservative and less liable to be led astray by passion or prejudice than any other body of men.

THE SUPREME COURT OF ILLINOIS.—The judges since the adjournment of the June term, have been in conference at Mt. Vernon, until last Thursday, when they separated and went to their respective homes, not to rest and spend the summer vacation in idleness, but to resume the writing of opinions to be delivered at the September term at Ottawa. Some idea of the labor performed and to be performed by the judges, may be formed when it is known, that in addition to the cases previously submitted, the judges at the September term took 656 cases for decision, at the January term 354 cases, and at the June term just closed 242, thus making in ten months 1,252 cases submitted, in which the records, the briefs of counsel and the abstracts are to be examined, and the opinions written by the seven judges of the Supreme Court. A large portion of time has also to be spent in the examination of authorities. On Thursday the judges delivered 350 opinions which are divided between Mt. Vernon, Springfield and Ottawa. Those for Ottawa and Springfield were sent by express. We regret that we have not been able to obtain the lists of these cases in time for this issue.

SUPREME COURT OF ILLINOIS.

[LIST No. 3],

CLERK'S OFFICE SUPREME COURT,
MT. VERNON, ILL., June 19, 1876.

The following opinions were this day filed:

30. Nancy Frye v. Alex. Partridge. Reversed and remanded. Breese and Sheldon, JJ., dissent.
71. Hallam & Barnes v. Harriet Means. Affirmed.
100. Hall et al. v. Barnes. Affirmed.
128. Dobschutz et al v. Halliday et al. Affirmed

The following cases heretofore submitted were, by order of the court, re-docketed at June term, 1876, and opinions filed of this date:

220. Gibson et at. v. Gibson et al. Reversed and remanded.
221. Darwin et al v. Jones et al. Affirmed.
222. Ill. Mutual Ins. Co. v. Archdeacon et al. Affirmed.
223. St. Louis, Vand. & T. H. R. R. v. Haller. Affirmed.
224. Pursley v. Forth et al. Affirmed.
225. Mulhelsen et al. v. Lane. Reversed and remanded.
226. Jones et al. v. Neely. Affirmed.
227. Morton, Adm'r. v. Rainy. Affirmed.
228. Williams v. Chalfont. Reversed and remanded.
229. Gisler v. Witzel. Affirmed.
230. Ralls v. Ralls et al. Reversed and remanded.
231. Rockford, R. I. & St. L. R. R. Co. v. Delaney. Reversed and remanded.
233. Symonds et al. v. Lappin. Affirmed.
234. Hamilton et al. v. Johnson. Affirmed.
235. Ditch v. Vollhardt. Affirmed.
236. Paul et al. v. People, etc. Reversed and remanded.
237. Atkins v. Moore. Affirmed.
240. Harrington v. Stees. Affirmed.

Respectfully, R. A. D. WILLBANKS,
Clerk Supreme Court.

THE DEMOCRATIC CONVENTION.

ON WOMAN SUFFRAGE.

On Tuesday, during the session of the National Democratic Convention at St. Louis, Mr. Weed of New York, made a motion to adjourn to 5 o'clock in the afternoon.

The Chairman arose and said—The gentleman from New York will be good enough to withdraw his motion until the Chair makes an announcement.

Mr. Weed—I will, sir.

The Chairman—The Chair desires to state that he is requested by delegates from the Woman's Rights National Convention to state that representatives of that organization are here and desire about ten minutes to make a statement to the convention.

["Hear them! hear them!"]

The Chairman — Without objection they will now be heard. The Chair will appoint Mr. Tweed, of New York, and Mr. Smalley, of Vermont, a committee to escort the ladies to the platform. [Applause and laughter.]

A delegate—Mr. President—

The Chair—No motion is in order. A lady has the floor. [Laughter.]

Several voices—Mr. President—

The Chair—Gentlemen will take their seats. The Chair has stated that a lady has the floor. The Chair has the honor to present to the Convention, Miss Phœbe Couzins, of St. Louis. [Applause.]

A delegate—I rose to a point of order.

The Chair—The gentleman is out of order and will take his seat immediately.

The same delegate—Can't I make a point of order?

The Chair—No, sir. A lady has the floor, and no point of order is in order. [Cries of "Hurrah for the Chair."]

Miss Couzins then stepped forward and delivered the following address:

THE SPEECH.

MR. PRESIDENT AND GENTLEMEN OF THE NATIONAL DEMOCRATIC CONVENTION: The Centennial anniversary of our national birthday is also happily a Centennial leap year. It is in order then, I take it, not only to receive proposals from fair women, but also to accept them. Taking advantage of this right and of your courtesy, I, as a delegated authority of the fair sex, am here not only to reaffirm for them the principles of liberty and equality, but to sue for the hand of those here assembled in National Convention; and the hand, Mr. President, must be neither larger nor smaller than a man's nand.

In the good old days of our ancestors, it was deemed an unpardonable offense

if the leap-year privilege accorded to women were not unhesitatingly acquiesced in, and he who would not joyfully say "Yes" to the sweet maiden's coy wooing, was regarded with supreme contempt, and in the isolation of single miserableness, died ere yet his race was run, unwept, unsung of women. So, then, gentlemen, if as a party you would live long, be prosperous and happy, give heed to the warning from out the gates of Paradise, "It is not good for man to be alone," and accept for your companion in the political household "she who binds all the discordant elements of life unto the Divine harmony, sweet nature's better half." James Madison said, let it be remembered, that it has ever been the pride of America that the rights for which she contended were the rights of human nature, and, gentlemen, we ask their recognition, not as women but as human beings. Our magna-charta is, Equality of Rights, and to-day we sue for this, not by force of might and power, but by the more potent voice of truth and justice, speaking to every thinking man's conscience in tones more persuasive than those which appealed to King John on the field of Runnymede. We cannot assert this right by a resort to the sword. We confess our inability to thunder forth our claim from the canon's mouth, or to fire a shot that can be heard around the world; but in this grand Centennial year, when all others are free, and when our souls, too, are responding to the music of the utterance of Jefferson, of Hancock, of Adams, and of Patrick Henry, with mind expanding to a realization of their grandeur, with pulse beating for the freedom they proclaimed, we would fain pluck a live coal from off the altar of our liberties that shall kindle in your souls a zeal for the rights of the individual, the universal humanity, such as our fathers had when they thrilled the hearts of the people with the cry "Taxation without representation is tyranny," and with burning thoughts and noble utterances, they wrote by the camp-fires of the Revolution that immortal truth, "Atl humanity is created free and equal."

Gentlemen, we appeal to your sense of justice and the right, using but the grand old truths of our fathers to support our claims; and here we rest our case, commending to you in closing, the truth that a sense of justice is the sovereign power of the human mind. The most unyielding of any, it rewards with a higher sanction; it punishes with a deeper agony than any earthly tribunal; it never slumbers, never dies. It constantly utters and demands justice by the eternal rule of right, truth and equity, and on this eternal foundation-stone—right, truth and equity—we stand.

FORMAL ADDRESS.

The address which Miss Couzins presented is as follows:

PHILADELPHIA, Pa., June 20, 1876.—*To the President and Members of the National Democratic Convention assembled at St. Louis, June*, 27, 1876—GENTLEMEN: In reading the call for your Convention, the National Woman-Suffrage Association were gratified to find that your invitation was not limited to voters, but cordially extended to all citizens of the United States. We accordingly send delegates from our Association, asking for them a voice in your proceedings, and also a plank in your platform declaring the political rights of women. Women are the only class of citizens still wholly unrepresented in the government, and yet we possess every qualification requisite for voters in the several States. Women possess property and education; we take out naturalization papers and passports; we pre-empt lands, pay taxes, and suffer for our own violation of the laws; we are neither idiots, lunatics, nor criminals, and according to your State Constitutions, lack but one qualification for voters, namely: sex, which is an insurmountable qualification, and therefore equivalent to a bill of attainder against one-half of the people, —a power no State nor Congress can legally exercise, being forbidden in Art. I., Secs. 9 and 10 of the Constitution. Our rulers may have the right to regulate the suffrage, but they cannot abolish it altogether for any class of citizens, as has been done in the case of the women of this Republic, without direct violation of the fundamental law of the land. As you hold the Constitution of the fathers to be a sacred legacy to us and our children forever, we ask you to so interpret that magna charter of human rights as to secure justice and equality to all United States citizens, irrespective of sex. We desire to call your attention to the violation of the essential principle of self-government in the disfranchisement of the women of the several States, and we appeal to you, not only because as a minority you are in a position to consider principles, but because you were the party first to extend suffrage by removing the property qualification from all white men, and thus making the political status of the richest and poorest citizen the same. That act of justice to the laboring masses insured your power, with but few interruptions, until the War. When the District of Columbia Suffrage bill was under discussion in 1866, it was a Democratic Senator, Mr. Cowan, of Pennsylvania, who proposed an amendment to strike out the word "male," and thus extend the right of suffrage to the women as well as the black men of the District. That amendment gave us a splendid discussion on woman suffrage that lasted three days in the Senate of the United States. It was a Democratic Legislature that secured the right of suffrage to the women of Wyoming, and we now ask you, in National Convention, to pledge the Democratic party to extend this act of justice to women throughout the nation, and thus call to your side a new political force that will restore and perpetuate your power for years to come.

The Republican party gave us a plank in their platform of 1868, pledging themselves to a special consideration of our demands. But by their constitutional interpretations, legislative enactments, and judicial decisions, so far from redeeming their pledge, they have buried our petitions and appeals under laws in direct opposition to their high-sounding promises and professions, and now, in 1876, they give us another plank in their platform, approving "the substantial advance made toward the establishment of equal rights to women," cunningly reminding us that the privileges and immunities we now enjoy are all due to Republican legislation. Although under a Republican dynasty inspectors of elections have been arrested and imprisoned for taking the votes of women; temperance women arrested and imprisoned for praying in the streets; houses, lands, bonds, and stock of women seized and sold for their refusal to pay unjust taxation, and, more than all, we have this singular spectacle,—a Republican woman who had spoken for the Republican party throughout the last Presidential campaign, arrested by a Republican officer for voting the Republican ticket, denied the right of trial by jury by a Republican judge, convicted and sentenced to a fine of $100 and costs of prosecution, and all this for asserting at the polls the most sacred of all the rights of American citizenship—the right of suffrage specifically secured by recent Republican amendments to the Federal constitution.

Again, the Supreme court of the United States, by its recent decision in the Miner *v.* Happersatt case, has stultified its own interpretation of constitutional law. A negro, by virtue of his United States citizenship, is declared under the recent amendments a voter in every State in the Union, but when a woman, by virtue of her United States citizenship, applies to the Supreme court of the United States for protection in the exercise of this sole right, she is remanded to the State by the unanimous decision of the nine judges on the Bench that the "Constitution of the United States does not confer the right of suffrage upon any one." All concessions of privileges or redress of grievances are a mockery for any class that has no voice in the laws and law-makers. Hence we demand the ballot, that sceptre of power, in our own hands, as the only sure protection for our rights of person and property under all conditions. If the few may grant or withhold rights at their pleasure, the many cannot be said to enjoy the blessings of self government. Jefferson said: "The God who gave us life gave us liberty. At the same time the hand of force may destroy, but cannot disjoin them." While the first and highest motive we would urge on you is the recognition in all your actions of the great principles of justice and equality that underlie our form of government, it is not unworthy to remind you that the party that takes this onward step will reap its just reward. Had you heeded our appeals made to you at Tammany Hall, New York, in 1868, and again in Baltimore, in 1872, your party might now have been in power, as you could have had what neither party can boast to-day—a live issue on which to rouse the enthusiasm of the people.

REFORM IS THE WATCHWORD OF THE HOUR.

But how can we hope for honor and honesty in either party in minor matters so long as both consent to rob one-half the people, their own mothers and sisters, wives and daughters, of their most sacred right? As a party you defended the right of self-government in Louisiana ably and eloquently during the last session of Congress. Are the rights of women in all the Southern States, whose slaves are now their rulers, less sacred than those of the men of Louisiana?

"The whole art of government," says Jefferson, "consists in being honest." It needs but little observation to see that the tide of progress in all countries is setting toward the emancipation and enfranchisement of women, and this step in civilization is to be taken in our day and generation. Whether the Democratic party will take the initiative in this reform and reap the glory of crowning fifteen million women with the rights of American citizenship, and thereby vindicate our theory of self-government, is the momentous question. We ask you to decide in this eventful hour as we round out the first century of our national life.

ELIZABETH CADY STANTON,
President.
MATILDA JOSLYN GAGE,
Chairman Executive Committee.
SUSAN B. ANTHONY,
Corresponding Secretary.

THE PROPOSED PLANK.

Accompanying this address was the following plank for the Democratic platform:

WHEREAS, The Democratic party was the first to abolish the property qualification and extend the right of suffrage to all white men in some of the older States; and

WHEREAS, It was a Democratic legislature that extended the right of suffrage to the women of Wyoming; therefore,

Resolved, That we pledge ourselves to secure the right of suffrage to the women of the United States on equal terms with men.

WHAT TO DO WITH IT.

The Chair—The Convention has heard the memorial, and the Chair will entertain a motion as to what disposition to make of it.

Mr. McClernand, of Illinois—I move that the memorial be referred to the Committee on Resolutions for their respectful consideration.

The Chair—Without objection, the resolution will be referred under the rule, as moved by the gentleman from Illinois.

THE WHISKEY CASES.

On last Saturday Judge Blodgett, of the United States District Court, finally disposed of twelve of the revenue cases known as the "whiskey cases." The parties had pleaded guilty or been found so, by the verdict of a jury of revenue frauds. The counsel for the parties convicted had previously been heard, and testimony introduced to mitigate the punishment, so that nothing remained to be done, but for the court to pass sentence.

The court room was full and overflowing at an early hour. Of the defendants, Mr. Hesing, was the first to come in. He was accompanied by his son, Mr. Washington Hesing. Mr. Burroughs and Buffalo Miller soon came in, and were followed by Pahlam and Rush, Dickinson, Abell, Powell and the others, to the number of twelve. All of them took seats in the jury box, filling it up. The Government was represented by District Attorney Bangs, and his assistant, Mr. Burke, and by Messrs. Ayer and Boutelle, of the special counsel. Of the counsel for the defendants, there were present Messrs. Storrs, Stanford, Lawrence, Jussen, Dow and Leffingwell.

There was a deep hush as Judge Blodgett entered the court-room, at ten minutes past 10, with the United States Statutes under his arm. The court was called to order immediately, and Judge Blodgett first decided the motion for a new trial in the Cullerton case.

The court said: No. 217—United States vs. Cullerton. The motion for a new trial and an arrest of judgment is entered in this case. The defendant was indicted under eight counts. Some charged him with conspiracy; others with negligence; others with designedly allowing fraud. The jury found him guilty on the second charge only. The motion for a new trial said that the proof did not show any intentional violation on the part of the defendant. This is the gist of the motion. The main charge was that of allowing the wine-room to be opened when the gauger was not there. The counsel laid too much stress upon the testimony of the defendant, and Hinckly, Miller and Burroughs. I can't concur in the statement that it relies upon their testimony alone. I think the testimony did warrant the finding of a verdict of guilty for negligence.

As to the motion for the arrest of judgment, the counsel based their argument upon the fact that the indictment was ambiguous and the verdict equally so. I think it was sufficient to charge that the defendant, being a Government officer, did negligently permit the government to be defrauded, under the meaning of the statute. The offense is laid with sufficient definiteness. It has been in accordance with a previous decision of this court where an arrest of judgment is asked, as in this case, to require an exception to be taken before the trial. The court would have allowed the indictment to be quashed, or allowed a bill of particulars to have been filed before the trial. But as he pleaded not guilty, went to trial and never asked for these, it seems to me that the indictment should stand. I have come to the conclusion that both the motion in arrest and for a new trial should be overruled. I shall not sentence the prisoner to-day.

PASSING SENTENCE.

The court then said he would proceed to pass sentence on such of the defendants as were called up last Monday. He would first dispose of the case of Anthony C. Hesing. Mr. Hesing here arose and stood up in front of the bar. The court said: Mr. Hesing, I have heard your counsel at length in mitigation of punishment in your case. Have you anything further to say yourself why sentence should not be pronounced?

Mr. Hesing paused for a moment, and then, very much flushed, and with considerable apparent effort, he addressed the court. He spoke substantially as follows:

MR. HESING'S REMARKS.

I simply wish to state, Your Honor, and would state the same if I were called now to the day of judgment, that while I have technically erred, I have never been guilty of any criminality. I have taken no oath of office; I have not corrupted anybody, seduced anybody, have not participated in any frauds or had anything to do with any frauds. I was only a stockholder in a distillery, but had nothing to do with the running of it. That was done by others, and so help me God (with great vehemence), I never had one word of conversation with these gentlemen on the subject of frauds.

I asked you, as my counsel has, to be as lenient with me as you possibly can. I helped ferret out frauds in 1868. Twice I might have had the Collectorship from President Grant, and twice it was refused. Not a dishonest dollar has ever stuck to my fingers. It was only when misfortune overtook me that I ever became interested in a distillery at all. Mr. Hesing then went over some of the events in his life, laying particular stress on his financial misfortunes. He also said that if others were to receive immunity for furnishing testimony and information, he wished to state a fact that had not come out in any of the trials. Before he was indicted at all, he went to J. R. Jones and gave him information against a dishonest Deputy Collector. Had his words been heeded, or had Mr. Jones been listened to, the deputy collector would have been taken and punished. But he was not listened to; the deputy collector referred to was allowed to act for months after that, and is now beyond the reach of the law, in Canada."

Mr. Hesing concluded in these words: "This is all I have to say. I beg of Your Honor that you will treat me as leniently as your conscience will permit."

Judge Blodgett said the defendant had pleaded guilty to two counts, which he went on to specify. The conspiracy count subjects the offender to a penalty of a fine not to exceed $10,000 and imprisonment not to exceed two years. The court then said he did not desire to add any unnecessary words. The evidence satisfied his mind that Mr. Hesing was one of the original conspirators, banded together in this city for the purpose of defrauding the revenues. He regarded it as of little consequence which of the conspirators seduced the others. They all acted together in this scheme of corruption, which included the wholesale corruption of the public officers and the public service, for which the court was ready to say almost that he could not see the slightest excuse. In regard to the distillers who had families to support, and were drawn into the conspiracy, he could see some excuse, but not so as to those who had originally formed the scheme. In fixing the sentence he had been as lenient as he possibly could. The sentence of the court was here pronounced, which was that Mr. Hesing pay a fine of $5,000, and be imprisoned in the County Jail of Cook county for a term of two years.

When these words were pronounced, Mr. Hesing flushed deeper than before; his eyes turned to the floor, and he stood without moving, until directed by the court to resume his seat. He had evidently not expected so long a term of imprisonment, and the thought of being shut up among common criminals for two years was a terrible one to his proud spirit.

George T. Burroughs was next called. He stood up, and the court said:

George T. Burroughs, you have pleaded guilty to the third and sixth counts in the indictment. Have you anything to say in addition to what your counsel have said?

Burroughs—No, sir.

Court—The evidence has shown that you were one of the chief conspirators. Your sentence is a fine of $3,000 and imprisonment for one year in the county jail.

O. B. Dickinson and Jonathan Abel were next called. They had nothing to say why sentence should not be pronounced. The court said: Your sentence is a fine of $1,000 each and imprisonment of three months in the county jail. The fine is the lightest in the power of the court. The imprisonment might be less, but I think this much is warranted.

Simon Powell was the next one called. He had nothing to say, and was sentenced to pay a fine of $3,000, and imprisonment in the county jail for a term of six months.

Henry B. Miller was called next. In answer to the question of the court whether he had anything to say, he said he thought, in justification of himself, he might add a little to what his counsel had said. The gaugers at his distillery, when the crookedness commenced, were Herman Becker and Adolph Mueller. They had both testified on the stand that they were engaged in crooked business before that time. While he did not wish to shirk any responsibility, he would submit that they corrupted him instead of his corrupting them. He then mentioned his efforts, in conjunction with others, to have the frauds stopped. But they were not listened to. All distillers would have preferred to remain honest, but as they could not, he thought that ninety-nine men out of every hundred would have done as they did. He closed by saying that he should have to take whatever the court gave him. He was sentenced to pay a fine of $3,000, and imprisonment for six months in the county jail.

Frederick L. Reid had nothing to say. The District Attorney had said that in this case, considering the circumstances, he would be satisfied with a light punishment. The sentence of the court was that he pay a fine of $1,000 and be imprisoned in the county jail for one day.

Herman J. Pahlman and D. G. Rush were called. The court said: "Have you anything to add to what your attorney said in mitigation of punishment?"

P. and R.—"We have not."

The court said that they had been found guilty by the jury on five counts. He did not feel it his duty to go to the full extent of the law. The sentence is a fine of $1.000 each, and imprisonment in the county jail for three months.

William Cooper was requested to stand up. The court said that the District Attorney had added his recommendation to the statements of defendant's counsel in favor of a light punishment. His sentence was a fine of $200 and imprisonment for three months.

James H. Hildreth was next called by Judge Blodgett, but he did not respond. It became evident at that moment that the report of his flight was true.

Judge Lawrence, however, rose and said his law-firm was called on by Mr. Hildreth, a week ago to-day, and asked to make statements in his behalf on Monday. Judge Lawrence accordingly appeared at the time and did. He also sent a note to his house, yesterday, giving him notice to appear for sentence to-day. The inference is that he has escaped. Had the speaker known that he had any such intention he would not have appeared for him Monday. Judge Lawrence hoped it was not necessary to say that neither he nor any of Hildreth's counsel advised this escape, or had any knowledge of it. The defendant had acted entirely without their advice or knowledge. He would consider it gross misconduct for counsel to advise or connive at anything of the kind.

The court said that no such imputation rested on Judge Lawrence, or on any of Mr. Hildreth's counsel.

Judge Bangs wanted Mr. Hildreth called, and his bail defaulted. His bondsman was Frank W. Warren, and the bail $5,000. It was declared forfeited and a *scire facias* ordered to issue against Mr. Warren.

Ben P. Hutchins and David Cochrane were next called before the bar of the court. In mitigation of punishment they had nothing to say. They had plead guilty to the conspiracy count in the indictment. The sentence was a fine of $1,000 each, and an imprisonment in the county jail of three months.

IN CUSTODY.

This completed the number to be sentenced this morning, and the court directed Marshal Campbell to take the prisoners in custody and convey them to jail.

Colonel Jussen applied for a suspension of sentence until application for pardon could be made. He thought twenty days would be sufficient. He did not wish to take up any time in making the application.

The court said they had had ample opportunity. For months their case had been before the court. Moreover, there was no reasonable ground for hope of pardon. They had pleaded guilty. He was obliged to refuse the application.

Mr. Storrs suggested that there might be good reason for a suspension until Monday morning. The defendants might desire to visit their friends. There is no such thing as run in them. They are men advanced in years, and have families. He thought these might be reasons why the court would give them Sunday.

The court said that these men were brought up last Monday for sentence, and had had all the time since then to prepare. They all knew, and their counsel knew, that they must be imprisoned. He had given them all the time since Monday, and could give them no more. He again directed the Marshal to take them in custody. The defendants were requested by the Marshal to remain in their seats until the crowd got out of the court room.

THE USE OF EXTRINSIC EVIDENCE TO SUPPLEMENT OR CONTROL DOCUMENTS OF TITLE.

[From the London *Law Times.*]

3. LATENT AMBIGUITIES.

(*Continued from page* 318.)

Falsa demonstratio non nocet is a maxim which still embodies the rule of the courts. In Bernasconi *v.* Atkinson, 10 Hare, 345, Lord Chancellor Hatherley, then Vice-Chancellor Wood, held that George Vincent Bernasconi, the son of a deceased uncle of the testator, named Joseph, took, on the ground that the testator was mistaken in description rather than in the name of the legatee, and also upon evidence that George Vincent Bernasconi frequently visited and dined with the testator, who usually called him Vincent. In Adams *v.* Jones, 9 Hare, 485, the bequest was to Clare Hannah Adams, the wife of Thomas Adams. The wife's name was Hannah only, but there was an infant daughter whose name was Clare Hannah. Vice-Chancellor Turner held that the wife took. In Bradshaw *v.* Bradshaw, Lord Abinger allowed the name to yield to the description. The devise was in terms to Robert Blagrove Bradshaw, the second son of the testator's daughter. Robert Blagrove was the eldest son, but the Chief Baron, holding that the second son was to take, did so, because the will itself, as well as a parol evidence, showed the intention of the testator to provide for him. In Gillett *v.* Gane, a testator devised certain freehold property to trustees to the use of his son George Gillett for life, and after his decease to the use of Robert Gillett, the fourth son of George Gillett, in fee, in case he should attain twenty-one, but if he should die under that age, to the use of the fifth son, in fee, and if he should die under twenty-one, to the first son coming after the fifth who should attain twenty-one. Robert H. Gillett was the third, and John William Gillett was the fourth son of George Gillett, who had seven sons. Vice-Chancellor Malins considered that there were reasons apparent from the evidence why the testator passed over the first and second sons, but not for passing over the third, and he held that the name must prevail over the description, citing the maxim, *Veritas no minis tollit errorem descriptionis*, L. Rep., 10 Eq. 29; 22 L. T. Rep. N. S., 58.

In Farrer *v.* St. Catharine's College, Cambridge, L. Rep., 10 Eq. Cas., 19; 28 L. T. Rep. N. S., 801, a testator by his will gave legacies of £25 each to the Rev. J. B., the Rev. N. L., and the Rev. J. D. C. W., described as curates of Holy Trinity church, Brompton. At the date of the will and the death of the testator there had been no curate of that church of the name of W. Lord Chancellor Selborne held that it was a case of *falsa demonstratio*, that extrinsic evidence was not admissible, and that W. was entitled; and as to the admission of evidence approved of Drake *v.* Drake, 8 L. C., 172.

In Wells *v.* Wells, L. Rep., 18 Eq., 504, the Master of the Rolls held that in Grant *v.* Grant the Exchequer Chamber only decided that the primary meaning of the word nephew included not only the child of the testator's own brother, but also the child of his wife's brother. That, he thought, was a question not of law, but of the English language; the ordinary meaning of the words nephews and nieces is a man's own nephews and nieces, that is, by consanguinity, and not by affinity. Sir George Jessel did not discuss the question of extrinsic evidence, or consider the circumstances of Grant *v.* Grant. He concluded that as in Blower's Trusts Lord Justice Mellish observed, "the words nephews and neices *prima facie* mean the children of brothers and sisters," and as the same learned judge took the same view in Sherratt *v.* Mountfort, L. Rep., 8 ch., 928, they must, in the case before him, have their primary sense unless there was something in the context to give them a different meaning. He even went further, and considered that you cannot import the secondary meaning of the word into the residuary gift merely because it has been used in the former part of the will, citing as an authority the case of Smith *v.* Lidiard. With all respect to the learned Master of the Rolls, we are bound to say that we think he attributes to testators a more scholarly use of the English language than they exhibit. "*Bigne faciendæ sunt interpretationes, propter simplicitatem laicorum ut res magis valeat quam pereat; et verba intentioni nom e contra debent inservire:*" Co. Litt., 36a.

A testator appointed as his executor his son Forster Charter. He had no son of that name, but he had two sons named William Foster Charter and Charles Charter. Lord Penzance was of opinion that if a man be christened by several names they constitute in law but one christian name, and anyone of them, the rest being omitted, is not the full legal name of the individual. He did not deny that a bequest to a man by his first christian name, or by any one of them by which he was familiarly known, or even commonly called by the testator, would be good. But the present case being one in which the name used was neither the legal christian name nor the first name, nor a name by which the man was ever called, there was such an ambiguity as to admit parol evidence in its explanation. After considering the circumstances under which the testator wrote the will, the position of the parties about him, and the contents of the will itself, the court decreed probate to Charles Charter. Charter *v.* Charter, 25 L. T. Rep. N. S., 575.

A testator appointed his nephew to be executor of his will. At the date of the will there was living a son of the brother of the testator of that name, with whom he was not on terms of intimacy. The nephew of the testator's wife was also of the same name, had lived with him for many years, and had latterly managed his business. Lord Penzance held that where a word is used in a will as part of the description of a person specified by name, and is applicable to persons so named in an ordinary and popular sense as well as in a strict and primary sense, an ambiguity is raised, and the court may receive evidence of the circumstances in which the testator was placed when he executed his will, and of the sense in which he was accustomed to use the word in order to ascertain the person indicated. Grant *v.* Grant, L. Rep. 2 P. & M., 8; 21 L. T. Rep. N. S., 645.

In Millard *v.* Bailey, L. Rep. 1 Eq Cas., 378; 35 L. J., 312, Ch., a testatrix bequeathed thirty-three shares in the Epsom and Ewell Gas company amongst her four children, and the remaining shares to her godchild. She had thirty-seven original paid-up shares, in respect of which thirty-seven bonus shares had been allotted. The children claimed double shares, and gave evidence of a conversation in which the testatrix said that her husband treated them as such, and that she continued to do so. Lord Chancellor Hatherley, then Vice Chancellor Wood, was of opinion that the authorities show that in particular counties there may be particular denominations used for measure of land or other things of universal application in the district, and that parol evidence is admissible for the purpose of explaining the custom of the district, or of the usage of the particular class of persons to whom the testator belonged. But he held that these new shares appearing on the register in different numbers from the original shares, and one at least of the holders having dealt with them separately from the original shares, no evidence was admissible to show that the shares were treated by all holders as double shares. The particular expressions attributable to the testatrix could not prevail, not being the general language universally applicable to the particular subject matter.

In Re Sayers' Trusts, L. Rep., 6 Eq. Ca., 319; 18 L. T. Rep. N. S., 787, the testator made a bequest to a married woman for life, with remainder to her children for life, with remainder to the grandchildren. The gift to the children would be void for remoteness if the class of children was to include other than those living at the death of the testator. Evidence was therefore offered that the married woman was then past child bearing. Vice-Chancellor Malins refused to admit it, saying, to do so would be attended with the utmost danger, because a lawyer, on looking at the instrument, could say whether the gift was good or void for remoteness, whereas if parol evidence were admitted an inquiry would be necessary in every case into the position of beneficiaries named in it.

4. THE ACQUISITION OF LANDS AFTER THE DATE OF THE WILL.

Statute 1 Vict. c. 26, s. 24, enacts that every will shall be construed with reference to the real and personal estates comprised in it, to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention shall appear by the will.

A preliminary question to the use of parol evidence is whether there is a contrary intention or not. In Doe *v.* Walker, 12 M. & W., 591, parol evidence was used, notwithstanding the testator spoke in his will of "the lands which I have."

In Cole *v.* Scott, 1 Man. & G., 518, Lord Chancellor Cottenham held that the use of the adverb "now," in the expression "lands which I now have," showed the intention of excluding from the devise after acquired lands, and therefore the evidence was not admissible. In Lord Lifford *v.* Powys Keck, L. Rep. 1 Eq., 347, the testator gave all his freehold estate of or to which he was seized or entitled, and gave the copyhold estate which he was, or at the time of his death should be possessed of or entitled to. The Master of the Rolls, Lord Romilly, gave no

sanction to the argument that the testator had, with reference to the copyholds, but not with reference to the freeholds, pointed to the acquisition of other property. This he considered did not show a contrary intention of the testator; but effect was to be given to the broad intention of the legislature, and that a gift of all his freehold estate should pass all he had at the date of the will, as well as all he acquired afterwards, 30 Bea., 300. Vice Chancellor Knight Bruce, with some degree of wit, 2 De G. & Sm., 793, put the question, "Suppose a man to have a brown horse, and bequeath it and then to sell it and buy another brown horse, and die, does the horse of which he was possessed at the time of his death pass." In Castle *v.* Fox, L. Rep. 11 Eq. Cas., 542; 24 L. T. Rep. N. S., 536, Vice-Chancellor Malins made use of the illustration, and replied, "Yes. Unless other words describe the brown horse, all the judge is at liberty to ask is, Had he a brown horse when he died?" A brown horse is given, it is to that the description is applied, and it is perfectly immaterial that he had another brown horse when he made the will. The same learned judge remarked that whether it be a particular description, or whether it be a general description, if a testator gives property by a particular name, the question is not what was known by that name when he made his will, but what was known by that name, and treated by him as coming under that description at any time during his life, and, therefore, evidence as to his treatment of the property, and what he called the particular estate after the date of his will, is just as legitimate evidence as evidence of what he did before the date of his will, because the words of the statute are that the will is to be read as speaking immediately before the death of the testator, unless a contrary intention appears.

In Lady Langdale *v* Briggs, 8 De G. M. & G., 391, Lords Justices Knight Bruce and Turner held that where a testator, after the date of his will became entitled to the personal estate of a deceased sister, as one of the next of kin, leaseholds forming part of the sister's general estate, passed under a bequest of the testator's leasehold property, though it might be specific, the will speaking from death by virtue of sect. 24 of the Act.

5. MISTAKE.

Hall *v.* Cazenove, 4 East, 476, is an authority for the admission of extrinsic evidence to show that a charter-party was wrongly dated; so is Jayne *v.* Hughes, 10 Ex., 430, where it is sought to rebut the date of a deed; so is Randfield *v.* Randfield, H. L. 6 Jur. N. S., 901, to correct the date of a will, even where the correction brought the will within the new law of the Wills Act. Randfield *v.* Randfield was followed by Sir J. P. Wilde in Reffell *v.* Reffell, 12 Jur. N. S. 910; L. Rep. 1 P. & D, 139 He was of opinion that where the question is not as to the factum of the document, or as to the time of its execution, but as to the meaning of the language used, then the doctrine of latent and patent ambiguities is, as it always has been, applicable.

If some plain and palpable error has crept into any written document equity formerly, and the courts of law now, sanction the admission of evidence to expose the error: Wake *v.* Harrop, 6 H. & N., 768; Story, p. 772.

6. REVOCATION—DEPENDENT RELATIVE REVOCATION.

As early as 1754, Sir George Lee laid down the law in Helyar *v.* Helyar, 1 Phil Rep., 472 that if a will was last seen in the testator's custody, and a diligent search has failed to discover it, a presumption, though not a conclusive one, arises that he destroyed it *animo revocandi*. Lord Wensleydale, in Phillips *v.* Phillips, 1 Moo. P. C., 299, affirmed the rule, as also did Dr. Lushington, in Cutts *v.* Gilbert, 9 Moo. P. C., 131. Accordingly, in Brown *v.* Brown, 8 Q. B., 876, where A executed a will, and afterwards executed a second will, which he took away with him, and on his death the earlier was found, but the second was not, and the solicitor from recollection deposed that the second revoked the first, the Court of Queen's Bench, Chief Justice Campbell, and Justices Coleridge, Wightman, and Crompton, held that the evidence of revocation was conclusive. In Lord St. Leonard's case, the Court of Appeal held that on the loss of a will traced to the testator's custody, there arose a presumption that it had been revoked; but that such presumption was not *de jure*, and might be rebutted by parol evidence.

As the acts by which a testator may physically destroy or mutilate a testamentary instrument may be the result of accident or of a single intention, or of various intentions, they are equivocal in their nature. It is, therefore, necessary in each case to study the act done by the light of the circumstances under which it occurred, and the declarations of the testator with which it may have been accompanied. For unless it be done *animo revocandi*, it is no revocation. In such cases parol evidence is admissible. "What then," asked Sir J. P. Wilde, in Powell *v.* Powell, 14 L. T. Rep. N. S., 800; L. Rep. 1 P. & D., 209, "if the act of destruction be done with the sole intention of setting up and establishing some other testamentary paper for which the destruction of the paper in question was only designed to make way?" It is clear that in such cases the *animus revocandi* had only a conditional existence, the condition being the validity of the paper intended to be substituted. In accordance with this principle, where a testator had executed a will in 1864, revoking all former wills, and in 1865 destroyed this will, at the same time expressing a wish to substitute for it a will which he held in his hand. Sir J. P. Wilde held that, inasmuch as the statute 1 Vict. c. 26 prevented the revival of the will prior, this physical destruction of the instrument of 1864 did not prevent its testamentary dispositions being admitted to probate.

Though an equivocal act of physical destruction may be controlled by evidence of the intention with which it was done, so that a will so destroyed may not lose its effect, yet such a condition has never been engrafted on the physical destruction of another written instrument; for example, a revoking codicil or will qualifying and making a prior one of no effect if it should fail in law to carry out the intention of the parties: Newton *v.* Newton, 12 Ir. Ch. Rep., 118. In Wood *v.* Wood, L. Rep. 1 P. & M., 309: 15 L. T. Rep. N. S., 593, Lord Penzance admitted parol evidence of the contents of a later will. The former will was found after the testator's death, but not the later, in which it was asserted that there was a clause of revocation. On proof by parol of the execution, of the existence of the clause at that time, of the testator's keeping the will in his custody until death; that it could not then be found, and that he had declared an intention to destroy it, the court pronounced for an intestacy, the Judge expressing his approval of Brown *v.* Brown.

(To be continued.)

SUPREME COURT OF NEBRASKA.

BOWKER, KENNARD and WHEELER *v.* G. W. COLLINS.

HOMESTEAD.—After a judgment has been recovered against him, a debtor cannot prevent the enforcement of the lien thereby created on his real estate, by moving thereon and occupying it as a homestead.

Error from Pawnee County.

Opinion by MAXWELL, J.

On the fifteenth day of April, 1874, Boker, Kennard & Wheeler recovered a judgment in the District Court of Pawnee county against G. W. Collins and W. H. B. Strout, for the sum of $718.12 and costs of suit. Collins at that time was the owner of the undivided half of the northeastern quarter of section 17, township 1, north of range 11, east, in Pawnee county, which appears to have been unoccupied; on or about the 16th day of October, 1874, defendant, Collins, removed with his family on to the land in question, and has ever since resided thereon. On the eighth day of February, 1875, an execution was issued out of the District Court of Pawnee county, on the judgment heretofore mentioned, and was levied on the interest of Collins in the above described land; on the thirteenth day of February, 1874, the defendant, Collins, served a notice on the sheriff that he claimed the land above described as a homestead; the land was sold to W. H. B Strout. Afterwards, on motion of Collins, the sale was set aside, on the ground that the land in question was exempt from sale, under the homestead law, to which the plaintiff excepted, and now brings the case into this court, by petition in error. "The statute makes it a material condition to the exemption of the property, that it is owned and occupied by a resident of this State. The word 'homestead' means a place of residence, which again implies occupancy, possession." Upham *v.* Bank, 15 Wis., 453.

"If the property is not a homestead when the judgment is obtained, it is a lien upon it.

"The property not being a homestead, in other words not being exempt, when the judgment is obtained, the judgment creditor has a right to levy upon it, to the exclusion of other adverse interests, subsequent to the judgment; and when the levy is made, the title of the creditor relates back to the judgment, so as to cut off intermediate incumbrances." Ib. 452.

In Fogg *v.* Fogg, 40 N. H., 285, the plaintiff had no other real estate, the buildings were erected by him for the purpose of being occupied as his family home, and just completed, and ready for his family, and he had commenced moving in before the attachment, and had got in a substantial part of the furniture, and intended to finish that day, and would have done so, but for the attachment. Under these circumstances, the plaintiff was considered as being in possession at the time of the levy of the attachment.

It is clearly shown that the lien of the judgment had attached to the lands in question, at the time Collins entered thereon for the purpose of claiming the same as a homestead; does the right of homestead attach in such a case so as to defeat the lien of the judgment? We think not. The law evidently requires that the lands to be selected as a homestead shall be actually used for that purpose, at the time the judgment is recovered. The homestead law being remedial in its character, should receive the most liberal construction consistent with justice, for the purpose of preserving a home to the unfortunate. But it must not be forgotten that the payment of just obligations is the foundation on which rests our industrial and commercial prosperity. And the design of the homestead law is not to enable those claiming its benefits to evade the payment of debts justly due, but to prevent the household being broken up and destroyed; and to leave under the control of the debtor the means by which he may, by economy, retrieve his fortune, and be enabled, in time, to meet his obligations.

But lands not occupied for homestead purposes at the time judgment was recovered, it is reasonable to suppose were used as a means of obtaining credit; their occupation at that time was not considered necessary for the purpose of preserving a home for the family, and a party cannot be permitted to defeat the payments of just debts, by afterwards removing thereon and asserting a claim of homestead. To sanction such doctrine under the pretext of liberality of construction of the homestead law, opens the door to gross abuse and fraud, and offers a premium to dishonesty, while but few of those for whom the homestead law was designed would be benefited thereby.

The judgment of the District Court is therefore reversed, and the cause remanded for further proceedings.

LVI. NEW HAMPSHIRE REPORTS.

We are indebted to JOHN M. SHIRLEY, official Reporter, for advance sheets of the LVI. Volume of his Reports, from which we take the following head-notes:

Cutting v. *Jackson.*—p. 253.

FRAUDULENT SALES—RETAINING POSSESSION AY VENDOR.

S, being indebted to C and D, sold to them certain cattle and hay for $90, who endorsed the amount upon a note held by them against S. The sale was made in the presence of a witness. The cattle and hay were left in the possession of S to feed the hay to the cattle, also to his own cow at his own expense; and it was agreed that the manure made by the cattle should become the property of S. The creditors of S attached the cattle and hay as the property of S, and C and D replevied them. Upon the trial, these facts appearing, it was ruled that the sale was void as to creditors, and that the facts furnished no sufficient explanation of the retaining the possession of the propertyb y S; and a verdict was ordered for the defendant. *Held*, that the ruling was correct.

When the possession of chattels is retained by the vendor after an absolute sale, it is no sufficient explanation to show that the sale was made in the presence of a witness, where it was not attended with such publicity as would naturally give notoriety to the transaction, and when there was no change in the possession or use of the chattels to indicate that any change in the ownership had taken place.

Currier v. *Lebanon Slate Co.*—p. 262.

CORPORATIONS—PURCHASING IN OF SHARES—REDUCTION OF CAPITAL.

An insolvent corporation cannot purchase in a portion of its capital stock. Such a transaction would be in conflict with Gen. Stats., ch. 135, sec. 3. A corporation, whose capital stock as fixed and limited has not been fully paid in, cannot relieve a delinquent stockholder from payment of assessments upon his stock by a purchase of the same, especially against the objection of another stockholder.

A corporation cannot reduce its capital stock, under the provisions of ch. 134, sec. 6, Gen. Stats., by purchasing the shares of any stockholder. In order that such reduction may operate justly to all the stockholders, each stockholder should be allowed to surrender such proportion of his stock as the amount of the proposed reduction bears to the whole amount of capital stock.

NINETY-NINE YEAR LEASES IN MARYLAND—RENEWAL OF INJUNCTION.—One of our Baltimore exchanges of the 23d instant, says the court of Appeals of that State has just rendered an important decision regarding leasehold estates.

In this city a very large number of the most valuable lots and improvements are held by leasehold tenants for the term of ninety-nine years, renewable at the request of the lessee. Some of these leases have recently expired, and in cases where no application was made for renewal, suits have been instituted to recover possession of the property. In the case just decided, lease was made of a lot containing one quarter acre on Fells Point, Baltimore, at a yearly rent of two pounds ten shillings, sterling money, for ninety-nine years, renewable, if request was made at any time within the said period of ninety-nine years. The original term expired on the 18th of January, 1871. In the meantime the reversion of the fee, as also the leasehold interest, become vested in purchasers not parties to the original lease. At its expiration the lease was not renewed. In May, 1874, the owner of the fee brought ejectment to recover the property, and on October 24, 1874, the owner of the leasehold interest filled a bill in the Circuit Court for a renewal of the lease and injunction to restrain the ejectment. It thus appears the bill was filed a little more than three years and nine months after the expiration of the original term, and about five months after the action of ejectment. The case was submitted on bill and answer, and the Circuit Court passed a decree directing the defendant, upon the complainants paying the renewal fine of two pounds ten shillings, sterling, with all arrearages of rent due under the lease up to the time of such payment, and costs, to execute a new lease of ninety-nine years, commencing at the end of the original term of the lease at the same rates. The Court says it is of opinion that our courts of equity ought to grant the relief asked for, and compel a renewal on the equitable conditions stated in the decree before it.

The court of Appeals affirms the decree of the Circuit court. The possession of millions of dollars worth of property in this city is quieted by the decision.

REHM'S CASE.—On yesterday Rehm was brought up before Judge Blodgett for sentence. The statements of counsel heard as to the promises which were made him by the government attorneys if he would go on the stand and testify truthfully to what he knew of the whisky frauds, and the Judge after hearing the arguments of counsel upon the law relating to the case, and the amount of punishment that should be inflicted on Rehm, took the case under adviseiment for a few days.

CHICAGO LEGAL NEWS.

CHICAGO, JULY 8, 1876.

The Courts.

UNITED STATES SUPREME COURT.

No. 60.—OCTOBER TERM, 1875.

JOHN H. KENNARD, Plaintiff in Error,
v.
THE STATE OF LOUISIANA ex rel. PHILIP HICKEY MORGAN.

In Error to the Supreme Court of the State of Louisiana.

CONTEST FOR THE OFFICE OF JUDGE—DUE PROCESS OF LAW.

Held, That the State of Louisiana, acting under the statute of January 13, 1873, through her judiciary, did not deprive Kennard of his office of Associate Justice of the Supreme Court of the State, without due process of law.—[ED. LEGAL NEWS.

Mr. Chief Justice WAITE delivered the opinion of the court.

The sole question presented for our consideration in this case, as stated by the counsel for the plaintiff in error, is whether the State of Louisiana, acting under the statute of January 13, 1873, through her judiciary, has deprived Kennard of his office without due process of law. It is substantially admitted by counsel in the argument that such is not the case, if it has been done "in the due process of legal proceedings, according to those rules and forms which have been established for the protection of private rights." We accept this as a sufficient definition of the term "due process of law" for the purposes of the present case. The question before us is not whether the courts below having jurisdiction of the case and the parties, have followed the law, but whether the law, if followed, would have furnished Kennard the protection guaranteed by the Constitution. Irregularities and mere errors in the proceedings can only be corrected in the State courts. Our authority does not extend beyond an examination of the power of the courts below to proceed at all.

This makes it necessary for us to examine the law under which the proceedings were had, and determine its effect. It was entitled, "An act to regulate proceedings in contestations between persons claiming a judicial office." Section one provided that "in any case in which a person may have been appointed to the office of judge of any court in this State, and shall have been confirmed by the Senate and commissioned thereto, * * * such commission shall be *prima facie* proof of the right of such person to immediately hold and exercise such office."

It will thus be seen that the act relates specially to the judges of the courts of the State, and to the internal regulations of a State in respect to its own officers.

The second section then provides "that if any person, being an incumbent of such office, shall refuse to vacate the same and turn the same over to the person so commissioned, such person so commissioned shall have the right to proceed by *rule* before the court of competent jurisdiction, to have himself declared to be entitled to such office, and to be inducted therein. Such rule shall be taken contradictorily with such incumbent, and shall be made returnable within twenty-four hours, and shall be tried immediately without jury, and by preference over all matter or causes depending in such court, * * * and the judgment thereon shall be signed the same day of rendition."

There is here no provision for a technical "citation," so called, but there is in effect provision for a rule upon the incumbent to show cause why he refuses to surrender his office, and for service of this rule upon him. The incumbent was, therefore, to be formally called upon by a court of competent jurisdiction to give information to it, in an adversary proceeding against him, of the authority by which he assumed to perform the duties of one of the important offices of the State. He was to be told when and where he must make his answer. The law made it the duty of the court to require this return to be made within twenty-four hours, and it placed the burden of proof upon him. But it required that he should be called upon to present his case before the court could proceed to judgment. He had an opportunity to be heard before he could be condemned. This was "process," and, when served, it was sufficient to bring the incumbent into court and to place him within its jurisdiction. In this case, it is evident from the record that the rule was made, and that it was in some form brought to the attention of Kennard, for on the return day he appeared. At first, instead of showing cause why he refused to vacate his office, he objected that he had not been properly cited to appear, but the court adjudged otherwise.

He then made known his title to the office; in other words, he showed why he refused to vacate. This was, in effect, that he had been commissioned to hold the office till the end of the next session of the Senate, and that time had not arrived. Upon this he asked a trial by jury. This the court refused, and properly, because the law under which the proceedings were had, provided in terms that there should be no such trial. He then went to trial. No delays were asked except such as were granted. Judgment was speedily rendered, but ample time and opportunity were given for deliberation. Due process of law does not necessarily imply delay, and it is certainly no improper interference with the rights of the parties to give such cases as this precedence over the other business in the courts.

The next section provides for an appeal. True, it must be taken within one day after the rendition of the judgment, and is made returnable to the Supreme Court within two days. The proceeding on appeal was given preference over all other business in the appellate court, and the judgment upon the appeal was made final after the expiration of one day. Kennard availed himself of this right. He took his appeal and was heard. The court considered the case and gave its judgment.

From this it appears that ample provision has been made for the trial of the contestation before a court of competent jurisdiction — for bringing the party against whom the proceeding is had before the court and notifying him of the case he is required to meet—for giving him an opportunity to be heard in his defense—for the deliberation and judgment of the court—for an appeal from this judgment to the highest court of the State and for hearing and judgment there. A mere statement of the facts carries with it a complete answer to all the constitutional objections urged against the validity of the act. The remedy provided was certainly speedy, but it could only be enforced by means of orderly proceedings in a court of competent jurisdiction in accordance with rules and forms established for the protection of the rights of the parties. In this particular case, the party complaining not only had the right to be heard, but he was in fact heard both in the court in which the proceedings were originally instituted, and, upon his appeal, in the highest court of the State.

The judgment is affirmed.

U. S. CIRCUIT COURT, N. D. OF ILLINIOS.

OPINION JUNE 30, 1876.

SEYMOUR et al. *v.* THE PHILLIPS & COLBY CONSTRUCTION CO. et al.

THE RIGHT TO SUE IN THE UNITED STATES COURT ON A SUPERSEDEAS BOND, IRRESPECTIVE OF THE CITIZENSHIP OF THE PARTIES.

Held, Where a suit had been commenced in the Circuit Court of the United States, judgment entered against the defendants, and a writ of error had been sued out to the Supreme Court of the United States, and a supersedeas bond given, and the writ of error dismissed, that a suit could be maintained in the Circuit Court of the United States where the original suit was commenced, on the supersedeas bond, independent of the citizenship of the parties.—[ED. LEGAL NEWS.

Opinion by DRUMMOND, J.

The facts of the case are substantially these: The plaintiffs recovered a judgment in this court against the Phillips & Colby Construction Company, in July, 1873, and thereupon the defendants in that case, sued out a writ of error to the Supreme Court of the United States, and gave a supersedeas bond, to which the defendants in this case are parties, as obligors. The writ of error having been dismissed, and the judgment of this court affirmed, a suit was brought upon the bond given, to which a plea in abatement is put in, alleging that all the plaintiffs and all the defendants are citizens of this State, and that this court, therefore, has no jurisdiction of the case; and the question is, whether, in consequence merely of the suit being upon a bond given under the circumstances mentioned, this court has jurisdiction of the case, independent of the citizenship of the parties; and I am inclined to think that it has.

I would state that, in giving this opinion at this time, I do not desire to foreclose any of the rights of the defendants. If, as the result of my opinion, there shall be a finding against them upon the demurrer, there may be a motion made in arrest of judgment, and they may take the opinion of the Justice of the Supreme Court for this Circuit, upon the question; and if they should plead to the merits, and an issue shall be found against them before the court or a jury, in that case also, a motion may be made in arrest of judgment, and the opinion of Judge Davis taken upon the question.

So far as I have been able to investigate the subject, I am of opinion that this court has jurisdiction on account of the nature of the controversy. I leave out of view one very strong aspect of the case, which was presented by the counsel for the plaintiffs, namely: that growing out of the fact that this may, in one sense, be said to be an incident of the original suit — something inseparably connected with it, and that owing to that circumstance alone, independently of the nature of the controversy, the court might have jurisdiction precisely as it would of a bill filed (connected with a judgment at law), on the equity side of the court of which, as is well known, the court has jurisdiction, irrespective of the citizenship of the parties. Waiving that view of the case, at present I think the nature of the controversy is such as to give the court jurisdiction.

Section 1,000 of the Revised Statutes of the United States, which re enacts a provision of the act of 1789, declares that when a judge signs a citation on any writ of error, "he shall take good and sufficient security that the plaintiff in error or the "appellant shall prosecute his writ to "effect, and if he fail to make his plea "good, shall answer all damages and "costs where a writ is a supersedeas, "and stays execution; of all costs only "where it is not a supersedeas, as afore-"said." This does not prescribe the particular form of the security. In practice, the security has uniformly been under this statute a bond given by the party in the usual form, and because it is such a bond, the defendants contend that the obligations growing out of the bond are of a common law character, and really give rise to no question under the laws of the United States. But it is clear that in one sense the obligation must be determined by the law of the United States, namely, this statute—"If he fail to make his plea good he shall answer all damages and costs." Now what are those damages and costs, must be determined by a construction to be given to this statute, because it is this statute which constitutes the measure of damages, and is the law governing the rights of the parties. Section 1007 of the Revised Statutes is substantially the same as the act of 1789 amended by the act of the 18th of February, 1875, after the passage of the law authorizing an extension of time to sixty days, to give the bond. What is the law upon the subject, can be further ascertained by referring to rule No. 29, adopted by the Supreme court of the United States. A rule established by the Supreme court of the United States in pursuance of law, becomes, to all intents and purposes, of the same effect as the law itself, and where the court prescribes a rule as to the kind of indemnity that shall be given, then it becomes a rule under the law, and substantially a law of the United States. Now this was a supersedeas bond, and the rule is this: "Supersedeas bonds in the Circuit courts must be taken with good and sufficient security, that the plaintiff in error or appellant shall prosecute his writ or appeal to effect, and answer all damages and costs if he fail to make his plea good. Such indemnity, where the judgment or decree is for the recovery of money not otherwise secured, must be for the whole amount of the judgment or decree, including just damages for delay and costs and interest on the appeal, &c." This is the rule upon the subject, and whatever questions there are, must arise under the law and under this rule. Whenever any question comes up in a controversy between parties upon a bond thus given, what court is to decide it;—what was the intention of the law in relation to the determination of that controversy? Is it not manifest, that if it be true, that a State court may have jurisdiction of the case, it is only concurrent with the jurisdiction of the Federal court, and that the Federal court is peculiarly the tribunal that ought to decide all such questions, because they are questions that arise under the acts of Congress, or under rules of court passed in pursuance of acts of Congress; and is it not also manifest that if a State court took jurisdiction of such a controversy, that it might ultimately, under the law or under the rule, be carried to the Supreme court of the United States? And that position was not seriously controverted in the argument. If that is so, how can the court say, upon the declaration on the bond, that there may not necessarily arise some question which is not a mere common law question, but may become a question under the statutes or under the rule; and must it affirmatively appear before the court can take jurisdiction of the case, that there will be necessarily a question arising under the statutes or under the rule? It was said, and perhaps that constituted the strongest argument on the part of the defense in presenting the demurrer, that it did not follow, because there was a contract made under an act of Congress, or a bond given, that therefore the Federal court could necessarily take jurisdiction of the case. Perhaps that is so. The case of Wilson *v.* Sandford, 10 Howard, 99, was a case where there was a contract made growing out of a patent right, and the court held, where the question was whether or not the Supreme court of the United States had appellate jurisdiction in the case, that it had not, because it affirmatively appeared that there was no question arising under the patent law; that it was simply a contract made in relation to a patent right, all questions connected with which were to be determined independently of the statute upon the subject of patents.

Now, if it affirmativly appeared in this case that it was so; if, in other words, it did appear that there was no question arising in this case, either under the act of Congress, or under the rule of the court, then it might be brought within this decision; but it is manifest that if the question had been in relation to the validity of the assignment of a patent right, then it would necessarily come within the jurisdiction of the Federal court, because it would be a question arising under an act of Congress covering patent rights, and I apprehend that the Supreme Court in this case, does not intend to intimate that if such a question had come up on the validity of an assignment, as authorized by an act of Congress, that the court would not have had appellate jurisdiction of the case, although the amount in controversy might not have been two thousand dollars—the Supreme Court of the United States having jurisdiction independently of the amount in controversy in patent cases.

The first section of the act of the third of March, 1875, which we have had occasion so often to examine since it was passed, declares that "Circuit courts of "the United States shall have original "cognizance concurrently with the courts "of the several States, of all suits of a "civil nature at common law or in equi-"ty, where the matter in dispute ex-"ceeds, exclusive of costs, the sum or "value of five hundred dollars, and aris-"ing under the constitution or laws of "the United States." Now, is this not a matter in dispute arising under the laws of the United States, as it is presented upon the face of the pleadings? It is an indemnity given in pursuance of a law of the United States; the measure of the liability of the party, and the rights both of the plaintiffs and the defendants, depend upon a law of the United States, and a rule of the Supreme Court of the United States. It is impossible to take a step in the progress of the cause in order to determine the rights of the parties, without looking at the law and the rule as the guide of the court, and controlling its judgment in the determination of the case.

From the best consideration that I have been able to give this case, therefore, I think that the court has jurisdic-

tion. It is a little singular that no case precisely in this form has been reported.

The argument, from inconvenience, is not without weight in determining this question. It is a controversy springing out of a suit already determined in the federal court. It is in one sense an off-shoot of that suit. It would seem, upon principle, that this is the proper forum to settle all controversies growing out of that suit. If it were a question connected with an execution, and a bill had been filed, as already stated, this court would be the proper forum to determine any such controversy. This is a bond growing out of that suit; it would seem that this is the proper forum to settle all controversies connected with the execution of the bond, and the rights of the parties, particularly as to the liabilities of the obligors to the bond, so that, conceding that it may in one sense be considered a new question, I feel inclined, so far as I am concerned, to establish a precedent, that the Federal court is the proper forum to settle the rights of the parties, and the demurrer, therefore, to the plea in abatement will be sustained, reserving, of course, as has been stated previously, the right to the defendants to move in arrest of judgment.

Messrs. SLEEPER & WHITON, for plaintiffs.

Messrs. DIXON, ABBOT, DENT & BLACK, for defendants.

UNITED STATES CIRCUIT COURT, D. OF LOUISIANA.

OPINION IN MAY, 1876.

In Bankruptcy—Petition for Rent.

JAMES BUCKNER *v.* JEWELL and E. F. NORTON, Assignees.

PETITION FOR REVIEW—NEITHER THE BANKRUPT OR THE ASSIGNEE OCCUPY LEASED PREMISES AFTER THE BANKRUPTCY WITHOUT PAYING THE RENT.

Opinion by BRADLEY, J.

The petitioner leased a store, 133 Gravier street, to the bankrupt for five years, commencing October 1, 1871, at an annual rent of $3,200, payable monthly, 266.66; the lessee became bankrupt January 9, 1872, having paid all arrears of rent up to that time.

The assignees were appointed in April, and took possession of the premises, and refused to give up possession to the landlord. They paid him rent, however, from time to time, to the amount of $650. He sues for nine months' rent, which accrued during the occupation by the assignees, less the said payment of $650, the amount demanded being $1,750, besides interest.

He only demands judgment against the assignees for the proceeds of the property of the bankrupt which was in the building, on which he claims he had a lien. For the balance he asks a general judgment, with the privilege of coming in *pro rata* with the other creditors.

The assignees have filed an answer, and with it an account showing that the proceeds of the estate amounted to $2,492.40, of which $1,500 was from the goods in the leased premises; but they claim credit for the whole amount for the general expenses of the bankruptcy, including their own fees, and claim to have the petition dismissed, including the $650 paid to the landlord.

The position of the assignees is untenable.

A landlord cannot prove against a bankrupt's estate for rent which accrues after the bankruptcy; and neither the bankrupt nor the assignee can claim to occupy the leased premises thereafter without paying the rent in full, unless it has been prepaid by the bankrupt. If they continue to occupy the premises, they are liable personally for the rent, and the landlord has his lien on their goods in the premises, the same as against other tenants. For rent thus accruing after the bankruptcy, the landlord has nothing to do with the expenses of the estate. They are nothing to him. They cannot be deducted from his rent. If an assignee continues to occupy leased premises of the bankrupt, he ought always to make some definite arrangement with the landlord, unless he expects and is willing to pay the accruing rent.

This being the case, the petition for the rent is like any action for rent, and is subject to like rules and proceedings. I think I was mistaken, therefore, in refusing a jury trial in this case.

If the assignees wish it, they may have it, but the petitioner ought, in that case, to be allowed to amend his petition, and claim a judgment for the whole rent due.

If the assignees elect to let the case stand without a jury, the petitioner may have such judgment as he asks, namely, that the assignees be compelled to pay him the proceeds of the goods which were in the leased premises, less the expense of sale, and have a judgment for the balance to come in *pro rata* with the other creditors.

The assignees must, within ten days, file a written election which course they will pursue.

Messrs. KENNARD, HOWE & PRENTISS, for James Buckner, petitioner.

Messrs. L. A. SHELDON and SINGLETON & BROWNE, for assignees.

We are under obligations to Edward Roby, of the Chicago Bar, for the following opinion:

SUPREME COURT OF ILLINOIS.

OPINION FILED JUNE 30, 1876.

THE PEOPLE *ex rel.* H. B. MILLER *v.* COOPER et al.

BILL 300 UNCONSTITUTIONAL—NOT A GENERAL LAW—THE ACT OF 1872, FOR THE INCORPORATION OF CITIES CONSTRUED—LOCAL OPTION LAWS—COLLECTING OF THE REVENUE.

1. LOCAL OR SPECIAL LAW.—The words "local or special," in the clause of the 22d section of article 4, of the present Constitution, are used in contradistinction to the word "general," and the restriction, therefore, is equivalent to a command that all laws to be passed by the General Assembly, incorporating cities, towns or villages, or changing or amending their charters, shall be general.

2. WHAT IS A GENERAL LAW.—General laws are those which relate to or bind all within the jurisdiction of the law making power, limited as that power may be in its territorial operation, or by constitutional restraint; that the number of persons upon whom the law shall have any direct effect, may, by reason of the subject to which it relates, be very few; but it must operate equally and uniformly upon all brought within the relations and circumstances for which it provides.

3. THE CITY TAX ACT.—The city tax act assuming to be obligatory only to the extent the city council may elect to proceed under its provisions, in preference to those of the general law, is not a general law, but is a "local or special law" to those electing to proceed under it. The local option clause affects and characterizes it as "a local or special law," and brings it within the constitutional prohibition, and it cannot, therefore, be sustained.—[ED. LEGAL NEWS.

The opinion of the court was delivered by SCHOLFIELD, J.

When the cases, of which Otis *v.* The People (reported 7 Chicago Legal News, 323) was selected as the representative, were before us at the January term, 1875, we refrained from considering the objection urged against the constitutionality of the act of April 15, 1875, known as "the city tax act," because in our opinion there were defects in the act itself which defeated its practical enforcement, and we indulged the hope that the wisdom of the legislature might relieve us of the delicate and responsible task of pointing out wherein, in our opinion, such legislation is in contravention of the Constitution.

The amendment to that act of April 7, 1875, however, attempts no more than to obviate the specific objections which we held in the Otis case rendered it impracticable to enforce it, and it has thus become manifest that the principle which we deem fundamentally objectionable in such legislation has not been asserted hastily and without due consideration by the legislature; and that if it shall now pass unchallenged it will seem to have the sanction of the court, and may in the future become the precedent for endless local option legislation in lieu of the general laws required by the constitution. We feel, therefore, constrained to pass by the numerous questions that have been discussed with so much ability by the different counsel, with reference to the proper construction of the act as amended, and the regularity of the various steps taken in the case, and to confine our observations to the single question, Is the act, as amended, a valid constitutional enactment?

By one of the clauses of Sec. 22 of Art. 4 of the present constitution, the General Assembly is prohibited from passing "any local or special law incorporating cities, towns, or villages, or changing or amending the charter of any town, city, or village."

The words "local or special" in this connection are clearly used in contradistinction to the word "general," and the restriction, therefore, is equivalent to a command that all laws to be passed by the General Assembly incorporating cities, towns, or villages, or changing or amending their charters, shall be general.

In obedience to this mandate of the constitution, the General Assembly passed an act, in force July 1, 1872, to provide for the incorporation of cities and villages, under the provisions of which cities may become incorporated, and those already incorporated may change their charters for its provisions. It is unlimited in its application, and fully meets the requirement of the constitution. It is not and cannot be reasonably claimed that it is not a general law. It contains all the provisions necessary to a complete municipal charter, among others those relating to the assessment and collection of municipal taxes. By these it is provided that such taxes shall be collected and enforced by the same officers, and in the same manner provided for the collection of State and county taxes. R. S. 1874, p. 231, Art 8, Sec. 2. This act, with the exception of some amendments immaterial to the question before us continued in force, was embodied in the revision of the laws made by the General Assembly in 1874. The same provision in regard to the collection of municipal taxes is also a part of the general revenue law in force since July 1, 1872.

The "City Tax Act" provides an entirely different system for the collection of municipal taxes, to be carried out and enforced by different officers. It does not repeal and take the place of the general law on the same subject, either expressly or by implication, but on the contrary it recognizes in direct terms its continued existence, and provides in the twenty-second section as follows:

"The city council of any city shall have power at any time, in lieu of the mode herein provided for the assessment and collection of general city taxes, to, by resolution or ordinance, elect to certify to the county clerk the amount or amounts required to be raised by taxation upon the assessment of property for State and county taxes, and to collect the taxes for said city in the manner provided for in the General Revenue laws of this State, and in such case to abolish the office of the City Assessor and City Collector. Provided, however, that nothing in this section contained shall be so construed as to prevent such corporation at any time thereafter from providing for the assessment and collection of taxes by ordinance, and in the manner in this act hereinbefore set forth."

It can hardly require argument or the citation of authorities to support the position which we shall assume, that a law conferring power upon municipal corporations to levy and collect taxes and prescribing the mode, is to that extent the charter or organic law of such corporations, and, being such, the requirement of the Constitution is, it shall be a general law.

General laws are said to be those which relate to or bind all within the jurisdiction of the law-making power, limited as that power may be in its territorial operation or by constitutional restraint. (Sedg. on Statutes, and Const. Law Jr., 30.) The number of persons upon whom the law shall have any direct effect may, by reason of the subject to which it relates, be very few, but it must operate equally and uniformly upon all brought within the relations and circumstances for which it provides. (People ex-rel. *v.* Wright, 70 Illinois, 398.)

The evil supposed to exist which led to the adoption of the clause in the Constitution under consideration, was dissimilarity in the provision of the different cities, towns and villages; and while it was not designed by the mere act of adopting the Constitution to repeal the provision of existing charters any further than they were in conflict with other provisions of the Constitution which became operative without the aid of legislation, it was intended, as is plainly manifested by the language employed, that no city, town or village should thereafter become incorporated, or have its charter changed or amended, except by a general law. All cities, towns and villages becoming incorporated would thus be governed by the same law; and all having their charters changed or amended would, to the extent of such change or amendment, likewise be governed by the same law. Neither the letter nor the spirit of the clause, therefore, allows that, under the pretense of enacting general laws in relation to cities, towns and villages, different systems of municipal law can be provided by the General Assembly for different cities, different towns, and different villages.

The section we have quoted from the City Tax Act leaves it optional with the city council whether the act shall apply to the city or not. We are bound to judicially know that many cities in the State have become incorporated under the general law, and have not elected to proceed under the City Tax Act; so that, where there should be a single formal law, uniform in its operation, we have, if this may be sustained, two local or special laws, unless indeed it shall be held we may have an indefinite number of general laws in force with dissimilar and discordant provisions in relation to the charter of cities, towns and villages at the same time.

It is true what are styled "local option laws" have been sustained by this court and by many other courts; but so far as we now recollect this has only been as against the objection that they were not laws, but an attempt to delegate legislative authority to the people. The question whether such laws are "local or special" within the meaning of our Constitution, has never been decided here—and if there is any decision elsewhere sustaining them as general laws against objection argued under a like constitutional restriction, we have been unable to find it.

If there may be two laws, either to be in force at the option of those representing the city authority in relation to the levy and collection of taxes, there may be two such laws in relation to every other question affecting municipalities; and if there may be two, they may be multiplied indefinitely, for either the local option brings the law within the prohibition of the constitution, or the General Assembly is unrestricted in regard to the enactment of such laws.

It will, therefore, be obvious if local option laws are not within the meaning of the words "local or special laws," this clause of the constitution is of no value whatever; for it need but to change the form of the legislation to produce precisely the same results as those which it was designed to prevent. It would be only necessary instead of saying as heretofore in special charters: "The City of Chicago," "the City of Quincy," or "the City of Peoria," etc., "shall have power," or "may," etc., simply to say, "all cities shall have power," or "may," etc. And then add a section conferring the option upon any city to adopt or reject its provisions.

It must not be understood that we claim there is no discretion to determine whether a city shall become incorporated or not, or whether a city incorporated at the adoption of the constitution may elect to change or amend its charter by adopting the provisions of a general law created for that purpose, for these rights are unquestioned and are within the contemplation of the constitution, nor must it be understood that we claim that the discretionary powers contained in the general law must be exercised in the same manner and to the same extent in every municipal corporation. We claim simply that when the election is made to become incorporated, or to change or amend an existing charter, the incorporation must be under a general law, and the change or amendment of the existing charter must be by adopting, to the extent of such change or amendment the provisions of the general law; that the measure and limit of municipal powers and duties, so far as they are a subject of regulation by the General Assembly, must be prescribed by the general law, and that it must absolutely and of its own force be applicable as the measure and limit of municipal powers and duties to all within the class to whom it relates.

"The City Tax Act," assuming to be obligation only to the extent the City Council may elect to proceed under its provisions, in preference to those of the general law, is not a general law, but is "local or special" to those electing to proceed under it. The local option clause affects and characterizes it as a "local or special law," and brings it within the constitutional prohibition, and it cannot, therefore, be sustained as a valid constitutional enactment.

The judgment must be affirmed.

THROUGH the kindness of the law firm of ROSENTHAL & PENCE, of this city, we have received the following opinion:

SUPREME COURT OF ILLINOIS.

OPINION FILED JUNE 30, 1876.

BARBARA KIEL et al. *v.* GEORGE P. A. HEALY et al.

Appeal from Cook Co.—Re-hearing.

DEED MADE BY MINOR NOT VOID, BUT VOIDABLE—WITHIN WHAT TIME MAY BE DISAFFIRMED.

1. MINOR'S DEED.—That the deed of a minor is not void but voidable.
2. MUST BE DISAFFIRMED WITHIN THREE YEARS.—That the deed of an infant must be disaffirmed within three years after reaching majority, or such infant will be concluded by the deed.
3. EFFECT OF SUBSEQUENT MARRIAGE.—That when the complainant was of age and free from disability, the time in which she had to disaffirm the deed commenced to run, and her subsequent marriage could not affect or prevent the running of the bar which had already commenced.
4. POWERS OF A COURT OF EQUITY.—That complainant voluntarily permitted the time to pass in which she could revoke the deed, and a court of equity is powerless to grant her the relief which she has lost by her own neglect to assert her rights in apt time.—ED. LEGAL NEWS.

Opinion by CRAIG, J.

This was a bill in equity brought by Barbara Kiel and Joseph Kiel, her husband, to set aside a deed of certain real estate in Chicago, executed by Barbara Kiel, on the 22d day of October, 1852, while she was a minor.

She was, when the deed was executed, sixteen years of age. She married Joseph Kiel in January, 1855, being then about five months past eighteen.

Since the deed was executed, the property conveyed has passed by *mesne* conveyance through the hands of several innocent purchasers.

The Circuit Court, on the hearing, rendered a decree dismissing the bill. The complainants appealed, and at a former term of this court a decision was rendered, reversing the decree. (Reported in 5 CHICAGO LEGAL NEWS, 438.) Petition having been filed, a rehearing was ordered, and upon further consideration of the case, we have arrived at a different conclusion from that reached by a majority of the court when the record was first before the court.

The facts upon which the decision of the case will rest, are not controverted. The real question involved is one of law, and that is narrowed down to the proposition whether Barbara Kiel can now avoid the deed executed by her on the ground that she was a minor at the time the conveyance was made.

The record affords no ground for the position of appellants that the deed was obtained by fraud, but on the other hand, it is obvious that when the deed was made she knew she was conveying the land, and after she was of age, and before marriage, she knew she had conveyed, and that her grantees had parted with the title, and yet no effort was made to impeach the deed at the time on the ground of fraud, nor did she express any dissatisfaction with what she had done.

The conduct of appellant and the facts surrounding the transaction are so inconsistent with the theory that the deed was obtained by fraud, that we cannot adopt it, and the evidence affords so slight a foundation for the position that further discussion of this branch of the case is not deemed necessary.

This brings us to the consideration of the real controverted question presented by the record, whether Barbara Kiel can now repudiate the deed made by her while a minor.

It is well settled by the authorities that a deed made by a minor is not void but only voidable. Such has been held to be the law in many of the States and it was expressly decided by this court in Cole *v.* Pennoyer, 14 Ill., 158.

The deed in question being voidable Barbara Keil had the right within a reasonable time after she became of age to revoke it. If she failed to avail of this right given her by the law, then the deed must be regarded as binding and obligatory upon her and upon all others. If she took no steps whatever to revoke the deed within a reasonable time after she attained her majority, non-action on her part will be regarded as a ratification of the instrument. She could not, by remaining silent for a number of years, render that void which was only voidable.

As was held in Block *v.* Hills, 36 Ill., 376, the deed of an infant may be ratified by acts *in pais* or by long acquiescence

The deed before the court was executed in October, 1852. Barbara Keil was eighteen years of age in August, 1854. When, as has been settled by this court her minority terminated. Stevenson *v.* Westfall, 18 Ill., 209; Kester *v.* Stark, 19 Ill., 328.

But no steps whatever were taken by her to revoke the deed or disaffirm the the conveyance, until the filing of the bill in January, 1871.

When she arrived at the age of eighteen years she had full power to sell and convey lands, make any and all contracts she saw proper, and bind herself for the faithful performance of contracts in the same manner and with like effect as other persons who are under no disability.

Was the act of disaffirmance which came for the first time in 1871, and after the land had passed through the hands of several innocent purchasers and had largely increased in value, within a reasonable time?

The time within which an infant, after majority, should revoke a conveyance made during minority cannot be regarded an open question in this State. In Blenkenship *v.* Stout, 25 Ill., 132, it was held that a person who has conveyed lands during infancy was bound to disaffirm the deed within three years after arriving at majority, and a neglect or failure to do so would be held to be a ratification of the conveyance.

This rule was adopted from analogy to a section in the limitation law of 1839, which required one under disability to bring an action within three years after the disability was removed. The same rule was adopted in Cole *v.* Pennoyer, 14 Ill., 158, and we perceive no reason why it should be changed.

If the infant has been imposed upon, and his lands obtained for less than an adequate consideration, certainly three years after he attains majority is time enough to determine that fact, and bring an action to recover the property. On the other hand, if a longer or indefinite time was allowed, the title to real property would be insecure, and the stability and repose in titles, which it is the policy of the law to foster and encourage, would be to a great extent destroyed.

There is nothing that has a greater tendency to retard the growth and prosperity of a country than insecurity in titles to real property.

The complainant, however, seeks to avoid the operation of the rule announced, on the ground that after her minority ceased she was under the disability of coverture.

From the 6th day of August, 1854, until the 12th day of January, 1855, Barbara Kiel was of age and unmarried. During this time she was under no disability, but had full power to sell and convey lands, and engage in any legitimate business she might desire. During this period she might have revoked the deed made by her while in minority and conveyed the title to the land to another, or she could have brought ejectment, or filed a bill to set aside the deed.

In the construction of statutes of limitation it is a well recognized rule that where the statute has begun to run, no subsequent or supervening disability in the party against whom it is taking effect, will arrest its operation. Angel on Limitations, sec. 197.

Cumulative disabilities cannot therefore be regarded, as one disability cannot be added to another. Mercers Lessee *v.* Selden, 1 Howard, 37; Eager *v.* Commonwealth, 4 Mass., 182.

Had there been a statute barring the right of the complainant to revoke the deed, unless the revocation was made within a given time after she reached her majority, it is clear that she could not now obtain the relief prayed for in the bill. But as the law requires an infant, within a reasonable time after reaching majority, to disaffirm a conveyance made during infancy, and in analogy to the provision of the Limitation Act of 1839, fixed that period at three years after the infant was of age, the principle that must control and govern the case is the same as if a statute of limitations had been enacted by the legislature.

The rule that an infant must disaffirm a conveyance within three years after reaching majority or she be concluded by the deed, was fully settled by Cole *v.* Pennoyer and Blenkenship *v.* Stout, supra, and the doctrine announced in those cases has remained the law of the State unquestioned so long that it has become an established rule of property, and it should not now be changed or modified unless the rule established was wrong in principle, and has operated detrimental to the public interest, neither of which do we believe to be the case.

When, therefore, the complainant was of age and free from disability, the time in which she had to disaffirm the deed commenced to run, and her subsequent marriage could not affect or prevent the running of the bar which had already commenced.

She voluntarily permitted the time to pass in which she could revoke the deed, and a court of equity is now powerless to grant her the relief which she has lost by her own neglect to assert her rights in apt time.

The decree of the Circuit court will be affirmed.

Affirmed.

ROSENTHAL & PENCE, for appellant.
MCCAGG & CULVER, for appellees.

WE are indebted to the law firm of ROSENTHAL & PENCE for the following opinion:

SUPREME COURT OF ILLINOIS.

OPINION FILED JUNE 30, 1876.

FREDERICK F. WHITE *v.* CATHERINE RUSSELL et al.

Appeal from Cook.

PARTNERSHIP—THE RIGHTS OF CREDITORS WHERE A DECEASED PARTNER HAD MADE A FRAUDULENT CONVEYANCE—FILING A BILL TO REACH ASSETS—PREVIOUS CASES CONSIDERED.

A CREDITOR OF A DECEASED PARTNER MAY FILE A BILL.—The bill in this case alleged that appellant and Rossman were in partnership; that appellant had an excess of capital in the firm, which was insolvent; that Rossman died insolvent, and his estate is in that condition; that he made a will devising his estate in equal parts to his wife and his brother James R. That Corby had administered on his estate, and in due course of administration, appellant, as surviving partner, had the claim of the late firm allowed in the probate court for $2,746.58; that he proved his individual claim; that the assets of the estate do not exceed $3,069 30, of which $1,530 was set off to the widow. That the demands against the estate amounted to $4,060.30, that Rossman being insolvent, with $2,050 of the firm money, purchased a lot, and had it conveyed to his wife, alleging, as a reason, that he was insolvent, and would thus be able to retain a home; *Held*,

1. That this was a fraud against which equity will afford relief in favor of creditors.
2. That when a claim is allowed in the county court against an insolvent estate, equity will take jurisdiction to remove fraudulent conveyances, and subject the property to the payment of the debts of the deceased.
3. The court states under what circumstances a creditor of an insolvent estate may file a bill to have fraudulent conveyances removed.—[ED. LEGAL NEWS.

Opinion by WALKER, J.

The bill in this case alleges that appellant and J. V. R. Rossman were in partnership in business; that appellant had an excess of capital in the firm; that the firm was insolvent, and that Rossman died insolvent, and his estate is in that condition; that Rossman made a will, devising his estate in equal parts to his wife, and his brother, James R.; that Francis M. Corby had administered upon his estate, and in due course of administration, appellant, as surviving partner, presented and proved the claim of the late firm in the probate court, where he was allowed $2,746 58; that he also proved his individual claim, and was allowed $587.37, against the estate; that the assets of the estate do not exceed $3,069.30, and that $1,530 thereof had been set off to the widow.

That the aggregate of the demands against the estate allowed by the probate court amounted to $4,060 20; that in May, 1872, Rossman, then being insolvent, purchased a lot of ground in the city of Chicago for the sum of $3,050, and paid on the same money of the firm $2,050, and had the land conveyed to his wife for the reason he assigned that he was largely insolvent, and by having the lot so conveyed, he would be able to retain a home from his creditors; that he and his wife gave their note and a mortgage on the same for $1,000 to secure the remainder of the purchase money; that his wife died about the 7th of September, 1873; that before her death she made a will and devised this property to her mother, Catharine Russell, who has been in the receipt of the rents and profits arising from the same.

That Catharine Russell has pretended to convey the same to Wm. M. Case, but she has received no consideration therefor; that she only made such conveyance to cloud the title to the lot; that no portion of the money paid for the lot had been furnished by or belonged to Mrs. Rossman; that she held the property in trust for Rossman's creditors, all of which Catharine Russell and Case well knew; that the property is subject to the payment of the debts of the estate of Rossman.

These are the material facts set out in the bill. Defendants filed a demurrer which was sustained by the court, and the bill was dismissed, and complainant appeals.

The facts presented by this bill, if true, and the demurrer admits them, entitle appellant to relief. They show a fraud upon the creditors of the firm, and upon the creditors of Rossman, deceased. Whilst insolvent and for the purpose of placing this property beyond the reach of creditors, he wrongfully withdrew money belonging to the firm, which is insolvent, and purchased the lot, and had it conveyed to his wife. This is a fraud on creditors that equity cannot sanction. It is immoral, unjust, and highly inequitable. It is so to the extent that it would so strike the mind of all fair thinking men. It was an unjust appropriation of funds in his hands that should have been held for, and paid to, his creditors. As charged in the bill, it was contrived to hinder, delay and defraud his creditors, and cannot be sanctioned or sustained.

It is the settled practice of courts of equity to afford relief in favor of creditors in such cases where they have first exhausted their legal remedies without having obtained satisfaction of their debts. This is usually proved by a judgment and an execution returned *nulla bona*. That is held to rebut all presumption that the legal remedy would be availing to the creditor. But there are cases in which other proof will suffice, as where the debtor dies and the claim is probated and allowed against the estate, and it is shown to be insolvent, it is held that equity will take jurisdiction to remove fraudulent conveyances, and subject property to the payment of the debt. McDowell *v.* Cochrane, 11 Ill., 31, Bay *v.* Cook, 31 Ill., 336, and a number of other cases in this court established the practice.

The law not permitting the creditor of an estate, on recovering judgment against the administrator, or having his claim allowed, to have an execution, it has been held that proof of the allowance of the claim, and the insolvency of the estate, will be regarded as an exhaustion of the creditors' legal remedy, and will authorize a court of Chancery to proceed to hear and afford relief. The allegations of the bill are, in this respect, sufficient.

It is, however, urged that as the claim had been allowed against the estate, that an application by the administrator was the only mode by which Rossman's interest in the land could be reached; that creditors have no such power. And the case of LeMoyne *v.* Quimby (Sep. Term, 1874,) it is claimed, announces the rule, and other cases in this court are referred to for the same purpose. The cases referred to announce that the proceeding for the sale of real estate to pay debts as a general rule, must be by the administrator, but it has its limitations. As where a debtor in his lifetime makes a fraudulent conveyance to hinder or delay his creditors, such a conveyance, although void as to creditors, is binding on his heirs and representatives. Neither his heirs or executors or administrators can maintain a bill to set aside the conveyance, as it is binding on them. This being true, the only mode of reaching such property is by a bill filed by one or more of the creditors of the estate. Were the courts to deny such a remedy, then the unscrupulous debtor would thus be able to elude his creditors, and effectually consummate the fraud.

When, however, there is no such fraud, it is for the executor or the administrator alone to proceed to subject the lands of deceased to the payment of his debts. In such a case a creditor having proved his claim, cannot file his bill for the sale of real estate for its payment. That, when necessary, must be done by the executor or administrator. Equity, on the application of one or more of the creditors, will not withdraw the administration of estates from the probate courts where it has been placed by the statute, nor will it withdraw a part of the assets unless there are prior and superior liens against a portion of the property. But where there is an equitable fund that should be applied to the payment

of all or a portion of the debts, which cannot be reached by the executor or administrator, then equity will, at the instance of creditors entitled to participate in the fund, seize upon it, and apply it to those equitably entitled to it.

The case of LeMoyne *v.* Quimby was where there was no impediment in the way of the administrator to prevent him from obtaining an order for the sale of the land and all of the interest which deceased held in it, and a creditor intervened to prevent its sale until outstanding titles could be settled, and it was held that the creditor could not so intermeddle; that the administration of estates could not be thus interfered with, although the administrator had no power to file a bill to settle the title before the land was sold. There was no question of fraudulent conveyances or fraudulent trusts created by the deceased, as there is in this case, and in that consists the broad distinction between the cases. The bill in this case, therefore, presented a case which, if the facts are true, entitled appellant to have the property subjected to sale for the payment of this claim, but whether other creditors may participate in the fund is not presented by this record, and will not therefore be discussed.

It is next urged that it appears from the bill that appellant is insolvent and that it would be improper to entrust him with the the money, that would arise from the sale of this real estate as his claim should be distributed among the creditors of the firm. The administrator being a party to the suit and being charged with the interest of all the creditors and the heirs, if he believes that the fund would not be safe in the hands of appellant, can apply to the court to have the money paid directly to the firm creditors, who are entitled to participate in its distribution and thus secure the estate against liability to again pay the firm creditors. Had Rossman been still living, appellant could undeniably have filed a bill for an account and to subject this property to the payment of such sum as should have been found due him or the firm on the accounting, and we apprehend nothing has since occurred to prevent his maintaining his suit. But in such a proceeding Rossman, on a proper showing, could have had a receiver appointed, or the money paid by the Master directly to the firm creditors. So in this case the administrator may on a proper showing have the money applied directly to those who may be shown to be entitled.

The decree of the court below is reversed and the cause remanded.

Decree Reversed.

ROSENTHAL & PENCE, for appellees.

THROUGH the kindness of JOHN CONOVER, of the law firm of CONOVER & HICKLIN, of Galatin, Missouri, we have received the following opinion:

SUPREME COURT OF MISSOURI.

MAY TERM, 1876.

THE DAVIESS CO. SAVINGS ASSOCIATION
v.
B. K. SAILOR, et al.

AUTHORITY OF CASHIER TO BIND BANK.

Held, That the cashier of a bank has no authority to bind the bank, by statements to the surety on a note. That the bank has made arrangements for the payment of the note, and that he will not be looked to for payment thereof.—[ED. LEGAL NEWS.]

Opinion by NEPTON, J.

This suit was on a promissory note, executed by John Ballinger and Benj. K. Sailor to Joshua M Sailor, and assigned by the latter to the plaintiff. This note was dated 25 January, 1872, and was payable in one month from date, and bore interest from maturity at 10 per cent. per annum. The suit was against the two makers and the assignee.

The defense of Ballinger was that he was really a security for J. M. Sailor, that on or about the 2d day of July, 1872, he called on the plaintiff to ascertain if said note had been paid by said Joshua M. Sailor, and was informed that, although said note had not been paid, plaintiff had made arrangements with said Joshua M. Sailor, by which they looked to him alone for payment of said note, and that they did not look any longer to this defendant for payment of said note, or any part thereof, and this defendant, relying upon such statements of plaintiff, did not give plaintiff notice in writing to bring suit upon said note against the said defendant, as he at the time intended to do, and would then have done but for such statements, and that, relying upon these statements, the defendant Ballinger took no steps to secure himself against liability on said note, as he would and could have done, but for said statements. That at the time said statements were made, and for several months thereafter, said Joshua M. Sailor was a resident of Daviess county, and was solvent and had a large amount of unincumbered real and personal property, out of which this defendant could and would have secured himself fully against every liability on said note, had he not been misled by said misrepresentations of plaintiff. That a short time before the institution of this suit, said Joshua M. Sailor became insolvent and absconded, and has ever since been a non-resident of this State, and has no property out of which any part of said note could be made.

To sustain this plea, defendant Ballinger testified on the trial, that in July, 1872, he went to the bank to see Mr. Tomlin, the cashier, and asked him if the Sailor note had been paid. He said it had not, but that the bank at Chillicothe, or McFerraus' bank, had a mortgage on Sailor's land, had been loaning him money, was carrying him, and that plaintiff would not look to him—Ballinger—any longer for the payment of the note. In consequence of these statements, defendant—and witness—thought no more of the matter, and was surprised at the suit some 14 months after the maturity of the note.

This evidence was objected to on the ground that the cashier had no right to bind the bank by such statements, and because they did not correspond with the defense set up in the answer.

Tomlin, the cashier, was examined on the other side, who said that no such conversation ever occurred, and that he never had any conversation whatever with Ballinger after the note was executed, in July, 1872, until this suit was brought. He stated some conversations with Ballinger in 1871, in which he told Ballinger of Sailor's indebtedness to the Chillicothe bank, by way of warning.

There was then evidence given as to Sailor's condition in 1871 and '72, and subsequently—his insolvency—his abandonment of the State about 1873, etc. It is unnecessary that the testimony should be stated, as no point arises on it. The court gave a number of instructions for the plaintiff, and also for the defendant, all based on the assumption that Tomlin, the cashier, represented the bank in this interview, or alleged interview, with Ballinger. It is useless to recite these instructions, as no point is made on them. On the evidence admitted, the issue was a very plain question of veracity between the cashier and the defendant Ballinger, and the verdict having been for defendant, it is not proposed that we should interfere on the ground of the weight of evidence.

The only point to be considered in this court is, whether the evidence of Ballinger was properly admitted, or rather, whether the statements said to have been made to him by the cashier, are such statements as, without proof of special authority, would bind the bank.

The general powers of a cashier are stated in Story on Agency, § 114, and Fleckner *v.* Bank of U. S., 3 Wheat., 360. He has no authority to bind the bank by declarations or admissions outside of the general line of his duty, which is to collect notes, keep the funds arising from them, and deliver up notes and other securities when paid.

The cashier in this case distinctly informed the defendant that the note was not paid, nor was any statement pretended to have been made from which any reasonable man could infer that the note was paid. The statement of the cashier was that a Chillicothe bank had made loans to Sailor, and proposed "carrying him," and that the plaintiff would not look to Ballinger. There was nothing in this statement from which the witness had a right to assume that the note had been paid or otherwise secured. On the contrary, the very reverse was stated in plain words, and the information in regard to what had been done in the bank at Chillicothe did not give any assurance that this note had been provided for in the mortgage taken by that bank.

Assuming, however, that the cashier's assurance was that the debt was otherwise secured, and that the defendant would not be troubled, that was, as the court of New Hampshire declared in Cochecho Nat. B. *v.* Haskell, 51 N. H., 116, (see same case, 12 Am. Rep., 67,) a case cited and relied on by both parties, a mere agreement to discharge the surety, and not within the ordinary scope of a cashier's authority.

A cashier of a bank has ordinarily no power to discharge a debtor without payment, nor has he any authority to bind the bank by an agreement that a surety shall not be called on to pay the note he has signed, or that he would have no further trouble from it. A special authority to discharge sureties may be provided, or the cashier may be allowed to represent the stockholders generally, without any regard to the usual duties of a cashier. But there must be proof of such authority, as upon general principles he does not have any such powers. There is no dispute in the case, in regard to the general principles of estoppel. They are recognized by this court in the case of Driskell *v.* Mateer, 31 Mo. R., 325.

The only question for this court to decide is how far declarations and statements by an officer of a bank, called a cashier, binds the bank in a case where there is no evidence to show special authority.

The evidence of Ballinger without proof of special authority conferred on Tomlin, its cashier, was incompetent to bind the bank.

The judgment must be reversed and the cause remanded. The other judges concur except Judges Wagner and Vories, who are absent.

CONOVER & HICKLIN and HALE & EADS, for appellant.

SHANKLIN, LOW & MCDOUGAL, for respondents.

NEW HAMPSHIRE REPORTS.

(*From John M. Shirley, to appear in* LVI *New Hampshire.*

AMENDMENT—RESULTING TRUST.

Hall v. Congdon, p. 279.

A bill in chancery was brought for the purpose of enforcing a trust in regard to certain land, and alleged an express trust. It was proposed to amend the bill by inserting allegations of facts from which a trust resulted. It was objected that the resulting trust was displaced by the express trust, and that the amendment would introduce a new cause of action. *Held*, that it was no objection to the implied trust that it was alleged that the defendant had expressly promised to perform it, and that the object of the bill as amended being to enforce substantially the same trust, the amendment did not introduce a new cause of action.

It being alleged that the money with which the land was purchased was the plaintiff's money: *Held*, that it was no objection to the implied trust that the defendant furnished the money by way of loan, and that the plaintiff had agreed that he should hold the land by way of security until the money had been repaid.

ABSTRACT OF ILLINOIS OPINIONS.

FILED JUNE AT SPRINGFIELD JUNE 30, 1876.

34.—Philip Crane *v.* Andrew S. Rutledge. —Error to McLean.—Opinion by BREESE, J., reversing and remanding.

CHARACTER IN SEDUCTION—TESTIMONY OF DIVORCED WIFE.

Held, 1. That in an action for seduction, the general character of the defendant is inadmissible in evidence. General character can only be admitted when the issues necessarily involve it—as a prosecution for keeping a common gaming house, etc. In such an action as the present, the woman's character for chastity is in issue, but the defendant's is not, and his general character cannot be shown.

2. In such action, the divorced wife cannot be introduced by the defendant, (nor the State, of course,) as a witness to prove a fact which could only have come to her knowledge through the marital relation while it continued. It would be different as to facts occuring after divorce.

35.—Hartwell C. Howard *v.* James T. Logan.—Error to Champaign.—Opinion by WALKER, J., affirming.

HOMESTEAD—WHERE HOUSE DESTROYED BY FIRE.

STATEMENT.—Fire destroyed a house on a homestead lot—the whole being within the exemption of $1,500. The owner finding himself unable to rebuild, sold, the lots to appellee. Appellant had a judgment, and he levied on the lots in appellee's hands, who brought bill to enjoin, and obtained a decree.

Held, That there was no loss of the homestead right by the accident; especially, as a homestead is not even lost by a voluntary absence for a temporary purpose, there being an intention of returning.

Andrew Wilson *v.* School Directors, etc. —Error to Calhoun.—Opinion by DICKEY, J., reversing, and dismissing the suit.

DEDICATION—COMPELLING CONVEYANCE TO DEFINE IT—PARTIES REQUISITES.

STATEMENT.—Dedication, by Wilson, of school-house lot. After 20 years' occupancy, for the purpose of a school, he made two attempts to convey the lot, conditionally, by deed. The deeds not being satisfactory, were both destroyed, the trustees of schools not having accepted, expressly nor by implication, either of the deeds, probably relying on the dedication alone.

Suit was brought, in the name of the trustees, to compel Wilson to convey. This the trustees dismissed. Then the directors of the district brought another suit, for the same purpose, alleging that the trustees refused to prosecute a suit for the purpose. In this, a decree was rendered for a full conveyance of the unqualified fee. Wilson brought up the judgment. *Held*,

1. That the directors had no interest upon which they could be allowed to bring such suit. This could only be brought by the trustees themselves, to whom the deed was to be made; or else some tax-payer, or other person having a pecuniary interest therein, on allegation that the trustees refused to do their duty in the premises.

2. If Wilson was under any obligation at all to give a deed, he could not be compelled to give one which would more than merely define the prior dedication.

38.—Isaiah Boon *v.* The Moline Plow Co. —Appeal from Piatt.—Opinion by SHELDON, J., affirming. SCOTT, Ch. J., dissenting.

VALIDITY OF NIGHT SESSIONS OF COURT.

STATEMENT.—In open court, a judge announced that he would hold a night session, and call the docket for trial. The case of appellant herein was reached between ten and eleven o'clock at night, when both he and his witnesses were absent. Judgment against him.

He moved for a new trial, on an affidavit alleging a meritorious defense, setting out the facts thereof; also that he and his witnesses had been constant in their attendance at court, that they all lived ten miles distant, that he could prove the facts alleged by at least four witnesses besides himself, that they were all married men, and could not be away from home at night. Motion for a new trial overruled. *Held*,

That the holding of a night session, by due appointment, is a matter of discretion in the court, not to be interfered with, except in case of abuse; and that parties notified by the announcement must attend, at their peril; and that the affidavit was insufficient.

[*For other cases, see page* 335.]

BAGGAGE RECEIPTS.—Philip A. Madan, arriving in this city on the New York and New Haven Railroad, gave the checks for his baggage, while in the train, to the agent of the New Transfer Company, at the same time receiving a receipt on which was a printed clause whereby the company limited its liability to $100 for loss of baggage, unless a special contract was made to the contrary. It was then dark, and Mr. Madan put the receipt into his pocket without looking at it. The baggage was stolen, and Mr. Madan sued for $415. On the trial, yesterday, the company set up the receipt as a binding contract, limiting their liability to $100 Judge Sedgwick charged the jury that it was for them to determine whether Mr. Madan could see enough of the paper to indicate that it was a contract, and not a receipt, and the jury gave Mr. Madan $415.—*N. Y. Sun.*

CHICAGO LEGAL NEWS.

Lex vincit.

MYRA BRADWELL, Editor.

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We call attention to the following opinions, reported at length in this issue :

CONTESTATION FOR THE OFFICE OF JUDGE.—The opinion of the Supreme Court of the United States by WAITE, C. J., holding that under the statutes of Louisiana, Kennard was not deprived of his office as one of the judges of the Supreme Court of that State, without due process of law.

RIGHT TO SUE ON A SUPERSEDEAS BOND IN THE U. S. COURTS.—The opinion of the United States Circuit Court by DRUMMOND, J., holding where a writ of error is taken from a judgment of a Circuit Court of the United States to the Federal Supreme Court, and a supersedeas bond given, and the writ of error dismissed, that a suit can be maintained on the bond in the Circuit Court where the original suit was commenced, without regard to the citizenship of the parties. We do not remember to have seen this precise question decided, but we are satisfied the decision of the learned judge is correct. To hold any other way would be to say, in many cases, before a plaintiff in the Federal Court could reap the fruits of his judgment, he would have to go into the State court.

BANKRUPTCY.—RENT OF LEASED PREMISES.—The opinion of the United States Circuit Court, for the District of Louisiana, by BRADLEY J., holding that neither the bankrupt nor the assignee can occupy leased premises after the bankruptcy without paying the rent.

BILL 300 UNCONSTITUTIONAL—SPECIAL LAWS.—The opinion of the Supreme Court of this State, by Scholfield, J., holding that the law known as "Bill 300" is unconstitutional; that the words "local or special," in the clause of the 22d section of article 4 of the constitution under consideration, are used in contradistinction to the word "general," and the restriction therefore is equivalent to a command that all laws to be passed by the General Assembly incorporating cities, towns or villages, or changing or amending their charters, shall be general. It is difficult to see how the Supreme Court could have made any other decision. In fact this decision is foreshadowed by that in the case of The People *ex rel.* Miller *v.* Otis, reported 7 Chicago Legal News, 323. It may not be amiss to inquire how or why such a bill ever came to be passed. After the fire it was claimed that Chicago, as well as some of the other cities of the State, needed to have a law stronger than the general revenue law, for the purpose of collecting revenue. Mr. Tuley being at the head of the law department of the city, and Mr. Medill, its mayor, urged, with all the power they had, the passage of Bill 300—claiming that it would be disastrous to the best interests of the city not to pass it. The city attorneys and the mayors of the cities of the State met at Springfield, and requested their local members to go for Bill 300. The entire daily press of this city, with the exception of the *Times*, favored the measure. The few members of the legislature who believed the bill, and its subsequent amendment, to be unconstitutional, and had the courage to stand up and speak against them, were denounced as tax-fighters. Time has shown who were working most effectually in the interest of the tax-fighters. This opinion affirms the judgment entered by Judge Wallace in the County Court, holding the law unconstitutional. E. Roby from the first took an active and leading part in the war upon Bill 300 in the courts.

THE DEED OF A MINOR—WITHIN WHAT TIME IT MAY BE DISAFFIRMED.—The opinion of the Supreme Court of this State by CRAIG, J., holding that the deed of an infant must be disaffirmed within three years after reaching majority, or such infant will be concluded by the deed; that when the complainant was of age and free from disability, the time in which she had to disaffirm the deed commenced to run, and her subsequent marriage could not affect or prevent the running of the bar which had already commenced. The former opinion of the court in this case is reported 5 CHICAGO LEGAL NEWS, 438.

RIGHT OF CREDITOR OF AN ESTATE TO FILE A BILL TO REMOVE A FRAUDULENT CONVEYANCE.—The opinion of the Supreme Court of this State by WALKER, J., as to the right of a creditor having a claim allowed in the County court against an insolvent estate to file a bill to have a fraudulent conveyance removed, and subject the property to the payment of the debts. The court holds, for the purpose of laying the foundation for filing a bill that the allowance of a claim in the County court and showing the estate to be insolvent, is equivalent to obtaining a judgment in a court of law, and having an execution returned, no property found. The court reviews its former decisions, and states that they are not in conflict with the doctrine here laid down. We regard this as an important opinion, and one which settles questions about which there has been great variety of opinion.

AUTHORITY OF BANK CASHIER TO BIND BANK.—The opinion of the Supreme Court of Missouri, by NEPTON, J., holding that the cashier of a bank has no authority to bind the bank by statements to the surety on a note; that the bank has made arrangements for the payment of the note, and that he will not be looked to for the payment thereof.

NOTES TO RECENT CASES.

AGENT OF MORTGAGEE TO COLLECT.

The Court of Common Pleas of Pa., 33 *Leg. Intel.*, 238, in Taylor *v.* Vingeret, held that the agent of the mortgagee to collect the interest has not thereby an implied authority to collect and receive the principal; neither will such unauthorized receipt of the principal bind the assignee of the mortgagee.

PURCHASER SUBJECT TO JUDGMENT LIEN.

In the case of the Miner's Trust Co. Bank *v.* Roseberry, 33 *Leg. Intel.*, 240, the Supreme Court of Pa. held that a purchaser of property subject to the lien of a judgment is not entitled to have himself credited with the excess of legal interest paid on such judgment, the defendant in the judgment not making any such claim.

FIREMEN—SALVAGE.

The U. S. District Court for the district of Texas, in Davey et al. *v.* Frost, 3 *Cent. Law J.*, 419, held that firemen employed and paid under a city ordinance are not entitled to salvage for vessels saved while lying at their wharves, as such services are simply in the line of their duty.

BANKRUPTCY—CORRECTION OF STATEMENT OF ASSETS.

In re Asten, the United States District Court for the eastern district of N. Y., 14 N. B. Reg., 7, held that a resolution cannot be recorded where the statement of assets and debts shows that the requisite proportion of creditors have not confirmed it, although the statement is inaccurate; that a statement of assets and debts can only be corrected at a meeting of the creditors.

INVOLUNTARY PETITION—JUDGMENT WHEN FINAL.

The U. S. D. Court, S. D. N. Y.. *in re* Duncan et al., 14 N. B. R., 18, held when the court has adjudged that the requisite proportion of creditors have joined in an involuntary petition, the judgment is final, not only as respects the debtor, but as respects all his creditors, and will not be re-examined by the District Court except upon an allegation of fraud or bad faith; that after an adjudication of bankruptcy, no inquiry can be made into the truth of an affidavit filed to show that the requisite proportion of creditors have not united in the petition, unless fraud or bad faith is alleged.

AN ILLINOIS DIGEST.—There is a general desire with the profession in this State for a new digest of the reports of the Supreme Court, which shall commence with the first case, and proceed in regular order by subjects to the latest reported case. What is wanted is not a voluminous work of many volumes, but one giving the points decided by the Court, clearly and concisely, in the fewest possible words, with an index and table of contents, so skilfully arranged as to enable an attorney to readily find what the Court has decided on any given question. Such a digest would not only be of use to the profession but would be of great value to the Circuit judges and would have a tendency to make them more familiar with the decisions of the Supreme Court, and as a consequence, appeals would not be so frequently taken in order to make the judgments of the lower courts correspond with the decisions of the Supreme Court. It would be an aid to the Supreme Court itself, in preparing its opinions. Who will prepare such a digest? It would have a good sale.

RECENT ILLINOIS CASES.—In this issue we publish entire three opinions of the Supreme Court of this State, delivered on the 30th of last month, and give an abstract of thirty filed on that day, at Springfield. These opinions alone make this number worth, to any Illinois lawyer, more than the subscription to the volume.

MASTERS IN CHANCERY.—The judges of the Circuit Court have re-appointed George Willard, Walter Butler, Charles T. Adams and Horatio L. Wait, Masters in Chancery. Judge Grant Goodrich declined a re-appointment, and Henry Waller was appointed in his stead.

REHM'S CASE.—On yesterday, Judge Blodgett sentenced Rehm to six months' imprisonment in the county jail, and to pay a fine of ten thousand dollars, and to stand committed until the fine and costs are paid.

MEMBERS OF THE BAR ACTING AS JUDGES. It will be seen by the abstract of opinions published in this issue that the Supreme Court have decided that it is unconstitutional for a member of the bar to try a case as circuit judge, even where it is done under a stipulation of the parties. In other words that consent cannot create a judge unknown to the Constitution, or confer jurisdiction.

GARNISHEE—WAGES.—We would call the especial attention of our readers to the abstract of the opinion of the Supreme Court, relating to garnisheeing the wages of a laborer, etc. The Supreme Court evidently intend that a man having a family shall have the right to work and receive his wages up to the extent of twenty-five dollars, free from a garnishee process, and that a man may contract to receive his wages in sums of not more than twenty-five dollars in advance, and thus free himself from the grasp of hungry, devouring creditors, who would take the bread out of his childrens' mouths, if the law would allow it.

THE USE OF EXTRINSIC EVIDENCE TO SUPPLEMENT OR CONTROL DOCUMENTS OF TITLE.

[From the London *Law Times.*]

(*Continued from page* 328.)

7.—LOST WILL.

If a testator intended by his will to adopt two instruments, and only one is found, the law, (as shown by the judgment of Chief Justice Erle, and Justices Williams. Willes, and Byles in Dickenson *v.* Stidolph, 11 C. B., N. S., 341,) requires that effect should be given to that which is found. The Court of Common Pleas unanimously held that either the ordinary presumption must prevail that the missing paper was destroyed by the testatrix *animo revocandi*, or the principle must be applied that the apparent testamentary intentions of a testator are not to be disappointed merely because she made other dispositions of her property which are unknown by reason of the testamentary paper which contained them not being forthcoming. On the same principle a will is not revoked by a subsequent one where the contents are unknown, even where it is known that a difference which cannot be ascertained exists. See Hutchins *v.* Basset, 3 Mod. 203; 2 Salk. 592; Show P. C. 146; Goodright *v.* Harwood, 3 Wels., 497; 2 Will. Bl. 937; Cowp. 87; 7 Bro. P. C. 344.

In Keen *v.* Keen, 29 L. T. Rep., N. S. 247, Sir J. Hannen thought there could be no doubt that while on the one hand evidence of statements made by a testator subsequent to the execution of his will that he intends to act in conformity with the dispositions contained in the will is clearly admissible, it necessarily follows that other statements made by a testator to the contrary effect are admissible. The admissibility of evidence cannot depend on the form of words in which the intention is expressed. Accordingly, the will being missing, the learned Judge admitted such declarations not directly as evidence of destruction, but of intention not to adhere to the will.

The facts of Lord St. Leonards *v.* Sugden are so well known to the readers of the *Law Times* that we need not recapitulate them. The Chief Justice divided his judgment into four parts;—1. Was the will destroyed? 2. Is secondary evidence admissible? 3. Is it satisfactory? 4. If satisfactory, can part only of the will be admitted to probate?

The opinion of his Lordship as to the admissibility we presented in a condensed form in our criticism of Doe *v.* Palmer, while considering the use of parol evidence to ascertain alterations and interlineations. The fourth question his Lordship answered in the affirmative. "Why," he asked, "if one loses should all? He could not but think there must be some ultimate remainder of the realty, and that there might be some few legacies which Miss Sugden could not recollect. They could not be many. But to refuse probate would be to enable a wrongdoer or an accident to frustrate a will. This might be very mischievous. Of two evils it was better for the court to see its way to giving what effect it

could to the will, rather than to allow wrong or accident to triumph." Sir George Jessel ably argued that as in cases of lapse it was the duty of the court to give effect to the secondary intention of the testator on failure of the first. He was of the opinion that probate of a will in solemn form, under the Probate Act, did not alter the law of the Chancery as to establishing wills, though it erected a new tribunal. "Separate wills for separate purposes," he said, "are not uncommon, and that in ejectment for Blackacre the will as to Whiteacre is immaterial. Secondary evidence depended on loss, and the requirements of justice in the case of lost deeds, and on principle there was no difference between wills and deeds. Before 1 Vict. c. 26, a will of personalty could be proved by parol." The learned Master of the Rolls then somewhat rhetorically continued: "Must declarations be limited to those made before the will? In other countries they had a like law in all cases. Our law formerly excluded the declarations of deceased persons, but crying injustice necessitated exceptions. There were three principal and three subordinate, those accompanying the act, those against interest, those in course of business. Subordinate to the first were the proofs of matters of general or *quasi* historical interest, to the second, questions of pedigree. The grounds of the admission were the difficulty of obtaining other evidence, the disinterestedness of the declarant, the absence of bias in that they were made before litigation or dispute, and lastly, the peculiar knowledge of the declarant. Each of these reasons existed in the case of a testator." Lord Justice James thought Dickenson *v.* Stidolph, 11 C. B. 341, directly in point. Lord Justice Mellish, while thinking declarations after the making of the will inadmissible, held that still there was sufficient evidence to justify the granting of probate.

(To be continued.)

ILLINOIS SUPREME COURT OPINIONS.

NORTHERN GRAND DIVISION.

CLERK'S OFFICE, SUPREME COURT,
OTTAWA, ILL., June 30, 1876.

Opinions of the Supreme Court have this day been filed in the following causes:

1873. CIVIL DOCKET.

77. Keil et al. v. Healy et al. Decree affirmed.

1874. RE-HEARING DOCKET.

2. R. R. I. & St. L. R. R. Co. v. Byam, admr., etc. Reversed and remanded.

CIVIL DOCKET.

25. Reynolds v. Greenebaum. Affirmed.
62. Stowell v. Beagle. Affirmed.
78. Filkins v. Sullivan et al. Reversed.
85. Zirkle v. Joliet Opera House Co. Affirmed.
95. Shreeves v. Allen. Reversed and remanded.
111. Hards et al. v. Myers et al. Reversed and remanded.
134. Powers v. Briggs et al. Reversed and remanded. Scott and Sheldon, JJ., dissenting.
156. Womer v. Lamar Ins. Co. Reversed and remanded.
164. Becker v. Becker. Affirmed in part and remanded.
188. Pickering et al. v. Cease, impld. etc. Affirmed.
195. A. M. U. Ex. Co. v. Wilsie. Reversed and remanded.
204. Stanley v. Valentine et al. Decree reversed and remanded.
213. Breckenridge et al. v. Ostram, admr., etc. Decree affirmed.
221. May v. Magee et al. Affirmed.
236. Adams v. Adams et al. Reversed and remanded.
249. Smith v. Lyon. Reversed and remanded.
257. Prout v. Lomer et al. Decree affirmed.
260. Rulison et al. v. Post, by next friend. Affirmed.
272. Walker et al. v. Stevens. Affirmed.
284. Edbrook v. Cooper et al. Affirmed.
290. Stampofski v. Steffens. Affirmed.
308. Cushman et al. v. Ill. Starch Co. Affirmed.
314. Fowler v. Coney. Affirmed.
324. Doan et al. v. Dunham. Reversed and remanded.
330. C. B. & Q. R. R. Co. v. Chamberlain et al. Decree reversed and remanded.
346. Denis v. Denis. Decree affirmed.
368. Smith v. 3d Nat'l Bank of St. L. Affirmed.
375. Glennon et al. v. C. M. & St. P. R. R. Co. Affirmed.
382. Bowen et al. v. Bond et al. Decree reversed and remanded.
388. Burlingame v. Brewster. Affirmed. Scott and Sheldon, JJ., dissenting.
406. In the matter of Will of Tuller, dec'd. Reversed and remanded.
424. C. & A. R. R. Co. v. C. W. & V. Coal Co. Affirmed.
427. Sturges v. Miller et al. Decree affirmed.
431. Brown et al. v. Lowell et al. Decree affirmed.
436. Ill. Cent. R R Co. v. Green. Reversed.
453. Claasen impld., etc., v. Schoenamann. Affirmed.
476. Combs v. Steele et al. Affirmed.
487. Donlin v. Daegling et al. Affirmed.
499. Knickerbocker Ins. Co. v. Talman. Reversed and remanded.
500. Walker v. Carrington et al. Decree reversed and bill dismissed, Breese, J., dissenting.
517. Berdel v. Berdel. Decree affirmed.
520. Hartshorn v. Dawson. Affirmed.
523. Riley v. Clodgio. Dismissed.
531. Dreyer et al. v. Durand et al. Decree reversed.
532. Hermandez v. Drake, impld., etc. Decree affirmed. Scott, J., dissenting.
541. Campbell v. Daggett. Affirmed.
596. City of Chicago v. Brophy. Affirmed.
602. Hitchcock v. Wonder. Reversed and remanded.
616. Boynton et al. v. Pierce et al. Reversed and remanded. Sheldon, J., dissenting.
623. Gage v. Mechanics' National Bank. Affirmed
630. Pratt et al. v. Stone. Decree affirmed.

1875. PEOPLE'S DOCKET.

6. Staak v. The People. Reversed and remanded
9. Rickert v. The People. Affirmed.

RE-HEARING DOCKET.

5. C. & N. W. R. R. Co. v. Chisholm. Reversed and remanded.
30. Kelley impld. etc., v. Kellogg et al. Reversed and remanded.
41. Atkinson v. Cash. Decree reversed and remanded.
45. Harris et al. v. Cornell et al. Decree reversed and remanded.
55. Bracken et al. v. Cooper et al. Decree reversed and remanded. Walker, J., dissenting.

CIVIL DOCKET.

26. Moody et al., impld., etc., v. Thomas. Reversed and remanded.
29. Peru Coal Co. v. Merrick. Affirmed.
40. Bostwick et al. v. Skinner et al. Decree affirmed.
56. King v. Mix et al. Decree affirmed.
58. Stone v. Carr et al. Decree affirmed.
61. Kruse v. Wilson. Reversed and remanded.
64. People ex rel. etc., v. Board of Trade. Dismissed.
65. Pacific Hotel Co. v. Pollak et al. Decree affirmed.
69. Goodrich v. Cook. Decree affirmed.
70. Sperry, gdn., v. Fanning et al. Affirmed.
78. Strubher et al. v. Belsey. Affirmed in part, and reversed in part.
84. Knickerbocker Ins. Co. v. Gould et al. Affirmed.
85. Craft et al. v. McConaughy. Decree reversed and remanded.
93. Gdn. Mut. Life Ins. Co. v. Hogan. Reversed and remanded.
107. McNab v. Young et al. Decree affirmed.
113. Work v. Hall et al. } Affirmed in part &
Walker v. Frost et al } reversed in part.
120. Gilbert v. Bone. Affirmed.
132. First Nat. Bk. Sioux City v. Gage et al. Decree reversed and remanded.
137. Huck v. Flentye. Reversed and remanded.
145. Wadsworth v. The People ex rel. etc. Reversed.
155. Kile v. Town of Yellowhead. Affirmed.
159. N. W. University v. People ex rel. etc. Affirmed.
160. Kent, admr., v. Mason, exr. Reversed and remanded.
174. Samuel v. Agnew. Affirmed.
180 Lowell et al. impld. etc. v. Wren. Decree affirmed.
184. People ex rel. etc. v. Cooper et al. Affirmed.
196. Hanford v. Blessing. Decree affirmed.
208. Moore v. Mauck. Affirmed.
209. Brown v. Luehrs. Decree affirmed.
222. Hartford L. & A Ins. Co. v. Gray et al. exrs. Reversed and remanded.
240. Colehour v. Coolbaugh. Decree affirmed.
241. Allen et al. v. Watt. Reversed and remanded.
243. Melvin v. Lamar Ins. Co. et al. Decree reversed and remanded.
245. Lincoln Ave. & N. C. G. R. Co. v. Daum. Affirmed.
251. P. L. Ins. Co. v. Foote. Affirmed.
258. Lehmer v. People ex rel. etc. Affirmed.
259. Bap. Theo. Union v. Same. Affirmed.
260. Hosmer v. Same. Dismissed.
261. N. W. University v. Same. Affirmed.
264. Griswold v. Shaw et al. Reversed and remanded.
271. Honeyman et al. exrs. etc. v. Jarvis, gdn. Affirmed.
275. S. Park Com'rs v. People ex rel. etc. Reversed.
292. Richardson et al. v. Quinn. Affirmed.
294. Easter & Co. v. Boyd. Affirmed.
298. Sellaff et al. v. Guthrie. Affirmed.
298. Fauntleroy et al. v. Wilcox. Decree affirmed.
304. Gould, Jr. impld. etc. v. City of Chicago. Reversed and remanded.
306. Sherman impld. etc. v. Bush et al. }
307. Bush et al v. Sherman et al. } Decree reversed and bill dismissed.
308. Abt v. Burgheim. Affirmed.
309. Barker v. Int. Bank Chicago. Decree reversed and remanded.
315. White et al. v. Trustees T. 41 14. Affirmed.
321. Ericson v. Rafferty. Decree reversed and remanded.
324. Hyman impld. etc. v. Bayne. Reversed and remanded.
326. Thatcher v. People ex rel., etc. Affirmed.
327. Ernigh v. Same. Affirmed and dismissed.
330. Wells v. Same. Affirmed and dismissed.
331. Cronkhite v. Same. Affirmed and dismissed.
332. Salisbury v. Same. Affirmed and dismissed.
333. Miller v. Same. Affirmed and dismissed.
334. Smith v. Same. Affirmed and dismissed.
335. Purington et al. v. Same. Affirmed.
337. White v. Russell. Decree reversed and remanded.
339. Smith et al. v. Bateham. Reversed and remanded.
341. Foster v. Clark. Decree affirmed.
350. Paris v. Lewis. Affirmed.
356. Stevens et al. v. People ex rel. etc. Affirmed and dismissed.
371. Sterling Bridge Co. v. Pearle. Reversed and remanded.
374. Yates et al. v. Village of Batavia. Decree affirmed.
375. McCarty impld. etc. v. Marlett et al. Decree affirmed.
383. Roth v. Eppy. Affirmed. Breese, J., dissenting.
384. Village of Kewanee v. DePue. Reversed. Scott, Ch. J., dissenting.
385. Wilkins v. Marshall. Reversed.
386. T. P. & W. R. R. Co. v. Eastburn. Reversed and remanded.
398. Herrick v. Gary. Affirmed. Breese, Scholfield and Dickey, J. J. J., dissenting.
407. Roberts et al. v. Beckwith. Decree reversed and remanded.
424. Fisher v. Board of Trade, Chicago. Decree affirmed.
425. Binz v. Tyler et al. Affirmed.
428. Greenleaf impld. v. Beebe et al. Affirmed in part.
432. Eastman v. City of Chicago. Reversed and remanded.
435. Dinet v. Dinet. } Decree reversed and re-
436. Dinet v. Dinet. } manded.
440. Coey v. Lehman et al. Reversed.
444. Turner et al. v. Jenkins for use, etc. Decree reversed and remanded.
446. Snoer v. O'Riley. Affirmed.
448. Curtis v. Baugh. Decree reversed and remanded.
449. Niles et al v. Harmon. Decree affirmed.
450. Ogiesby Coal Co. v. Pasco. Decree affirmed.
452. Gage v. Smith et al. Decree affirmed.
454. Allen et al. v. Deakman. Dismissed.
459. Blake v. Blake for use. Decree reversed and remanded.
460. Blake v. People etc. Decree reversed and remanded.
461. Daegling v. Schwartz. Affirmed.
462. Fabbri v. Bryan. Affirmed.
464. Ward et al. v. Lawrence et al. Reversed and remanded.
466. Dow v. Eyster. Affirmed.
468. Miller v. Johnson. Affirmed.
469. Wolf et al. v. McClure. Affirmed.
470. Spellman v. Dowse. Decree reversed and remanded.
471. David et al. v. Bradley for use, etc. Reversed and remanded.
473. Grant et al. v. Bennett et al. Decree reversed and remanded. Breese, Walker and Scholfield, J. J. J., dissenting.
475. Murphy v. McGraph. Affirmed.
476. Haas v. Chi. Bldg. So. et al. Decree modified.
477. Peterson v. Nehf. Decree reversed and remanded.
478. Herman v. Pardridge. Affirmed.
481. Morrill v. Colehour. Decree affirmed.
483. Prindeville v. Jackson et al. Reversed and remanded.
486. Kautsky v. Atwood. Affirmed.
488. Maxwell et al. v. White. Affirmed.
489. Eldridge v. Walker et al. Affirmed.
490. Strubher et al. v. Mohler. Reversed and remanded.
491. Barker v. Koozier. Affirmed.
493. Wilder v. Arwedson. Affirmed.
495. Harvey v. Drew. Affirmed.
496. Yale v. Kinzie, } Affirmed.
Moore v. Kinzie. }
497. Warren v. Tyler et al. Affirmed.
498. C. B. & Q. R. R. Co. v. McGinnis. Reversed and remanded.
499. C. & N. W. R. R. Co. v. Hatch. Reversed and remanded.
500. Lewis et al. v. Lanphere. Decree affirmed.
501. Stewart et al. v. Mumford. Decree reversed and remanded.
502. Hunter et al. v. Hartsook. Affirmed.
534. Sea impld. v. Morehouse. Decree affirmed.

C. D. TRIMBLE, Clerk.

LIST No. 1.

SUPREME COURT, CENTRAL GRAND DIVISION.

JANUARY TERM, 1876.

Opinions of the court have been this day filed in the following cases:

RE-HEARING DOCKET.

1. Shaw v. The People, etc. Reversed and remanded.

PEOPLE'S DOCKET.

4. Fletcher v. The People, etc. Reversed and remanded.
10. Pearce v. The People, etc. Reversed and dismissed.
11. Haines v. The People, etc, Affirmed.
18. Connelly v. The People, etc. Affirmed.
21. Henline et al. v. The People, etc. Affirmed.
25. Mooney v. The People, etc. Affirmed.
26. Kribs v. The People, etc. Reversed.
27. " " " Reversed and remanded.
26. People ex rel. Mayo v. Lippincott, etc. Man. Ref.

CIVIL DOCKET.

3. Wright et al. v. Troutman. Decree affirmed.
4. Jennings v. Hinckle et al. Decree affirmed.
7. Cutright et al. v. Stanford et al. Decree affirmed.
11. T. W. & W. R. W. Co. v. The People, etc. J. affirmed.
12. Hoagland v. Creed et al. Dismissed.
13. Morgan et al. v. Corlies. Affirmed.
18. Daniels v. Aholtz. Affirmed.
19. Conwell v. McCowen. Decree affirmed.
22. Arbuckle v. Ill. M. R. R. R. Co. Decree affirmed.
25. Rowand et al. v. Carroll et al. Affirmed.
26. Rowand et al v. Clemens et al. Affirmed.
28. Martin v. Judds. Affirmed.
31. City of Quincy v. Barker. Reversed and remanded. Dissenting opinion by Scott, J.
33. Hoffman, etc. v. Fitzwilliams & Sons. Affirmed.
34. Crose v. Rutledge. Reversed and remanded.
35. Howard v. Logan. Affirmed.
38. Boon v. Moline Plow Co. Affirmed.
41. Wilson v. School Directors, etc. Reversed and dismissed.
43. Logan v. Musick et al. Affirmed.
44. T. W. & W. R. W. Co. v. Gilvin. Affirmed.
45. Thompson et al. v. Wilhite. Reversed and remanded.
46. Alsop v. Eckles. Reversed and remanded.
47. Binz v. Webber. Affirmed.
51. Rearick v. Wilcox. Reversed and remanded.
55. Fanning et al. v. Russell, etc. Affirmed.
56. Dunlap et al. v. Gillett. Stricken from Doc.
57. Bennett v. Pierson. Affirmed.
60. Leroy v. City of Springfield. Affirmed.
63. Steinmetz v. Lang. Reversed and remanded.
66. Sandusky et al. v. Exchange Bank, etc. Affirmed.
69. Withers, etc. v. Fitzimmons. Reversed and remanded.
70. Drew et al. v. Mason et al. Decree affirmed.
72. Protection Life Ins. Co. v. Palmer, etc. Affirmed.
73. Corbin v. Pearce. Affirmed.
75. Husband, etc. v. Epling. Reversed and remanded.
77. Jewett et al. v. Cook. Affirmed.
78. Harris v. Evans et al. Affirmed.
81. Scroggs v. Cunningham et al. Decree affirmed.
82. Bongard v. Black. Decree affirmed.
83. Bongard v. Black. Decree affirmed.
84. Bongard v. Core. Reversed and remanded.
85. Greenebaum et al. v. Greenebaum. Reversed and remanded.
87. Dayhoff v. Dayhoff et al. Decree affirmed.
90. Keokuk Northern Packet Co. v. City of Quincy. Reversed and remanded.
95. Arnold v. Crowder. Reversed.
96. Arnold v. Stock. Reversed and remanded.
97. C. B. & Q. R. R. v. Damerell et al. Reversed and remanded.
100. Rasengrants v. Mason. Affirmed.
101. Davis v. Dresbach. Reversed and remanded.
102. St. L. V. & T. H. R. R. Co. v. Bell & Co. Reversed.
103. Church et al. v. English. Affirmed.
106. Mervin v. Arbuckle. Reversed and remanded.
107. Hanson v. Myers et al. Affirmed.
110. Town of Old Town, etc. v. Dooley. Affirmed.
111. Huebsch v. Scheel et al. Reversed and remanded.
112. Hall et al. v. Beveridge, etc. Affirmed.
114. Opdike v. Wright. Decree affirmed.
116. Goldstein v. Lowther. Reversed and remanded.
117. Hashberger v. Forman et al. Decree affirmed.
118. Ross v. Sutherland. Decree affirmed.
119. I. & St. L. R. R. Co. v. Herndon et al. Affirmed.
121. Koester v. Burke et al. Reversed and remanded with directions.
124. Imp. Ins. Co. v. Gunning et al. Decree affirmed.
125. Ulery v. Jones. Reversed and remanded.
127. Alwood et al. v. Mansfield. Reversed and remanded.
130. Angelo v. Angelo. Reversed and remanded.
135. Preston, impld. etc. v. Williams et al. Decree affirmed.
138. Ives v. Vanscoyoc, use., etc. Reversed and remanded.
139. Governor, use, etc. v. Dodd. Reversed and remanded.
142. Wilson et al. v. Turner. Affirmed.
145. Edgington, admr., etc. v. Hefner et al. Reversed and remanded.
146. Sandberg v. Papineau. Affirmed.
147. Clevenger v. Curry. Reversed.
149. People, use, etc. v. Herr et al. Affirmed.
150. Baker v. Town of Normal. Affirmed.
151. Board of Supervisors, etc. v. City of Lincoln. Affirmed.
152. Cusey et al. v. Hall et al. Decree affirmed.
153. Trustees of Schools, etc. v. Trustees of Schools, etc. Affirmed.
157. Smalley v. Smalley. Affirmed.
158. P. & D. R. R. Co., et al. v. Raub. Decree affirmed.
160. Buckmaster v. Gowan. Affirmed.
161. Gordon v. Clark et al. Affirmed.
163. Dana v. Short. Affirmed.
164. Patridge et al. v. Chapman et al. Decree affirmed.
165. Kissinger v. Whittaker et al. Decree affirmed.
169. Conwell v. S. & N. W. R. R. Co. Affirmed.
174. Adams Ex. Co. v. Wilson et al. Affirmed.
179. Webster v. People, etc. Reversed and remanded.
180. Jones v. Warner. Affirmed.
181. Scott v. Kenton. Reversed and remanded.
185. Freudenstein v. McNier et al. Reversed and remanded.
196. Shaw et al., v. Wilson Sewing Machine Co. Affirmed.
200. Schwabacher et al. v. Rush et al. Affirmed.
203. Raymond et al. v. Kerker. Reversed and remanded.
208. Mix v. The People, etc. Affirmed.
213. Roberts et al. v. Parlin et al. Reversed.
214. Massay v. Harkin. Affirmed.
219. Roberts v. Hughes et al. Affirmed.
224. Cushman v. Oliver. Reversed and remanded.
225. Morrison v. Smith. Reversed and remanded.
226. Gill v. Woods, admr., etc. Decree affirmed,
228. Kemper v. Prest, Trustees, etc. Affirmed.
230. Broadwell v. Paradise. Reversed and remanded.
231. Lowman et al. v. People, etc. Affirmed.
235. Hillyer v. Lewis, et al. Decree affirmed.
238. Crabtree et al. v. Dodsworth, ex., et al. Affirmed.

CASES ORDERED RE DOCKETTED FROM 1875.

285. Tone v. Wilson et al. Decree affirmed.
286. Crane v. Crane et al. Affirmed.
289. McCann v. Roach. Reversed and remanded
290. Dickson v. C. B. & Q. R. R. Co. Reversed and remanded.
291. Steere et al. v. Pruitt. Decree affirmed.
292. Papineau v. Belgarde. Affirmed.
293. I. B. & W. R'y v. Strain et al. Affirmed.
295. Bruce v. Doolittle et al. Reversed and remanded.
296. Worth v. Worth et al. Decree affirmed.
298. Central City Horse R'y Co. v. Ft. Clark Horse R'y Co. Reversed and remanded.
299. C. B. & Q. R. R. Co. v. Lieb, etc. Reversed and remanded.
300. Clark v. Hatfield. Affirmed.

Opinions have also been filed in the following cases of January term, 1875:

83. Dils v. Stobie et al. Affirmed.
208. Yazel v. Palmer. Reversed and remanded.
224. Cobb et al. v. Ill. Cent. R. R. Co. Affirmed.

All cases submitted to the court and not mentioned above are held under advisement. Members of the bar and parties will be notified when they are decided.

E. C. HAMBURGHER,
Clerk of Supreme Court.

SPRINGFIELD, ILL., June 30, 1876.

SUPREME COURT OF ILLINOIS.

ABSTRACT OF OPINIONS FILED AT SPRINGFIELD JUNE 30, 1876.

83-1875.—Harrison Dills *v.* Alexander Stobil et al.—Appeal from Adams.—Opinion by SCHOLFIELD, J., affirming.

SURRENDER OF LEASE—CHANGE OF POSSESSION.

Held, 1. That where it is eventually agreed between parties that a lease shall be surrendered, and a new one is thereupon made with another party, and the landlord accepts the new party as his tenant, this will estop the landlord thereafter from denying the surrender of the first lease, notwithstanding it was in writing, under seal, and the agreement to surrender is verbal.

2. An actual and continued change of possession, by the mutual consent of the

parties, will amount to a surrender by operation of law.

3. Nor does it make any difference that the new tenant was in possession under the old as well as the new lease. The law does not require the useless ceremony of formally vacating the premises and then re-entering again.

208-1875.—Elizabeth Yeagle *v.* Ezekiel H. Palmer.—Appeal from De Witt.—Opinion by SCOTT, J., reversing.

RELINQUISHMENT ON CONSIDERATION OF HOMESTEAD AND DOWER RIGHTS—SEPARATE PROPERTY IN THAT CONSIDERATION—POWER TO SUE ON BOND THEREFOR—DEFENCES—TITLE.

STATEMENT.—Suit on a bond given by defendant to plaintiff in consideration that she should unite with her husband, John Yeagle, in a deed, and thus relinquish her homestead and dower rights therein. *Held*,

1. That the consideration was sufficient to support the bond in suit, as payable to the plaintiff—the payment being designed to obtain her another homestead, instead of the one she gave up, and it being therefore her separate property.

2. Homestead and dower rights are valuable rights secured to a woman by positive law; and of which she cannot be deprived by any act of her husband, nor in any manner to which she does not yield her voluntary consent. She can convey the rights by joining with her husband, but if any consideration therefor is exacted, that consideration is her separate property, being based upon the conveyance of her own personal and positive rights.

3. Nor can a purchaser question the good faith of the transaction, as to the creditors of the husband, as a defense against the payment of the bond. Only creditors can impeach it.

4. Nor will the defense be allowed, in such case, that the title has failed, unless there has been a prior offer to reconvey back again. The purchaser cannot retain the title, and withhold the purchase money. The parties must be placed in *statu quo*.

Ill. Cent. R. R. Co. *v.* Caleb Christy & Co.—Appeal from McLean.—Opinion by BREESE, J., affirming; SCOTT, J., dissenting.

DAMAGES TO GRAIN IN SHIPMENT—WHO MAY SUE THEREFOR.

STATEMENT.—Suit for damages in shipment and conveying of corn. *Held*,

That, inasmuch as the grain was not to belong to appellants until it arrived at its destination, and was there inspected and accepted, they had no such property therein *in transitu* as to entitle them to sue for damages to it. This right belongs only to the seller—he being the owner until delivery.

1.—Benjamin Shaw *v.* The People ex rel.—Appeal from Clark.—Opinion by CRAIG, J, reversing and remanding.

WEIGHT OF EVIDENCE—WHAT WILL BE CONSIDERED UNDER A GENERAL ASSIGNMENT OF ERROR THAT A NEW TRIAL OUGHT TO HAVE BEEN ALLOWED.

Held, 1. That it is no part of the duty of a court to instruct a jury in regard to what weight they should attach to the testimony of any witness. The jury are the sole judges of the credibility of the witnesses, and it is their province to determine, for themselves, without prejudice or bias from any source, the weight to be given to the evidence of each witness that may testify in a cause.

2. Under a general assignment of error that a court should have granted a new trial, an appellant may urge the rejection of proper, and the admission of improper, evidence, excepted to at the time; and, also, the giving of improper, and the refusing of proper, instructions, and that the evidence does not sustain the verdict.

31.—The City of Quincy *v.* Ebenezer B. Baker.—Appeal from Adams.—Opinion by CRAIG, J., reversing and remanding; SCOTT, J., dissenting.

LIABILITY OF CITIES FOR ICE ON SIDEWALKS.

STATEMENT.—Appellee, an asthmatic, much out of health, slipped and fell on a cake of ice, about a foot broad and elevated, it being in the middle of a public sidewalk, near the post-office, and being formed by the flow of a conductor through a leak in the awning. The injury was very severe, and probably permanent. The walk was from 12 to 16 feet wide, so that there was a space of 11 or 15 feet free from the ice. The accident occurred in daylight. *Held*,

1. That the law does not require a city or incorporated town to respond in damages to every injury received on a public street. To make a city liable, the injured must have used ordinary care to avoid the danger, and use all facilities for that purpose.

2. To make a city, or other municipal corporation, liable for obstructions in the streets, they must be of such a nature that they are, in themselves, dangerous; or such that a person, exercising ordinary prudence, cannot avoid danger or injury, in passing them—in general, such defects as cannot be readily detected.

Justice SCOTT, dissenting, held:

1. That the evidence showed the plaintiff had exercised even unusual care.

2. That, while a city is not liable for the condition of the streets where that condition is general, resulting from the action of the elements, unless there has been a negligence allowing it to continue longer than was necessary to restore a good condition, yet, where the damage to a street or sidewalk is local, and in a public place, readily detected by the city authorities, the city should be held liable for any accident occurring by reason of the defect.

4 P. D. William Fletcher *v.* The People.—Error to Moultrie.—Opinion by WALKER, J., reversing.

FILLING UP OF PANEL OF GRAND JURORS—SEVERAL COUNTS AND SENTENCES THEREUNDER ON CONVICTION.

Held, 1. That the statute allowing the filling up of the panel of grand jurors by summoning persons from the body of the county, is complied with sufficiently by the sheriff summoning from those in the court-room. He needs not go outside of the court-room, unless necessary. For even granting that the law intends that persons shall not be summoned who are in the habit of hanging around a court-room, yet it will be presumed, until the contrary appears, that the persons summoned were good citizens, having every needful qualification.

2. Where there are several counts in an indictment, and a prisoner is convicted thereon, it is error to pronounce a sentence in gross; but there must be a separate sentence on every count on which he is convicted.

10 P. D. Daniel Pierce *v.* The People.—Error to St. Clair.—Opinion by SCHOLFIELD, J., reversing.

WHAT THE "CONFIDENCE GAME" IS—CONSTRUCTION OF STATUTE.

STATEMENT.—Conviction and sentence for one year, under the statute, on the "confidence game."

The defendant secured, for some time, accommodations at a hotel in East St. Louis, by representing himself as carrying on business in St. Louis, and as having correspondents in New York and elsewhere, showing letter-heads, etc., also copies of drafts, and the like.

Payment being demanded at length, he gave his note, payable at a bank in St. Louis, where he claimed to have funds deposited. It was returned protested. He then gave an order on his son who had been in partnership with him. But the son was not found, and the store was closed. He then gave an order for flour on a milling company, who refused to honor it, on the ground that they had already lost considerable money by Price & Son. He was then arrested. *Held*,

1. That not all cases of fraud come under the confidence game law. The language is, "Every person who shall obtain, or attempt to obtain, from any other person, or persons, any money, or property, by the use of any false or bogus checks, or by any other means or device, commonly called the confidence game, shall be," etc. And the meaning is, that if money shall be obtained directly for, and by, the bogus check, etc., and not merely if a confidence shall be excited in the ability and willingness of one to pay for goods, or accommodations—that is, it must be not merely as a means of gaining credit, but as a matter of barter.

2. If defendant violated any part of the criminal code, it was the section as to obtaining goods and chattels by false pretenses, but not even this, unless the representation was in writing.

11 P. D.—Leander Haines v. The People.—Error to McLean County Court.—Opinion PER CURIAM, affirming

BALANCING EVIDENCE—REASONABLE DOUBT—CIRCUMSTANTIAL PROOF.

STATEMENT.—Bastardy—prosecutrix, a deaf mute.

1. Bonnell *v.* Wilder, 67 Ill., 327, reaffirmed, namely, "where the only witnesses are the plaintiff and the defendant, and neither is impeached, and the plaintiff's evidence contradicts that of the defendant, the jury should look to the circumstances usually attending such a transaction as is testified to; which is a part of their general knowledge; and they ought to consider them and be governed by the reasonableness of the testimony of each, when so viewed.

2. Otmer v. The People, 76 Ill., 149, re-affirmed, namely, "What circumstances will amount to proof can never be matter of general definition. The legal test is, the sufficiency of the evidence to satisfy the understanding and conscience of the jury. Absolute certainty is not essential to proof by circumstances, but it is sufficient if they produce moral certainty, to the exclusion of every reasonable doubt.

8 P. D.—Mathew Tierney *v.* The People.—Error to Champaign.—Opinion by SHELDON, J., affirming.

MISTAKES IN INDICTMENT IN MATTERS OF FORM—CONSTRUCTION—SPECIAL TERM OF COURT.

STATEMENT.—Conviction for selling liquor without license. *Held*,

1. That where an obscurity arises in the language of an indictment, as from the words "intoxicating" and "liquors" being separated by a parenthetical sentence, yet if A appears, with reasonable certainty, what is the offence charged, this will not vitiate the indictment.

2. An order calling a special term of a circuit court needs not be set out in the record. Unless the contrary expressly appears, the presumption of the law is that the term is regular.

3. Where there are, say, twelve counts in an indictment numbered to six, and then the remainder are also numbered from one to six, this does not necessarily render the indictment uncertain. The numbers are no part of the counts, and the counts may be clearly referred to by the judgment, without them, and, if so, the judgment is good, and not void, merely by reason of a confusion in such numbering.

4. The objection that no more than $100 fine and 30 days imprisonment can be inflicted, in one prosecution, is not valid.

18 P. D.—William M. Connolly *v.* The People.—Appeal from Clark.—Opinion by SCOTT, Ch. J., affirming.

EVIDENCE IN THE SUPREME COURT AND BEFORE A JURY.

STATEMENT.—Bastardy. *Held*, That where a jury has been properly instructed, and where the testimony is contradictory and irreconcilable, the verdict of a jury will not be interfered with, even where the entire evidence is set out in the record; because a clearer understanding is always obtained of the testimony by hearing it from the witnesses, as it is delivered, than is ever obtained on its reproduction in writing. And especially in such a case as this, where the wildest latitude was given in the court below to assaults on the character of the prosecuting witness.

21 P. D.—William B. Henlin, et al. *v.* The People, etc.—Error to McLean.—Opinion by WALKER, J., affirming.

OBSTRUCTING HIGHWAY—JURISDICTION OF COUNTY COURT IN HIGHWAYS—PRESUMPTIONS—DEFENCES—VIEWERS.

STATEMENT.—Indictment for obstructing a highway by erecting fences, and placing gates across the highway.

The jurisdiction of the court to make the order for the highway was attacked in defence.

Held, 1, That in regard to highways, the county court is not an inferior, but a superior court; and therefore, it needs not set out, in an order, the facts necessary to confer jurisdiction; and its conclusions cannot be attacked collaterally; but everything will be presumed regular unless attacked in a direct proceeding, as provided by law, in appeal.

2. It is no defense that others also put gates across the same road, for it is no excuse in one violating a law, to say that others had also violated it.

3. Viewers may be appointed by a county court having acquired jurisdiction, whether at the first, or any subsequent term, until the matter is disposed of.

25 P. D.—Samuel P. Mooney *v.* The People.—Appeal from Shelby.—Opinion by BREESE, J., affirming.

REQUISITES OF RECOGNIZANCE—DEGREE OF CERTAINTY REQUIRED—CONSTRUCTION AS TO THE INDICTMENT—PLEADING.

STATEMENT.—Suit on a recognizance binding John Mooney to appear and answer to a charge of burglary and larceny. The recognizance was filled up by S. P. Mooney, and bore date September 12, while the approval of the officer bore date September 11. *Held*,

That this did not vitiate, since the filing in the clerk's office determined the date when it took effect.

The condition was that John Mooney should appear to answer the charge of larceny, whereas, the indictment was for burglary and larceny.

Held, Sufficient; since the condition also bound him to appear and abide the order of the court, and therefore answer any other charge that might be brought against him, this being one of the objects of a recognizance. (O'Brien *v.* The People, 41 Ill., 456)

The recognizance stated the wrong day as the beginning of the term.

Held, That the essence was the appearance on the first day of the next term; and the mere misstating of the date would not vitiate. *Held*, also,

That *nul tiel recognizance* associated with *nul tiel record* is an improper plea in such an action—the latter being the appropriate plea.

27 P. D.—John G. Kribs *v.* The People.—Error to Kane.—Opinion *per curiam*, reversing and remanding.

EMBEZZLEMENT—EVIDENCE.

STATEMENT.—Indictment for embezzlement—one Shaver having placed in the hands of Kribs some money, and taking this receipt therefor:

"ELGIN, ILL., June 26, 1874.

"Received of George W. Shaver five hundred and fifty dollars, to be loaned at ten per cent. for one year from this date. JOHN G. KRIBS."

Afterwards $150 was paid back, namely, in Nov., 1874; and interest at the same time on the whole up to December, 1874,—the balance Kribs converted to his own use. *Held*,

1. That, if the money was placed in the defendant's hands to be loaned, and he fraudulently converted it to his own use, the charge would lie. But if he merely placed it in his hands to look to him for repayment, the charge would not lie. One cannot resort to the criminal laws to enforce the payment of a debt.

2. In a trial, in such a case, it is error to admit evidence that the defendant collected money from others and converted it to his own use. He cannot be expected to come into court prepared to defend against any other charge than the one in the indictment.

28 P. D.—The People, etc., ex rel Mayo *v.* The Auditor of Public Accounts.—Petition for mandamus.—Opinion by SHELDON, J., refusing; SCOTT, C. J., dissenting.

REGISTRATION—FUNDING ACTS.

STATEMENT.—Macoupin county issuing a new bond in lieu of a prior indebtedness, occurring since the passage of the act of February 13, 1865, on the subject, and prior to the passage of the act of March 22, 1872, afterwards amended by the act of April 14, 1875. This new bond was presented to the auditor for registration, who refused to register it on the ground that the act of 1865 only related to debts accruing prior to its passage. A mandamus was sued out to compel the registration.

Held, 1. That the act of 1865 only applied to debts having accrued prior to its passage.

2. That the act of 1872 did not repeal that act, either expressly or by implication; since the acts may very well stand together—the purposes of the acts being

different, namely—the act of 1865 is for the purpose of funding, and also for providing for payment by taxation; the acts of 1872 and 1875 are simply for funding indebtedness.

3. Nor can the later acts be regarded as amending that of 1865. Neither amendments nor repeals by implication are ever favored.

26 P. D.—John G. Kribs *v.* The People, etc. (Second case.)—Error to Kane.—Opinion by SCHOLFIELD, J., Reversing.

DISTINCTION BETWEEN LARCENY UNDER EMBEZZLEMENT ACT AND AT COMMON LAW.

STATEMENT.—Indictment for larceny as at common law, as to the money placed in defendant's hands, by Shaver (as supra), yet under the embezzlement statute.

Held, 1. That the indictment must set out the case of embezzlement, and then aver that so the defendant committed larceny; because the defendant's fiduciary character, which is the distinguishing feature between embezzlement and larceny, must be specially averred.

2. The larceny embezzlement statutes were solely and exclusively passed for private cases which larceny at common law did not include. Nothing that is larceny at common law is larceny under the embezzlement statute; and nothing that is larceny under the embezzlement statute is larceny at common law.

3. Where a prosecutor never had the money interest in his own hands—as where one sells a lot and converts the proceeds to his own use—the offense is not larceny at common law, the prosecutor never having had possession.

3. James G. Wright et al. *v.* Frank Troutman.—Error to Coles.—Opinion by CRAIG, J., affirming.

ASSIGNMENT OF LIEN IN CONTRACT FOR SALE OF LANDS—WHAT IS A VENDOR'S LIEN.

STATEMENT.—Lands bargained for under a contract of sale, providing that a full conveyance would be made on payment of the purchase money, ($6,000.) The contract and notes were assigned by the vendor to Troutman, who brought bill in equity to foreclose the "vendor's lien."

It was objected that a vendor's lien was not assignable; and therefore the action could not be maintained. A decree was rendered for complainant, directing payment or sale, etc. *Held*,

1. That this was not a vendor's lien, and was, therefore, assignable. A vendor's lien is an implied lien, where land has been conveyed, and the purchase money not fully paid. It is lost if another security is given, and it does not exist where, as in the present case, there is but a contract of sale providing expressly for retaining the title until payment—thus holding the land for security of the payment.

2. Such contract is as fully assignable as is a mortgage; so that an assignee can sue upon it.

4.—Ephraim Jennings *v.* Benson C. Harkle et al.—Error to Cumberland.—Opinion by SCOTT, Ch. J., affirming.

MECHANICS' LIEN AS TO A DISORGANIZED RELIGIOUS SOCIETY—OWNER'S LIABILITY THEREUNDER.

STATEMENT.—Plaintiff in error donated to a religious society a lot, on condition that they should build a house on it—lodging a deed in the hands of a third party to await the fulfilment of the condition. But the society disbanded, it seems, before the building was completed. Defendants in error furnished materials for the building, and brought suit to enforce the lien.

It was objected that the society ought to be made defendants, also. *Held*,

1. That a sufficient answer to this objection was that the society was disbanded, and had no existence.

2. That the owner of the lot succeeded to its interests. And as he knew of the erection of the building on the lot, and raised no objection, the lien could properly be enforced against him.

7.—Albert Cutright et al. *v.* Joseph R. Stanford et al.—Error to Cumberland.—Opinion by BREESE, J., affirming.

REIMBURSEMENT BY HEIRS — EXTENT OF THEIR LIABILITY—*res adjudicata*.

STATEMENT.—The plaintiffs in error were heirs-at-law of John Cutright, deceased. The defendants in error were executors of James E. Stanford, deceased, formerly administrator of the estate of John Cutright. During the administration, all the claims filed and allowed within the two years' limitation, were paid, leaving in the hands of the administrator, a large amount for distribution among these heirs. The distribution was made thereof, and a final settlement was had with the probate court.

But one Fox filed a claim, and had it allowed, after the two years had expired, based on a judgment previously obtained in the United States court—Fox being a non-resident—against the administrator, on the ground that the intestate was a stockholder in a railroad company indebted to him. The judgment was recovered by default. Fox began suit on the administrator's bond, after the distribution, and the administrator paid the claim. These executors brought the present suit for reimbursement of this amount, so paid for the estate descended to these heirs. *Held*,

1. That the heirs are liable to reimburse, to the extent of the property which descended to them severally.

2. That a decree for this purpose should be against them all jointly, for the whole amount; but to be paid *pro rata*, according to the property descending to each only.

3. As to the liability of the ancestor, as stockholder, that was *res adjudicata* in a competent court. The failure of the administrator to defend will be presumed to be because there was no defense available, as to the liability based on the intestate's having been a stockholder.

11. T. W. & W. R. R. Co. *v.* The People, use, etc.—Error to Sangamon.—Opinion by SHELDON, J., affirming.

SUIT FOR OBSTRUCTING CROSSING BY TRAIN—R. R. COMPANY'S LIABILITY THEREFOR.

STATEMENT.—Suit for obstructing crossing by railroad trains; brought primarily against the company, instead of the conductor, or engineer, under 53rd section, namely; "Every conductor, or engineer, violating the provisions of the preceding section, shall, for each offence, forfeit the sum of not less than $10, nor more than $100, to be recovered in an action of debt, in the name of the people of the State of Illinois, for the use of any person who may sue for the same; and the corporation on whose road the offence is committed shall be liable for the like sum."

It was contended that "the like sum" meant the sum for which the servant had been previously convicted—the sentence being the measure of the amount—which would render strictly necessary the prior conviction of the servant, in order to render the company liable at all. But the court *held*,

That such prior conviction is not necessary, and that the design of the statute is to make either the conductor, or engineer, or company, liable for the act.

12. James M. Hoagland *v.* Gideon Creed, et al., etc.—Error from Morgan.—Opinion by BREESE, J., dismissing writ of error.

NO JUDGE CAN BE CONSTITUTED BY AGREEMENT OF PARTIES.

STATEMENT.—Parties agreed to have a case heard by a member of the bar—who afterwards signed a bill of exceptions as Judge of the Circuit court. *Held*,

1. That no consent can confer jurisdiction, in such a case; and no valid judicial decision can be thus rendered; and not even a valid award, since the agreement is not a submission to arbitration. The judgment is simply a nullity.

2. There is no provision in our constitution for a temporary filling of the office of judge. Judges are only to be chosen in the manner prescribed by law; and a stipulation by parties that any other person than the judge shall exercise his functions in their case, is nugatory; even if the judge vacates his seat for the purpose of the hearing.

13.—Thomas L. Morgan et al. *v.* Henry D. Corlies.—Error to Champaign.—Opinion by CRAIG, J., affirming.

JUDGES IN OTHER CIRCUITS THAN THEIR OWN—JUDGE HAVING BEEN OF COUNSEL—STIPULATION IN A CHANCERY CAUSE—OBJECTIONS TO DEPOSITION, WHEN MUST BE MADE—EVIDENCE IN A DECREE.

STATEMENT.—During the pendency of a chancery cause, a considerable number of different judges sat in the court, and made orders, etc. The resident judge had been of counsel. It was urged that the record should show the reason why another circuit judge sat, or the proceedings are void. It was also objected that the resident judge, having been of counsel, ought not to have made any order in the case. *Held*,

1. That a circuit judge of one circuit may properly hold court in another circuit. And, although it were advisable to state in the placita that the non-resident judge presided at the request of the resident judge, yet this will be presumed in the absence of anything showing the contrary.

2. That even if a judge had been of counsel, he could properly make an order, unless objection was interposed at the time.

3. Where there is a stipulation on file that in consideration of an extension of time in which to answer, the answer should be to the merits, a plea instead of answer will be regarded as a violation of the stipulation, and may properly be stricken from the files.

4. An objection to depositions, as that they were without caption or certificate cannot be made for the first time in the Supreme Court.

5. Where facts found in a decree are alleged in the bill and admitted in the answer, the evidence of the facts needs not to be set out in the decree.

18. — John H. Daniels *v.* Frederick Aholtz.—Error to Edgar.—Opinion by DICKEY, J., affirming.

TRESPASS BY ONE UNKNOWINGLY AND UNDER DECEPTION.

STATEMENT. — Aholtz and Prather owned a tract of land each adjoining, and under one fence, in a single field. They both cultivated corn therein. Prather gathered his, and sold to Daniels the stalks, before Aholtz had gathered his, Prather representing the whole field to belong to himself, and selling the whole of the stalks to Daniels. The cattle being turned in, trespassed on Aholtz's corn. He brought suit against both, and recovered a judgment, which Daniels brought up on error; *held*,

That although Daniels was deceived and knew nothing of Aholtz's ownership, yet, as his cattle did the damage to the corn, he was liable for the trespass and damage thereby occasioned.

19.—Samuel C. Conwell *v.* John McCowen et al.—Error to Tazewell.—Opinion by SCOTT, Ch. J., affirming.

SUBROGATION.

STATEMENT.—These parties were partners, and, as such, contracted a debt with one Thompson, and gave a note with personal security. Afterwards, they dissolved partnership, and Conwell agreed to pay the debts of the firm, including the Thompson note. As an act to indemnify McCowen, he gave Thompson a mortgage in addition to the personal security. McCowen had, however, to pay the note in part, he being one of the principals thereon. He then brought a bill to be subrogated to Thompson, as his rights under the mortgage, so far as he had paid the claim. A decree was so rendered, and a decree of foreclosure entered; *held*,

That McCowen was properly subrogated to the rights of Thompson, so far as he had paid the note.

22.—Samuel R. Arbuckle *v.* The Midland R. R. Co.—Appeal from Edgar.—Opinion by WALKER, J., affirming.

LIEN LAWS FOR LABOR AND MATERIALS ON R. R.—LIMITATION.

STATEMENT. — Complainant brought a bill to enforce a lien for labor and materials, rendered in 1870, to the Paris and Decatur R. R. Co., under a contract with a contractor, and not with the company directly. He alleged notice to the company, and also a subsequent consolidation with the companies forming the Midland; *held*,

1. That the mechanic's lien law of 1861, gave no lien to a sub-contractor.

2. That, at the best, the claim was lost by the limitation clause of the lien law, the suit not being brought within the three months, nor even for years.

3. The law of 1872 does not relate back to labor and materials previously furnished, and, even if so, the limitation was again fatal to the proceeding.

4. If it be said that colsolidating railroad companies are liable for the debts of the prior companies, yet, in that case, the remedy is herein mistaken.

25.—John F. Rowand *v.* John Carroll.—Error to Edgar.—Opinion by SHELDON, J., affirming.

AFFIDAVIT FOR—NOTICE BY PUBLICATION INSTEAD OF PERSONAL SERVICE—ASSIGNMENTS OF ERROR.

Held, 1. That an affidavit of non-residence as the basis of publication instead of personal service, may be on information and belief and by another than the party: because the facts to be stated in the affidavit are not, of necessity, peculiarly in the knowledge of a party. And perjury would lie on such an affidavit. In attachment and replevin suits, the affidavits must be positive, because of the language of the statute; but in chancery service, etc., the language of the statute is different, and the same strictness is not required.

2. Errors cannot be assigned which only affect co-parties not joining in prosecuting the writ of error. Unless it can be shown that the rights of the complaining parties—plaintiffs in error—are prejudiced by the error, particularly relating to another, they cannot be heard thereon.

3. Dower might be assigned in relation to several tracts in a body, even prior to the statute of 1865 expressly allowing it.

33.—Frank J Hoffman, etc., *v.* William M. Fitzwilliam et al.—Appeal from McLean.—Opinion by SCOTT, Ch. J., affirming.

GARNISHMENT OF WAGES—RESTRICTIONS THEREON—WAGES AFTER SERVICE OF THE WRIT.

Held, That after the service of a writ of garnishment, a laborer may lift his subsequently earned wages, as they become due, provided the installments do not exceed $25, he being the head of a family, and residing with them. And an employer will be protected in paying such wages as they become due, after the service of the writ, in sums not more than $25. And even if a contract be terminated after the writ is served, and a new one entered into at the same salary, payable in advance, this act will make no difference as to the liability.

[*For other cases, see page* 332.]

CHICAGO LEGAL NEWS.

CHICAGO, JULY 15, 1876.

The Courts.

UNITED STATES SUPREME COURT.

No. 60.—OCTOBER TERM, 1875.

JOHN H. KENNARD, Plaintiff in Error,
v.
THE STATE OF LOUISIANA ex rel. PHILIP HICKEY MORGAN.

In Error to the Supreme Court of the State of Louisiana.

CONTEST FOR THE OFFICE OF JUDGE—DUE PROCESS OF LAW.

Held, That the State of Louisiana, acting under the statute of January 13, 1873, through her judiciary, did not deprive Kennard of his office of Associate Justice of the Supreme Court of the State, without due process of law.—[ED. LEGAL NEWS.

THROUGH the kindness of L. HARMON of the Peoria bar, we have received the following opinion:

SUPREME COURT OF ILLINOIS.

OPINION FILED JUNE 30, 1876.

WILLIAM ROTH *v.* MARY EPPY.

Appeal from Peoria.

THE LIQUOR LAW—SUIT BY WIFE FOR DAMAGES AGAINST LIQUOR SELLER—LAW NOT REPEALED BEFORE ACTION—THE REVISION—INTOXICATION—EXEMPLARY DAMAGES.

1. WHERE SEVERAL CAUSE THE INTOXICATION.—Where it was alleged that the intoxication was caused in whole by the defendant, and the proof was that the intoxication was caused only in part by the defendant, *held*, that a recovery might be had.

2. LAW NOT REPEALED.—That the revision of 1874 did not affect the right of action of the plaintiff under the act of 1872, so as to defeat it.

3. INTOXICATION.—What constitutes intoxication is a question of fact, to be determined by the jury upon the whole evidence, in the light of their own observation.

4. EVIDENCE AS TO EMPLOYMENT.—That, as bearing upon the question of damages, it was proper to show any want of, and inability to, obtain employment, in consequence of Eppy's previous habits of intoxication.

5. EXEMPLARY DAMAGES.—That to support a finding of exemplary damages, there must be a finding of actual damage, and that without this, exemplary damages cannot be awarded. This was what was decided in Freese *v.* Tripp, 70 Ill., 496, as to damages; nothing more.

6. RIGHT OF ACTION.—The court states who has a right of action under the statute.

7. DAMAGES EXCESSIVE.—The objection that the damages are excessive, is not sustained.—[ED. LEGAL NEWS.

Opinion by SHELDON, J.

This was an action on the case, brought on September 24th, 1874, by Mary Eppy, under the liquor act, against William Roth, to recover for injury in her means of support, in consequence of the habitual intoxication of her husband, George Eppy, from intoxicating liquors sold and given to him by Roth. The plaintiff in the court below recovered a verdict and judgment for $1,200, and the defendant appealed.

Appellee's husband had, for years, been drinking to excess at appellant's drinking saloon, and continued to drink there up to the time he became insane, June 21st, 1874. He was sent to the insane Asylum at Elgin in July, 1874, and remained there under treatment until some time in April, 1875, when he was released and returned home.

There are various reasons urged for the reversal of the judgment.

The averment in the declaration is, that the defendant sold and gave to Eppy intoxicating liquors, "and thereby caused him the said George Eppy to become, and he was during that time before named, habitually intoxicated." It is claimed this is an averment that the intoxication was caused *in whole* by the defendant, and that such must be the proof; that it is not sufficient that the intoxication was caused *in part* by defendant; and that the most which the proof shows, is that defendant caused the intoxication *in part*.

The statute gives the right of action where the defendant shall have caused the intoxication in *whole* or in *part*. Contracts are entire and must be proved substantially as alleged, but torts are divisible, and in them the plaintiff may prove a part of his charge and recover, if there be enough proved to support the tort. Hite *v.* Blanford, 45 Ill., 9.

This objection we regard as without force. The point is made that the statute upon which appellee relied for a recovery was repealed before the suit was instituted. The suit was brought under the provisions of an act entitled, "*An act to provide against the evils resulting from the sale of intoxicating liquors in the State of Illinois*," approved January 13th, 1872. It is said this act was fully revised by the statutes of 1874, in an act entitled, "*An act to provide for the licensing of and against the evils arising from the sale of intoxicating liquors*," approved March 30th, 1874, and in force July 1st, 1874. That the statute of 1874 was a revision of the whole subject, and was intended as a substitute for the act of 1874, and therefore the act of 1872 was repealed, and ceased to be in force July 1st, 1874, which was before the commencement of this suit. A complete answer is found to this position on page 1012, Rev. Stat. 1874, under sections 2 and 4, where it is provided that no new law shall be construed to repeal a former law, whether such former law is expressly repealed or not, as to any offense committed against the former law, or as to any act done, or any right accrued, or claim arising under the former law, or in any way whatever to affect any such offense or act so committed or done, or any right accrued, or claim arising before the new law takes effect, save only that the proceedings thereafter shall conform so far as practicable to the laws in force at the time of such proceeding.

It is insisted that the evidence fails to show any habitual intoxication on the part of George Eppy.

It is conceded by appellant's council, that the insanity of Eppy was caused by long, continued excessive use of alcoholic liquors, that he had been in the habit of using intoxicating liquors to excess for many years, but it is denied that it was to the extent of being habitually intoxicated.

Very many witnesses on both sides were examined upon this point. Facts were detailed, and the opinions of witnesses given. There was a conflict of testimony as to the opinions of witnesses, whether at the various times testified to, the condition of Eppy, from the liquor he drank was one of intoxication or not. The testimony of some of the witnesses was, that they frequently saw Eppy at defendant's place intoxicated. Other witnesses stated his condition as verging on but not amounting to actual intoxication.

The question was one of fact for the determination of the jury, upon the whole evidence in the light of their own observation.

We think the decision of the question should rest with the finding of the jury, no sufficient reason appearing for disturbing it. It is insisted that the court below admitted improper, and rejected proper evidence.

Eppy having recovered, he returned home from the insane asylum in April, 1875, and inquiries were made of witnesses, as to his efforts to get employment, to obtain his former situation as locomotive engineer on the railroad, and his inability to do so. Exception was taken to such inquiries, which were permitted.

As bearing upon the question of damages, it was proper to show any want of and inability to obtain employment, in consequence of Eppy's previous habits of intoxication. The inquiry as to his desire for intoxicating liquors should have been excluded, but the refusal to exclude the inquiry was not of sufficient importance to amount to a fatal error.

Some evidence as to Eppy and his wife drinking together, was excluded, which might properly have been received, on the question of exemplary damages; but there was much other evidence of the same character which was received, which was abundantly sufficient for all purpose of advantage to the defendant on that head.

There was no error in not admitting proof of a license.

Objection is taken to the giving, modifying and refusing of instructions. Several of the questions raised under the instructions were met and disposed of adversely to the views of appellant's counsel, in the case of Hackett *v.* Smelsley, decided at the January term, 1875, and we need not further allude thereto. Other questions are sufficiently disposed of by what has already been said.

The third instruction for the plaintiff was that, under its hypothesis, the jury had a right, if they thought proper, to allow the plaintiff such punitive damages as they thought the evidence warranted.

It is erroneously supposed that this militates against the decision in Freese *v.* Tripp, 70 Ill., 496. All that was there decided in respect to exemplary damages, was that, to support a finding of exemplary damages, there must be a finding of actual damages, and that without this, exemplary damages cannot be awarded. But the present instruction was on the hypothesis, among others, that actual damages had been sustained. The employment, in the instruction, of the words "punitive damages" instead of "exemplary damages," was not material. They are synonymous terms. Hackett *v.* Smelsley, supra.

Some of the instructions for plaintiff may be faulty in being argumentative, but there is not sufficient in this respect to make them fatally erroneous.

We perceive no error in any modification which was made of defendant's instructions. The 15th instruction asked by the defendant, which the court refused to give, was one that assumed to define the words "habitual intoxication." These are terms in common use, generally understood in their application, more or less familiar to the observation of all unlearned persons, of no peculiar legal signification, calling for judicial exposition.

The definition which was here asked to be given, was not especially instructive to a jury. We do not consider that, for the want of this instruction, there was a loss to the jury of any words of essential enlightenment on the question of what was habitual intoxication.

Appellant's 5th refused instruction, was to the effect that defendant was not responsible for consequences which he or any reasonable or prudent man could not reasonably have foreseen as the natural consequence of selling liquors to the plaintiff's husband.

The provision of the statute is, that one who shall be injured in person or property, or means of support, in consequence of the intoxication, habitual or otherwise, of any person, shall have the right of action. We regard the instruction as properly refused.

Appellant's 6th refused instruction is confused, not sufficiently intelligible, and properly enough refused by the court.

Appellant's 12th refused instruction was calculated to mislead the jury, who would be likely to conclude from it that they could not, in their verdict, go beyond the actual damages sustained and give exemplary damages.

The remarks already made in reference to appellee's 3d instruction, are applicable to this 12th refused instruction

It is lastly complained that the damages are excessive. From an examination of the evidence, we see no sufficient ground for any interference with the verdict of the jury on this score.

Finding no error in the record sufficient for the reversal of the judgment, it must be affirmed.

Judgment affirmed.

BREESE, J.—I do not concur in this opinion, believing instructions one, three and five for plaintiff should not have been given. I think the damages are excessive, as plaintiff knew the habits of her husband when she married him.

PUTERBAUGH, LEE & QUINN and C. FREUSE for the appellant.

L. HARMON and J. K. COOPER for the appellee.

THROUGH the courtesy of the law firm of DENT & BLACK, of this city, we have received the following opinion:

SUPREME COURT OF ILLINOIS.

OPINION FILED JUNE 30, 1876.

THE PEOPLE ex rel., etc., *v.* THE BOARD OF TRADE OF THE CITY OF CHICAGO AND THE DIRECTORS THEREOF.

Appeal from Cook.

THE BOARD OF TRADE—EXPELLING MEMBERS—POWER OF COURT TO RESTORE.

Held, that a court has no jurisdiction by *mandamus* to compel the Board of Trade of Chicago, which is to be regarded as a voluntary association, to restore a member who has been expelled.—[ED. LEGAL NEWS.

Opinion by WALKER, J.

The General Assembly granted a charter authorizing a number of persons and their associates to form, in the city of Chicago, a board of trade. The organization was perfected, officers elected, by-laws adopted, and the objects of the incorporation carried into operation. Thomas Rice, the relator, applied to and became a member of the body. In the year 1872 he was a member of the firm of John B. Lyon & Co., which consisted of Lyon, Rice and George J. Bime. The firm was largely engaged in buying and selling grain during the month of August of that year. They purchased a considerable quantity of wheat of Dugan, Case & Co., and also of the firm of T. H. Seymour & Co., also 10,000 bushels of corn of this latter firm.

On the 22d of August, 1872, wheat suddenly declined largely in price. The wheat and corn was deliverable at the seller's option, a portion during that month, and a portion at any time during the year. On this decline in price the sellers who had deposited margins according to the rules of the board of trade necessary to secure the performance of their part of the contract, called on the firm of J. B. Lyon & Co., to deposit further margins, as they were authorized to do by the rules of the board of trade. This J. B. Lyon & Co. failed to do, and thereupon the respective venders proceeded, under the second section of the 9th rule of the Board of Trade, to give notice to Lyon & Co. that the contract must be considered as filled at the market price, and demanded payment of the difference between the selling and market price. The bill for the difference was presented for payment. Its correctness was admitted, and they at different times made various propositions for the settlement of the claim.

In October, 1873, Dugan, Case & Co. filed a complaint against J. B. Lyon & Co. with the Board of Directors of the Board of Trade. The members of the firm were notified to appear and defend themselves against the charges. They appeared and the hearing was continued from time to time until the 17th of March, 1874, when on a hearing the prosecution was dismissed without prejudice.

On the 3d day of April following, Dugan, Case & Co. petitioned for a rehearing, which was granted, and an order was passed allowing appellant and the other members of his firm to be allowed to appear by counsel, which had been previously denied them. Notice was served upon them, and on the 13th day of April they attended with counsel and obtained a continuance, and subsequently another continuance was granted them. They appeared in person and protested against the trial, denying any jurisdiction of the Board of Directors to try them, and withdrew, declining to offer evidence or make any defense.

The case was heard again, and on the 28th of April the several members of the firm were suspended from the privileges of the board until they should pay the money or otherwise satisfactorily arrange the claim. Rice thereupon filed a petition in the Superior court of Cook county for a writ of mandamus to compel the Board of Trade to restore them to all of the rights and privileges of membership therein. Respondents answered the petition, to which petitioners demurred, and the court below entered a *pro forma* order denying the writ, and relator appeals to this court.

No question has been raised whether the court below had jurisdiction to entertain the application for, and to award the writ of madamus. Has relator such an interest or legal right to a membership in the board as will be regarded by a court of justice? It is true that the body is organized under a statutory charter, and so are churches, Masonic bodies and Odd-Fellows, and temperance lodges; but we presume no one would imagine that a court would take cognizance of a case arising in either of those organizations, to compel them to restore to membership a person suspended or expelled from the privileges of the organization. They being organized by voluntary association, and not for the transaction of business, but for the purpose of inculcating their precepts and trusts, not for pecuniary gain but for the advancement of morals and for the improvement of their members, they are left to adopt their constitutions, by-laws and regulations for admitting, suspending, or expelling their members. This organization is not maintained for the transaction of business, or for pecuniary gain, but simply to promulgate and enforce among its members correct and high moral principles in the transaction of business. It is not engaged in business,

but only prescribes rules for the transaction of business. In the organization of churches and the other bodies referred to, each person, on becoming a member, expressly or by implication, pledges himself to stand to and abide by all rules, edicts and regulations adopted by the organization. And it appears that all persons becoming members of the Board of Trade, do the same thing. And the body has the right to make, ordain and establish by-laws, rules and regulations for the government of the body and its members in their connection with it. It may be that when a corporation is created for the purpose of pursuing some pecuniary business for the acquisition of profits and gains for its members as stockholders, and a member is deprived of a right or privilege conferred by their charter, that a court would, by mandamus, compel the body to admit such member to the exercise of his rights. In that case, a member or shareholder has such a pecuniary interest as might enable him to be protected or be admitted to the exercise of such rights by legal process. But courts never interfere to control the enforcement of the by-laws of merely voluntary associations, created for the advancement of religious, moral and social principles, or merely for amusement. In such organizations they must be left to enforce their rules and regulations by such means as they may adopt for their government. The Board of Trade, so far as we can see, is only a voluntary organization, which their charter fully empowers them to govern, in such mode as they may deem most desirable and proper.

They have adopted their by-laws, provided a forum for their enforcement, which has acted thereunder, and the court will not interfere to control their action. It is true that in the case of Paige *v.* The Board of Trade, 45 Ill., 112, this court proceeded to investigate and decide the questions there presented and arising out of the by-laws of this corporation. But in that case no question was raised as to the power of the court to entertain jurisdiction to grant the relief sought. Inasmuch as we regard it as obvious that appellant has failed to disclose a right which entitles him to the relief sought, we must decline to review and pass upon the action of the court below, in refusing to award the writ to compel the Board of Trade to admit him to membership in that organization. The appeal will, therefore, be dismissed.

Appeal dismissed.

LEONARD SWETT and JONH J. HERRICK for appellants.

LAWRENCE, CAMPBELL & LAWRENCE and DENT & BLACK for appellee.

WE are under obligations to WM. T. BUTLER, of the Chicago bar, for the following opinion:

SUPREME COURT OF ILLINOIS.

OPINION FILED JUNE 30, 1876.

NICHOLAS BERDEL *v.* CATHARINE BERDEL.

Appeal from the Superior Court of Cook County.

BILL AND CROSS-BILL FOR DIVORCE ON CHARGES OF CRUELTY AND DESERTION.

1. "Bruises and marks observed and sworn to (by witness) were competent testimony in confirmation of the evidence given by the complainant."

2. "It is the peculiar province of the jury to reconcile the conflict in the proof, and determine from all the evidence, whether the truth was on the side of the complainant or the defendant; and when this has been done, free from passion and prejudice, and the record contains evidence sufficient to sustain or justify the finding, the result of the verdict must be regarded as final."

3. It was error to admit evidence of complainant's good character—her good character not being in issue. But the evidence adduced being of no intrinsic strength or weight, could do no harm, and court will not reverse on that ground.

4. "It is only an error that works an injury that should reverse."

Opinion by CRAIG, J.

This was a bill for divorce brought by Catharine Berdel against Nicholas Berdel, her husband. The bill charges the defendant with acts of extreme and repeated cruelty inflicted upon the person of the complainant, and also alleges desertion for the space of two years.

To the bill the defendant put in an answer in which he denied each and every charge therein contained He also filed a cross-bill, in which he charged the complainant with desertion, without cause, for more than two years upon which ground he prayed for a divorce. To the cross-bill the complainant put in an answer denying the charges therein contained. Replications having been filed, a trial on both bill and cross-bill was had before a jury, which resulted in a verdict in favor of the complainant in each of the cases presented by her bill, and against the defendant on the cross-bill. The court, on motion, set aside the finding in the charge of desertion, but sustained the verdict as to extreme and repeated cruelty. A decree was therefore rendered dissolving the marriage and dismissing the cross-bill; to reverse which this appeal has been brought by the defendant in the original bill.

Two errors are assigned upon the record. First, that the verdict was contrary to the evidence; and second, that the court erred in admitting evidence of the character of the complainant.

The complainant and defendant were married in 1855, and resided together in Cook county until 1861, when the former left the home of her husband, and they have not since resided together.

The complainant claims that the cause of her leaving was on account of repeated acts of personal violence received from her husband; while, on the other hand, it is claimed she was well treated, and deserted her husband of her own accord, and not through any improper treatment on his part.

The evidence introduced before the jury, bearing upon the conduct of the parties, and the causes that led to the separation, is voluminous and exceedingly contradictory. We shall not enter upon a critical analysis of the evidence, as such would be of no practical benefit to the parties or the profession. We have, however, carefully examined the testimony, and while we would be better satisfied with the decree, if the evidence was less conflicting, yet, under the uniform rulings of this court, we perceive no ground upon which the decree, based upon the verdict rendered by the jury, can be reversed.

The complainant, in her evidence, testifies to numerous acts of personal violence on the part of her husband, which were unjustifiable and without cause or provocation; and, if her evidence be true, there can be no doubt but a clear case for divorce was established. But, independent of her evidence, on several occasions the marks of violence were discovered on her person by her neighbors; often she complained to have received blows from her husband.

While this character of evidence is not as satisfactory as if witnesses had been produced who saw the blows given, yet the bruises and marks observed and sworn to were competent testimony in confirmation of the evidence given by the complainant. It was also proven, that on two occasions, when the complainant returned to the house of the defendant, he allowed her to be assaulted in his presence; and in his own house, on one occasion, as the evidence shows, pushed down stairs; and on another, her hair was torn from her head, and her clothing badly injured by an inmate of the house, while, as one witness testifies, the defendant held the complainant so she could not defend herself.

It is true the defendant, in his evidence, positively denies every and all acts of violence, and says that he never in any manner mistreated or abused the complainant, and testifies to misconduct on her part, and introduces other evidence tending to establish the truth of his own. It was, therefore, the peculiar province of the jury to reconcile the conflict in the proof, and determine from all the evidence whether the truth was on the side of the complainant or the defendant; and when this has been done, free from passion or prejudice, and the record contains evidence sufficient to sustain or justify the finding, the result of the verdict must be regarded final. As was said (Coursey *v.* Coursey, 60 Ills., 186) the jury had the witnesses before them, and have passed upon the weight of evidence.

It is, however, argued that the court erred in permitting the complainant to introduce evidence of good character in the neighborhood where she resided.

The rule, as stated by Starkie, vol. 2, page 364, is this: There are three classes of cases in which the moral character and conduct of a person in society may be used in proof before a jury, each resting upon peculiar and distinct grounds. Such evidence is admissible, 1st, to afford a presumption that a particular party has or has not been guilty of a criminal act. 2ndly, to affect the damages in particular cases where their amount depends upon the character and conduct of any individual. And 3rdly, to impeach or confirm the veracity of a witness. This we understand to be the general rule on the subject.

While it is true the defendant introduced, on the trial, evidence of specific acts of the complainant tending to reflect upon her character for sobriety and modest, peaceable behavior, yet, under the rule announced by Starkie, we do not understand that she had the right to rebut by proof of general good character. Her general good character was not in issue. But upon an examination of the proof called on this subject, we fully agree with the counsel for appellant, when they say it was "of no intrinsic strength or weight;" and for that very reason it could do the defendant no harm. And while it was error to admit the proof, we cannot, on that ground, reverse. It is only an error that works an injury that should reverse. The decree will therefore be affirmed.

Affirmed.

WM. T. BUTLER and JAMES ENNIS, for appellant.

LEAKE & VOCKE, for appellee.

OUR thanks are due GEORGE O. IDE, of the law firm of PADDOCK & IDE, of this city, for the following opinion:

SUPREME COURT OF ILLINOIS.

OPINION FILED JUNE 30, 1876.

THE NORTHWESTERN UNIVERSITY *v.* THE PEOPLE, etc., *ex rel.* MILLER.

Appeal from the County Court of Cook Co.

EXEMPTION FROM TAXATION — AMENDMENT TO CHARTER—HOW FAR UNCONSTITUTIONAL.

The exemption in the amendment to the charter of the Northwestern University, to the effect "that all property, of whatever kind or description, belonging to or owned by said corporation, shall be forever free from taxation, for any and all purposes," is unconstitutional and void, in so far as it attempts to exempt from taxation any other property than that which is directly used for educational purposes. It was not competent for the General Assembly, under the Constitution of 1848, which was in force at the date of this amendment, to grant an exemption so broad and sweeping in its character.

The general principle upon which taxation was required to be levied by the Constitution of 1848, was that of uniformity, and exemptions were exceptional, and therefore to be construed strictly. Such exemptions are in derogation of public right—there are no presumptions in their favor—and every reasonable doubt should be resolved against them.

It not being competent for the General Assembly to make the exemption, the attempt was a nullity, and the case is not affected by the provision of the Constitution of the United States forbidding the impairing of the obligation of a contract.

SCHOLFIELD, J.—This appeal is from a judgment rendered by the Cook county court against certain lands and town lots in the towns of Evanston and Willmette, in Cook county, for delinquent taxes.

Appellant's claim is that the lands and town lots are exempt from all taxation, which claim is based on the fourth section of an amendment to its charter, approved Feb'y 14, 1855, in these words: "That all property, of whatever kind or description, belonging to or owned by said corporation, shall be forever free from taxation for any and all purposes."

It is conceded by a stipulation, read in evidence on the trial in the court below and made part of the record, that the lands and town lots, the taxation on which is in controversy, "are leased by appellent to different parties on leases for a longer or a shorter time, and that none of them are used or occupied for buildings or other direct appliances for education."

The question we propose to consider is, conceding that the clause we have quoted from appellant's charter is, as it seems to be, broad enough to comprehend these lands and town lots, was it competent for the General Assembly, under the constitution of 1848, which was in force at the date of that enactment, to grant an exemption so broad and sweeping in its character?

It was provided by section three, article nine, of that instrument: "The property of the State and counties, both real and personal, and such other property as the General Assembly may deem necessary for schools, religious and charitable purposes, may be exempted from taxation."

It is not claimed that appellant is, in any sense, a public corporation, but it is claimed that the purpose for which it is created is so far beneficial to the public that it affords a sufficient consideration for the grant of exemption from taxation in the amendments, and that when the amendment was accepted and acted upon by the corporators, it must be held a vested right which cannot be withdrawn by subsequent legislation because of the provision in the constitution of the United States which prohibits a State from passing a law impairing the obligation of a contract.

If it was competent for the General Assembly to make the exemption, we are not disposed to contest the correctness of this position, but if it was not competent to make the exemption, the attempt was a nullity, and the case is not affected by the constitution of the United States.

The corporation being private, the taxpayer, in general, is relieved of no obligation in consequence of the exemption which he would otherwise have to discharge by the payment of taxes, and in proportion as appellant becomes the owner of property which is thereby withdrawn from taxation, the burden of taxation is increased upon him.

The equality between burden and benefit in such cases is presumptive only, and can, if at all, only be true in fact in reference to the public as an aggregate. In the very nature of things, such exemptions must proportionally increase the burdens upon individual tax-payers, in many cases, where there can be no corresponding actual benefits. It is true it is impracticable that there can in any instance of the levy and collection of public taxes be an actual equivalent received by every tax-payer for the full amount he pays; or that there can be any system of taxation devised so perfect in its practical operation that there shall be no inequality in the distribution of the burden—but it has always been recognized that laws imposing taxes were just and equitable in proportion as they approximate such principles, and unjust and inequitable as they depart from them. The general principle upon which taxation was required to be levied by the constitution of 1848 was that of uniformity, and exemptions were exceptional and therefore to be construed strictly, and such is the general rule of construction in regard to exemptions from taxation. Cooley on Taxation, 146; Sedgwick on Stat. and Const. Law, 632. As is said in a recent case by the Supreme court of the United States—Tucker *v.* Ferguson, 22nd Wallace, 575,—"The taxing power is vital to the functions of government. It helps to support the social compact and give it efficacy. It reaches the interests of every member of the community. It may be restrained by contract in special cases for the public good, where such contracts are not forbidden. But the contract must be shown to exist. There is no presumption in its favor. Every reasonable doubt should be resolved against it. Where it exists it is to be rigidly scrutinized and never permitted to extend, either in scope or duration, beyond what the terms of the concession clearly require. It is in derogation of public right, and narrows a trust created for the good of all."

Bearing in mind this rule of construction, if it had been intended the General Assembly was to be empowered to exempt all property, of whatever kind or description, as is assumed to be done by the amendment to the charter, we must suppose it would have been so said in unmistakable language. By the language of the constitution we have quoted, while a discretion is conferred on the General Assembly, whether to exempt or not, and if it shall determine to exempt the amount of the exemption, it is clearly restricted in the exercise of this discretion, to property for schools and for religious and charitable purposes. Property for such purposes, in the primary and ordinary acceptation of the term, is property which is itself adapted to, and intended to be used as an instrumentality in aid of such purposes. It is the direct or immediate use, and not the remote or consequential benefit to be derived through the means of the property that is contemplated, houses, furniture, grounds, etc., to be actually used for educational purposes, may be said to be for schools or for school purposes, but property to be used in farming or manufacturing, or in trade, is property for

farming, for manufacturing, or for trade, and the purpose to which the resulting profits may be devoted does not change its character. So property owned by corporations created for school, religious, or charitable purposes, and property for schools, or religious, or charitable purposes, by no means necessarily mean the same thing. The ownership may extend to all kinds of property authorized by the charter, whether it is such as is to be actually used in connection with the purposes of the incorporation or otherwise; but property for the purposes of the incorporation must be such as to be used in connection with those purposes. An accurate description of the property, the tax upon which is in controversy, would seem to be, "property used for profit for the benefit of the University."

As illustrative and in support of this construction, the following cases, which, though arising on the construction of statutes, are equally pertinent to the construction of like clauses in constitutions, may be referred to.

In the First M. E. Church *v.* The City of Chicago, 26 Ill., 482, the question was whether under a statute exempting from taxation "every building erected for the use of any literary, religious, benevolent, charitable or scientific institution, a building was exempted of which the third and fourth stories were in one large room used exclusively for religious purposes, while the first and second stories were rented for compensation and the proceeds applied to religious purposes, and it was held the portion rented for compensation was taxable, and the portion occupied for religious purposes was not. The court said: The meaning of the law is, as applied to religious buildings and furniture, that they must be used directly for sacred and not for secular purposes. It is not enough that the profits or income of the secular uses are to be applied to sacred purposes. When money is made by the use of the building, that is profit, no matter to what purpose that money is applied. It will be observed that the words of the statute therein describing the building to be exempted, are, "any building for the use of any literary or religious society," etc., and the argument that the fact that the profits derived from renting were devoted exclusively to religious purposes showed that the rooms rented, as well as the balance, were for the use of the religious society, was equally as forcible and rested on the same premises as does the argument here that the property is for schools, or the purposes of schools, although it is devoted to agricultural or other purposes entirely disconnected from schools, because the profits to be derived from renting it are to be appropriated in aid of the University.

In Pierce *v.* The Inhabitants of Cambridge, 2nd Cushing, 612, the statute exempted from taxation: "The personal property of all literary, benevolent, charitable and scientific institutions, and such real estate belonging to such institutions as shall be actually occupied by them or by the officers of such institutions *for the purposes for which they* were incorporated."

The plaintiff was a professor of mathematics and astronomy in Harvard College, and the house and land which he occupied was the property of the college but had been let to him at a rent of $400 a year, and the question was, whether this property was within the exemption of the statute. It was held that it was not; that the occupation of a lessee was not such an occupation as was intended by the statute; but that it would have been otherwise if the building had been erected by one of the professors or officers of the college, and had been occupied by the plaintiff with the permission of the college, and without having any estate therein or paying any rent therefor.

Washburn College *v.* Com'rs of Shawnee county, 8th Kansas, 344, presented the question whether a quarter section of land held by the plaintiff, which was a literary and educational institution, for the sole purpose of thereafter erecting its permanent buildings thereon, but which was at that time unimproved and unoccupied, was exempt from taxation under a clause in a statute exempting from taxation, "all property used exclusively for State, county and municipal, literary, educational, scientific, religious and charitable purposes," and it was held that it was not. See also Orr *v.* Baker, 4 Ind., 86; Lowell *v.* Lowell, 1st Metcalf, 538; State *v.* Ross, 4th Zabriskie, 497; Wyman *v.* St. Louis, 17th Mo., 335.

Our conclusion is that it was not competent of the General Assembly to exempt from taxation property owned by educational, religious or charitable corporations which was not itself used directly in aid of the purposes for which the corporations were created, but which was held for profit merely, although the profits were to be devoted to the proper purposes of the corporation. To the extent, therefore, that the 4th section of the amendment to appellant's charter approved February 14th, 1855, assumes to do so, it is to be considered void and of no effect, but no further.

The judgment is affirmed.

SIDNEY SMITH & GRANT GOODRICH, for appellant.

GEORGE O. IDE & JAMES P. ROOT, for appellee.

WE are under obligations to H. B. HOPKINS and L. HARMON, of the Peoria bar, for the following opinion:

SUPREME COURT OF ILLINOIS.

OPINION FILED JUNE 30, 1876.

CENTRAL CITY HORSE RAILWAY CO. *v.* FORT CLARK HORSE RAILWAY CO.

Appeal from Peoria.

THE RIGHT OF ONE HORSE RAILROAD COMPANY TO CONDEMN THE TRACK OF ANOTHER—MAY BE TWO HORSE RAILROADS IN ONE STREET.

1. CANNOT CONDEMN A PART OF ROAD. — One competing street railroad company cannot take, by the exercise of the right of eminent domain, a fragment of a competing road in successful operation, and the most valuable part of it, and thus destroy in effect and usefulness and value the remaining fragment.

2. MAY PERHAPS CONDEMN THE WHOLE.—That appellees may, perhaps, by a very liberal construction of the acts cited, and of the eminent domain act, condemn the entire road of appellants, and appropriate it to their use, on paying just compensation therefor.

3. TWO ROADS IN ONE STREE—PUBLIC ACCOMMODATION.—That there is no apparent reason why an easement in this street, wholly independant of that of appellants, should not be granted by the city authorities to appellees, if the public accommodation is not sufficiently subserved by this single road; the street is wide enough for an another independent track, without encroaching upon the public accommodations.

4. LAND NOT IN ACTUAL USE. — In former decisions, the court has held that land not in actual use, or necessary for the use of a railroad, might be condemned, clearly implying if it was in actual use for their track or appurtenances, it was not subject to condemnation by another road.—[ED LEGAL NEWS.

Opinion of the court by BREESE, J.

The General Assembly of this State, on February 21, 1867, passed an act entitled, "An act to provide for the construction of horse railways in the city of Peoria," by which the corporations therein named were authorized and empowered to construct and maintain horse railways along such streets in the city of Peoria, as the city council might authorize.

The city council, on October 6, 1869, adopted an ordinance authorizing complainant to construct and maintain horse railways along certain streets named therein, of which Adams street was one, the whole length thereof. Complainant duly organized as a corporation under the act of 1867, built and equipped a horse railway along Adams street, and commenced operating the same, nearly three miles, in December, 1870, at a cost of eight thousand dollars. It was the first railway of the kind constructed in that city, and when the enterprise was inaugurated, it was understood to be of doubtful result to the proprietors, in a financial view, and can only reach productive results by continuing it in its entirety under exclusive supervision of one authority and head.

In July, 1872, certain individuals became an incorporation under the general law, under the corporate name of the "Fort Clark Horse Railway Company." Articles of incorporation were duly executed, and filed in the office of the secretary of State, and the usual license, by that functionary, to commissioners named therein, to open books for subscription to its capital stock.

In May, 1873, the report of the commissioners, filed in the office of the secretary of State, showed the entire stock had been subscribed. The corporation was duly organized May 17th, 1873, whereupon the secretary of State issued a certificate of incorporation.

Before the organization of this company had been perfected, and on August 6th, 1872, the city council of Peoria passed an ordinance conferring upon a railroad company, with the name of defendants' company, authority to construct and maintain a horse railway over certain streets in the city, within certain limits. Some eight different streets, of which Adams was not one.

In August, 1874, complainant's company, having completed their road four years previously, and then in the profitable enjoyment of their franchise, producing some equivalent for their great outlay, were met by an application of this last constituted corporation to the city council, requesting that body to pass an ordinance to confer upon the defendant's company authority to construct and operate a horse railway, to depart from their line of way already there established and operated therein, so as to occupy Adams street, then occupied by complainants.

The city council passed the ordinance permitting defendants to build and operate a railway on Adams street to Harrison street, and reciting therein that the public interest forbid laying any more tracks on Adams and Main streets. The defendant's company were authorized and empowered and required to run their cars on and over, and to use for that purpose any and all the tracks and rails now laid on Adams street and Main street, and to make the necessary connections with the same, "provided they should first acquire, by purchase from the owners or by condemnation or other legal means, the rights to use and run over said tracks and rails."

To avail itself of this ordinance, the defendant's company, in October, 1874, presented their petitions to the judge of the Peoria county court, to proceed, according to the acts in force July 1st, 1872, respecting eminent domain, to assess the damages to be paid complainant's company for taking and appropriating to the use of defendant's company the railroad track, iron, ties and superstructure along that portion of Adams street running between Main street on the northeast and Harrison on the southwest, fronting the three blocks numbered on the easterly side as 6, 5 and 33, and on the westerly side as blocks 10, 11, 32.

The proceedings for condemnation were set for trial on October 21st, 1874, to prevent which this bill was filed, alleging the results of such proceedings would be a destruction of complainant's franchise, and productive of irreparable damage to them.

An injunction was prayed and granted.

An answer was put in to the bill and a replication thereto, and on the hearing the injunction was dissolved and the bill dismissed. Complainants appealed.

We shall not discuss all the questions raised upon this record, but confine ourselves to such points, the discussion of which will be decisive of the case.

It is not shown in any part of the case, where the fee in Adams street is vested. We will assume it is in the city. The grant of an easement therein by the city to the appellant was in 1869. That of appellees was in 1872 and before the company was organized. The right of appellants was consequently prior in time to any right claimed by appellee.

It would seem from the plot of the city of Peoria, made on exhibit in this cause, with the lines of these contesting roads distinctly marked thereon, that appellants road extends from South street on the southwest along Adams street, by a straight line northeasterly to Abington street, in close proximity to the Chicago Rock Island and Pacific Railroad, and near to the Peoria City Water Works, a distance, from its commencement to its terminus, of three miles as is alleged.

The width of this street is not noted on the map, nor is there any scale of feet. To the eye it appears to be a very wide street, capable, without detriment to the public, of allowing space sufficient for two railroads, did the public necessity demand greater accommodations than appellants' railroad could supply.

From the map we should judge the lines already established by these companies, are in a great measure, competing lines, that of appellees being parallel with appellants' line for many streets, the street next westerly of appellant's terminus to Main street, a distance, judging by the eye, of near one-half of appellants road.

The proposition of appellees is, after their road has reached Main street it shall be permitted to make a sharp turn to the southeast along Main street, to its intersection with Adams street, thence southwesterly, taking possession of appellants' road, the distance of three blocks. Then turn short to the northwestward one block along Harrison street to their line of road on Franklin street, thus breaking appellant's road nearly in the middle and rendering their franchise comparatively worthless.

The question then is, under the laws of this state, can a competing horse railway company, in an incorporated city, acquire, by compulsion, title to or the joint use of the track and superstructure of another like corporation, and for the express purpose of making the tracks so compulsorily taken a portion of its own line.

At first blush the proposition seems so indefensible as to cause no hesitation in giving a negative answer;

Appellees say this right, now claimed by them, is, if not expressly, at least impliedly conferred by chapter 66 R. S. 1874, title "Horse and Dummy Railroads." p. 571.

An examination of that act shows that private property, not property used and occupied by the public, was alone in the contemplation of the legislature when the act was passed.

If that kind of roads were thought of or designed to be included in the act why were they not named? Section 3 provides, no such company shall have the right to locate or construct its road upon or along any street or alley, or over any public ground in any incorporated city, town or village without the consent of the corporate authorities of such city, town or village, nor upon any road or highway.

It is a strained construction of this statute to include within its terms, roads, authority to construct which had been granted by the city, and in actual use.

We do not wish to be understood as holding one railroad company may not condemn the road of another, under a power granted by the legislature so to do. On this we express no opinion, but we do insist, an established railroad being a public institution, and useful only in its entirety, cannot be cut up and sectionized by a competing road, acting under the ordinance of a city council.

Proceedings might be instituted, perhaps, to condemn the entire road and franchise, and thus pass it over, as an entirety, to the competing road; but that one competing road can break it here and another there, at a different point, taking to themselves the most productive portions of the road, and leaving the unproductive fragments to the first proprietors, we do not believe, and have seen no authority giving countenance to a doctrine in its operation so unjust and at war with first principles. And we are at a loss to understand how this part of appellants' franchise, occupying the most populous and business part of the city, can be operated jointly by these competitors. But whether it can or not be safely done is unimportant to inquire, as, in our opinion, one competing street railroad company cannot take, by the exercise of the right of eminent domain, a fragment of a competing road in successful operation, and the most valuable part of it, and thus destroy, in effect, and usefulness, and value, the remaining fragments.

Appellees may, perhaps, by a very liberal construction of the acts cited, and of the eminent domain act, condemn the entire road of appellants, and appropriate it to their use, on paying just compensation therefor.

Appellees say they seek only to take the use of a small portion of appellant's track. Herein lies the insuperable objection to this proceeding. Take the whole, or none, is the command of justice and honesty. It is not at all like the case of an ordinary proceeding to condemn private property for a railroad, in which it would be no answer to say, take my whole farm, or the whole tract, or none. In such case there would be no propriety in such a demand by the proprietors of the land. Here is wanted a portion of appellants' franchise, the exclusive use of which by them gives value to the whole franchise. There is then, manifest propriety in saying to the competing roads, take all or none.

There is no apparent reason why an easement, in this street, wholly independent of that of appellants, should not be granted by the city authorities to appellees, if the public accommodation is not sufficiently subserved by this sin-

gle road. The street is wide enough for another independent track, without encroaching upon the public accommodations.

The plausible plea of public policy forbidding another track there, may be a mere cover for a purpose. We see no ground, legal, just or equitable, for this grasping claim of appellees, and it should not receive the favorable consideration of a court of justice and of equity.

It is unnecessary to cite authority to sustain these views; the principles find a lodgment in every breast animated by right, and justice, and equity.

So far as this court has heretofore spoken on this question, a reference may be made to the P. P. & J. R. R. Co. *v.* The Peoria and Springfield R. R. Co., which was an application to condemn lands belonging to one company, for the track of the other. It was held that land not in actual use, or necessary for the use of a railroad, might be condemned; clearly implying, if it was in actual use for their track or appurtenances, it was not subject to condemnation by another road.

Competition—an honest, healthy competition—is productive of good. The law affords no aid to that kind of competition which claims the right to crush a competitor to advance a rival interest.

We are satisfied the injunction should not have been dissolved, but the same should have been perpetuated. If appellees desire to possess this franchise and property, already devoted to public use, let them institute proceedings to that end.

For the reasons given, the decree is reversed, and the cause remanded with directions to reinstate the bill, and make the injunction perpetual.

H. B. HOPKINS, L. HARMON and JOHN HOUGH for appellants.

H. W. WELLS for appellees.

OUR thanks are due JAMES H. DAVIDSON, general solicitor of the Keokuk Northern Line Packet Co., for the following opinion:

SUPREME COURT OF ILLINOIS.

OPINION FILED JUNE 30, 1876.

THE KEOKUK NORTHERN LINE PACKET CO. *v.* THE CITY OF QUINCY.

WHARFAGE ON VESSELS — TONNAGE TAX—IS IT CONSTITUTIONAL.

An ordinance of the city of Quincy requires certain vessels to pay wharfage, according to the tonnage of the vessels. The court holds that the vessels of the appellants do not come within the terms of the ordinance, and therefore declines to pass upon the question of the constitutionality of the ordinance.—[ED. LEGAL NEWS.

Opinion of the Court by SCOTT, C. J.

Elaborate arguments have been made on the validity of an ordinance of the city of Quincy that establishes a schedule of charges for landing at the public wharf of the city of "all boats and water crafts therein mentioned." But it will not be necessary to discuss that question in the present case.

One objection insisted upon goes to the foundation of the action and is fatal to the present judgment, no matter what construction might be given to the ordinance. The rates of charges for landing at the city wharf are specifically for the landing of each packet boat belonging to certain packet companies named in the ordinance, and there is also a provision, all persons plying "tow-boats," and all persons landing "transient boats or water crafts," shall be required to pay certain charges, according to the tonnage of the vessels.

The defendant company was running a regular line of packet boats, but was not one of the companies named in the ordinance which were required to pay the rates fixed for the privilege of landing at the city wharf, nor does its boats come within the definition of tow-boats or transient boats which are to be charged rates in proportion to their tonnage.

The ordinance does not, by its terms, apply to all packet boats, but only to boats of certain companies named, and to tow boats and to transient vessels. An attempt was made on the trial to prove defendant was the successor of the companies named in the ordinance, but the proof is by no means satisfactory to establish that fact. Conceding the fact, however, we are not inclined to hold it would subject defendant to the payment of the wharfage rates established. The defendant's company is a new organization, and the rates fixed are not chargeable to it by any express provision of the ordinance. It is not shown that all of the boats belonging to defendant and for which rates have been exacted, belonged to the original companies named in the ordinance. Nor does the ordinance assume to make the successors of the former companies liable for the rates charged against their boats. There is, therefore, absolutely nothing in the ordinance that makes it obligatory on defendant to pay any rates or charges for landing at the city wharf, and as this view is conclusive of the whole case, we will not now discuss other questions raised upon the record.

The judgment will be reversed and the cause remanded.

Reversed and remanded.

JAMES H. DAVIDSON, St. Paul, General Solicitor for K. N. L. Pkt. Co.

JOHN H. WILLIAMS, Atty., Quincy, Ill.

O. P. BONNY, City Atty., ADAMS, WHEAT & MARCY, Att'ys for appellee.

SUPREME COURT OF ILLINOIS.

OPINION FILED JUNE 30, 1876.

AQUILA H. PICKERING et al *v.* HENRY CEASE.

Appeal from Superior Court of Cook Co.

SPECULATIVE OPTION CONTRACTS IN GRAIN UPON THE CHICAGO MARKET HELD TO BE ILLEGAL AND VOID.

Opinion by SCOTT, C. J.

This controversy arises out of grain transactions between the parties, about which there does not seem to be any serious misunderstanding, except as to two "option deals" in corn,—one for 10,000 bushels for delivery in August, and another for a like amount for delivery in September. An amount was admitted to be due on former transactions, for which the Court rendered judgment in favor of plaintiffs and against defendant, Cease, who was the only defendant served with process. Plaintiffs claimed that a larger sum was due on the previous transations, but the amount was not considerable, and probably the sum found by the Court is nearly if not entirely correct. That, however, is not the matter in dispute. It has reference only to the two last transactions in corn, and it is in regard to those items that plaintiffs bring the the case to this Court on appeal.

Upon the theory that plaintiffs made purchases for defendants of corn for August and September delivery, still, in view of the evidence, the judgment is quite as large as it ought to be. Had plaintiffs sold the corn at the highest market price after the alleged purchases, there would have been but little if any loss sustained. Whether they were directed to do so by defendants was a question of fact, to be found by the Court to whom the cause was submitted. On this question the testimony was flatly contradictory. If the court adopted the theory of the defendants, the judgment is warrantedby the evidence. Clearly it was the province of the Court to determine which was the better evidence on that question, and we see no reason to be dissatisfied with the conclusion reached.

But there is another consideration that is fatal to a recovery in any event, so far as the two last deals are concerned. There is no sufficient evidence that any grain was in fact bought for defendants for delivery in August or September. So far as anthing is proven, the alleged purchases are purely fictitious: The grain plaintiff bought of Hutchinson was immediately sold back to him. It was not paid for, nor was it expected by the parties it would be called for or delivered. The parties were merely speculating in difference as to the market values of grain on the Chicago market. Such contracts are void at common law, as being inhibited by a sound public morality. They were in no just sense contracts, with the privilege of the seller to deliver at a future day. Time contracts are of daily occurrence, and must of necessity be in commercial transactions. Agreements for the future delivery of grain or any other commodity are not prohibited by the common law, nor by any statute of this State, nor by any policy adopted for the protection of the public. What the law does prohibit, and what it deems detrimental to the general welfare, is speculating in differences in market values. The alleged contracts for August and September, come within this definition. No grain was ever bought and paid for, nor do we think it was ever expected any would be called for, or that any would have been delivered had demand been made. What were these but "option contracts" in the most objectionable sense?—that is, the seller had the privilege of delivering or not delivering, and the buyer the privilege of calling or not calling for the grain, just as they chose. On the maturity of the contracts they were to be filled by adjusting the differences in the market values. Being in the nature of gambling transactions, the law will tolerate no such contracts. The judgment is for quite as much as it ought to be under the evidence, and will be affirmed.

WILKINSON, SACKETT & BEAN appeared for appellants; MCCOGG, CULVER & BUTLER for appellee.

JUDGE WALKER CONGRATULATED.

The immediate neighbors of a public man have facilities for judging of his true worth which the public at large have not, and therefore their judgment is entitled to more weight than the judgment of others. It is with pleasure that we clip from the Rushville *Times* of the 7th instant, the following account of the reception given to Judge Walker on the occasion of his re-election, upon his return from Mt. Vernon:

A very pleasant incident occurred at the close of the ratification meeting, Saturday night, which had no connection with the regular programme of the evening. As Judge Walker had just returned from Mt. Vernon, and our people having had no opportunity to congratulate him on his unanimous re election to the supreme bench, it was decided to improve the opportunity and give him a serenade. The announcement was made at the close of the meeting, and everybody, irrespective of party, were invited to join in honoring our respected citizen. A large portion of the crowd formed into line, headed by the Beardstown band, and marched to the residence of Judge Walker. On arriving there, the band proceeded to play a national air, at the conclusion of which Judge Walker made his appearance on the portico. Hon. S. P. Cummings stepped forward, and introduced him to the crowd, and said:

JUDGE WALKER: We, your neighbors and friends, irrespective of party, have come to congratulate you on your unanimous re-election to the office of Judge of the Supreme Court of the State of Illinois. You have our warm congratulations.

JUDGE WALKER'S REPLY,

Friends and fellow-citizens: I sincerely thank you for the compliment conferred by this token of your respect. I am unable adequately to express my feelings, but be assured that I highly appreciate this expression of your friendship and good will. Having since my boyhood lived in this community, and been identified with it, the compliment possesses the greater value.

I came to Rushville over forty years since. I was not then nineteen years of age; and like all others who immigrated to the State at that day, I was poor, and dependent alone on my own efforts and the good will of my neighbors for success in after life. And to the partiality and friendship of my fellow citizens I owe all that I may have accomplished. The confidence reposed, and the encouragement extended, have at all times stimulated me to diligent effort not to forfeit the trust thus extended.

I have been one of you from the time our county and the surrounding country was almost a wild, uninhabited and uncultivated. But it now possesses the beauty bestowed by improvement and which confers the abundance and comfort that is the natural reward of the toil, the privation and patience our people have endured. This condition of things has been produced by the almost heroic effort of our people. Nothing short of indomitable will, sustained by steadiness of purpose, could achieve such results.

I have witnessed the erection of our churches, the establishment of our schools, and other public institutions. You have advanced education on a firm and solid basis, and have practiced pure morals and disseminated useful information, until to-day this community is the equal of any in intelligence, moral and general information. These efforts to advance have resulted in an independence in thought and action that is entirely free from the control of mere leaders. All are capable of judging and acting for themselves, and usually correctly. The results of our efforts in behalf of education and moral development should be accepted as highly satisfactory.

We see that when our young men leave to seek their fortunes in other communities they, from their training, education and development of character among us, are enabled to rank with their associates, and some of them are making their mark in competition with rivals who have apparently had superior advantages. This should be to us a source of gratification, as it is the natural reflection from our social organization. We have reason, therefore, to believe that although our institutions lack in pretension, they have a solid basis, and are well calculated to develop well-formed minds, whether for the professions, business, or for other pursuits. And whilst we do not have overgrown wealth, competency is enjoyed by many and extreme poverty scarcely exists in our midst. And whilst we have high moral worth, we have but little depraved and vicious population. Our social organization contributes more to happiness and real enjoyment, than would wealth with its follies and its splendors. We, I think I may say, occupy a high moral position, and enjoy a fine social development. Our community is harmonious, is not distracted by personal feuds and strifes. We are free from vain and empty pretentions and ignorant arogance, and kindness and charity is the rule with our people. And I have always esteemed myself fortunate to have lived in such a community.

To the efforts of my neighbors and friends of the town and county, I am largely indebted for the public confidence and honor that has been so repeatedly conferred upon me. Your unselfish friendship and trust naturally inspired confidence amongst the people of other counties, and in fact throughout the State. You contributed largely twice to my election to the office of Circuit Judge. You have lent efficient aid to my election three times to a place on the Supreme Bench of the State. And the last election to that position was conducted in a manner the most gratifying, not only by my neighbors and acquaintances, but by the whole district. It is sufficient to satisfy the highest laudable ambition. It has impressed me with the deepest and most abiding gratitude; and it will stimulate me to unremitting efforts to so discharge my duty as to be worthy of such liberal and flattering confidence. Next to a consciousness of being right, and my self respect, I value the confidence and esteem of my friends. And few men have apparently had more reason to be well satisfied with such manifestations. I am deeply sensible of your past and present kindness, and I should be recreant to every principle of honor if I should fail to labor to be worthy of my friends at home and abroad. I shall therefore apply myself to the discharge of every duty that may devolve upon me in the future.

Having lived long and happily among you, it is my fervent desire to be able, during the remainder of my days, to participate in the enjoyment of your prosperity and happiness. And I hope that you may be enabled, not only to maintain the high, moral, social and intelligent position you have attained, but be able to progress to a still higher development.

I again thank you for this expression of your friendship.

When the Judge concluded his remarks, he cordially invited the crowd in, when they were sumptuously treated to a repast of the good things to satisfy the inner man.

CHICAGO LEGAL NEWS.

Lex vincit.

MYRA BRADWELL, Editor.

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We call attention to the following opinions, reported at length in this issue:

LIQUOR SUIT BY WIFE TO RECOVER DAMAGES.—The opinion of the Supreme Court of Illinois, by SHELDON, J., holding in a case where it is alleged that the intoxication was caused in whole by the defendant, and the proof is that the intoxication was caused only in part by the defendant, that a recovery may be had; that the action which was brought under the act of 1872 was not defeated by the revision of the statutes of 1874; that to support a finding of exemplary damages there must be a finding of actual damage. From this opinion Judge BREESE dissents, believing that instructions one, three and five for plaintiff should not have been given, and that the damages are excessive, as plaintiff knew the habits of her husband when she married him. In this connection we would refer our readers to the opinion of the Supreme Court of Iowa, construing the liquor law of that State, published in 8 Chicago Legal News, 324.

BOARD OF TRADE—POWER TO EXPEL MEMBERS—JURISDICTION OF COURT.—The opinion of the Supreme Court of this State by WALKER, J, holding that a court has no power by mandamus to compel the Board of Trade of Chicago to restore a member who has been expelled.

PRACTICE IN DIVORCE CASES.—The opinion of the Supreme Court of Illinois, by CRAIG, J., upon several questions of practice in divorce cases.

EXEMPTION OF THE PROPERTY OF AN INTITUTION FROM TAXATION.—The opinion of the Supreme Court of this State, by SCHOLFIELD, J., holding that the exemption in the amendment to the charter of the Northwestern University, to the effect "that all property, of whatsoever kind or description, belonging to or owned by said corporation, shall be forever free from taxation for any and all purposes," is unconstitutional and void, in so far as it attempts to exempt from taxation any other property than that which is directly used for educational purposes; that it was not competent for the General Assembly, under the Constitution of 1848, which was in force at the date of this amendment, to grant an exemption so broad and sweeping in its character.

THE RIGHT OF ONE HORSE RAILROAD COMPANY IN A CITY TO CONDEMN THE TRACK OF ANOTHER—TWO ROADS IN ONE STREET.—The opinion of the Supreme Court of Illinois by BREESE, J., holding that one competing street railroad company cannot take, by the exercise of the right of eminent domain, a fragment of a competing road in successful operation, and the most valuable part of it, and thus destroy in effect and usefulness and value, the remaining fragment; that appellees may, perhaps, by a liberal construction of the acts cited and of the eminent domain act, condemn the entire road of the appellants and appropriate it to their use on paying just compensation therefor; that there is no apparent reason why an easement in this street, wholly independent of that of appellants, should not be granted by the city authorities to appellees, if the public accommodation is not subserved by this single road, the street being wide enough for another independent road. In this case a temporary injunction was granted by Judge Burns, of the twelfth circuit. Judge Cochran being interested in the decision of the case, Judge Tipton, of Bloomington, went to Peoria and tried the case. He dissolved the temporary injunction and dismissed the bill, which decision is wholly reversed by the Supreme court. For the purpose of getting an early decision, the case was taken on appeal to Springfield instead of Ottawa. There are several very important questions decided in this case. One is, that if a horse railroad, in the street, of an incorporated company is not sufficient to properly accommodate the public, that the council may give authority to another to lay down a track in the same street. Another is, that one horse railroad company cannot, by the exercise of the right of eminent domain, condemn the track of another competing road by piece-meal.

WHARFAGE ON VESSELS—TONNAGE TAX.—The opinion of the Supreme Court of this State, by Scott, C. J., declining to pass upon the constitutionality of an ordinance of the city of Quincy requiring certain vessels to pay wharfage according to their tonnage, as the vessels of the appellants do not come within the terms of the ordinance. In a number of cases ordinances of a like character have been tested in the federal court, and in every instance decided to be in conflict with the constitution of the United States. We have no doubt this ordinance will be decided to be unconstitutional by our Supreme Court, when it passes on that question.

OPTION CONTRACTS.—The opinion of the Supreme Court of Illinois, by SCOTT, C. J., holding that speculative option contracts, or, as they are sometimes called, "betting on the price of grain at a future time," are illegal and void. These gambling grain contracts have seriously injured the character of our market with the farming community. They have put the market up and down, without any regard to the true value of grain. It is to be hoped that this decision of the Supreme Court will exercise a healthy influence over the market.

Recent Publications.

A TREATISE ON THE LAW OF PERSONAL PROPERTY. Vol. II. Embracing Original Acquisition, Gift, Sale, and Bailment. By James Schouler, author of "A Treatise on the Law of the Domestic Relations." Boston: Little, Brown & Company. 1876. Sold by E. B. Myers, Law Bookseller, Chicago.

The former volume of the author on personal property was issued three years ago. We then announced that, in order to complete the work according to the original plan, another volume on title would be required. The first having been received with universal favor by the profession, the author has carried out his original plan, and produced the second. Mr. Schouler says, pursuing, as before, a natural order of progression, he is enabled in this volume to give to the leading topics the full space needful for an elementary text book. Our law of Original Acquisition, which embraces topics familiarly known by the name of Occupancy and the Confusion of Goods and of Gifts, receives in these pages a more ample treatment than any writer has bestowed. With the law of Sales it is different—for here he has been aided by the larger works of Story and Benjamin—that by pursuing independent methods, making ample use of materials collected from all other accessible sources, and constantly investigating the reported cases for himself, he has carefully prepared an exposition of the law of Personal Property, which we may fairly call his own; the leading object being, if it were possible, to furnish within the space of some four hundred and eighty pages, a better working treatise on the subject for English and American lawyers than has been hitherto presented. Mr. Schouler is one of the most careful of text writers; his works are the result of years of careful study. He will not, as is the case with too many of the men of the present time, who assume to be law writers, make a book in a few months at the command of some law publisher. Law books are being made with too great haste. It is really a pleasure to examine a new law book which shows the marks of honest labor, as does the work before us. In mechanical execution, it is fully up to the high standard of the house from which it emanates.

CONTEMPT OF COURT.—A certain pompous judge fined several lawyers $10 each for contempt of court. After they had paid their fines, a steady-going old attorney walked gravely up to the bench and laid down a $10 bill. "What is that for?" inquired the judge. "For contempt, your honor." "Why, I have not fined you for contempt." "I know that," said the attorney, "but I want you to understand I cherish a secret contempt for this court all the time, and I am willing to pay for it."—*Ex.*

Dr. Kenealy is now elaborating a scheme for combining in his own person the functions of all the law courts, local, national and international. "Before long," he modestly says, he will establish a "High Court of Arbitration," to which all persons who have differences may resort, "if they think proper." The persons who thus think proper will "simply have to enter into an agreement to abide by the award of Dr. Kenealy, the judge." He observes, very pointedly, that "this award will be legally binding on both parties." Although the costs are to be almost nominal, "justice will be fairly and honestly administered." Parties may argue their own case, but "counsel will not be allowed to appear." We would recommend the learned doctor to read and perpend the case of *The Queen v. O'Connell and others*."—*Ex.*

PRINCIPLES OF THE LAW RELATING TO THE STOCK EXCHANGE AND TO THE SALE OF SHARES.

1.—PARTIES TO THE CONTRACT.

(*a.*) *Principal and Agent.*

A principal who employs his broker to deal for him on the Stock Exchange is bound by the customs of that market, though personally ignorant of them: (Grissell *v.* Bristowe, L. Rep. 4 C. P. 49; Sutton *v.* Tatham, 10 Ad. & E. 27; Chapman *v.* Shepherd; Whitehead *v.* Izod, L. Rep. 2 C. P. 228; Taylor and another *v.* Stray, 2 C. B., N. S., 175 and 97; 26 L. J. 185, 287, C. P, Maxted *v.* Paine, L. Rep., 6 Ex. 132; Bayliffe *v.* Butterworth, 1 Ex. 425.)

The contract of a stockbroker with his principal is not to procure the required shares at all events, but only to use due and reasonable diligence in endeavoring to procure them. (Fletcher *v.* Marshall and another, 15 M. & W. 755.)

If a stockbroker has received money to invest in shares, and does not deliver them within a reasonable time, his principal can recover against him in an action for money had and received; and where by the usage of a particular market there are fixed days for the settlement of all transactions between brokers and their principals, a reasonable time for the delivery of shares bargained for is until the next of such settling days. (Fletcher *v.* Marshall and another, 15 M. & W., 755.)

A purchasing broker represents that the person whose name is on the ticket which he issues is his principal; that he has authority to accept the transfer on that person's account, and to bind him; and that the person is capable of accepting the shares. (Merry *v.* Nickalls, L. Rep. 7 Ch. 733; L. Rep. 3 E. & I. 530.)

When a broker on the Stock Exchange becomes a defaulter, through the bankrupty of his principal, but is re-admitted on payment of a portion of his liabilities, he is not thereby released from his liability for the remainder, and therefore has a right to prove for the full amount against the estate of his principal. (Lacy *v.* Hill (Crowley's Claim), L. Rep. 18 Eq. 182; Lacy *v.* Hill (Scrimgeour's Claim), L. Rep. 8 Ch. 921.)

The undisclosed principals of members of the Stock Exchange can enforce the contracts made by their agents. (Maxted *v.* Paine (second action), L. Rep. 4 Ex. 203: 6 Ex. 132; Grissell v. Bristowe, L. Rep. 4. C. P. 49; Langton *v.* Waite, L. Rep. 6 Eq. 165.)

Stock-jobbers are principals, and personally liable upon the contracts into which they enter: Cruse *v.* Paine, L. Rep. 6 Eq., 641; L. Rep. 4 Ch., 441.

An action by a stockbroker against his principal for an indemnity is founded on the ordinary and general principles of common law with regard to implied indemnities (Duncan and another *v.* Hill; Duncan and another *v.* Beeson, L. Rep. 8 Ex., 242; Taylor and another *v.* Stray, 2 C. B., N. S., 175, 197; 26 L. J., 185, 287, C. P.; Lacey *v.* Hill (Scrimgeour's Claim) L. Rep. 8 Ch., 921). Where a stockbroker is subjected to loss by reason of his having entered into the contracts made by him on behalf of his principal, there is an implied promise on the part of his principal to indemnify him (Duncan and another *v.* Hill; Duncan and another *v.* Beeson, L. Rep. 8 Ex., 242; Taylor and another *v.* Stray; Lacey *v.* Hill (Scrimgeour's Claim), L. Rep. 8 Ch., 921; Lacey *v.* Hill (Crowley's Claim), L. Rep. 18 Eq. 182). Where a stockbroker is subjected to loss by reason of a default of his own, there is no promise which can be implied on the part of his principal to indemnify him, Duncan and another *v.* Hill; Duncan and another *v.* Beeson, L. Rep. 8 Ex., 242.

Loss suffered by a defaulting broker, in consequence of the rule of the Stock Exchange, that a defaulter's transactions shall be closed at market prices immediately on his failure, is not such a loss as will entitle him to sue his principal upon an implied indemnity, Duncan and another *v.* Hill; Duncan and another *v.* Beeson, L. Rep. 8 Ex., 242.

When a stockbroker has bought scrip certificates on the Stock Exchange for a principal, which scrip is afterwards repudiated by the directors of the company on the ground that it was issued by the secretary without authority, the principal cannot recover from his broker the

money paid by him for such scrip: Lambert *v.* Heath, 15 M. & W., 486.

The principal of a mining share broker cannot resist payment of the money paid by the broker on his behalf, on the ground that the money was paid in pursuance of a wagering contract, illegal under 8 & 9 Vict. c. 109, s. 18: Rosewarne *v.* Billing, 15 C. B., N. S., 316; 33 L. J. 55, C. P.

There is an implied request by the principal of a share broker to the share broker to pay the amount due under the contract, and an implied promise to reimburse him: Rosewarne *v.* Billing, 15 C. B., N. S., 316; 33 L J ,55, C. P.; Chapman *v.* Shepherd, Whitehead *v.* Izod, L. Rep. 2 C. P. 228; Taylor and another *v.* Stray, 2 C. B. N. S., 175, 197; 26 L. J., 185, 287, C. P.

An unlicensed sharebroker can recover the money he has paid on his principal's behalf, but not any commission for his labor: Smith *v.* Lindo, 4 C. B., N. S., 395; 27 L. J. 196, C. P.; 5 C. B., N. S., 587; 27 L. J. 335, C. P.; Cope *v.* Rowlands, 2 M. & W., 149.

By a usage among sharebrokers who are not members of the Stock Exchange, similar to that which prevails on the Stock Exchange the names of their principals are not disclosed. That course of business is authorized by any person who thinks proper to deal in the market where it prevails. The broker who enters into a contract in that form becomes liable upon the bargain; and if he has to pay, through his principal's default, he can recover the money from his principal: Smith *v.* Lindo, 4 C. B., N. S., 395; 5 C. B., N. S., 587; 27 L. J. 196, 335, C. P.; Taylor and another *v.* Stray, 2 C. B., N. S., 175, 197; 26 L. J. 185, 287, C. P.

It is a question of evidence whether the party who sells stock meant to hold the broker only responsible, or to have also the security of the principal, the rules of the Stock Exchange not taking away the right to choose to what person credit shall be given: Mortimer *v.* M'Callan, 6 M. & W., 58.

When a stockbroker is bound by the Stock Exchange rules to pay the price of shares duly bought by him for a principal, and does pay accordingly, it is no answer to his claim for repayment that a winding-up proceeding subsequent to the contract of sale has rendered a complete legal transfer of the shares impossible, without the leave of the court: Chapman *v.* Shepherd, Whitehead *v.* Izod, L. Rep. 2 C. P., 228; Taylor and another *v.* Stray, 2 C. B., N. S., 175, 197; 26 L. J., 185, 287, C. P.—*The London Law Times.*

(*To be continued.*)

SUPREME COURT OF ILLINOIS.

ABSTRACT OF OPINIONS FILED AT SPRINGFIELD, JUNE 30TH, 1876.

(*Continued from page* 336.)

43.—Benjamin F. Logan *v.* George Musick, et al.—Error to Logan.—Opinion by CRAIG, J., affirming.

CONTRADICTORY EVIDENCE — CREDIBILITY — GAMING CONTRACTS—WHAT THEY ARE.

STATEMENT.—Appellees were commission merchants, and as such, bought wheat for appellant for June delivery and for July delivery; and also sold grain for him, on exchange at Chicago—the selling resulted in a loss of over $3,000—appellant having paid a margin of $1,200. Then another similar transaction was made to save the previous loss. But only 10,000 bushels instead of 20,000 being sold, there was a further loss, owing, one of the appellees testifies, to sudden restrictions placed upon them by appellant's raising the price. On this, the evidence was quite contradictory. Verdict for plaintiffs (appellees)—the defense being an offset, against the commission claims, of the losses in the transaction, charged to the fault of the merchants—also, that the contract was a gaming contract. *Held,*

1. That the contradictory testimony of the witnesses was peculiarly and exclusively within the province of the jury to estimate its credibility, respectively.

2. That where parties deal in options, leaving the sale to the option of either buyer or seller, the transaction is a gaming contract, and cannot be enforced in any way; nor can commissions be collected thereon. But where, (as in this case) there is an absolute buying or selling, leaving nothing optional but the time of future delivery, the transaction is legitimate, and commissions for services therein can be collected.

44.—T. W. & W. R. R Co. *v.* Jerry Gilvin.—Error to Pike.—Opinion by DICKEY, J., affirming.

DELIVERY OF GRAIN SOLD CONDITIONALLY—RIGHTS OF SELLER THEREIN—WHO TO SUFFER BY FRAUD PRACTISED—ESTOPPEL.

STATEMENT. — One Smith contracted with Gilvin for wheat, to be loaded into a car furnished by Smith for that purpose, but not to be removed until judgment was made. Smith, before the grain was loaded, obtained a bill of lading from the R. R. agent, on his representation of the purchase. On this bill, as collateral security, he obtained money from a bank, giving a draft on a firm in Toledo. Gilvin, knowing nothing of Smith's doings herein, loaded up the wheat, meanwhile, and, afterward, hearing of Smith's having absconded, removed the wheat again from the car into his warehouse. The draft being protested, the railroad company paid the amount, and sued Gilvin to recover the damages to them. Being defeated, they brought error. *Held,*

1. That Smith having received the car from the company, and having put it into the possession of Gilvin, and the condition on which the title was to pass to Smith having utterly failed, there never was a delivery to Smith, and the grain was all the while in the possession of Gilvin, and he had a right, at any time, on breach of condition, to restore the grain to his warehouse again, without notice to any one.

2. The doctrine of estoppel cannot apply, since he was no privy, in any way, to the deception practised by Smith.

3. The loss was caused by the negligence of the railroad agent in giving a bill of lading for grain not, in any wise, in his possession or control; and, therefore, the company must bear it.

4. Even if both the bank and the railroad company on the one hand, and Gilvin on the other, were equally innocent, the rule is, that in such a case, the party must be the loser who gave credit to the knave.

5. No man can be deprived of his property except by his consent or forfeiture. If he has acted in bad faith therein, as to a third party, he may, on the principle of estoppel, be required to surrender it to a party deceived by him. Otherwise, he must consent.

6. Smith, never having acquired any title, could not give title to the R. R. or the bank.

48.—County of Piatt *v* David Grumley. —Error to Piatt.—Opinion by SHELDON, J., reversing and remanding.

AUDITOR'S CERTIFIED LIST OF SWAMP LAND —EVIDENCE IN EJECTMENT.

STATEMENT.—In ejectment for swamp lands, by the county against Grumley, the court rejected, as evidence for plaintiff, a list of swamp lands certified to by the auditor of public accounts. Verdict, accordingly, for defendants. *Held,*

That, by the terms of the statute, such list is competent evidence—as much so as patents for school lands.

45.—Leonard Thompson *v.* William T. Wilhite.—Error to Green.—Opinion by SCOTT, Ch. J., reversing and remanding.

DELIVERY OF PERSONAL PROPERTY ON SALE —REQUISITES THEREOF—FRAUD IN LAW.

STATEMENT.—Appellee purchased some hogs, a half interest in a reaping machine, and a lot of corn and wheat growing. Afterwards, a judgment was obtained against the seller before a justice of the peace by appellant, who levied on this property, all except the reaper still remaining on a farm belonging to the seller's (and judgment debtor's) wife. Appellee put in his claim to try the right of property—the delivery of the property being the particular question. The reaper was in the hands of the other half-owner thereof. *Held,*

1. That the growing grain, having been delivered so far as the nature of the property would admit, was exempt from the levy.

2. That the reaper, being in the hands of the other part-owner, was sufficiently delivered.

3. That the hogs, remaining still on the farm where they were sold, and there being, therefore, no visible change of ownership, were subject to the levy, nor would it have been different had the buyer employed the seller to continue to feed them on the farm *for him.*

4. There needs be no intentional fraud in a sale, to vitiate it, where the property remains with the former owner. This is fraudulent in law, as to creditors, notwithstanding the good faith of the parties. The law requires, so far as possible, some notice of a change of possession as to goods sold.

John Alsop *v.* Mary Eckler et al.—Error to Effingham.—Opinion by BREESE, J. reversing and remanding.

CONDITIONAL DELIVERY OF DEED—PRAYER FOR GENERAL RELIEF.

STATEMENT.—The appellant, being in expectation of death, caused his son, who held the legal title, to execute to his daughter, the mother of the infant appellee, a deed to certain lands. As to the actual delivery, the evidence was contradictory. But the daughter having died, appellant brought suit in equity to cancel the deed, alleging no delivery of it, and praying protection to his possession. The court dismissed the bill, although praying general relief, likewise. *Held,*

1. That, if there had been a delivery of the deed, yet it was a conditional delivery, namely: to take effect on his death only, and that this condition may be enforced, although it be not expressed in the deed, [it being a condition of the delivery, and not of the conveyance, is the principle of the decision, evidently, although not the exact language of court].

2. That, under the general prayer for relief, the court could enjoin disturbance of the possession, although denying the specific prayers of the bill.

47.—Andrew Binz *v.* Hannan G. Weber, Error to St. Clair.—Opinion by WALKER, J., affirming.

CONSTITUTIONALITY OF STATUTES — TITLES TOO BROAD — CONSTITUTION — PRESUMPTION.

STATEMENT.—This case involves the question, simply, of the constitutionality of a private law authorizing Belleville and Mascoutah to subscribe to a railroad according to the title of the act. But the body of the act also embraced Nashville, although the title did not The Senate bill included the latter place also, in the title; but it seems the House, in passing it, dropped the latter part of the title by some accident. Tax was levied in the town of Mascoutah, to meet the interest of the bonds issued there. Defendant paid the tax under protest, and brought an action in the Circuit court. Losing the case, he brought it to the Supreme court. *Held,*

1. That every presumption of regularity must prevail as to an act signed by the speakers of both houses and the governor.

2. That in the absence of the original bill from the secretary's office, the printed copy must guide the court.

3. That where a bill is broader than the title, if the part which is not embraced in the title can be taken out, and yet leave a sensible and complete law, as to the matters actually included by the title, this must stand as constitutional and valid; and the law will only be adjudged void as to the part not included in the title.

51.—Frederick Rearick *v.* Daniel Wilcox.—Appeal from Adams.—Opinion by CRAIG, J., reversing and remanding.

ELECTIONEERING LIBELS—RIGHTS OF NEWSPAPERS—RESTRICTIONS — COMPENSATORY AND EXEMPLARY DAMAGES—REPETITION OF INSTRUCTIONS—MALICE IN FACT AND IN LAW.

STATEMENT.—Suit for libel against the Quincy Whig, by appellant, who was a candidate for office, who recovered $25, and appealed on the ground of erroneous instructions. *Held,*

1. That a repetition of instructions ought to be refused.

2. In such an action, a defendant can not be allowed to prove that there was no malice in fact, in the publication of a libelous article, as against compensatory damages; but only against exemplary damages.

3. Though it is lawful for newspapers to discuss the respective merits and qualifications of candidates for office, yet they cannot be allowed to assault with impunity, the private character of such candidates.

4. It is no excuse to say that the article was printed and published during the excitement of a campaign, and solely for the purpose of defeating the libeled candidate.

5. The publisher of a journal may publish facts; but the character and reputation of a candidate for office are as sacred as those of any other citizen, and should be equally protected.

6. Nor is it any excuse to say that the publisher supposed he was rendering a service to the public, to defeat a candidate by such means.

55.—John K. Fanning et al. *v.* Andrew Russell, agent.—Error to Morgan.—Opinion by DICKEY, J., affirming.

STRIKING PLEAS FROM THE FILES—JUDGMENT BY NIL DICIT AND DEFAULT—DISTINCTION.

STATEMENT. — Pleas stricken from the files—Judgment by *nil dicit*, for $8057.90. *Held,*

1. That where pleas are stricken from the files, and the evidence heard on the motion is not preserved by bill of exceptions, the Supreme court cannot review this action of the court below.

2. Where pleas are stricken from the files, a judgment by nil dicit is the proper practice, because here there has been an appearance entered; whereas a default is only proper where there has been no appearance.

Isaac R. Bennett *v.* William Pierson.—Error to Morgan.—Opinion PER CURIAM, affirming.

DISMISSAL OF APPEAL IN CIRCUIT COURT FOR NON-COMPLIANCE WITH RULE.

Held, That where, in case of an appeal from the decision of a justice of the peace, the Circuit court enters a rule for an additional appeal bond, which rule is not complied with, the case should be dismissed for the non-compliance.

60.—N. Leroy *v.* City of Springfield.—Error to Sangamon. — Opinion by BREESE, J., affirming.

STATUTE OF LIMITATIONS—PLEADABLE BY MUNICIPAL CORPORATION—WHEN BEGINS TO RUN.

STATEMENT.—Action in 1875, for personal injury by a defective sidewalk, in 1872. Statute of limitations pleaded by the city, successfully. *Held,*

1. That a municipal corporation may plead against a private citizen, or in any suit, the statute of limitations, or any other defense available to an individual party.

2. That the statute begins to run when the injury was first received, whether the full results were then apparent or not.

63.—John Steinmetz et al. v. Anna B. Lang et al.—Appeal from Cook.—Opinion by SHELDON, J., reversing and remanding; SCOTT, Ch. J., dissenting.

ERASURE OF INDORSEMENT ON PROMISSORY NOTE AS TO TRUST DEED—PRESUMPTIONS.

STATEMENT. — A promissory note was presented against Lang's estate, secured by a trust deed. On the back of the note, was the following indorsement, erased by a pen:

"Release of trust deed, by which this note is secured, made and delivered by order of holder." Signed by the holder (who had since died), and his attorney. The attorney testified that he had no recollection of the matter, but the indorsement was in his handwriting, and he thought the erasure was his also, and especially as he was in the habit of making, as attorney, such indorsements on notes secured by trust deed, when the trust deeds were to be cancelled. The court *held,*

That the presumption of law arising from the nature of the case, and the ordinary course of affairs, was, that the entry had been made on a promise of Lang to pay the note, and that, he failing to do so, it was erased, as not expressing the truth in the matter; and, therefore, it did not invalidate the note, or the trust deed, the deed being still actually uncancelled, and the note unpaid, as was evident from its being in the hands of the executor of the holder.

The production of the note and trust deed was *prima facie* evidence of the debt still existing, and the security still remaining; and in the absence of contrary evidence, it must prevail.

66.—Harvey Sandusky et al. *v.* John C. Short et al.—Appeal from Vermillion. —Opinion by CRAIG, J., affirming.

APPEAL BOND—RELEASE OF PRINCIPAL BY BANKRUPTCY—SURETY—BAD JOINT PLEAS.

STATEMENT.—Suit on an appeal bond

given on carrying up a case to the Supreme court; there affirmed. Plea, that Sandusky (principal) had received a discharge in bankruptcy, from the judgment on which the bond was given, both joining in the plea. Demurrer; sustained; *held*,

1. That the bankruptcy of the principal obligor could not affect, in itself, the obligation of the surety in any manner.

2. A joint plea, bad in part, is bad in whole; and so, although, if separately pleaded, the bankruptcy of the principal might avail him, yet the plea being joint, and being bad as to the surety, could avail for neither.

69.—Henry C. Withers, admr., etc., *v.* Mary R. Fitzsimmons.—Appeal from Greene—Opinion *per curiam*, reversing and remanding; DICKEY, J., dissenting.

BALANCE OF EVIDENCE BY THE SUPREME COURT.

STATEMENT.—A claim for dower in personal property, by virtue of a marriage with the intestate, fifteen minutes before his death. The question was, whether he was conscious, and gave consent, at the time of the ceremony. Both in the County court and in the Circuit court, Mrs. Fitzsimmons prevailed with her claim.

The parish priest who performed the ceremony, testified that he thought intestate was unconscious at the time, and gave no consent that he could see.

On the other hand, the petitioner and her mother, testified positively, that he was, at the time, conscious, and gave consent by a nod of the head. Her brother also testified that he thought so. The court, without assigning any especial reasons, pronounced the "weight of the evidence" to be "against the finding."

70.—Joseph Drew et al. *v.* John Mason et al.—Appeal from Mason.—Opinion by SCOTT, Ch. J.

MECHANIC'S LIEN LAW—PUTTING UP LIGHTNING RODS.

Held, That furnishing materials and labor in putting up lightning rods, does not come under the protection of the mechanic's lien law, being neither "building, repairing, altering or ornamenting" a house in the meaning of the statute.

72.—The Protection Life Ins. Co. *v.* John R. Palmer, adm'r., etc.—Appeal from McLean.—Opinion by WALKER, J., affirming.

ASSUMPSIT ON SEALED INSTRUMENS—DATE OF NOTICE—COMPUTATION OF TIME—NO DEFAULT OR FORFEITURE AFTER DEATH OF INSURED.

STATEMENT.—Suit on insurance policy in assumpsit; the company claimed in defense that the policy had lapsed, the assured having failed to pay an assessment made upon him in his lifetime. He died on the 5th of March. The notice of assessment bore date January 25; was mailed in Chicago on the 3d of February, and in due course of the mail, should reach the assured on the 4th—the next day; assessments were to be paid in thirty days after date of notice, or policy void; *held*,

1. That as the statute has abolished all distinction between actions on sealed and on unsealed instruments, assumpsit may be brought on a policy, though sealed.

2. A notice is not to be dated with the date of the paper containing it, nor of the depositing it in the post-office, which is merely a means of conveying the notice to the party to be notified, just as a messenger would do; but of actual possibility of service, that is, on arriving at its destination by post, which will be presumed to have been at the time, and in business hours; and it will be presumed that the assured received it duly.

3. The computation of time for the thirty days, will exclude the first day, viz., the 3rd of February, and include the whole of the last day, viz, the 6th of March. So then, in this case, the assured had the whole of the 6th of March to pay the assessment in.

4. But he died on the 5th, and therefore, was not in default at the time of his death. And a life insurance company cannot annul a policy for a default happening after death. [Although, in the payment of the policy, they may deduct any assessment or premium due.]

78.—Mary E. Harris *v.* Frederick Evans. et. al.—Appeal from Montgomery.—Opinion by DICKEY, J., affirmed.

LEVY AND DISCHARGE OF AN EXECUTION.

STATEMENT.—A sheriff levied an execution on some property, sold a part of it, and applied on the judgment; and, at the request of the plaintiff's attorney left the remainder in the hands of the judgment debtor, to be harvested and marketed—it being wheat. The debtor marketed the grain and paid over only a part of the money—retaining over $300 of it; *held*,

1. That if an officer pursues a different course, as to the disposal of property levied on, than that prescribed by the statute, he is liable therefor. If by the request or assent of the judgment creditor, the judgment creditor must suffer the loss.

2. If (as in this case), a sufficient amount of the property is levied upon to satisfy the judgment, this is, of itself, a satisfaction of the execution. And the money being lost in this way, the judgment is satisfied, and the debt paid by the levy, and the plaintiff, having assented to the arrangement, has no remedy.

81.—George Scroggs *v.* Joseph O. Cunningham.—Appeal from Champaign.—Opinion by SCOTT, Ch. J., affirming.

INTEREST ON PARTNERSHIP ACCOUNT.

STATEMENT.—This was a partnership account, and the case largely consists of a construction of the terms of the articles of dissolution embracing no principle of law. The court however, *held*,

That where a partner, whose duty it is to render an account, refuses to do so, or to allow access to the books, he may afterwards properly be charged with interest by the court, from the day the account ought to have rendered, on the amount found due from him.

83.—Joseph Bongard, et al. *v* Christian F. Block.—Appeal from Champaign.—Opinion by BREESE, J., affirming.

THE STATUTE OF FRAUDS AS TO CAUSE OF ACTION EX DELICTO.

Held, That, under the word "creditors," in the statute of frauds, are included all who have causes of action arising *ex delicto*; so that if one, expecting to have a judgment in tort rendered against him, conveys his lands to his children for "natural love and affection," without reserving enough to satisfy any liability which may be therein found against him, the conveyance will be set aside, as delaying, hindering, or defrauding creditors.

84.—Victoria Bongard *v.* Henry C. Core.—Appeal from Champaign.—Opinion by WALKER, J., reversing and remanding.

MARRIED WOMEN AND THEIR SEPARATE PROPERTY—HOW ACQUIRED—HUSBAND AS AGENT IN MANAGING—"EARNINGS"—PROCEEDS, INCREASE, ETC.—PERSONAL LABOR OF HUSBAND.

Held, 1. That a married woman may employ her husband, to act as her agent, in regard to her separate property.

2. If a husband and his wife live upon her farm, and she employs and pays for the labor, in raising grain, the grain is her separate property, even if her husband does act as her agent in preserving and selling it.

3. And if the farm is purchased in whole, or in part, by grain and articles so raised upon it, the farm is nevertheless her separate property.

4. The rents of a wife's property, the products of her farm, or the increase of her stock, are not included in the word "earnings." They are as much her separate property as the principal out of which they arise.

5. And if a husband contributes his personal labor in a minor degree to raise grain, this does not change the ownership thereof from her to him.

85.—Harvey Greenebaum, et al. *v.* Henry Greenebaum, guardian.—Appeal from Cook.—Opinion by SHELDON, J., reversing.

PETITION OF A GUARDIAN TO SELL MORTGAGED LANDS.

STATEMENT.—Petition to sell lands which were mortgaged, to pay the mortgaged debt; brought to the Circuit court. The court granted the petition, and there was a kind of amicable appeal to the Supreme court, to ascertain whether the Circuit court had jurisdiction in the matter. This the court declined to decide because there was no necessity, at any rate, for the exercise of such a jurisdiction; since, if the lands were to be sold at public sale at all, a foreclosure sale would be as well for the minor heirs as a guardian's sale; and even better, since there is a redemption in a foreclosure sale.

87.—William Dayhoff *v.* Philip Dayhoff et al.—Error to Fayette.—Opinion by BREESE, J., affirming.

VENDOR'S LIEN—ENFORCEMENT BY ADMINISTRATOR.

STATEMENT.—Bill filed to enforce a vendor's lien by administrators. During the proceedings, the heirs sold the note to a party, but it was not assigned. *Held*,

1. That the personal representatives of a vendor can enforce a vendor's lien, for the benefit of the estate.

2. Although an assignee cannot, yet where there has been no transfer of the note by indorsement, such an act as selling it by the heirs during the progress of a suit to enforce by the administrators, does not change the status of the matter.

90.—Keokuk, etc., Packet Co. *v.* City of Quincy.—Appeal from Adams.—Opinion by SCOTT, Ch. J., reversing and remanding.

CHARGES FOR BOATS LANDING—HOW WHARFAGE CHARGEABLE.

Held, 1. That, without an ordinance, boats cannot be charged for landing at a public landing place.

2. An ordinance specifying certain classes of boats, and certain companies, and subjecting them to certain rates, cannot be made available against the successors of such companies, without specially providing to that effect.

95.—Joseph W. Arnold *v.* James H. Crowder.—Appeal from Sangamon.—Opinion by BREESE, J., reversing.

THE LAW OF FIXTURES—INTENTION AS TO FIXTURES—ONUS PROBANDI—EFFECT OF MORTGAGE.

STATEMENT.—The question herein was, whether platform or stock scales, set into a place excavated for that purpose in the soil, passed under a mortgage sale of the premises. *Held*,

1. That the general maxim of the law is, that what is annexed to the land becomes a part of the land; but it is not always easy to say what constitutes an annexation sufficient for that purpose.

2. Perhaps, the true rule is, that articles not otherwise attached to the land than by their own weight, are not to be considered as part of the land. But the circumstances may be such as to show that they were intended to be part of the land. If so, the *onus* of showing this intention is upon those who affirm it to be realty. And, so, an article may be affixed, and yet not intended to be a part of the land. Then the *onus* is on those claiming it to be a chattel. The intention is manifested by acts.

3. A mortgage will pass all the fixtures on land, unless it expressly reserves them. Even a hay-cutter, affixed to a stable, has been held to pass, and also a threshing-machine.

4. The general doctrine is stated by Washburn to be that, "If the owner of land provides anything of a permanent nature, fitted for, and actually applied to use upon the premises, by annexing the same, it becomes a part of the realty, and passes to the purchaser, though it might be removed without injury to the premises; and this, as between mortgagor and mortgagee, whether the article in question be annexed to the premises before or after making the mortgage. Although the rule may be different between landlord and tenant.

5. In Bishop *v.* Bishop, 11 N. Y., 123, hop-poles, piled on the ground, passed with the land; and in Weston *v.* Weston, a bell hung upon a frame, and fastened to it by a hasp, the frame being nailed to the cupola of a barn, was held part of the realty.

6. The hay-scales, in this case, passed under the mortgage.

7. Annexations are presumed to be with a design of permanency.

73.—William P. Corbin *v.* James W. Pearce.—Appeal from Moultrie.—Opinion by DICKEY, J., affirming.

EXECUTION LIEN—VARIANCE BETWEEN EXECUTION AND JUDGMENT—EFFECT OF LEVY—EFFECT OF AMENDING AN EXECUTION AFTER LEVY MADE.

STATEMENT.—Judgment against Cox before J. P. for $154.50, July 16, 1875. Three days afterwards, execution issued thereon for $104.50. August 23, Cox assigned all his personal property to Corbin, for the benefit of creditors, and Corbin took possession on the same day, under the assignment. August 26, the execution was levied on a portion thereof. Replevin by Corbin; tried September 1, before the justice. On that day, the justice changed the amount in the execution to $154 50.

It was insisted, first, that the variance as to amount between the execution and the judgment, rendered the execution void; and, second, if not, then the alteration of it rendered it void. The court *Held*,

1. That, while an execution based on a void judgment is void, and while a discrepancy may be so marked as to afford a just inference that the judgment in question is not the one mentioned in the writ, (which inference, however, is rebuttable,) yet, if it appears that, in fact, the writ was issued on the judgment, a variance, though an irregularity, will not avoid the writ.

2. A levy by an officer, under a valid writ, vests the title of the property in him, for the purpose of obtaining funds to apply on the judgment; and this title remains until divested by subsequent proceedings. And although the writ has no legal effect after the return day, yet a levy made under it prior to the return day remains good; and the title is not divested, even by the return of the writ; after which return he may advertise and sell the property, by virtue of the levy. And, accordingly, no act done to the writ, subsequent to the levy—even if thereby the writ should be destroyed—can, in any way, invalidate the levy, or title of the officer, or his right to make the sale.

3. Such an amendment, however, could not enlarge the lien of the execution, or levy; nor could it bind any party in interest not having notice. Nor could an amendment enlarge a lien of the levy, even if regularly made. It could not, in any way, have any retroactive effect.

75.—Sarah Husband, use, etc., *v.* Elisabeth Epling.—Appeal from Sangamon.—Opinion by SCHOLFIELD, J., reversing and remanding.

ASSIGNABILITY OF INSTRUMENTS IN WRITING, AS TO THE PAYMENT, ETC.—PLEA OF COVERTURE AND REPLICATION THERETO—SEPARATE PROPERTY IN AN ESTATE.

STATEMENT.—Suit by appellant on the following instrument: "Whereas, there has been a matter of controversy between Sarah Husband, of the one part; and Emily Jane Brunk, Elisabeth Epling, and William T. Mason, children and heirs of Thomas Mason, deceased, of the other part; witnesseth, that, whereas the said Sarah Husband claims a compensation for keeping and raising said children, during the lifetime of said Thomas Mason, deceased; and whereas the said parties have agreed upon a settlement, as follows; the said Emily Jane Brunk, Elisabeth Epling, and William T. Mason, agree to pay said Sarah Husband the sum of eighteen hundred dollars; that is to say, six hundred dollars each; which, when paid, is to be in full satisfaction of all claims and demands which the said Sarah Husband, or her children, have, or claim, against said persons, for keeping or raising to this date, which amount is to be paid over when the estate of the said Thomas Mason is settled up." (Signed.)

On this was indorsed, "We assign this claim to Jane Husband," etc. Suit brought by Sarah Husband for use of Jane Husband.

The first question was upon this assignment, under the statute allowing assignments by indorsement of all "instruments of writing whereby the maker agrees to pay any sum of money," etc. On this the court *Held*,

That it is essential to the assignability of any instrument, under the statute, that the event upon which it is to become payable must inevitably happen, sometime or other. Notwithstanding the law provides that estates shall be settled up, and it is to be presumed that the law will be obeyed, yet the event is not to be regarded as morally certain, since it depends on human agencies.

Therefore the instrument is not assignable.

The other question in the case was on a cross-error. The defendant pleaded coverture, and the plaintiff replied that she was about to enforce a *bona fide* valid claim against the estate of defendant's father, and defendant signed the above instrument, in consideration of the release of that claim, which was accordingly released. The court below sustained a demurrer to the replication. But, *Held*,

That the replication was proper; since the defendant's interest in her father's estate was her personal property, and was protected or enlarged by the withdrawal of the claim against the estate. And a married woman is empowered to make contracts concerning her separate estate, on which she will be held liable at law.

WHEREAS, ELL NATHAN HOPKINS, BEING indebted upon three promissory notes (given by him for balance of purchase money), each for the sum of thirteen hundred and fifty-eight dollars and seventy-five cents, all bearing date of the twentieth day of April, A. D. 1874, and all payable to the order of himself, one in eighteen, one in thirty, and one in forty-two months, after said date, each of said notes bearing interest from date until maturity at the rate of eight per centum per annum, payable at the maturity of the first one due of said notes, and yearly thereafter, and each bearing interest after maturity at the rate of ten per centum per annum, did to secure the payment of said notes and interest, by his trust deed of even date with said notes, filed for record in the office of the recorder of Cook county, in the State of Illinois, on the nineteenth day of June, A. D. 1874, and recorded at page 293 of book 402 of records, in said office, convey unto me, the undersigned, Samuel M. Moore, the lands and premises therein and hereinafter described, in trust, among other things, that in case of default in the payment of the said promissory notes and interest, or any part thereof, according to the tenor and effect thereof, the undersigned, Samuel M. Moore, on the application of the legal holder of said notes, or either of them, should sell and dispose of said premises, and all the right, title, benefit, and equity of redemption of said Ell Nathan Hopkins, his heirs and assigns therein, at public auction, at such place in the city of Chicago, in the State of Illinois, or on said premises, as might be specified in the notice of such sale, for the highest and best price the same would bring in cash, two weeks' notice having been previously given of the time and place of said sale, by advertisement in the Chicago Legal News or in any newspaper at that time published in said city of Chicago, and to make, execute and deliver to the purchaser or purchasers at such sale, good and sufficient deed or deeds of conveyance for the premises sold, and to apply the proceeds or avails of such sale in the order and manner, and for the purposes prescribed in said trust deed, and that in case of default in any of said payments of principal or interest, then, and in that case, the whole of the principal sum, secured in and by said trust deed, and the interest thereon to the time of sale, might at once, at the option of said legal holder become due and payable, and the said premises be sold in the manner and with the same effect as if the said indebtedness had matured: to the originals of which notes and trust deed, now open to inspection in the custody of Charles M. Sturges, attorney at law, at Room No. 7, Methodist Church Block, in said city of Chicago, as well as to said record of said trust deed, reference is hereby had and made for further certainty as to the contents and provisions thereof. And whereas, default was made in the payment, when and as they became due, of the principal and interest of the one of said notes which fell due eighteen months after the date thereof, and also in the payment when and as the same became due, of the first due instalments of interest upon the other two of said notes respectively, which said sums so in default are and remain still due and unpaid. And whereas, by the election of the legal holder of said notes upon the default aforesaid, the whole of the principal sum secured by said trust deed, with the interest thereon to the time of sale, has become due and payable and said legal holder has thereupon made application to the undersigned to sell said premises for the purposes and in pursuance of the provisions set forth in said trust deed. Now, therefore, public notice is hereby given, that for said purposes, and in pursuance of said provisions, I, the said Samuel M. Moore, on the thirty-first day of July, in the year of our Lord one thousand eight hundred and seventy-six, at the hour of one o'clock in the afternoon of said day, at the building occupied as a court house, situate at the southeast corner of Adams street and LaSalle street, in the city of Chicago, in the county of Cook, in the State of Illinois, to wit, at the door of said building which fronts on said Adams street, and is nearest to said LaSalle street, will sell and dispose of, at public auction, for the highest and best price the same will bring in cash, the following described lands and premises, situate in the town of Calumet, in the county of Cook and State of Illinois, to wit: Lots one to fifteen inclusive, in block thirteen; and lots one to seven, inclusive, in block fourteen; being twenty-two lots, all in Vincennes Road addition to Washington Height, being a subdivision of the west half of the southeast quarter of section nineteen, and that part lying east of the Dummy Track, of the east half of the southwest quarter of said section, all in township thirty-seven north, range fourteen, east of the third principal meridian, as the same is recorded in book three of maps, on page twenty-five, in the recorder's office of said Cook county, together with all and singular the tenements, hereditaments, privileges and appurtenances thereunto belonging, and all the right, title, benefit and equity of redemption of the said Ell Nathan Hopkins, his heirs and assigns therein. Dated this fifteenth day of July, A. D. 1876.

SAMUEL M MOORE,
Trustee as aforesaid.

CHARLES M. STURGES, Atty. 43-45

EDMUND S. HOLBROOK,
Attorney, Metropolitan Block.

STATE OF ILLINOIS, SUPREME COURT, WITHin and for the Third Grand Division of said State. William H. Brooks, Jr. v. Catharine E. Ewing Kearns. —Error to Circuit court of Cook county.

Whereas, the said William H. Brooks, Jr., has sued out a writ of error from said Supreme court to reverse a judgment obtained by said Catharine E. Ewing Kearns against said William H. Brooks, Jr., in the said Circuit court of Cook county, which said writ of error is now pending in said Supreme court; and whereas, a writ of *scire facias* has been duly issued herein, returnable on the first day of the next term of said Supreme court, to be holden at Ottawa, in said State, on the second Tuesday in September next, according to law; and whereas, also, it appears by affidavit, on file in the clerk's office of said Supreme court, that the said Catharine E. Ewing Kearns is a non-resident of the State of Illinois, and without the reach of the process of said Supreme court,

Now, therefore, you, the said Catharine E. Ewing Kearns, the said defendant in error, whose non-residence appears as aforesaid, are hereby notified to be and appear before the justices of said Supreme court, at the next term of said court, to be holden at Ottawa, in said State, on the second Tuesday in September next, to hear the record and proceedings brought into said Supreme court on return of said writ of error, and the errors assigned, if you shall see fit, and further to do and receive what said court shall order in this behalf.

Dated this 12th day of July, A. D. 1876.

C. D. TRIMBLE,
Clerk of the Supreme Court,
By A. H. TAYLOR, Deputy.

EDMUND S. HOLBROOK, Atty. for Brooks. 43-46

WHEREAS, ELL NATHAN HOPKINS, BEING indebted upon three promissory notes (given by him for balance of purchase money), each for the sum of sixteen hundred and ninety-six dollars and twenty-five cents, all bearing date of the twentieth day of April, A. D. 1874, and all payable to the order of himself, one in eighteen, one in thirty, and one in forty-two months, after said date, each of said notes bearing interest from date until maturity at the rate of eight per centum per annum, payable at the maturity of the first one due of said notes, and yearly thereafter, and each bearing interest after maturity at the rate of ten per centum per annum, did to secure the payment of said notes and interest, by his trust deed of even date with said notes, filed for record in the office of the recorder of Cook county, in the State of Illinois, on the nineteenth day of June, A. D. 1874, and recorded at page 54 of book 403 of records, in said office, convey unto me, the undersigned, Samuel M. Moore, the lands and premises therein and hereinafter described, in trust, among other things, that in case of default in the payment of the said promissory notes and interest, or any part thereof, according to the tenor and effect thereof, the undersigned, Samuel M. Moore, on the application of the legal holder of said notes, or either of them, should sell and dispose of said premises, and all the right, title, benefit, and equity of redemption of said Ell Nathan Hopkins, his heirs and assigns therein, at public auction, at such place in the city of Chicago, in the State of Illinois, or on said premises, as might be specified in the notice of such sale, for the highest and best price the same would bring in cash, two weeks' notice having been previously given of the time and place of said sale, by advertisement in the Chicago Legal News, or in any newspaper at that time published in said city of Chicago, and to make, execute and deliver to the purchaser or purchasers at such sale, good and sufficient deed or deeds of conveyance for the premises sold, and to apply the proceeds or avails of such sale in the order and manner, and for the purposes prescribed in said trust deed, and that in case of default in any of said payments of principal or interest, then, and in that case, the whole of the principal sum, secured in and by said trust deed, and the interest thereon to the time of sale, might at once, at the option of said legal holder become due and payable, and the said premises be sold in the manner and with the same effect as if the said indebtedness had matured: to the originals of which notes and trust deed, now open to inspection in the custody of Charles M. Sturges, attorney at law, at Room No. 7, Methodist Church Block, in said city of Chicago, as well as to said record of said trust deed, reference is hereby had and made for further certainty as to the contents and provisions thereof. And whereas, default was made in the payment, when and as they became due, of the principal and interest of the one of said notes which fell due eighteen months after the date thereof, and also in the payment when and as the same became due, of the first due instalments of interest upon the other two of said notes, respectively, which said sums so in default are and remain still due and unpaid. And whereas, by the election of the legal holder of said notes upon the default aforesaid, the whole of the principal sum secured by said trust deed, with the interest thereon to the time of sale, has become due and payable, and said legal holder has thereupon made application to the undersigned to sell said premises for the purposes and in pursuance of the provisions set forth in said trust deed. Now, therefore, public notice is hereby given, that for said purposes, and in pursuance of said provisions, I, the said Samuel M. Moore, on the thirty-first day of July, in the year of our Lord one thousand eight hundred and seventy-six, at the hour of one o'clock in the afternoon of said day, at the building occupied as a court house, situate at the southeast corner of Adams street and LaSalle street, in the city of Chicago, in the county of Cook, in the State of Illinois, to wit, at the door of said building which fronts on said Adams street, and is nearest to said LaSalle street, will sell and dispose of, at public auction, for the highest and best price the same will bring in cash, the following described lands and premises, situate in the town of Calumet, in the county of Cook and State of Illinois, to wit: Lots one to twenty inclusive, in block fifteen; lots six, seven, ten and eleven, in block twelve; and lots twenty-three and twenty-four, in block thirteen, being twenty-six lots, all in Vincennes Road addition to Washington Heights, being a subdivision of the west half of the southeast quarter of section nineteen, and that part lying east of the Dummy Track of the east half of the southwest quarter of said section, all in township thirty-seven north, range fourteen, east of the third principal meridian, as the same is recorded in book three of maps, on page twenty-five, in the recorder's office of said Cook county, together with all and singular the tenements, hereditaments, privileges and appurtenances thereunto belonging, and all the right, title, benefit and equity of redemption of the said Ell Nathan Hopkins, his heirs and assigns therein. Dated this fifteenth day of July, A. D. 1876.

SAMUEL M. MOORE,
Trustee as aforesaid.

CHARLES M. STURGES, Attorney. 43-45

SCOVILLE & BAYLEY,
Attorneys, 99 Madison Street.

TRUSTEE'S SALE.—WHEREAS, JAMES H. BOWen and Caroline A. Bowen, his wife; George S. Bowen and Julia E. Bowen, his wife; and Chauncey T. Bowen and Therese S. Bowen, his wife, grantors, made their certain deed of trust to the undersigned, Robert C. Wright, as trustee, bearing date October 15th, A. D. 1872, and conveying the premises, hereinafter described, to secure payment of two certain promissory principal notes for the sum of twenty thousand dollars each, and ten notes for interest on each of said principal notes, for eight hundred dollars each, all bearing even date with said trust deed; said principal notes being payable five years after date, and the interest notes being payable at intervals of six months after date; which deed of trust is recorded in the recorder's office of Cook county, Illinois, in book 41 of records, at page 242, and provides, amongst other things, for sale of said premises in case of default in payment of said notes, or either of them, or any part thereof, or in case of default in the payment of taxes;

And whereas, default has been made in payment of a part of two of said interest notes that became due and payable forty-two months after date thereof, and also in payment of taxes on said premises, and application has been made by the legal holder of said notes to said trustee, to advertise and sell said premises, according to the terms of said deed of trust; and the amount due and unpaid on said notes is eight hundred dollars, with interest thereon at eight per cent. per annum since the fifteenth day of April, 1876, and the whole of said principal sums, to wit, forty thousand dollars, with interest at eight per cent. per annum since the 15th day of April, 1876, is also unpaid,

Now, therefore, in pursuance of said application, and by virtue of the power and authority given by said deed of trust, I will sell at auction, for cash, at two o'clock in the afternoon on the thirty first day of July, A. D. 1876, on the said premises (also known as numbers 15 and 17, Randolph Street, in the city of Chicago), the said premises, to wit: Lot one, of Bowen Brother's plat of subdivision of sub-lots four, five, six, seven, in re-subdivision of lots twenty-six to thirty-four inclusive, in block ten, Fort Dearborn addition to Chicago, being forty feet front on Randolph street, by one hundred and sixty-eight feet to Benton Place, and being west and adjoining the alley, with the improvements thereon, and all right and equity of redemption of said grantors in said deed of trust, their heirs and assigns therein.

Chicago, July 15, 1876.

ROBERT C. WRIGHT, Trustee.

SCOVILLE & BAYLEY, Attys. 43-45

TO WILLIAM HENRY COMMONS, ROBERT Commons, John Commons, Charles Wesley Commons, Rhoda Jane Commons, Jane Commons, widow, Charlotte Ann Commons, and William Charles Commons:

Take notice that on Monday, August 21st, 1876, at 10 A. M., or as soon thereafter as the matter can be heard, I shall present my final report and account as executor of the last will and testament of Henry Commons, deceased, for approval, to the County Court of Cook county, Illinois, at Chicago, Illinois, and shall at the same time ask that the estate of said deceased may be declared fully settled, and that I may be discharged from further duty, when and where you can be if you see fit.

43-43 JAMES COMMONS, Executor.

WHEREAS, ELL NATHAN HOPKINS, BEING indebted upon three promissory notes (given by him for balance of purchase money), each for the sum of fifteen hundred and twenty-seven dollars and fifty cents, all bearing date of the twentieth day of April, A. D. 1874, and all payable to the order of himself, one in eighteen, one in thirty, and one in forty-two months after said date, each of said notes bearing interest from date until maturity, at the rate of eight per centum per annum, payable at the maturity of the first one due of said notes, and yearly thereafter, and each bearing interest after maturity, at the rate of ten per centum per annum, did, to secure the payment of said notes and interest, by his trust deed of even date with said notes, filed for record in the office of recorder of Cook county, in the State of Illinois, on the nineteenth day of June, A. D. 1874, and recorded at page 295, of book 402 of records, in said office, convey unto me, the undersigned, Samuel M. Moore, the lands and premises therein and hereinafter described, in trust, among other things, that in case of default in the payment of the said promissory notes and interest, or any part thereof, according to the tenor and effect thereof, the undersigned, Samuel M. Moore, on the application of the legal holder of said notes, or either of them, should sell and dispose of said premises, and all the right, title benefit and equity of redemption of said Ell Nathan Hopkins, his heirs and assigns therein, at public auction, at such place in the city of Chicago in the State of Illinois, or on said premises, as might be specified in the notice of such sale, for the highest and best price the same would bring in cash, two weeks' notice having been previously given of the time and place of said sale, by advertisement in the Chicago Legal News, or in any newspaper at that time published in said city of Chicago, and to make, execute and deliver to the purchaser or purchasers at such sale, good and sufficient deed or deeds of conveyance for the premises sold, and to apply the proceeds or avails of such sale in the order and manner, and for the purposes prescribed in said trust deed, and that in case of default in any of said payments of principal or interest, then and in that case the whole of the principal sum secured in and by said trust deed, and the interest thereon, to the time of sale, might at once, at the option of said legal holder, become due and payable, and the said premises be sold in the manner and with the same effect as if the said indebtedness had matured: to the originals of which note and trust deed, now open to inspection, in the custody of Charles M. Sturges, attorney at law, at Room No. 7, Methodist Church Block, in said city of Chicago, as well as to said record of said trust deed, reference is hereby had and made for further certainty as to the contents and provisions thereof. And, whereas, default was made in the payment when and as they became due, of the principal and interest of the one of said notes which fell due eighteen months after the date thereof, and also in the payment when and as the same became due, of the first due installments of interest upon the other two of said notes respectively; which said sums so in default, are and remain still due and unpaid. And, whereas, by the election of the legal holder of said notes upon the default aforesaid, the whole of the principal sum secured by said trust deed, with the interest thereon to the time of sale, has become due and payable, and said legal holder has thereupon made application to the undersigned to sell said premises, for the purposes and in pursuance of the provisions set forth in said trust deed: Now, therefore, public notice is hereby given, that, for said purposes, and in pursuance of said provisions, I, the said Samuel M. Moore, on the thirty-first day of July, in the year of our Lord one thousand eight hundred and seventy-six, at the hour of one o'clock in the afternoon of said day, at the building occupied as a court house, situate at the southeast corner of Adams street and LaSalle street, in the city of Chicago, in the county of Cook, in the State of Illinois, to wit, at the door of said building which fronts on said Adams street, and is nearest to said LaSalle street, will sell and dispose of, at public auction, for the highest and best price the same will bring in cash, the following described lands and premises, situate in the town of Calumet, in the county of Cook, and State of Illinois, to wit: Lots twenty-two to thirty-four, inclusive, in block fourteen; lots fifteen, seventeen, eighteen, nineteen and twenty, in block twelve; and lots sixteen, seventeen and eighteen in block ten, being twenty-one lots, all in Vincennes Road addition to Washington Heights, being a subdivision of the west half of the southeast quarter of section nineteen, and that part lying east of the Dummy track, of the east half of the southwest quarter of said section, all in township thirty-seven, north range fourteen, east of the third principal meridian, as the same is recorded in book three of maps, on page twenty-five, in the recorder's office of said Cook county, together with all and singular the tenements, hereditaments, privileges and appurtenances thereunto belonging, and all the right, title, benefit and equity of redemption of the said Ell Nathan Hopkins, his heirs and assigns therein. Dated this fifteenth day of July, A.D. 1876.

SAMUEL M. MOORE,
Trustee as aforesaid.

CHARLES M. STURGES, Attorney. 43-45

TRUSTEE'S SALE.—WHEREAS, KATHARINA Feilen and Peter Feilen, her husband, did on the fifth day of June, A. D. 1875, as grantors, execute and deliver to Lyman Baird, as grantee and trustee, their certain deed of trust of that date, to secure the bond of the said Peter Feilen, of even date therewith, (which said bond has been assigned to James D. Dana), for the sum of $3,200.00, with interest thereon at ten per centum per annum since the date thereof, which principal sum, with interest thereon since June 5th, A. D. 1875, is now claimed to be due under the provisions of said bond and deed of trust, on which bond there is now claimed to be due the sum of about $3,562.72, and default having been made in the payment thereof;

And whereas, application has been made to me, the said trustee, by the legal holder of said bond for the sale of the premises in said deed of trust described, to wit: all the following described lands and premises, situate in the city of Chicago, county of Cook and State of Illinois, to wit:

Lot numbered twenty-seven (27), in block three (3), of subdivision of blocks two (2) and three (3), and the west thirty-three (33) feet of block one (1), in the State Bank of Illinois' subdivision of the northeast quarter of the northwest quarter of section four (4), township thirty-nine (39) north, range fourteen (14) east of the third principal meridian. The said lot has a frontage of twenty-five (25) feet on the south line of North avenue, and extends south of that uniform width one hundred and six (106) feet, more or less, to an alley.

Now, therefore, I, Lyman Baird, trustee as aforesaid, hereby give notice, that, in pursuance of such application, under the powers and for the purposes in said trust deed expressed, I will, on Monday, the 21st day of August, A. D. 1876, at ten (10) o'clock A. M., at the north door of the court house on Adams street, nearest LaSalle street, in said city of Chicago, sell at public auction, for cash, all the real estate and premises hereinbefore and in said deed of trust described, with all the rights, benefits and equity of redemption of the said grantors and their heirs, assigns, and legal representatives therein.

Chicago, July 15, 1876.

LYMAN BAIRD, Trustee.

UPTON, BOUTELL & WATERMAN, Attys. 43-48

G. GILBERT GIBONS,
Attorney, Room 49, Major Block.

STATE OF ILLINOIS, COOK COUNTY, ss. COUNty court of Cook county. August Term, 1876.

To all whom it may concern: Take notice that Carl Leiseberg has filed in said County court a petition praying for the appointment of himself, as conservator of Hannah Rinne, an insane person; the hearing of said petition will take place on the first day of the August term, A.D. 1876, being Monday, the twenty-first day of August, A.D. 1876, at the County court room, on Dearborn street, between Michigan and Illinois streets, in the city of Chicago, Cook county, Illinois, at which time and place you are hereby notified to attend and show cause, if any you have or can show, why the prayer of said petition should not be granted.

Chicago, July 12th, 1876.

HERMANN LIEB, Clerk.

G. G. GIBONS Atty. for Petitioner. 43-43p

LAW BOOKS.—EVERY FACULTY CAN BE found for the printing, and stereotyping Law Books, at the LEGAL NEWS OFFICE, 151 and 153 Fifth Avenue.

PADDOCK & IDE,
Attorneys, 155 LaSalle Street.

TRUSTEE'S SALE.—WHEREAS, ON JUNE 12TH, 1872, Edwin S. Stewart executed, acknowledged and delivered to the undersigned, trustee, a trust deed, conveying the following described premises:

Block twelve (12), and the west half of block thirteen (13), in Avondale, an addition to Chicago, being a subdivision of the west half of the northeast quarter of section twenty-four (24), in township thirty-eight (38) north, range thirteen (13), east of the third principal meridian, for the purpose of securing by the east half of said block twelve, the payment of a promissory note for seven hundred and ten dollars; by the west half of said block twelve (12), the payment of a promissory note for six hundred and ninety dollars; by the west half of said block thirteen, the payment of a note for six hundred and seventy-nine dollars; and by all of said property the payment of a note for six hundred dollars; all of said notes being dated June 12th, 1876, being payable at the First National Bank of Chicago, with interest at ten per cent. per annum, payable semi-annually to Alonzo J. Sawyer or order, signed by said Stewart and falling due, the first three above mentioned, three years from date, and the last on December 16th, 1872, which said trust deed was recorded in the office of the recorder of deeds of Cook county, Illinois, in book 139, page 429, and was given to secure the purchase money of said premises;

And whereas, it is provided in said deed, that in case of default in the payment of said notes and interest, or either or any part thereof, on the application of the legal holder of said note or notes, it shall be lawful for said trustee to sell said premises or any part thereof, in mass or separate parcels, as said trustee may prefer, at public auction at the north door of the court house, in the city of Chicago, in the State of Illinois, for the highest and best price the same will bring in cash, twenty days' notice of such sale having been first given in one of the newspapers published in said city, and out of the proceeds of such sale, after paying costs of advertising, sale, commissions and all other expenses of the trust, taxes and assessments, to pay the principal and interest due on said notes, rendering the overplus to the grantor;

And whereas, said notes were duly endorsed by said payee in blank, and default has been made in the payment of the principal of said first three notes, and of all interest thereon; since June 12th, 1875, on said note of $679; since Dec. 12th, 1874, on said note of $690; since June 12th, 1874, on said note of $710, excepting $8.95 paid on said interest;

And whereas, application has been made to the undersigned, as such trustee, to sell said lands according to the terms of said deed, by the legal holder of said notes, upon which there is now estimated to be due the sum of $2,762.85,

Now, therefore, I, the said trustee, pursuant to the powers given me in said deed, do hereby give notice that on Saturday, the fifth day of August, A. D. 1876, at 10 o'clock A. M., at the west north door of the court house on Adams street, in said city of Chicago, I shall sell at public auction, for the highest and best price the same will bring in cash, the said premises, to wit: The said east half of said block twelve, for the purpose of making the money due on said note of $710; the said west half of block twelve for the purpose of making the money due on said note of $690; and the said west half of block thirteen for the purpose of making the money due on said note of $679, and all costs and expenses of sale and of the trust, together with all the right and equity of said Stewart in said premises.

July 8th, 1876.

ALEXANDER McCOY, Trustee.

PADDOCK & IDE, Attys. 43-45

THIS IS TO CERTIFY THAT THE UNDERSIGNed have formed a limited partnership, pursuant to the provisions of the Revised Statutes of the State of Illinois, now in force. That the name of the firm under which such partnership is to be conducted, is "Port Washington Lime Company, M. S. Druecker & Co." for the purchase and sale of lime, cement, hair and stucco;

That the names of all the general and special partners are as follows: James W. Vail, who resides at Port Washington, Wisconsin, is the special partner, and has contributed the sum of five thousand ($5,000) dollars as capital to the common stock; Mathias S. Druecker and Joseph Druecker, who reside at Port Washington, Wisconsin, are the general partners. That the said partnership is to commence on the tenth day of July, A. D. 1876, and is to terminate on the tenth day of July, A.D. 1878, unless said special partner should elect to terminate it at an earlier date.

Dated this seventh day of July, A.D. 1876.

JAMES W. VAIL, [SEAL.]
M. S. DRUECKER, [SEAL.]
JOE DRUECKER, [SEAL.]

State of Wisconsin, County of Ozaukee, ss.—I, Adoph Heidkamp, County Judge in and for the County of Ozaukee, State aforesaid, do hereby certify that James W. Vail, Mathias S. Druecker and Joseph Druecker, personally known to me to be the same persons whose names are subscribed to the foregoing instrument, appeared before me this day in person, and acknowledged that they signed, sealed and delivered the said instrument as their free and voluntary act, for the uses and purposes therein set forth.

Given under my hand and seal, this seventh day of July, A. D. 1876.

A. HEIDKAMP,
[SEAL.] County Judge of Ozaukee County, Wis.

State of Wisconsin, County of Ozaukee, ss.—Mathias S. Druecker and Joseph Druecker, being first duly sworn, on oath, each for himself, says that he is one of the general partners named in the above certificate, and that the sum of five thousand ($5,000) dollars, specified in said certificate to have been contributed by the special partner, James W. Vail, to the common stock, has been actually and in good faith paid in cash.

M. S. DRUECKER.
JOE DRUECKER.

Subscribed and sworn to before me, this seventh day of July, A. D. 1876.

A. HEIDKAMP,
[SEAL.] County Judge of Ozaukee County, Wis.

State of Illinois, County of Cook, ss.—I, Hermann Lieb, clerk of the County court of Cook county, in the State aforesaid, do hereby certify that the foregoing is a true and correct copy of the original instrument on file in my office, all of which appears from the records and files of my office.

In witness whereof, I have hereunto set my hand and affixed the seal of said County court, at my office, in the city of Chicago, in said county, this 10th day of July, A. D. 1876.

HERMANN LIEB,
[SEAL.] [43-48] Clerk of the County Court.

MASTER'S SALE.—STATE OF ILLINOIS, COUNty of Cook, ss. Superior court of Cook county.—In chancery. George H. Laflin, complainant, vs. Samuel J. Walker, Fanny E. Cameron, Russell M. Larned, Lycurgus Laflin and Matthew Laflin, defendants.

[Foreclosure of Trust Deed.]

Public notice is hereby given, that in pursuance of a decree entered in the above cause, on the twenty-ninth (29th) day of June, A. D. 1876, I, Benjamin D. Magruder, master in chancery of said court, will, on Monday, the seventh (7th) day of August, A. D. 1876, at the hour of ten (10) o'clock in the forenoon of that day, at the north door next to LaSalle street, on Adams street, of the building now used for a court house, situated on the southeast corner of LaSalle and Adams streets, in the city of Chicago, in said Cook county, sell at public auction, to the highest bidder for cash, all the premises situate in the county of Cook and State of Illinois, and described as follows, to wit:

Being lots numbered seventeen (17) and eighteen (18), in block number five (5), of Matthew Laflin, George H. Laflin and Allen Loomis' subdivision of Canal Trustees' subdivision of the west half, and west half of the northeast quarter of section seventeen (17), township thirty-nine (39) north, of range fourteen (14), east of the third principal meridian, according to a recorded plat No. 62,082, recorded January 31, 1863, in book 161 of maps, on page 75.

Dated Chicago, Ill., July 15th, 1876.

BENJAMIN D. MAGRUDER,
Master in Chancery of the Superior court of Cook county.
J. H. THOMPSON, Complts. Solr. 43-46

CHICAGO LEGAL NEWS.

CHICAGO, JULY 22, 1876.

The Courts.

We have received from JOSIAH H. BISSELL, official reporter, the following opinion, which is to appear in his forthcoming volume of reports:

U. S. CIRCUIT COURT, N. D. OF ILLINOIS.

SHERIDAN SHOOK et al. *v.* ARTHUR MCKEE RANKIN et al.

In Equity.

1. COPYRIGHT—TRANSLATIONS OF PLAYS.—Where the translator of a play, by consent of the author, has obtained a copyright upon it, the owner of such copyright can maintain a bill enjoining any other person from using or representing such translation, or any part of it.
2. PRACTICE.—Affidavits, evidently intended to be used in a case, but not entitled in it, will be allowed to be read on motion for injunction.

Complainants' bill alleged that prior to February 1, 1875, a dramatic composition or play, entitled "Les Deux Orphelines," was designed and composed in the French language by Adolph D'Ennery and Eugene Cormon, residents and citizens of France. N. Hart Jackson, a resident of the United States, became the owner by purchase and assignment of the original manuscript, for representation in the United States.

Before February 1, 1875, Jackson, with the consent of D'Ennery and Cormon, composed and arranged a translation from the French play into the English language, and entitled the translation "The Two Orphans," being a literal translation of "Les Deux Orphelines," and adapted his translation for performance and representation to English-speaking audiences.

February 1, 1875, by and with the consent of D'Ennery and Cormon, and before publication, Jackson obtained a copyright on his translation, as author, under the copyright laws of the United States.

Complainants afterwards became the sole owners and proprietors of the original manuscript in French, the translation by Jackson and his copyright, by purchase and assignment from Jackson.

Complainants alleged that the original "Les Deux Orphelines" had never been translated or published with the knowledge or consent of its authors, except the translation by Jackson; that defendants had announced and had on divers nights publicly performed, the "Two Orphans" at the Adelphi Theater in Chicago, without the consent and license of complainants; that defendant Rankin and his associates had previously, and while in the complainants' employ, performed and acted the "Two Orphans," and had thereby familiarized themselves with it, and were acting the same translation at the Adelphi.

Prayer for an injunction and accounting.

The bill was supported by several affidavits, among which were complainants' and Jackson's. The affidavits were sworn to in New York, but were not entitled of the suit or court until filed.

The affidavit of L. F. Post, one of complainants' counsel, was filed, showing these affidavits were made and sworn to for the purposes of this suit and for no other purpose.

The defendants denied that Jackson acquired any rights by his translation or copyright; that "Les Deux Orphelines" was translated by consent of the authors by John Oxenford, of London, prior to Jackson's translation; that defendants had obtained from London, Oxenford's translation, and intended thereafter to perform the latter, and not Jackson's translation.

Motion for an injunction upon bill and affidavits to restrain the defendants from publicly performing the "Two Orphans."

Upon hearing, defendants objected to the reading of complainants' and Jackson's affidavits, because not properly entitled when sworn to.

S. M. MILLARD and L. F. POST, for complainants, in support of the motion cited on the point that an author might be a translator:

21 Morgan's Law of Literature, 315-321, as to what constitutes infringement; Boucicault v. Wood, 2 Bissell, 34. What is *prima facie* evidence of copyright? Roberts *v.* Myers, 23 Law Reporter, 396.

CLARKSON & VAN SCHAACK and NORMAN J. EMMONS, for defendants.

DRUMMOND, J.—It seems to me that the complainants are entitled to an injunction to prevent the defendants from performing the work which has been translated from the French of D'Ennery and Cormon by N. Hart Jackson into English, and adapted by him for representation on the stage in this country.

The court can go no farther in deciding a motion of this kind than the proofs of the case clearly warrant. What are the facts established here beyond controversy? They are these: D'Ennery and Cormon were the authors of a drama in the French language called "Les Deux Orphelines;" Jackson translated it into English, and adapted it to representation on the stage. This was with the consent of the authors. After this was done, he applied under the law for a copyright, and the question is, whether there was any valid objection to his obtaining a copyright for the play, thus translated into English.

I do not see that there was. He was the translator of the play. He adapted it to representation on the stage, and was, in the sense of the law, the author of that for which he obtained a copyright. No one could complain of this, except the authors of the play in French, and it affirmatively appears that they assented to this action on the part of Mr Jackson. Then I do not see why he was not protected under the law for his translation and adaptation of the work to the stage, and of which he was in one sense the author.

That being so, has the defendant infringed his rights by performing this unpublished drama? To decide that, it is only necessary to determine the effect to be given to sundry affidavits which have been introduced in the case—those of Mr. Shook, Mr. Palmer and Mr. Jackson. I think it is proper for the court to receive these affidavits for the purpose for which they were filed. It is well known that the courts are much more liberal upon this subject than they were in former times. They do not reject affidavits simply because there may be some clerical error or omission, provided it appears that they were intended for the case which the court is called upon to investigate.

It affirmatively appears, I think, that these affidavits were made for the purpose of being used in this case; and conceding that they did not at the time contain the proper title of the cause, still they were made and forwarded to counsel, who may be presumed to be authorized by the parties to give the proper character to them by stating the name of the cause in which they were to be used. It seems to me that it would be adopting a very rigid rule, and one hardly in accordance with the liberal practice of the present day, to declare that the affidavits should be rejected because at the time when the affidavits were made and signed by the parties, the name of the cause was not stated, provided they knew that they were to be used in the cause, although they did not know the technical description of the title of the same.

Then, these affidavits being received, as I think they should be, there can be no doubt that these defendants—the principal defendants who have performed this play—have been using the translation of Mr. Jackson, as adapted by him for representation on the stage.

They acquired their familiarity with it in consequence of the direct action of the translator or his assignees, and it would be hardly fair under the circumstances of the case that they should be permitted to go on and use it contrary to the wishes of the owners. It has been said that they do not propose to use it any longer; but in view of the facts the court cannot assume that they will not do so, or refuse an injunction on that ground. It is not controverted that these complainants are Jackson's assignees, and are entitled to all his rights. I do not think that, because Mr. Jackson, or, possibly, the complainants, may have been mistaken as to their legal rights, or as to the particular character annexed to their rights of property subsisting in this drama, the court should be prevented from acting in this case. The court will not go into a collateral issue upon this question of injunction. The only point is whether complainants have rights which have been violated by the defendants, and whether they are entitled to an injunction upon the facts as they are presented in the case.

I have no doubt that they are, and therefore an injunction will issue, restraining the defendants from performing the play, which has been translated from the French of D'Ennery and Cormon, by N. Hart Jackson, and adapted by him for representation on the stage, or any part thereof.

As to the romance of the "Two Orphans:" It purports to be a story in narrative form, founded, as I suppose, upon the play of the "Two Orphans;" but, so far as I have been able to examine it, I do not see, even conceding that its publication was made with the consent of the complainants, that it deprives them of the right to the play of the "Two Orphans," as translated by Mr. Jackson.

It would take much time for me to go through this story in detail, and compare it with the drama, which I have not had an opportunity of doing. But so far as I have looked at it, I think it does not deprive the complainants of a right to an injunction on that account.

As to the translations of the French play, I know there may be certain phrases which may be identical in them, as translated by Jackson and Oxenford. There are or may be the same translations of some French words; but, of course, the fact of there being identity of a few phrases does not make them one play as translated.

It always must be a question to be decided by comparison whether or not there is any essential part of the play taken as translated by Mr. Jackson. What I mean is, that they have no right to take any part of this, the work of Mr. Jackson, and use it.

So far as I can see, the translations are made by two distinct persons, and independent of each other. I do not, therefore, touch the Oxenford play in this decision at all.

The order will be that the defendants shall not use the whole or any part of Mr. Jackson's translation—the drama which he has translated and adapted for representation on the stage in this country.

As at present advised, I shall not enjoin the defendants from using Oxenford's translation.

[The question of the right to use the Oxenford translation came up subsequently before Judge Drummond on a motion to attach McKee Rankin for contempt, and he decided that the defendants had the right to use that translation, but that they must be careful not to interpolate any phrases of Jackson's translation.

[The consent of an author to publication abroad places him in the position of a foreign author, and is an abandonment of his rights under our statute. Boucicault *v.* Wood, 2d Vol. of this Series, 39. The representation of a play upon the stage is not at common law a publication, nor is it a dedication to the public. Crowe *v.* Aiken, Id., 208. The author's rights at common law have not been taken away or limited by any existing act of Congress. *Idem.*] [*Reporter.*

UNITED STATES DISTRICT COURT, D. OF CALIFORNIA.

(Before Hon. OGDEN HOFFMAN, District Judge.)

In Re FUNKENSTEIN.

BANKRUPTCY—FALSE STATEMENT IN PETITION—FINAL JUDGMENT.

1. FALSE STATEMENT IN PETITION.—A petition in involuntary bankruptcy, alleged, among other things, that it was filed by one-fourth of the creditors representing one-third of the provable debts, as required by the act. The bankrupt made default, and the court entered an order that the facts set forth were true, and adjudicated him bankrupt. On a motion to set aside the adjudication, on the ground that the requisite number of creditors had not joined in the petition, *held*, that it was not within the power of the court to do so.
2. FINAL JUDGMENT.—That "the judgment shall be final," does not mean merely that no appeal shall lie from it, but that the matter so adjudged shall not thereafter be examined.
3. FRAUD.—If the ground on which the motion was made were fraud, bad faith, or collusion, the rule would be different.

JOSEPH NAPTHALY for petitioners.

DAVID FREIDENRICH, for opposing creditors.

Opinion by HOFFMAN, J.

The petition against the bankrupt in this case, was filed on the 9th of April, 1875. It contained the usual averment that the petitioners constituted one-fourth in number of the creditors of the bankrupt, and that the aggregate of their debts, provable under the act, amounted to at least one third of the debts so provable. On the return day of the order to show cause, the bankrupt made default and he was adjudged bankrupt. The order was in the form prescribed by the Supreme Court under the original act. It was not modified to accommodate it to the provisions of the amended act of June 22, 1874.

With respect to the allegations of the petition, the court adjudged "that the facts set forth in the petition were true."

On the 29th April, the bankrupt filed his duly verified schedules, setting forth his debts and liabilities. On the 21st day of May, 1875, the bankrupt filed his petition for discharge. This was opposed by several of his creditors, who also moved that the adjudication be set aside and the proceedings vacated and dismissed, on the ground that the requisite number of creditors had not joined in the petition, and the debts due them were not of the amount required by the act. The matter was referred to the register, whose report is admitted to be true.

It appears that the petition was signed by seven creditors, representing in the aggregate $4 292 of indebtedness. By the bankrupt's own schedules it appeared that the number of his creditors whose claims are undisputed, are thirty-eight, and the aggregate of his indebtedness due them is $115,062.76. These schedules were offered in evidence before the register, and their accuracy admitted. It thus appears that the petitioning creditors constitute less than a fifth in number of all the creditors, and the debts due them amount to less than a twentieth of the total indebtedness of the bankrupt.

Had these facts appeared on the return day of the rule to show cause, the petition would have been dismissed, as of course.

The question presented is, can the court now take notice of them, and if so, what action should be taken? The statute provides that if, on the return day, the debtor "shall admit in writing that the requisite number and amount of creditors have petitioned, the court, if satisfied that the admission was made in good faith, shall so adjudge, which judgment shall be final, and the matter proceed without further steps on that subject." And if it shall appear that such number and amount have not so petitioned, the court shall grant a reasonable time, not exceeding ten days, within which other creditors may join in such "petition." If, at the expiration of that time, the requirements of the statute are complied with, the matter may proceed. If not, it is to be dismissed.

It will be observed that these provisions contemplate two cases. The first, where the debtor admits in writing the allegations of the petition with regard to the number and amount of creditors, and the second, where those allegations are denied. No provision is made for cases where the debtor neither admits nor denies, but merely makes default. In the first case, the court is required, if satisfied that the admission was made in good faith, to so adjudge, which judgment is final.

In the succeeding section, the provisions seem to embrace cases of default as well as those where the bankrupt admits the facts. It enacts in substance that if, on the return day of the order to show cause, the court shall be satisfied that the requirement of the act as to the number and amount of creditors has been complied with, or if within the prescribed time creditors sufficient to make up the required number and amount shall sign the petition, the court shall so adjudge, "which judgment shall be final."

It will be noticed that the form of the adjudication in the case at bar very imperfectly complies with these requirements. The act seems to contemplate a distinct and explicit judicial finding of the fact that the requisite number and amount of creditors have petitioned. And the judgment of the court on that point is made final. The form used merely finds that the allegations of the petition are true. This form, as before stated, is prescribed by the supreme court. It has not been modified since the passage of the amended act. The propriety of inserting the more explicit judgment which the act seems to contemplate, has been overlooked.

But I do not consider that this irregu-

larity is fatal to the proceeding. The judgment of the court that the allegations of the petition are true, embraces all the allegations of the petition, as well as those relating to the number and amount of the petitioning creditors as the other necessary averments. The court has in fact passed upon the truth of those allegations, as much as on that of the allegation of the residence of the plaintiff, and the date and existence of the act of bankruptcy, which are also facts necessary either to give the court jurisdiction, or to authorize the proceeding. The mere circumstance that its judgment has not been so explicit on one point as the act would seem to contemplate, ought not to defeat the proceeding. The inconvenience and hardship of so holding would be very great, for the same form has been followed in all cases of involuntary bankruptcy in this district, and it is presumed in many others. The clerks have no doubt very generally contented themselves with following the forms prescribed by the Supreme court.

The briefs of counsel in the case at bar discuss the question whether the averment with regard to the number and amount of creditors is a jurisdictional averment. On this point the opinions of the district judges are conflicting. The learned judge of the District court for the Eastern district of Michigan holds that to give the court jurisdiction, the petition must contain a clear, consistent and explicit allegation as to the proportionate number of creditors petitioning, and the amount of debts represented by them. For the want of such an allegation he vacated the order to show cause, and refused to allow an amendment. *In re* Rosenfelds, 11 B. R. 86. In *Ex parte* Jewett, 11 B. R. 443, the learned judge for the district of Massachusetts held that the insertion of the name of one of the creditors instead of that of the debtor, by a clerical mistake, did not vitiate a proceeding under the act to effect a composition, and that notwithstanding the error there was "a case in bankruptcy pending against the debtor." In this case there had been no adjudication. The views of Lowell, J., were adopted by the learned judge of the southern district of New York in the recent case of *In re* Duncan, Sherman & Co., where the point raised in the case at bar was distinctly adjudged. In the two previous cases the point upon which the judges differed was, whether it was necessary, in order to give jurisdiction, that the petition should contain a clear, consistent allegation that the requisite number and amount of creditors had joined in the petition. In the case at bar, as in that of Duncan, Sherman & Co., the petition contains the requisite allegation, and the question really is, can the enquiry as to whether that allegation be true be re-opened after the court has, on the return day of the rule to show cause, adjudged that it is. Blatchford, J., held that the provision of the statute which declares the judgment of the court on the point shall be final, forbids the reopening of the question at any subsequent stage of the proceedings, unless fraud be alleged and proved. His language is: "Unless this be so, there is no necessary limit to the number of times the court may be required to re-examine the question thus declared to be finally adjudged. I speak now of an allegation merely that the court has erred, *and not of an allegation of fraud or bad faith.*"

In these views I concur. I think the finality, attributed by the act to the judgment of the court, does not mean merely that no appeal shall lie from its judgment, but that the matters so adjudged shall not be thereafter re-examinable, even by itself. But I do not consider that Congress meant to deprive the court of its inherent right, where fraud and imposition have been practiced upon it, to apply the remedy. The ground upon which the present motion is based, is merely the insufficiency in number and amount of the petitioning creditors. In the brief of counsel fraud and bad faith are charged. There is certainly much color for this accusation. The gross disparity between the aggregate of provable debts due the petitioning creditors, and the total amount of the bankrupt's indebtedness, vehemently suggests the suspicion that both parties must have known that the allegation that they represented one-third of his entire indebtedness, was untrue. The creditors could have been at little pains to ascertain the facts if they supposed $4,292 to be one-third of an indebtedness which, twenty days subsequently to the filing of the petition, the bankrupt stated under oath to be $115,062.76.

For some reason, the opposing creditors failed to prove their debts before the election of an assignee. The assignee was therefore chosen by the petitioning creditors. He reports that no assets whatever have come into his possession. The counsel for the petitioning creditors intimate in their brief that the object of the opposing creditors in procuring the adjudication to be set aside, is to obtain the benefit of certain judgment liens on the real estate of the bankrupt.

But if so, why has the assignee failed to find the real estate? And why have they failed to point out to the assignee of their own selection assets which it is his duty to collect and distribute amongst all the creditors? The bankrupt about two yeas ago was adjudged bankrupt, but denied his discharge. The debts set forth in his schedule seem to have been contracted since the former adjudication. He claims that the debts from which he then sought to be discharged are barred by the statute of limitations.

Under all the circumstances, I think it proper that the opposing creditors should have an opportunity to allege, and prove if they can, fraud, bad faith or collusion in obtaining the adjudication. I therefore deny the motion as it is now made, but leave is given to renew it on the ground of fraud, bad faith, or collusion. —*The Central Law Journal.*

THROUGH the kindness of the law firm of POPE & COMPTON, we have received the following opinion:

SUPREME COURT OF ILLINOIS.

OPINION FILED JUNE 30, 1876.

THOMAS SAMUEL *v.* FRANCIS AGNEW.

Appeal from Superior Court of Cook Co.

SALE UNDER ATTACHMENT, WHAT TITLE PASSES—REPLEVIN, IN WHAT COURT MAY BE BROUGHT.

1. ATTACHMENT SALE—WHAT INTEREST PASSES.—That the proceedings in attachment are against the interest of the defendant in attachment, and those claiming under him, in the thing attached; and that a person whose goods have been seized improperly, and who is no party to the suit, is not concluded by the judgment.
2. REPLEVIN THE PROPER REMEDY.—Replevin is the proper remedy against a sheriff who has levied a writ of attachment against one person upon the property of another, at the instance of the party whose property is thus wrongfully levied upon.
3. IN WHAT COURT MAY BE BROUGHT.—That it was competent to commence the suit in replevin in the Circuit court, when the attachment suit was in the Superior court.—[ED. LEGAL NEWS.

STATEMENT.—This proceeding was instituted by appellant against appellee, as sheriff of Cook county, for the purpose of having him attached and punished for contempt in not selling certain goods and chattels in his hands, levied upon by an attachment and special execution.

A rule to show cause was entered and served upon appellee, who, in return thereto, showed that the goods and chattels, so levied upon, had not been sold, but had been delivered up to the coroner of Cook county on a writ of replevin issued out of the Circuit court of Cook county, at the suit of one, Edward Tyler, who was not a defendant in the attachment suit, after the executions had been issued and levied on said goods and chattels by appellee; and that he had been guilty of no negligence in selling before the writ in the replevin suit was served upon him. The court thereupon ordered that appellee be discharged, to reverse which order this appeal is prosecuted.

Opinion by SCHOLFIELD, J.

The question first arising on this record is, does a judgment *in rem* in attachment, where goods belonging to a person other than the defendant in attachment, and upon which there is no express prior lien in favor of the attaching creditor, have been seized by the sheriff, give the sheriff the right to hold the goods against the owner, or, in other words, convert what was before a tortious possession into a lawful one.

Counsel for appellant insist, this court in Bliss et al. *v.* Heasty et al., 61st Ill., 338, recognizes the doctrine that the judgment in such cases is conclusive when the goods are purchased by third parties, *bona fide* at the sale, although it would not be so as between the parties to the suit. A reference to the question before the court in that case will show that the court, in what was said, had not the slightest reference to a case where, under an attachment against one person, the goods of another are seized. There was no question, then, but the property seized was that of the defendant in the attachment, and he had proper notice by publication. The question was whether the judgment thereupon rendered was so conclusive between the parties as to bar an action by the defendant in the attachment for the malicious suing out of the attachment; and, with reference to that question, this language was used: "Appellants urged that the court below erred in rendering the judgment, because they claim the recovery in the attachment suit is conclusive between the parties, and cannot be questioned in a collateral proceeding. That it is so far conclusive, that strangers to the proceeding will be protected in their rights by purchase or otherwise, inasmuch as the court acquires jurisdiction of the subject matter, we cannot doubt." But there is nothing from which it can be inferred that the court intended to say that the issue of an attachment and the publication of a notice, in a suit against it, would give the court jurisdiction to render a judgment against the goods of B., merely because they had been wrongfully seized as the goods of it by the sheriff.

On the contrary, however, in Germania *v.* Steam Tug Indiana, 11th Ill., 535, where it was contended by counsel that a sale of a boat under proceedings in attachment, operated like sales under proceedings in admiralty courts, and that the purchaser acquired an indefeasible title, divested of all liens of whatsoever nature; it was held, the ordinary proceeding by attachment, although in some respects a proceeding *in rem*, has no such conclusive effect as a decree in admiralty, and that a sale under it does not divest any liens of a superior degree, nor any antecedent liens of the same degree. And this is quoted with approval in Propeller Hilton *v.* Miller et al., 62 Ill., 222.

It is said, in Drake, on Attachments, § 220: "It is a well settled principle that an attaching creditor can acquire through his attachment no higher or better right to the property on assets attached, than the defendant had *when the attachment took place*, unless he can show some fraud or collusion by which his rights are impaired." And we understand the more reasonable doctrine to be, that proceedings in attachment are against the interest of the defendant in attachment, and those claiming under him in the thing attached; and that a person whose goods have been seized improperly, and who is no party to the suit, is not concluded by the judgment. Megee *v.* Brine, 3rd Wright, 50-63; Breeding *v.* Siegworth, 5th Casey, 396; Woodruff *v.* Taylor, 20 Vt., 65; Barber *v.* The Bank, 9th Conn., 407.

The question then occurs, is replevin a proper remedy against a sheriff who has levied a writ of attachment against one person upon the property of another, at the instance of the party whose property is thus wrongfully levied upon? It seems to be well settled that this remedy would be appropriate in such cases, aside from anything to be found in our statute. Allen on Sheriffs, 272 *et seq;* 3rd Robinson's Practice 477, 8; Clark *v.* Skinner, 20th Johns, 465; Thompson *v.* Button, 14 Id., 84; Gamer *v.* Campbell, 15 Id., 401; Judd *v.* Fox, 9th Cowen, 259; Chinn *v.* Russell, 2d Blackford, 172; Daggett *v.* Robins, Ibid, 415.

The first section of our statute, entitled, "Replevin," Gross Stat. (1869) p. 569, extends the action generally to all instances where goods or chattels shall have been wrongfully distrained or *otherwise wrongfully taken*, or shall be *wrongfully detained* in favor of the owner or person entitled to their possession.

The second section is as follows:

No action of replevin shall lie at the suit of *the defendant* in any execution or attachment, to recover goods or chattels seized by virtue thereof, *unless* such goods and chattels are *exempted by law* from such execution or attachment, nor shall any action of replevin lie for such goods and chattels, at the suit of any other person *unless he shall at the time have a right to reduce into his possession, the goods taken.*" Thus clearly implying that when the goods of a person, other than the defendant in the execution or attachment are seized, and he has the right to reduce them to possession, he may bring replevin. Heagle *v.* Wheeland, 64th Ill., 423.

The remaining question is, whether it was competent to commence the suit in replevin, in the Circuit Court, or could it only have been legally commenced in the Superior Court when the attachment suit was pending? Taylor et al. *v.* Campl, 20th Howard, 583, and Freeman *v.* Howe et al,, 24th Id., 450, and other decisions cited from the Supreme Court of the United States, sustain the doctrine that where goods are in the custody of the officers of a United States Court under judicial process from such court, they cannot be taken by process from State courts, and so *vice versa*, and this to the end that there shall be no conflict between the respective jurisdiction of the State and Federal courts, and if that question were involved here they would be conclusive. But it is not, and upon the other questions discussed in them, they are binding only to the extent we are convinced of the justice and correctness of their conclusions. Nor is there any question presented of conflict as to the control of the property between courts of dissimilar organization and powers. Both courts emanate from the same sovereignty, and they have co-ordinate jurisdiction in civil cases in Cook county. In Jones *v.* Albee, 60th Ills., 34, we held that it was the design of the constitution that judges of the Circuit Court and the judges of the Superior Court of Cook county should exercise the same powers, and be placed upon the same footing.

There is, therefore, no apparent reason why, if the action of replevin might be brought in the Circuit court of Cook county, it might not, with equal propriety, be brought in the Superior court of that county, which is practically but a branch of the same court. Jones *v.* Albee, *supra.*

Entertaining these views, it follows, in our opinion, the court properly held that appellee was guilty of no contempt of court in surrendering the property in his custody to the coroner, on the writ of replevin.

When, if in any case an officer who submits in good faith to one, rather than the other, of two jurisdictions upon the face of record, apparently equally obligatory upon him, can be adjudged guilty of contempt, because it shall subsequently appear that to which he submitted was not legally paramount, we shall leave for the present an open question.

The judgment is affirmed.

POPE & COMPTON, for appellant.

RICCABY, BALDWIN & HANNA, for appellee.

WE are under obligations to the law firm of CARTER, BECKER & DALE, for the following opinion:

SUPREME COURT OF ILLINOIS.

OPINION FILED JUNE 30, 1876.

GEORGE E. EDBROOKE *v.* WILLIAM S. COOPER et al.

Appeal from Superior Court of Cook County.

PLEADING—EFFECT OF FILING PLEA WHILE ISSUE ON DEMURRER WAS STILL PENDING—STRIKING PLEA FROM THE FILES.

Opinion by SCHOLFIELD, J.

On the 6th day of April, 1874, appellant filed his demurrer to the plaintiff's declaration, and three days afterward, that is to say, on the 9th, he also filed his plea of non-assumpsit thereto. The record recites, that on the next day, the 10: "This day came the plaintiffs to this suit, by Carter, Becker and Dale, their attorneys, and the defendant by S. M. Davis, his attorney, comes also, and this cause, coming on now to be heard upon the defendant's demurrer to the plaintiff's declaration filed in said cause, after argument of counsel, and due deliberation by the court, * * * the court being fully advised in the premises, finds that said declaration is sufficient in law, and orders that said demurrer be, and the same is hereby overruled.

On the 11th of the same month, the record shows the plea of non-assumpsit was, on motion of plaintiff's attorneys, stricken from the files "for want of affidavit of merits, in pursuance of the statute in such case made and provided, and judgment was then entered" against the defendant for want of a plea. Subsequently the record was by order of the court, amended by striking out the words, "for want of affidavit of merits, in pursuance of the statute in such case made and provided."

The errors assigned question the regularity of the action of the court in sus-

taining the demurrer, and in subsequently striking the plea from the files.

There is no pretense that the declaration was, in fact, obnoxious to demurrer, but it is insisted, the filing of the plea, subsequently to the filing of the demurrer, was an abandonment of the demurrer, and withdrew the question presented by it from the consideration of the court.

It has been held in Nye *v.* Wright, 2d Scam., 222, and Grier *v.* Gibson, 36 Ill., 521, that a defendant, by filing a plea to a declaration, waives an antecedent demurrer; but this can hardly apply to the plaintiff unless he joins issue on the plea.

It is an old and familiar rule of pleading, that a party is not allowed to both plead and demur to the same matter. Stephens on Pleading, (9th Am. Ed.,) 278.

The record distinctly shows that the defendant did not abandon his demurrer, but that he appeared when it was called up by counsel; and it was overruled after argument of counsel. He is, therefore, estopped by the record from claiming his demurrer was abandoned.

The plea having been filed subsequently to the filing of the demurrer, and while the issue presented by it was still pending, the court was authorized to treat it as a nullity, and strike it from the files. Taylor *v.* Rhea Minon, 414.

Even if the plea had not been filed until after the demurrer was disposed of, being filed without the leave of the court, it might, in the discretion of the court, have been stricken from the files. Conradi et al. *v.* Evans et al., 2nd Scam., 186.

The court certainly was not authorized to strike the plea from the files, merely because it was not sworn to, since no affidavit was filed with the declaration; but it was properly stricken from the files because it was improperly filed while the issue on the demurrer was pending.

No objection is pointed out to the amendment of the record, and we are of the opinion there is none.

The judgment is affirmed.

We are indebted to the law firm of PADDOCK & IDE, for the following opinion:

SUPREME COURT OF ILLINOIS.

OPINION FILED JUNE 30, 1876.

No. 204.—B. F. STANLEY *v.* E. B. VALENTINE et al.

Appeal from Cook.

ESCROW—EFFECT OF PUTTING A RELEASE OF A MORTGAGE ON RECORD BY MISTAKE.

Where a release of a mortgage was made by the mortgagee, and left in escrow with a third person, and before the performance of the conditions under which the release was deposited, and without any delivery to the mortgagor, the release, by mistake or accident, was filed for record, and was recorded, *held*, that judgment creditors acquire no rights or advantage by such recording, and that an injunction will lie to restrain such creditors from selling under the levy of an execution, anything more than the equity of redemption of the mortgagor.

The recording of the release, under such circumstances, constitutes a cloud upon the title of the mortgagee, which a court of equity will remove.

The mortgagee, by making such a release and placing it in escrow with an agent, by whom it was placed on record by mistake, is not estopped to deny that it is his deed; especially so, where judgment creditors only of the mortgagor, seek to take advantage of the record of the release, or they advance no money, give no credit, or do any act by which they change their attitude to the case.

WALKER, J.

On the 4th day of November, 1872, appellant received from Elizabeth Valentine a mortgage on certain real estate in North Evanston, in Cook county, to secure the purchase money for the property, and for which she had given her six notes for different amounts, and payable on various dates, and amounting in the aggregate to $8,500, and bearing ten per cent. interest per annum. The mortgage was duly recorded on the 26th of February, 1873. About the 10th of March, 1873, she being desirous of raising money by loan and to secure the same by deed of trust on the property, for the purpose of paying one of the notes she had given for the purchase money of $3,850, applied to Benj. E. Gallup for a loan of $4,000, who consented to make it if her title should prove satisfactory, except a prior mortgage, and that given to appellant, and that appellant on being paid the $3,850, and being thereby enabled to pay the prior mortgage, would release his mortgage and take from her a new mortgage subject to a mortgage to be given to Gallup to secure the balance of his purchase money on the lots.

At the time this arrangement was agreed upon, appellant was on the eve of starting to New York, to be absent some time, and to enable the arrangement with Gallup to be carried out, he executed a release of his mortgage, and delivered it to Gallup to be held in escrow until the transaction should be fully consummated, and then delivered to Mrs. Valentine. Appellant having gone East, by some accident or mistake the release was taken from Gallup's office to the recorder's office, and there filed for record, which appellee learned for the first time on his return from New York. No loan was ever made by Gallup to Mrs. Valentine.

On the 17th day of February, 1873, Thomas Cogswell and others obtained a judgment in the Superior court of Cook county against Mrs. Valentine for $500.18 and costs. And the same parties recovered another judgment against her, in the same court, on the 30th day of April, 1873, for $499 67 and costs.

The judgment creditors sued out executions and placed them in the hands of the sheriff, who levied on these lots and advertised them for sale on the 31st May, 1873. Appellant thereupon filed this bill to have the release cancelled and the judgment creditors enjoined from selling the lots, unless it be subject to his mortgage. A temporary injunction was granted, but, on a hearing, the court below dissolved it, and dismissed the bill, and complainant appeals.

There is no pretense that Gallup had any the slightest authority to deliver the deed of release until the condition was performed upon which it was placed in his hands. Nor is it claimed that those conditions were ever performed, or that the release was rightfully filed with the recorder, and spread upon the records. That was an accident or mistake, without either appellant or Gallup intending that it should be done. Nor was there any delivery to Mrs. Valentine. It never went into her possession or came under her control, nor was it delivered to the recorder or any other person for her. As to her, then, the release in no wise changed or affected her rights, and was, as far as the apparent release of her mortgage was concerned, absolutely void, and was such a cloud on appellant's title as, in equity, required it to be cancelled, and she restrained from asserting any rights under it.

It is true that there is no specific prayer that it be cancelled as to her, but the bill contains the general prayer for relief, and no rule of chancery practice is more familiar than that other than the specific relief prayed will be granted under the general prayer, when consistent with the facts stated in the bill. Now such relief in this case is perfectly consistent with, and is not repugnant to or variant from, the facts alleged and proved. And we presume no one would say the prayer would be defective had it been specifically made in this bill. It then follows that it was error in the court below not to have retained the bill and granted at least that relief.

But it is urged that by filing the release for record, the judgment creditors acquired a superior lien to that of appellant. That the recording of the release, although by accident or mistake, let in their subsisting judgments as a lien that postpones appellant's mortgage to their debts. On the other hand, it is claimed that as the release was never delivered and was absolutely void, that creditors or subsequent purchasers, although *bona fide*, acquired no rights thereby. The release never having been delivered, it became no more operative than had it been a forgery. That the title of appellant could not pass from him until the deed was delivered. That the judgment creditors had not been misled by the recording of the release to advance money, to give credit, or do any act on the faith that the release was valid and operative; that their position to the case is in no way changed, nor have they done any act which gives them a superior or any equity whatever to claim an advantage over appellant's mortgage.

It is manifest to all that a deed cannot be operative until it is delivered. Perkins, who wrote his treatise on conveyancing more than three centuries since, says (sec. 138, p. 28), "and if I make a deed and deliver it to a stranger, as an escrow, to keep until such a day, etc., and upon condition that if, before that day, he to whom the escrow is made shall pay me ten pounds, give me a horse, enfeoff me of a manor, or perform any other condition, then the stranger shall deliver the escrow to him as my deed; in this case if he deliver the same to him as my deed before the conditions or condition fulfilled, it is not my deed *simpliciter*. But if the condition be fulfilled and the escrow delivered by him (after the conditions performed) as my deed; then it is my deed and shall bind me; and then begins to be my deed and shall not have relation to the first delivery." This, perhaps, is as early an announcement of the rule as may be found in the books, and is the same as definitions given by courts and text writers since that time. We are aware of no change in the rule since he wrote. Pierce *v.* Pitts, Ft. W. & C. R. R., 34 Ill., 13.

Then if a delivery before condition performed confers no title, it is difficult to perceive how others can acquire title from the grantee named in the escrow. Washburn on Real Property, vol. 3, p. 372, says: "If a deed is delivered before the previous condition is performed, it will not be the deed of the grantor, or have any effect as such;" and he refers to numerous authorities which support the text. The case of the grantee getting possession of the escrow by fraud before the condition performed, and then selling the land to an innocent purchaser, was fully discussed in Shirley *v.* Ayers, 14 Ohio, 308. The court say: "Until the performance of the condition it (the deed) must remain a mere scroll in writing, of no more efficacy than any other written scroll. But when, upon the performance of the condition, it is delivered to the grantee or his agent, it then becomes a deed to all intents and purposes, and the title passes from the date of the delivery. The delivery to be valid must be with the assent of the grantor. If the grantee obtains possession of the escrow without performance of the condition, he obtains no title thereby, because there has been no delivery with the assent of the grantor, which assent is dependent upon compliance with the conditions." "The recording of an escrow does not make it a deed."

The court held that although the grantee obtained the escrow and placed it on record, and then sold it to an innocent purchaser, he acquired nothing by his deed, because his grantor never acquired any title by obtaining possession of this escrow. It is likened to a deed which the grantee had stolen when no title is thereby acquired; and it is distinguished from one obtained by fraud from the grantor himself, while the title passes by the actual delivery by the grantor himself. See Smith *v.* Royalton Bank, 32 Verm., 341; People *v.* Bostwick, 32 N. Y., 450; Everts *v.* Agnes, 4 Wis., 453; Black *v.* Schreve, 13 N. Y., 458; Dyson *v.* Bradshaw, 23 Cal., 536; Ogden *v.* Ogden, 4 Ohio St. R., 191. From these authorities it would appear that even a grantee is not protected by a purchase, however honestly and fairly he may have acted, unless there was a delivery to his grantors. But we are not required to go the length of the rule announced in these cases to hold the release inoperative and void in this case.

But, in this case, the release never went into the hands of Mrs. Valentine. She did not know or intend that the release should be placed upon record. Hence, this case is not as strong as some of those referred to above. We are, therefore, clearly of the opinion that the judgment creditors acquired no rights or advantage by the recording the release, and they should have been restrained from selling under their executions, any thing more than Mrs. Valentine's equity of redemption, and in refusing to do so, the court erred.

In the light of the decisions referred to, there is no force in the objection that appellant, by making the escrow and placing it in the hands of an agent, and it having got upon the record, he should be estopped to deny that it is his deed. We have seen that such is not the rule, and it should be especially so here, as the judgment creditors have advanced no money, given no credit, or done any act by which they have changed their attitude to the case.

For the errors indicated, the decree of the court below is reversed and the cause remanded.

Decree reversed.

PADDOCK & IDE, for appellant.

SHELDON & WATERMAN, for appellees.

WE are indebted to the law firm of E. H. & N. E. GARY, for the following opinion:

SUPREME COURT OF ILLINOIS.

OPINION FILED JUNE 30, 1876.

MATHIAS RICKERT *v.* PEOPLE.

Error to DuPage.

THE "CLUB" SYSTEM AN ILLEGAL DEVICE TO EVADE THE DRAM-SHOP LAW.

1. JURISDICTION OF JUSTICE.—Section 12 of the act entitled Dram-Shops, Chap. 43, R. S., 1874, confers jurisdiction upon a justice of the peace, in suit brought to recover a a fine for violation of Section 2 of said act.

2. THE "CLUB" A DEVICE TO EVADE THE LAW.—An association or club called "Wheaton Copartnership Company, Number One," organized for the purpose of allowing defendant to distribute intoxicating liquors to the members thereof, to be drank upon the premises when distributed, was a shift or device to evade the law.

3. UNLAWFUL SELLING.—The appellant having no license to keep a dram-shop, whatever liquors were either given away or sold for tickets by him, under that arrangement, come within the definition of "unlawful selling."

4. IMPOSSIBILITY OF EVADING THE STATUTE.—It is preposterous to assume that a number of persons may with impunity associate themselves together as a firm or voluntary company, purchase a quantity of liquors, and retail them out to the several members. Such an enterprise is unlawful and all concerned would be guilty of violating the statute.

Opinion by SCOTT, C. J.

This action was commenced before a justice of the peace on complaint under oath, to recover the fine imposed for a violation of the second section of an act entitled "Dram-Shops," to provide for licensing of, and against the evils arising from, the sale of intoxicating liquors. That section makes it unlawful for any person not having a license, to keep a dram shop, either by himself or another, to sell intoxicating liquors of any kind, in a less quantity than one gallon, or in any quantity to be drank on the premises or in any adjacent room or place, and subjects the offender to fine and imprisonment. R. S. 1874, chap. 43, sec. 2. The 12th section provides that any fine or imprisonment mentioned in the act may be enforced by indictment in any court of record having criminal jurisdiction, or the fine may be sued for and recovered before any justice of the peace of the proper county, in the name of the people of the State of Illinois. Under this clause of the statute the justice of the peace had jurisdiction to try the cause, and we are not aware of any provision of the constitution it contravenes. McCutcheon v. The People, 69th Ills.

Of the questions raised, only one need be considered, and that has relation to the guilt of defendant. The statute makes the giving away of intoxicating liquors, or other shift or device to evade its provisions, unlawful selling. That defendant resorted to a shift or device to evade the provisions of the law against selling intoxicating liquors, we entertain not the slightest doubt.

There is no pretense defendant had a license to sell intoxicating liquors, and hence it follows if he made any sales in a less quantity than one gallon, or in any quantity to be drank on the premises or in any adjacent room or place, such sales must have been unlawful.

Prior to the first day of July, 1874, defendant had a bar in a room in the "Platt House," where he kept for sale the usual stock of liquors, having a license to keep a dram shop.

About that date there was organized what is called the "Wheaton Copartnership Company, No. One." The object of the company as set forth in the articles of association, was "to promote temperance, friendship, and good feeling in the community at large." "Any white male citizen above the age of twenty-one years, of steady, industrious habits, sound mind and memory, and good moral character," could become a member of the association on complying with certain conditions. The association or company had as officers, a president, vice president, secretary, and treasurer, whose duties were all defined. The capital stock of the company was to be $300, and was to be invested in business, but what that business was or its character, is not declared either in the articles of association or in the by-laws. One of the by-laws provides, "no partner shall give any goods of the company to a minor, unless such minor is a member of his family," and another that "no partner shall sell any of the firm goods to any person or persons whatever, either directly or indirectly." At the time this prosecution was commenced the proof

shows the association consisted of about one hundred and fifty members. Notwithstanding it is declared the object of the association is the promotion of "temperance, friendship and good feeling in the community at large," among its first acts the company rented the room defendant had formerly occupied, purchased of him the remaining stock of liquors he had on hand, and set up and opened a saloon, without having first obtained a license to keep a dram-shop, and all under the management of defendant, with the specious title of "treasurer." Bender, the secretary of the alleged company, was examined as a witness on the part of the prosecution, and gave a description of the place and manner of doing business as follows: "There were two front rooms in the Platt House, and that the west one was used for an office, store-room and one thing and another; that there was a door between the two rooms, and a front door opening south from the west room; and that from the east room there was also a door opening to the south on the street which was closed the latter part of June last, and had since that time remained closed; that a club or association known as the 'Wheaton Co-partnership Company, Number One' had had control of the east room from the first day of July, 1874; that this club had possession of the east room, and that the defendant stayed there most of the time and took charge of it, and kept it in order for the club; that in this room there was a bar, the same which was there and kept by the defendant before that time; that there was kept there lager beer, two kinds of whisky, bitters, wine, a beer cooler and glasses, with a lunch, but no brandy; that the defendant had absolute control of the east room during the night time, and that from the 1st day of July, 1874, to the 4th day of October, 1874, this beer and other liquors were from time to time delivered in glasses to different persons in this room; that the liquors were often replenished by defendant; that moneys received by defendant were by him put in his pocket; that the cost or price of one glass of beer was five cents, and five cents for the poorer quality of whisky, and ten cents for the better quality; ten cents a glass for wine, one kind of cigars was five cents, another kind ten cents each; that the defendant had nailed up on the bar a United States government license before the 1st day of July, 1874, and that it had remained there ever since; that the defendant and also his father drank liquor there without paying for it; that liquor was delivered to boys under the age of twenty-one years, but persons living outside the county did not get liquors there." Tickets were issued to persons on becoming members of the association, entitled, "Certificates of co-partnership investment in the Wheaton Co-partnership Company, Number One," signed by the president and secretary, with figures printed thereon from one to twenty, both numbers inclusive. Such tickets cost one dollar. Whenever a member wanted anything at the bar, he presented his ticket and it was punctured by cutting one number for a glass of beer, one for a poor grade of whisky, two for a better grade, and two for a glass of wine, and if he took a cigar the ticket was punctured in the same manner according to the price of the cigar selected, each number representing five cents.

Although the business had been carried on in this way from the first of July to October, no distribution of profits had been made among the alleged members, nor had the treasurer been called upon to make any account. The whole business was transacted by defendant; all purchases were made by him; he retained all moneys for tickets, paid all bills, and if he kept any account with the association this proof fails to show it. The proof is that moneys received by defendent were by him put in his pocket, and no other account is given of the receipts. Any person, it appears, could become a member of the association simply by buying a ticket. The witness whose testimony we have before cited says, "that he supposed a person might join the club, call for a glass of beer, get it, have his ticket punched, and then offer back his ticket and demand the balance of the money paid in by him, get it, and cease to be a member of the club." It is added, however, nothing of the kind had ever occurred, but the witness states he had known an instance of a person who was not a member drinking beer that belonged to the club in the club room. All this is plainly a device on the part of the defendant and those who desire to patronize his bar, to avoid the provisions of the law and to enable him to sell intoxicating liquors at retail, as he had formerly done, without first obtaining a license to keep a dram-shop. The purpose and object is so transparent that the subject need not be seriously discussed. The whole thing is a subtle artifice, planned with a view to avoid the penalties denounced against persons violating the law. The ticket arrangement was simply paying in advance and getting the liquors at convenient seasons when desired. The proposition is absurd that the ticket-holders really owned the liquors with which the bar was stocked. Each party bought tickets to be used at the bar when he wanted anything, and for no other purpose.

Should we adopt the theory of the defense, that the several ticket holders, or parties constituting the association, in fact owned the liquors in the saloon, it would make no better case for defendant, and a vastly worse one for the parties associated with him. In that view the liquors would belong to the company as partnership stock, and the company would have no more rightful authority to sell to the individual members or partners, at retail, without a license to keep a dram shop, than a mere stranger would have. Buying tickets, as we have seen, was simply buying twenty drinks, and paying for them in advance: Each one paid for whatever he got as he would have done had he bought of a licensed seller. It is preposterous to assume that a number of persons may, with impunity, associate themselves together as a firm or voluntary company, purchase a quantity of liquors and retail them out to the several members as they would to strangers. Such an enterprise is unlawful, and all concerned would be guilty of violating the statute. If such a device could be tolerated, it would render all legislation on this subject nugatory. But the alleged association is a mere fiction. It is nothing but a device under the guise of a copartnership company, adopted to enable defendant to sell intoxicating liquors to whomsoever might desire to buy at his counter, and to enable him to do so without taking out a license for that purpose, as the law requires.

The real object of the parties engaged in the business was purposely concealed in the articles of association. Had it been an honest enterprise there would have been nothing to conceal. It was adopted under legal advice, and is obviously nothing but a shift or device to evade the provisions of the law, and whatever liquors were either given away or sold for tickets under that arrangement, came within the definition of "unlawful selling." It was a question of fact whether the association was a mere shift or device to evade the provisions of the law, and the jury having found it was, we see no reason to be dissatisfied with the conclusion reached. The evidence so fully and so clearly sustains the verdict that we have not deemed it necessary to remark upon the instructions. Any other verdict than the one rendered could not be permitted to stand.

The judgment must be affirmed.

Judgment affirmed.

E. H. & N. E. GARY, attorneys for the people.

J. H. KNOWLTON & E. P. WEBER, for Rickert.

SUPREME COURT OF ILLINOIS.

ABSTRACT OF OPINIONS FILED AT SPRINGFIELD, JUNE 30TH, 1876.

96.—Joseph Arnet *v.* Henry Stook.—Appeal from Sangamon.—Opinion by WALKER, J., reversing and remanding.

PURCHASE OF MORTGAGED CHATTEL—WHO MAY COMPLAIN OF WANT OF DILIGENCE IN MORTGAGEE.

Held, 1. That one purchasing a mortgaged chattel before the maturity of the debt, purchases subject to the mortgagee's claim.

2. Such purchaser cannot be allowed to say that the mortgagee did not use due diligence in reducing the property to possession on the maturity of the debt. Such a defense is only available to a creditor, or purchaser, after condition broken.

97.—C., B. & Q. R. R. Co. *v.* Robert Damerell et al.—Appeal from Adams. Opinion by SHELDON, J., reversing and remanding.

R. R. CROSSING OF A HIGHWAY—COMPARATIVE NEGLIGENCE.

Held, 1. That one approaching a railroad crossing of a highway, is held to the exercise of due care and prudence, and cannot recover if he recklessly or carelessly comes into danger thereon.

2. The statute does not require the engine driver of a train to both ring a bell and sound a whistle, in approaching a crossing, but only that he shall do the one or the other.

3. It is not the duty of an engine driver to stop on approaching a highway crossing.

100.—Hiram H. Rosengrantz *v.* William Mason.—Appeal from Macon.—Opinion PER CURIAM, affirming.

PRESUMPTION AS TO PROMISSORY NOTE.

Held, That the giving of a promissory note, of itself, unexplained, is not evidence of a settlement of all demands between the parties.

101.—William M. Davis *v.* Andrew J. Dresback.—Appeal from Macon.—Opinion by CRAIG, J., reversing and remanding.

IMPEACHMENT OF OFFICERS RETURN—MORTGAGE SALE—EXTENDING TIME OF REDEMPTION.

Held, 1. That the return of an officer can only be impeached by clear and satisfactory evidence; and not merely upon the testimony of parties to the suit in which the return is made.

2. Where third parties have not acquired rights upon the faith of a return, it may be impeached by parol evidence, sufficient in degree.

3. Where several tracts of land are to be sold by a master in chancery under a decree, they should be sold separately. But if a certain quarter section, etc., or tract described by metes and bounds, is mortgaged as one tract, it may properly be sold together.

4. If a purchaser at a mortgage sale promises to extend the time of redemption, he will be held to his promise, even without a particular consideration, for it would be against public policy and good faith to allow him to excite confidence, in the security of which the mortgagor would allow the time of redemption to pass by, and then refuse to keep his promise.

102.—St. L., N. & T. H. R. R. Co. *v.* Robert Bell, etc.—Appeal from Madison.—Opinion by DICKEY, J., reversing.

NEGLIGENCE OF R. R. AS TO TURN-TABLE.

STATEMENT.—Appellee (9 years old), was injured by playing on a turn table; not kept locked, but only latched; situated remotely from any thoroughfare.

Held, That in view of the isolated situation of the turntable, the company were not chargeable with negligence, in not keeping it locked or otherwise protected.

103.—Sophia Church et al. *v.* Joseph G. English et al.—Error to Vermillion.—Opinion by SCOTT, Ch. J., affirming.

AMENDMENT OF COURT RECORD—WHEN AND HOW IT MAY BE DONE.

STATEMENT.—Amendment in 1875, by a court, on notice, of the records of a term in 1865, ten years previous. *Held*,

1. That a court has power to amend its records of a previous term, on notice to parties concerned, except that the rights of all parties not parties to the record, or their privileges, cannot be disturbed by the amendment. And the amendment may be made from any authentic source as the judge's minutes.

2. There is no limitation, as between the parties to the record, as to the time when the amendment may be made.

Sherman S. Jewett *v.* John Cook.—Appeal from Champaign.—Opinion by CRAIG, J., affirming.

DEFRAUDING CREDITORS—EFFECT AS EVIDENCE OF AN ATTACHMENT—AFFIDAVIT.

STATEMENT.—Cook's goods attached by virtue of a writ of attachment against West—the goods having been sold by West; and Cook having purchased them from the purchaser of West, after Cook himself had instituted attachment proceedings against West, and levied upon the goods in the hands of West's vendee, and having dismissed his attachment suit on the purchase of the goods. *Held*,

1. That if West's sale was only colorable, and Cook knew it was so, and bought the goods afterwards with such knowledge, Cook's purchase was then tainted with fraud, even if he was a *bona fide* creditor himself, and bought the goods to save his own debt. But it must be shown that West's sale was fraudulent, (which was not done in this case.)

2. Nor would the affidavit filed in his own attachment suit be held an estoppel in regard to the nature of West's sale. The affidavit would only be evidence that Cook thought, at the time, the sale was fraudulent; or, if the sale was proven fraudulent in the second attachment suit, the affidavit might be used to show that Cook knew it to be so.

106.—Asher Merwin *v.* Alexander Arbuckle.—Error to McLean.—Opinion by WAKLER, J., reversing and remanding.

FALSE REPRESENTATION AS TO LANDS—EVIDENCE FOR DEFENDANT.

STATEMENT.—Charge of false representation as to lands sold, which the seller had never seen. Defendant offered to show that he had received the same representation from his grantor, but the court rejected the evidence. *Held*,

That he should have been allowed to show this, because it bore directly upon his knowledge of the falsity of the representation. To render a representation fraudulent, it must not only have been false, but the party making it must have known that it was false, and a person seeking to recover must have relied upon it. Also, it must be material.

107.—Mathew Hanson *v.* Anton Meyer.—Appeal from McLean.—Opinion by SHELDON, J., affirming.

COVENANTS AS TO ASSIGNS NOT NAMED THEREIN—RETROACTIVE STATUTES.

STATEMENT.—Suit by a lessee against assignees of the reversion to whom the property was sold during his lease, to enforce a covenant contained in his lease. *Held*,

1. That, where assigns are not mentioned in a covenant, they are not bound thereby.

2. A statute passed after the execution of the covenant providing the contrary as a general rule, cannot retroact on covenants thus made prior to the passage thereof, so as to bind assigns.

110.—The Town of Old Town *v.* William Dooley.—Appeal from McLean.—Opinion by SCHOLFIELD, J., affirming.

RIGHTS OF OWNER OF SOIL IN A HIGHWAY.

STATEMENT.—Appellee, by permission of commissioners of highways, joined his fences to the approaches of a bridge erected across a stream, on his land. He was warned to remove it as an obstruction to a ford across the stream, but refused. Hence this suit. *Held*,

1. That the statute is only affirmative of the common law right of the owner of lands whereon a public road is laid, to use and enjoy the use of the lands, subject only to the easement which the public have in the highway.

2. That the ford being in no sense necessary, is not protected from the intrusion of appellee's fences.

3. The privilege of watering stock, using a spring, etc., is not incident to the right of the public to a passage over one's land.

111.—David Huesch, impl. etc. *v.* Elizabeth Scheel et al.—Appeal from St. Clair.—Opinion by CRAIG, J., reversing and remanding.

PRIORITY OF LIEN IN MORTGAGE—MERGER—NOTICE OF PRIOR UNRECORDED MORTGAGE.

Held, 1. That a mortgage subsequent to another in date, but first filed for record, has a prior lien, unless the mortgagee therein has, in some way, notice of the first mortgage unrecorded. And the burden is on the mortgagee in the first mortgage given, but last recorded, to show that the other mortgagee had such notice.

2. If the mortgagee whose mortgage was first of record but last of execution, takes a deed of the premises from the mortgagor, solely to give him additional security, and not absolutely, there will be no merger, and he will not thereby lose his priority.

3. The meeting of a greater and less estate in the same person does not, of necessity, make a merger. This depends upon the intent and interest of the parties; and if a court sees it necessary, in order to advance the ends of justice, that

(*Continued upon page* 350.)

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Lex vincit.

MYRA BRADWELL, Editor.

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We call attention to the following opinions, reported at length in this issue:

COPYRIGHT—TRANSLATION OF PLAYS.—The opinion of the United States Circuit Court, for the Northern District of Illinois, by DRUMMOND, J., holding, where the translator of a play, by consent of the author, has obtained a copyright upon it, the owner of such copyright can maintain a bill enjoining any other persons from using or representing such translation, or any part of it.

BANKRUPTCY—FALSE STATEMENT IN PETITION.—The opinion of the United States District Court for the District Court of California, by HOFFMAN, J., where a petition in involuntary bankruptcy alleged, among other things, that it was filed by one-fourth of the creditors, representing one-third of the provable debts, as required by the act, and the bankrupt made default, and the court entered an order that the facts set forth were true, and adjudicated him a bankrupt—on a motion being made to set aside the adjudication, on the ground that the requisite number of creditors had not joined in the petition, *held*, that it was not within the power of the court to do so.

ATTACHMENT SALE — WHAT INTEREST PASSES—REPLEVIN AGAINST SHERIFFF.—The opinion of the Supreme court of this State, by SCHOLFIELD, J., holding that the proceedings in attachment against personal property, are against the interest of the defendant in attachment, and those claiming under him in the thing attached; and that a person whose goods have been seized improperly, and who is no party to the suit, is not concluded by the judgment; that replevin is the proper remedy against a sheriff who has levied a writ of attachment against one person upon the property of another, at the instance of the party whose property is thus wrongfully levied upon; that it was competent to bring the action of replevin in the Circuit court, although the attachment suit was in the Superior court. We are aware that there is some conflict of authority upon the latter branch of the case, but have no doubt under our statute the decision is correct.

DEMURRER—STRIKING PLEA FROM FILES.—The opinion of the Supreme Court of this State, by SCHOLFIELD, J., as to the effect of filing a plea while an issue on demurrer, is still pending.

ESCROW—PLACING RELEASE OF MORTGAGE ON RECORD BY MISTAKE.—The opinion of the Supreme Court of this State, by WALKER, J., as to the effect of placing the release of a mortgage on record by mistake of the person in whose hands it was left, as an escrow.

THE CLUB SYSTEM AN ILLEGAL DEVICE TO EVADE THE DRAM-SHOP LAW.—The opinion of the Supreme Court of Illinois, by SCOTT, C. J., showing that the selling of liquor under the club system is plainly a device on the part of the defendant, and those who desire to patronize his bar, to avoid the provisions of the law, and to enable him to sell intoxicating liquors at retail without first obtaining a license.

SUSPENSION OF THE STATUTE OF LIMITATIONS—COVERTURE.—The opinion of the Supreme Court of Tennessee, holding that where the right of action had accrued, and afterwards the statute is suspended, and during the suspension plaintiff is married, the coverture existing at the end of the suspension cannot be relied on to defeat the bar.

PROBATE OF NUNCUPATIVE WILL.—The opinion of the Supreme Court of Tenessee, by MC'FARLAND, J., as to how the Probate of nuncupative will may be set aside.

INSURANCE—AUTHORITY OF AGENT.—The opinion of the Supreme Court of Pennsylvania, by SHARSWOOD, J., holding that where agents are acting for an insurance company, and are held up to the public as such, the reasonable presumption is that they are authorized to act for the company in a general way, unless the company specify what may be their special duties and powers. There is some common sense in this opinion. Insurance companies should be held responsible for the acts of their agents, the same as individuals.

NOTES TO RECENT CASES.

BANKRUPTCY — ENFORCING MORTGAGE IN STATE COURT.

The Supreme Court of Georgia *held*, in Cummings *v.* Clegg, 14 N. B. R., 49, that a mortgage creditor who did not prove his debt, may enforce his mortgage in a State court, although the property was duly set apart to the bankrupt as exempt.

JUDGMENT CREDITOR ABANDONING LEVY.

It was *held* by the Supreme Court of Georgia, in Winship *v.* Phillips, 14 N. B. R., 51, that a judgment creditor who levied upon personal property, and subsequently abandoned his levy, by permitting the property to go back into the hands of the defendant, may enforce his lien against land sold by the bankrupt before the commencement of the proceedings in bankruptcy, and need not follow the personal property into the hands of the assignee.

BANKRUPTCY—REDEMPTION OF PROPERTY.

The Supreme Court of Alabama, in Trimble *v.* Williamson, 14 N. B. R., 53, *held*, that where the right of a creditor and the right of a debtor, to redeem property sold under an execution, are, under the State laws, distinct and independent; the bankruptcy of the debtor does not affect or extinguish the right of the creditor.

BANKRUPTCY — FIRM—INVOLUNTARY PROCEEDING.

The U. S. District Court for the eastern District of New York, *in re* Pitt et al., 14 N. B. R., 59, *held*, that a firm cannot be adjudicated bankrupt in an involuntary proceeding to which one of the members is not a party; that an involuntary petition cannot be amended by adding a new party, after all the testimony has been taken, and the case is on hearing before the court.

EMPLOYEES OF DEFAULTING RAILROAD CO.

The Circuit Court of Richmond, Virginia, in Duncan et al. *v.* C. & O. R. R. Co., *held*, that employees of a defaulting railroad company are not to be considered as creditors at large of the company, in regard to their claims for wages, in arrears at the time of the appointment of a receiver of the company; that when mortgagees come into a court of equity, seeking satisfaction of their claims against a railroad company, by suit for foreclosure, they should be required to satisfy all arrearages of pay due employees, out of the trust property or its future earnings.

Recent Publications.

THE PHILOSOPHY OF LAW: being notes of Lectures delivered during twenty-three years (1852-1875) in the Inner Temple Hall, London. By Herbert Broom, LL. D., late Professor on Common Law to the Inns of Court. New York: Baker, Voorhis & Co., 1876.

Dr. Broom needs no introduction to the bench and bar this side of the Atlantic. As the author of Commentaries upon the Common Law and Constitutional Law, and of a treatise upon Legal Maxims, he has been long and favorably known to the profession in America. And while his commentaries have not, perhaps, attained the rank in this country to which their merits entitle them, yet no English work of the present generation of lawyers is more favorably known in America than Broom's Legal Maxims. As indicative of the high esteem in which it is held among our foremost lawyers, it may be remarked that the late Judge Arrington, that Nestor of the Chicago Bar, was accustomed to carry a copy of Broom's Maxims almost daily to and from his house on his way to his office, perusing it in the street cars. Indeed, it has become a *vade mecum*, both with students and practioners.

The present work is designed as a sketch in outline of the leading principles relating to contracts, torts and crimes. In the language of the author, it is "the result of much thought devoted to the adapting of legal knowledge to the ordinary concerns of life." Each of the three topics indicated is discussed in a general chapter, giving clearly and succinctly an outline of the topic under consideration, and each of these chapters is, in turn, supplemented by a chapter presenting the application of leading principles of law to given facts. These supplementary chapters necessarily contain frequent illustrations of the principles under discussion as applied in adjudicated cases, and these illustrations seem to have been carefully selected and are always *apropos* to the subject in hand. The author's definitions of contracts, torts and crimes are very satisfactory, and his statements of legal principles are uniformly clear and precise, being never encumbered with unnecessary verbiage, yet always sufficiently full and clear to be readily understood, even by the lay reader. And this is certainly high praise of any technical or professional treatise.

Our chief criticism upon the book is upon its title, which strikes us as rather a misnomer. The work is in no sense a philosophical analysis of the law, regarded either as a science, or as a part of the existing machinery of government. Indeed, the literature of our profession contains few such works, either English or American, and the authors who have successfully written of the philosophy of law, may be counted upon one's fingers. The present work is rather an introduction to the study of the law, and such, if we mistake not, will be its recognized status. As such, it is admirably adapted to the purposes intended. And this indicates another class of readers who may peruse its pages with much profit and satisfaction. We refer to that large, and, we trust, growing class of young men, who, while not intending to enter upon the law as a profession, are yet desirous of adding to the general culture of a college training, some acquaintance with our law as a science, and with its practical administration in courts of justice. No branch of legal literature has been more neglected than this, yet none is worthy of more attention. And among this class of elementary works, we predict for this volume a deservedly high rank.

TECHNICAL ERROR.—Any one who has examined the recent opinions of the Supreme Court of this State, cannot fail to have noticed that the court is less disposed than formerly to reverse for technical error, if upon the whole record it appears that the judgment could not have been properly rendered otherwise. The opinion we published in our last issue, construing the liquor law of this State, is a good illustration of a growing disposition to disregard technical error.

LVI. NEW HAMPSHIRE REPORTS.

We are under obligations to Hon. John M. Shirley for advance sheets of volume 56th New Hampshire Reports, from which we take the following head-notes:

ACTION FOR LIBEL—PLEADING—EVIDENCE.

Carpenter v. *Bailey*, p. 283.

On the trial of an action for libel, it appeared that the original writing, the publication of which was the foundation of the suit, was among the records of the navy department at Washington. *Held*, that secondary evidence of its existence and contents was properly admitted.

The alleged libel contained charges against the plaintiff as paymaster in the naval service of the United States stationed at Portsmouth, and requested his removal. *Held*, that a letter from Vice-Admiral Porter, while in charge of the department, to the plaintiff, making the removal, and stating the reasons for it, was admissible as an act of the department.

The plaintiff was permitted to testify that he sold his furniture at a loss upon his transfer from the naval station at Portsmouth. *Held*, no cause for setting aside the verdict in his favor

The allegations of a special plea of justification in such case must be proved substantially as laid. Hence, where such plea set up specific facts, going to show that the charges were true, and other facts showing that the occasion was lawful and the end justifiable, and alleged that such was the fact—*Held*, that the court properly refused to charge the jury that if the alleged charges are true the plaintiff cannot recover; also, that the jury were properly instructed among other things, that if the occasion was lawful, and the alleged libel true, the verdict should be for the defendant.

Whether an alleged libel is a privileged communication, is a question for the jury under proper instructions from the court.

DAMAGE FROM STOPPAGE OF COMMON SEWERS—DEGREE OF CARE—NOTICE.

Rowe v. *Portsmouth*, p. 291.

A city, having power by statute to construct public sewers, and to demand and receive pay from adjoining owners for liberty to enter their private drains into such sewers, is responsible for negligently suffering them to occasion a nuisance to the estates of such adjoining owners, if the nuisance does not result from the original plan of construction, and could be avoided by keeping them in proper condition.

In maintaining such public sewer, a city is bound to use that degree of care and prudence which a discreet and cautious individual would use if the whole loss or risk was to be his alone.

A city will not be liable for injuries caused to individuals, by an obstruction in such public sewer not placed there by its own officials or by authority of the city government, until after actual notice of such obstruction, or until, by reason of the lapse of time, actual notice may be presumed.

(*Continued from page* 348.)
the two estates shall be kept separate, they will be so regarded.

112.—Aaron W. Hall et al. *v.* John L. Beveridge, use, etc.—Appeal from Stephenson.—Opinion by DICKEY, J., affirming.

SALARIES OF COUNTY OFFICERS UNDER THE PRESENT CONSTITUTION.

STATEMENT.—Suit on official bond of clerk for failing to pay over fees into the treasury. Defence, that his salary was only $1,500, whereas the county contained between 30 and 50,000 inhabitants, and the constitution provides that in such counties the minimum of salary shall be $2,000, and the commissioners had no right therefore to allow less; *held*,

That the constitution provides no minimum, but only a maximum for the salary of county officers, to be fixed by county boards, etc.

114.—Joseph R. Stanford et al. *v.* Andrew J. Wright.—Error to Crawford.—Opinion by SCOTT, Ch. J.

EXPOSITION OF THE CONSTITUTIONAL PROVISION CONCERNING DRAINING, ETC.

Held, That neither the constitution providing "that the general assembly may pass laws permitting the owners or occupants of land to construct drains, or ditches for agricultural and sanitary purposes;" nor the act thereunder providing "for the constructing and protection of drains, ditches, levees and other works," (R. S., 1874, ch. 42, § 1, and Const. 1870, Art. Sec. 30) in the design or scope thereof, applies to works where the construction of an expensive levee, as a principal work to prevent the overflowings of a river. A levee must be merely auxiliary to a system of drainage, such as proposed in this case.

This point embraces the whole case. But the court added several very valuable dicta, namely:

1. The act referred to is unconstitutional, because it makes no provision for a vote of the people to be affected by a proposed improvement.

2. The general assembly possesses no power, under the constitution to vest commissioners or juries with authority to assess and collect taxes, or special assessments, for contemplated improvements.

3. Only cities, towns and villages may levy special assessments, or special taxes, for local improvements; and all other corporations can only be vested with jurisdiction to assess and collect taxes for corporate purposes, and that, too, under the positive inhibition that the taxes shall be uniform in respect to persons and property.

116.—Julius Goldstein *v.* Granville Lowther.—Appeal from Edgar.—Opinion per curiam, reversing and remanding.

SUBSTITUTION OF VERBAL CONTRACT FOR WRITTEN ON TRIAL OF A CAUSE.

Held, That the substitution of a verbal contract on the trial of a cause for the written one between the parties—the defendant not being apprised thereof by any pleadings in the case—is a fatal irregularity.

118.—William Ross *v.* Richard B. Sutherland.—Error to Edgar.—Opinion by SHELDON, J., affirming.

CONTRACT FOR EXTENDING TIME OF REDEMPTION—RELATION OF THE PARTIES AS TO OPPESSION AND DURESS.

STATEMENT.—Bill in chancery for relief for fraud and oppression in the making of a contract, whereby Ross was to have an extension of the time for redemption of lands sold from him, on condition that he would deed to Sutherland 122 acres of the 1100 sold, and Sutherland would convey to his (Ross') sons, 822 acres; also, within a certain time, Ross should pay between $12000 and $13000. It was claimed that, by reason of the relation between the parties (Ross being in the power of Sutherland), Ross was not in a condition to assert his rights in making the contract, and, therefore, an oppressive contract was forced upon him. The bill was dismissed, and the Supreme Court, in affirming, *Held*,

1. That there was nothing peculiar in such a relation, which should interfere with a free contracting by the parties, or prevent them dealing as strangers at arm's length, Ross not being any more in the power of Sutherland than any man is in the power of another who seeks to obtain some valuable thing which the former has to dispose of, and there was no ground therein for the interposition of equity.

2. That the evidence disclosed no actual oppression.

119.—Ind. & St. L. R. R. Co. *v.* E. W. Herndon et al.—Appeal from Edgar.—Opinion by SCHOLFIELD, J., affirming.

DELIVERY OF GOODS BY MISTAKE—RESPONSIBILITY OF CARRIER OR WAREHOUSEMAN THEREIN — EFFECT OF NEGLIGENCE OF CONSIGNEE—TROVER.

Held, 1. That an action of trover lies against a carrier, who, by mistake, delivers goods to a wrong person.

2. The same rule applies to warehousemen, who are not only responsible for losses arising by their negligence, but for those occasioned by the innocent mistake of themselves, and their servants, in delivering goods to a person not entitled to them, it being a part of their duty to retain the goods until they are demanded by the true owners; and if, by mistake, they deliver the goods to the wrong person, they are to be held responsible for the loss, as upon a wrongful conversion.

3. And where goods have arrived at their destination, the railroad company carrying them hold to them afterwards the relation of warehousemen; and hence, the rule applies to them in either relation.

4. And the rule applies where the delivery is made to the person to whom the goods are shipped, if the delivery is made before he fulfils a condition upon the delivery; as, for example, payment.

5. Nor does such company fulfil the demands of the law, when it has improperly disposed of property in its custody, by simply placing itself in a condition to repossess the property.

6. Nor is it an excuse that the proper consignee was negligent in calling for a delivery of the goods to himself; for this negligence does not contribute to the injury complained of.

121.—Julius G. Koester *v.* Beatty T. Burke.—Appeal from Macoupin.—Opinion by CRAIG, J., double opinion.

PRIORITY AS TO NOTES SECURED BY SAME TRUST DEED—IRREGULAR PROCEEDINGS OF TRUSTEE—INJUNCTION OF EJECTMENT SUIT.

STATEMENT.—Trust deed given on three promissory notes, due at different times, the deed providing that if the note first falling due was not paid within three days after maturity, the whole should become due and payable, and the premises should be sold to pay all of them. Before maturity, the note first falling due was negotiated to Judd—the other two to Burke. The first not being paid, Judd ordered the trustee to sell. He advertised to sell on the 13th of December. Then Burke, apprised that his notes were also payable by the terms of the deed, also directed the trustee to sell for the satisfaction thereof. He advertised to do so on the 12th of December. On the 12th, Burke bought in the land for the amount of his notes, and received a deed. The trustee proceeded to sell again the next day, and Koester was the purchaser, to whom, also, the trustee gave a deed on the same day. Both deeds were filed for record Dec. 13th, Burke's being a few hours ahead of the other. But Koester went into immediate possession of the premises. Burke brought ejectment. Koester filed bill to enjoin the ejectment suit, which bill was dismissed. *Held*,

1. That Judd's note, falling due first, gave him a prior lien, of which the trick of the trustee and Burke could not deprive him.

2. Koester, paying off Judd's note, was entitled to be subrogated to his rights.

3. Yet he could not use his lien as a defense to the action of ejectment, in which he must be defeated; because by the deed of the 12th, the legal title of the trustee passed, though wrongfully, to Burke.

4. But he was entitled in equity to a protection of his prior lien, and the suit in ejectment ought to have been enjoined.

5. The double sale was altogether irregular and unauthorized. All the claims should have been embraced in the same sale.

[The cause in ejectment was affirmed, and the other reversed and remanded, with directions to the court below to set the sale aside, and have the lot re-sold, and to enjoin the enforcement of the judgment in the ejectment suit, on an amendment of the bill for that end.—W.] John W. Harshberger *v.* John H. Foreman et al.—Error to Edgar.—Opinion by WALKER, J., affirming.

LAND UNDER VENDOR'S LIEN SOLD TO PURCHASER WITHOUT NOTICE—EFFECT.

Held, That where land subject to a vendor's lien is sold to a party who has no notice that a part of the purchase money remains unpaid at the time of his purchase, he takes the land discharged of the lien. And the evidence to prove such notice on his part must be clear and satisfactory, or he cannot be charged therewith.

124.—Imperial Fire Ins Co. *v.* John C. Gunning.—Appeal from Montgomery.—Opinion by SCOTT, Ch. J, affirming.

AVOIDANCE OF INSURANCE POLICY—NOT BY SUBSEQUENT UNLAWFUL ACT IN EQUITY—DEFENSE AT LAW — CONSOLIDATION OF GARNISHMENT SUITS—EQUITY JURISDICTION AS TO A MULTIPLICITY OF SUITS—WEEN IT ATTACHES.

STATEMENT.—Bill for injunction against collecting the amount of a policy, on a loss by fire—not on the ground of fraud in procuring the policy, it being admitted that the risk, in itself, was a proper one; but on the ground that Gunning procured the policy with the sinister purpose of afterwards destroying the premises by fire; which purpose was afterwards, as is alleged, actually carried into effect. *Held*,

That as it is claimed the policy was avoided only by a subsequent unlawful act, there is no ground for relief in equity, in the rescinding of the contract. This is only matter of defense against the payment of the policy when sued upon, and is, therefore, available at law.

But it was contended the suit in equity was maintainable to prevent a great multiplicity of suits, the company having been summoned by divers creditors of Gunning to answer as garnishee. But, *Held*,

1. That if the defense were established once, it would suffice for all. And if it could be made to appear that there was but a single cause of action, the court, on motion of the garnishee, could consolidate the actions, notwithstanding there were different plaintiffs; and so a single verdict could be rendered in all.

2. The proper practice, in such case, would be to enter judgment against the garnishee, if justly liable, in favor of the debtor; which would then stand, in favor of the debtor, for the benefit of such of his attaching or judgment creditors as should prove their right to share the proceeds. These creditors would then have the right to control the payment; and the money, when collected from the garnishee, would be distrtbuted among the creditors.

3. But even if the practice were different, yet, it would be incumbent on appellant to establish the defense at law; and then, if it should appear that other parties continued to harrass the company on account of the same cause of action, equity would interfere to prohibit further vexatious litigation. Until then, equity cannot properly entertain jurisdiction.

125.—Eli Ulery *v.* Clayborn Jones.—Appeal from Macon.—Opinion by BREESE, J., reversing and remanding.

PROPERTY IN WILD BEASTS DOMESTICATED —LICENSE.

STATEMENT.—Action for damages in killing a young buffalo bull, which had been imported from the western plains, civilized and reared with cattle, by Jones. He was of a roving disposition, and would trespass, at times, upon the neighbors' pastures, etc. But he could always be driven home without any difficulty, and was never dangerous. He would also feed from the hand, and seemed thoroughly domesticated; although breechy, as sometimes the ordinary cattle are.

In the defense, it was alleged that the animal was *feræ naturæ*, and therefore, defendant had a right to kill him while trespassing. And, second, that the defendant had a license from the owner to kill him. The latter plea was based on the following facts: Some months before the killing, defendant came over to plaintiff's house to complain of the animal then trespassing. An angry altercation ensued, during which defendant threatened to shoot the animal, if he were not kept at home, and the owner angrily exclaimed, "Well, go and shoot him, if you want to." He did not, then, but afterwards did so. As to this, the court *Held*,

1. That if these evidently angry words were to be construed as a license at all, the permission must be strictly confined to the then present time; and could not be made available, subsequently, as a permission.

2. It is, in itself, unreasonable to suppose that an owner of a valuable animal would give another man license to kill the animal at will.

As to the first defence, *held*,

That when an animal, though originally wild, has been domesticated, as the evidence showed this one to have been, so as to be controllable like other ordinarily domestic animals, the property therein is the same as in domestic animals; and no one has any more right to destroy it than to destroy any other domestic animal, trespassing in like manner.

127.—Sarah Alwood et al. *v.* Henry Mansfield.—Appeal from Tazewell.—Opinion by WALKER, J., reversing and remanding.

INTERPRETATION OF STATUTES RELATIVE TO DAMAGES ON DISSOLUTION OF AN INJUNCTION, AS TO THEIR EFFECT THEREON.

Held, 1. That the act of 1874, relative to the dissolution of injunctions, and allowing suit to be brought on the injunction bond, although the damages were not assessed at the time of the dissolution, thus amending the similar act of 1861, which required the damages to be assessed at the time of the dissolution, and would not, on failure, allow suit subsequently on the bond—cannot be allowed a retroactive effect; and, therefore, cannot apply to bonds executed before its passage. For, the prior act entered into, and became a part of, the agreement in the bond.

2. It is competent to the parties to stipulate expressly that the damages shall be assessed on dissolution, and the contract will be enforced, notwithstanding the provisions of the later act.

130.—John Angelo *v.* Sarah Angelo.—Appeal from Morgan.—Opinion by SHELDON, J., reversing and remanding.

DIVORCE—ALLEGATION OF AN ATTEMPT TO POISON — HOW ALLOWABLE — SEPARATE MAINTENANCE.

STATEMENT.—Bill for divorce by appellant, against appellee, on the grounds of adultery, and an attempt to cause his death by poison, put into coffee prepared separately by appellee for appellant. Cross-bill, alleging that appellant, by wrongful conduct, had caused appellee to desert him, in a week after marriage, and praying separate maintenance. Appellant was 74 years old and blind; appellee 24 years old. Original bill dismissed; the prayer of the cross-bill granted. The charge of poisoning was thrown out by the court.

The Supreme Court, commenting on the evidence adversely to the decision of the court below, *Held*,

1. That the charge of attempting to poison was improperly thrown out by the court, since, if proven, it would tend to confirm the charge of adultery, and strengthen the evidence thereon.

2. The evidence showing that appellee had been kindly treated, as she herself admitted, after the separation, and there being no excuse for her leaving, except that he had said that he had been deceived by her, and she was not a virtuous woman, she had no sufficient reason for leaving him; and ought not to have been allowed thereon a separate maintenance.

Both decrees were reversed, therefore.

SUPREME COURT OF TENNESSEE.

STATE, FOR USE OF HEIRS OF HOWARD, *v.* PARKER.

SUSPENSION OF STATUTE OF LIMITATIONS—COVERTURE.—Where the right of action had accrued, and afterwards the statute is suspended, and during the suspension plaintiff is married, the coverture, existing at the end of the suspension, cannot be relied on to defeat the bar.

SAME—GUARDIAN AND WARD—TRUSTEE.—A ward is not barred because the statute has run as to the guardian. The doctrine that when the trustee is barred the *cestui que trust* is also barred, does not apply to guardian and ward.

SURETIES—SEVERAL BONDS.—Sureties upon several bonds may be sued at the same time. It is not necessary to exhaust the property of the guardian and sureties on the last bond, before bringing suit against sureties on the first.

This is an action against the security upon a guardian bond, commenced in

the Circuit court of Lincoln county on March 27, 1874.

On the 3d of October, 1859, H. E. Moore was appointed guardian of Mary B., Martha, Julia A., Hester A., W. S., and James S. Howard, minor children of Benjamin Howard, and entered into bond in the sum of $3,000 with defendant, W. W. Parker and one R. H. McDonald as his sureties. On the 7th of October, 1861, Moore renewed his guardian bond in the sum of $5,000, with the said McDonald and one John S. Fulton as his sureties. On the 5th of March, 1866, Moore resigned as guardian, and on the same day F. M. Snoddy was appointed guardian of the three children last named, the others having become of age and married. Mary B. was of age May 23,1862; married December 28, 1865; Julia A. became of age January 29, 1866, married December 18, 1866. Hester A. became of age in 1870; W. S. Howard was of age June 14, 1868, and James F. on the 13th of December, 1872.

On the 31st of July, 1867, the guardian Snoddy, and all the parties for whom Moore had been guardian, filed a bill in chancery against H. E. Moore, R H. McDonald, and E. B. Boyles, administrator of Fulton. In 1870 they obtained a decree against Moore and Boyles, administrator, McDonald having been adjudged a bankrupt. An execution was issued and returned *nulla bona*. This action on Moore's bond of October 3, 1869, was commenced March 27, 1874, against defendant Parker alone, who was surety thereon. The case was heard by the Circuit judge without a jury. Judgment for the heirs, and an appeal by Parker. The statutes of limitations are chiefly relied on as a bar to this action.

Abstract of Opinion.—By sec. 2775 of the code it is provided that actions against sureties of guardians shall be commenced within six years after cause of action accrued. In this case the cause of action accrued to Mary B. May 23, 1862, and to Julia H. January 29, 1866, the dates at which they came of age. 10 Yer., 160. But it is insisted that the statute of limitations was suspended until the 1st of January, 1867, and at that time they were both under disability by means of coverture, and therefore are not barred. At the time the cause of action accrued they were not under disability, and their subsequent coverture cannot be relied on to defeat the bar of the statute.

As to W. S., James F., and Hester A., who were minors, the cause of action accrued at the time of the resignation of Moore, and the appointment of Snoddy as guardian. It is insisted that the right of action of these children is barred, because it accrued to his guardian immediately upon his qualification, and, that being so, he was barred January 1, 1873, and the guardian being barred that the wards are barred, though they be minors. To sustain this position, we are referred to the case of Goss *v.* Singleton, 2 Head, 67, and other cases, holding that when a trustee is barred the *cestui que trust* is barred. The position is not sound, nor is it sustained by these authorities. In the cases cited the legal title was in the trustee, but the legal title is not in the guardian. The ward is the owner, and the guardian is a mere custodian. It follows, therefore, that though the statute may bar the guardian, it does not bar the wards, and under our statute he has three years in which to commence an action after the removal of his disability. W. S. Howard became of age June 14, 1868, and Hester A. on December 9, 1870, and this action not being commenced within three years after the removal of their disability, the statute is a bar to their recovery, but not as to the youngest child, James F., who became of age on the 13th of December, 1872.

But it is insisted that none of these plaintiffs are barred. The statute was suspended when they commenced suit on the 31st of July, 1867, against H. E. Moore and his sureties on his last guardian bond, and that they could not maintain an action against the sureties upon the bond until they had exhausted the property of the guardian and the sureties on his last bond. This position is untenable. When the cause of action accrued against the guardian it accrued against the defendant. This suit was the commencement of action against defendant; he was not a party to the suit of July 31st, 1867, and was therefore not affected thereby. If they had seen proper, they could have made him a party to the bill filed at that time, and the court could have rendered a decree against the sureties upon the different bonds, declaring the order of their liability. The case of Jamison *v.* Crosby, 11 Hum., 273, which has been referred to, was not decided with reference to the statute of limitations; in fact, at that time there was no such statute in favor of sureties upon guardian bonds. While it may be true that the sureties upon the several bonds are not liable to make payment at the same time, or to be sued at law in the same action, yet there can be no question but that they are liable to be sued at the same time. The conditions of the bonds are that the guardian shall faithfully perform the duties of his guardianship; whenever he fails to do so he is guilty of a breach of the conditions of the several bonds, by the same act and at the same time, and the cause of action accrues against the sureties on each bond at the same time.

Judgment affirmed as to the plaintiff, James F. Howard, and reversed as to the others, their suit dismissed, and they will pay four-fifths of the costs, and defendant will pay the balance.

Opinion by LEA, Special Judge.—*Commercial and Legal Reporter.*

KNOXVILLE, JUNE 17, 1876.

JOHN BROWN AND WIFE *v.* E. Z. C. HARRIS et al.

NUNCUPATIVE WILL—PROBATE—SETTING ASIDE—NOTICE.—The probate of a nuncupative will in the county court is, in substance, under our statutes, required to be in solemn form; and such probate ought not to be set aside upon petition, merely because of the absence of the process or notice from the record, where the want of notice is not averred in the petition. The recital of the record that the next of kin were notified to appear, is sufficient to show the fact of notice.—[ED. *Commercial and Legal Reporter.*

Opinion of the court by MCFARLAND, J.

The nuncupative will of Matilda Roy was admitted to probate by the County court of Monroe county, at the June term, 1875. Subsequently at the September term, upon the petition of the next of kin, or some of them, the probate was set aside, and the will and proceedings certified to the Circuit court for an issue and contest in the usual form. In the Circuit court the administrator, with the will annexed, moved to dismiss the petition and annul the action of the County court setting aside the probate. This motion was sustained and the will was declared valid under the probate of the County court, and the matter remanded to that court to be proceeded with. The contestants have appealed.

The argument in support of the action of the Circuit court is, that the probate of a will had in *solemn form* cannot afterwards be set aside, and that under our laws the probate of a nuncupative will is a probate in *solemn form*, by the express requirements of the statute. If the next of kin, when notified to be present at the probate in the County court, failed to contest, and asked for an issue to be made, they cannot afterwards have the probate set aside. This, so far as we know, is a new question in this state. A probate in common form is the usual mode of proving wills in the County court: that is, wills other than nuncupative wills, may be set aside upon the petition of the parties in interest, and issue made for trial in the Circuit court, even after the lapse of many years. But probate in solemn form cannot thus be set aside. A probate in solemn form may be had in the County court by citing all who are intended to be present at the probation, and in their presence the will is offered for probate, and the witnesses all examined and the judgment of the court thereon establishes or rejects the will. Sec. 2166 of the Code, from the act of 1784, enacts "that no nuncupative will shall be proved by the witnesses * * * * till process has issued to call in the widow or next of kin, or both, if conveniently to be found, to contest it." This, in substance, requires the probate of such a will to be in solemn form, and we do not see but what the same results would follow as to the right to have the probate set aside which attach to other wills proven in solemn form.

The record of the County court shows that the will of Matilda Roy was produced in open court at the May term, 1875, for probate, when it was ordered that the probate be continued until the June term, and that process issue as to all resident defendants, and publication be made as to all non resident defendants, next of kin, notifying them that the will would be offered for probate at the June term. The record shows that a number of persons, including all the petitioners except Mary E. Barr, (who was a niece of the testatrix,) and her husband, by writing signed by attorney, waived service of process to appear at the June term, and at the June term the record recites that the next of kin were notified to appear on the day of probate.

The petition assumes that the probate of the will in the County court was in common form, but does not in terms aver a want of notice. Is the recital of the record that the next of kin were notified, sufficient to show the fact? Should the record affirmatively show the service of the process? The requirement of the statute is that "*process*" shall issue, etc. "Process" ordinarily would mean process issued by the clerk which should constitute part of the record, but the mere absence of the process or notice from the record, where the fact of notice is recited, ought not to vitiate the probate, where want of notice is not averred. The probate of a will is a proceeding *in rem*, and while we think parties in interest who had no notice ought not to be denied their right to contest, yet when the record shows a case of probate in solemn form and no want of notice is averred, that the probate ought not to be set aside merely because of the absence of the process or notice from the record.

Affirm the judgment.

SURVIVORSHIP.—ITS PERIOD, ITS MEANING.

[From the London *Law Times.*]

WAITE *v.* VARAH (34 L. T. Rep. N. S. 437).

The words survivor and survivorship play an important part not only in the calculations of insurance companies, but also in limitations of real and personal estate by deed or will. They test the skill and ingenuity of the draftsman, and frequently perplex the learned judges in equity who have to discover an intention for a testator inconsistent with the words used by him, if they may thereby prevent an intestacy or other failure of the provisions for his family. Often the question is, whether a gift to a survivor or a gift over on the death of a survivor, creates by implication an estate in those who precede their survivor, or succeed one who survives others; and then the principles laid down by Chief Justice Vaughan in the case which Lord Alvanly described as the great case which everyone has in his mind, meaning thereby Gardner *v.* Sheldon, have to be considered. Further, the time of survivorship is to those who lack prophetic foresight, an unknown quantity, and even where it appears to be limited, the reports show that frequently the limitation is either ill defined originally, or rendered indistinct by the change of circumstances. The survivorship may have reference to the testator, and then mere questions of fact are involved. But a prior donee or donees may intervene, the gift may either be absolute or for life. Though absolute, the gift to the survivors may not be expressly contingent. Even here, formerly, the period of survivorship was referred to the testator's death. Cripps *v.* Wolcott (4 Mad. 11), fixed the period to that of distribution where personalty was involved. Further, the prior absolute gift may be followed by a gift contingent on survivorship, and the contingency may be limited to the death of a prior tenant for life, as in Jenour *v.* Jenour (10 Ves. 562), where property was to be divided between two nephews who were brothers, and to go to the survivors of them in case the brother should leave no lawful issue; or the contingency may be indefinite. Again, an executory devise to a survivor may refer to the death of the testator. (Doe and Lifford *v.* Sparrow, 13 East, 359.)

Again, the prior gift may not be absolute, but only for life; here, in the simplest case, the period is of course indefinite. But frequently there is, then, another event, as the attaining majority superadded, and where such is the case, the courts choose the personal event as more likely to produce a reasonable scheme for the distribution of property. (Crozier *v.* Fisher, 4 Russ. 398.)

Lastly, the word survivor is one of the few words which the courts have considered themselves at liberty to change for one etymologically quite different. "And" has been changed to "or," "or" to "and," "fourth" to "fifth," "several" to "respective," "future" to "former," and "survivor" "to other." We shall, therefore, discuss first the period at which survivorship is to be ascertained in bequests of personalty and devises of realty; secondly, the change made in the meaning of the word survivor by judicial interpretation, which, disregarding its etymological sense, takes it as used instead of the word "other."

First, the Period.—Sir John Leach confessed his inability to reconcile every case, but considered it to be settled that if a legacy be given to two or more equally to be divided between them, or to the survivors or survivor of them, and there be no special intent to be found in the will, the survivorship is to be referred to the period of division. If there is no previous interest given in the legacy, then the period of division is the death of the testator, and the survivors at his death will take the whole legacy. But if the previous estate be given, then the period of division is the death of the tenant for life, and the survivors at such death will take the whole of the legacy. Even to Sir John Leach, the complicated idea of survivorship proved a fallacy. The rule just cited respecting survivorship to a tenant for life is too broadly stated, for the tenant for life may predecease the testator, and then the period of division will be the testator's death. (Spurrell v. Spurrell, 11 Hare., 154.)

The rule to govern the period for ascertaining the survivors in limitations of realty, was for a long time unsettled. Many cases fixed the period at the death of the testator. Doe *v.* Prigg made this the rule even in a devise to a class (8 B. & Cr. 231.) Wordsworth *v.* Wood, (1 H. L. 129), was thought by some to overrule Doe *v.* Prigg. In Young *v.* Robertson (H. L. 8 Jur. N. S. 825,) it was laid down as the rule that words of survivorship are to be referred to the period appointed for the payment or distribution of the subject matter of the gift. Nevertheless, in the next month, the Lord Chancellor Westbury in the House of Lords, held that the law in respect of real estate, was still unsettled. Taaffe *v.* Conmee (12 Ir. Ch. Rep. 338, H L.; 8 Jur. N. S. 919; 6 L. T. Rep. N. S. 666.) And Vice Chancellor Wood in *Re* Gregson's Trusts (10 Jur. N. S. 696; 10 L. T. Rep. N. S. 612), held that Doe *v.* Prigg was not overruled; but on appeal (10 Jur. N. S. 1168; 2 D. J. & S., 428,) Lord Justice Turner expressed his decided disapproval of Doe *v.* Prigg. He attributed what he called the painful conflict of authorities, partly to the fact that courts of law had, as to real estate, leaned strongly in favor of the vesting at the death of the testator, whilst the courts of equity had, as to personal estate, leaned as strongly to the vesting at the period of division. It was plain to his mind that the decisions as to personalty were strongly founded upon the intention of the testator, but still the governing question as to both laws was, and always had been, the intention of the testator. "The law," he said, "is subordinate to the intention. It comes into force only when the intention has been ascertained, and it cannot constitute the medium by which the intention is to be ascertained. In Foas' Will (11 Jur. N. S. 785) the Master of the Rolls followed Young *v.* Robertson, and Vice Chancellor Wood, in Wilmott *v.* Hewitt, distinguishing the case from Young *v.* Robertson, upon the words of the will, held that the survivorship was not to be referred to the period of distribution, but to the time of the death of the legatees dying in the lifetime of the tenant for life. (11 Jur. N. 1820.) These two cases show that Young *v.* Robertson is good law as to personalty, yet the intention is to govern.

In Bowers *v.* Bowers, (21 L. T. Rep. N. S. 134; L. Rep. 8 Eq. Ca., 283,) there was an immediate gift to four residuary legatees and devisees in equal shares, "with benefit of survivorship," in case any of them should be without issue, and in case any of them should die leaving children, then the share, whether original or accruing of each so dying, to go to such children. Vice Chancellor Malins held that the clause of survivorship was merely to guard against lapse, and was, therefore, confined to the lifetime of the testator. Lord Chancellor Hatherley and Lord Justice Giffard reversed this decision. The former observed: "There have been many cases in which the court has said that to refer a

clause providing for the divesting of a share to the time of the testator's own death, so as to make it merely a provision against lapse is not a natural construction. It is not *prima facia* to be supposed that he contemplated the death of the objects of his bounty in his lifetime, but he is to be considered as contemplating their death at some later period, unless he uses language which shows that he is referring to the time of his own death. Take the case of an immediate gift to A, "and in case he shall happen to die, then to B." Here death being spoken of as contingent, the testator must be referring to death before some particular period, and as there is no other period to which it can be referred than his own death, we are obliged to treat the gift over as taking effect only in the case of A's dying in the the testator's lifetime. But if the gift over is "In case A shall happen to die leaving issue," we have a contingency, and there is no occasion to confine the death to any particular period. (L. Rep. 5 Ch. App. 244.)

In marriage settlements, limitations to children on the death of the survivor of father and mother of course are frequent. Here the limitation is on the death of a person a certain event, and the word survivor merely ascertains who that person is, and therefore presents no difficulty of construction, though the limitation to a class of children may. The latest important case on such a limitation is Jeyes *v.* Savage (L Rep. 10, Ch. App. 555), in which Woodcock *v.* Dorset was explained.

(To be continued.)

AGENCY—OF THE EXTENSION OF AN AGENT'S AUTHORITY.

BY THE CONDUCT OF THE PRINCIPAL.

The authority with which an agent is invested is not necessarily confined to the performance of those actions alone which are authorized by the bare words in which an authority is conveyed. On the contrary, it is rarely so confined. Generally speaking, the authority may be extended in a variety of ways by the operation of a number of rules and principles, some of which have already been discussed. There now remains for consideration the influence of the principal's conduct in extending the original authority.

The rule applicable to this branch of law has been laid down with great clearness in the work of a learned writer upon mercantile law. The only ground of liability on the part of a principal, to third parties dealing with an agent for the acts of the agent done in excess of the power given him, and which he would be held to have even in a question between himself and the principal, is such *culpa* or *quasi-culpa* on the principal's part as would be a relevant ground for the plea of estoppel against his pleading the actual terms of the authority given to the agent. Where the principal by his words or conduct wilfully causes another to believe the existence of certain powers in the agent, and induces him to deal with the agent in that be lief; where the principal has by words or by conduct made a representation to another as to the agent's authority in order to induce others to act upon it, where the representation or conduct complained of, whether active or passive in its character, has been intended to bring about the result whereby that other dealing with the agent has altered his position to his loss—in such a case, and in such a case alone, will the doctrine of estoppel apply to bar the principal from pleading against the third party the terms of the real authority which he gave to the agent. Mere negligence is not of itself a ground of estoppel: Bell Commentaries, iii., I. 3, n. 5. The importance of the rules defining the limits of an agent's authority will fully appear when it is remembered that an agent's power to bind his principal is limited to the scope of his authority: Olding *v.* Smith, 16 Jur. Q. B., 497.

In Bishop *v.* Countess of Jersey, 2 Drew., 143, 1854, a bill was filed against the members of a banking firm for the purpose of making them liable to repay to the plaintiff the sum of £5,000, of which she alleged she had been defrauded by a former member of the firm. From the evidence it appeared that A., the member in question, had advised the plaintiff, a customer of the bank, to sell out some Dutch stock. He told her the firm could procure for her better security, and that he had one in view. He told her the money was wanted by his own son, who was in trade. The plaintiff sold out the stock and paid the money into the bank; she then gave him a check to draw it out and invest it. He drew it out, misapplied it, and absconded, the interest having been regularly carried to her account in the meantime in the books of the bank, but it did not appear by whom. All these transactions took place at the banking house, and the plaintiff had no acquaintance or dealings with this member except as banker and a member of the firm. The other partners did not appear to have known of them at the time they took place. The Solicitor-General (Sir Richard Bethel), with whom was Mr. Cairns, contended, *inter alia*, upon the authority of Willett *v.* Chambers, 2 Cowp., 814, and Rapp *v.* Latham, 2 B. & Ald., 795, that if one partner makes representations to a customer of the firm, however untrue they may be, the customer has a right to be put in the same position by the other partners as if the representation had been true. Vice-Chancellor Kindersley was of opinion that the defendants were not liable, on the ground that it was not within the scope of the business of bankers to seek or make investments generally for their customers, nor did the partners know of the dealings before the other partner had absconded. No direct reference was made to the principle that where one of two innocent persons must suffer by the fraud of a third, he who enabled that person, by giving him credit, to commit the fraud shall be the sufferer: 3 Salk., 233; 1 Ld. Raym., 225.

This case was referred to in Thompson *v.* Ball, 10 Ex., 10; 23 L. J., 321, Ex., a decision of the court of Exchequer in the same year. There the manager of a joint stock bank, at which the plaintiff kept a deposit account, represented to him that the bank had an equitable mortgage on some houses of a third person, subject to a mortgage of £400, and advised him to purchase the houses for £595, £400 to be paid in discharge of the mortgage, and £195 to the bank. The plaintiff consented, and took his deposit receipts to the manager at the bank, who, on presenting them to a clerk, obtained from him £595. The manager then gave the plaintiff a receipt in his own name, stating that £195 was the balance of purchase money of the houses, and that £400 was deposited with him to pay off the mortgage. He afterwards absconded with the £595. The plaintiff having brought an action against the bank to recover the money, the jury found that the manager had authority to assign securities, that the manager intended to make the plaintiff believe, and the plaintiff did believe, that the manager was acting in this transaction as agent of the bank. The court held that the bank was responsible for the money. The obvious conclusion from the findings of the jury was that the money was paid to the manager as agent of the bank. This distinguishes the case from Bishop *v.* Countess of Jersey (*sup.*).

There are a number of cases under this head in which the agent has been allowed to hold himself out as a principal.

In Ramazotti *v.* Bowring, 29 L. J 30, C. P.; 7 C. B. N. S., 85; 6 Jur. N. S., 172, 1860, N., representing himself to be the proprietor of a certain business carried on under the name of the Continental Wine Company, induced the defendants to receive from him certain wines and spirits in part satisfaction of a debt previously contracted by him with them. N. was really only clerk to R., who was the real proprietor of the establishment. The name of R. appeared over the entrance to the cellars, but it was not visible to persons going to the counting house. R's name also appeared (though in an ambiguous manner) upon a receipt signed by one of the defendants on the delivery of some of the goods. In an action brought by R. for the price of the goods, the Common Serjeant left it to the jury to say whether the plaintiff or N. was the real owner of the business, and told them that if they were of opinion that N. was the real owner, they must find their verdict for the defendants, but that if they thought the plaintiff was the owner, they must find for him. A verdict for the plaintiff was returned. A rule *nisi* for a new trial on the ground of misdirection, was obtained, and afterwards made absolute. "I think," said Erle, C. J., "the proper question was not put to the jury. . . . The proper question under the circumstances would have been whether Ramazotti so conducted himself as to enable Nixon to hold himself out to be the true owner of the goods, whether Nixon did so hold himself out, and whether the defendants, in dealing with Nixon, believed him to be the owner." Other points were raised in the course of the arguments, but it is not necessary to discuss them here.

The court of Queen's Bench had a similar question before them in Edmunds *v.* Bushell and Jones, L. Rep. 1 Q. B., 97, 1865. The defendant J. carried on business at Luton and in London. The business in the latter place was carried on in the name of Bushell & Co. J. employed B. to manage his business, and carry it on in the above name. The drawing and accepting bills of exchange was incidental to the carrying on of such a business, but it was stipulated between them that B. should not draw or accept bills. B. accepted a bill in the name of "Bushell & Co., and the court held that J. was liable on the bill in the hands of an indorsee, who took it without any knowledge of B. and J., or the business.

Where, however, the agent of a wharfinger, whose duty it was to give receipts for goods actually received at the wharf, fraudulently gave a receipt for goods which had never been received, the principal was not held to be responsible, because it was not within the scope of the agent's authority in the course of his employment to give such a receipt: Coleman *v.* Riches, 16 C. B., 104; 24 L. J., 125, C. P.—*The London Law Times.*

COURT OF APPEALS ABSTRACT.

CONTRACT—FAILURE TO PERFORM—WAIVER AGREEMENT FOR SALE OF BONDS—TENDER OF PERFORMANCE.

Defendant agreed to purchase and plaintiffs to sell bonds of an Alabama railroad company, indorsed by the State of Alabama. Delivery and payment was to take place at plaintiff's place of business at a specified day and hour. At the precise time defendant was at the appointed place, and asked for the bonds. Plaintiffs, who did not own the bonds, had agreed for the purchase of some with one K., and K. had offered them, but they had not accepted bonds which were indorsed with the name of the governor of Alabama, but without his official title. All parties believing the formality mentioned necessary, defendant told plaintiffs if they would deliver bonds indorsed in conformity to it before half-past two of that day to M. & Co., that firm were authorized to receive them. Before the time mentioned plaintiffs offered bonds, a part of which were indorsed by the governor without the addition of his official title. M. & Co. refused to receive them because of the want of the formality. The informal bonds at the time of such offer did not belong to plaintiffs, but to K, plaintiffs having taken them upon an agreement that if they were accepted they would pay K. for them. *Held*, that by the failure to deliver the bonds at the time and place originally agreed upon the defendant was relieved from all liability; that although the informality in indorsment did not render the bonds invalid as against the State of Alabama, and a tender of them to defendant in the first instance would have been sufficient, the tender to M. & Co. not being of such bonds as defendant had then agreed to accept, defendant was not liable on the contract. Levy et al. *v.* Burgess. Opinion by Andrews, J. [Decided March 21.]

EVIDENCE—HYPOTHETICAL QUESTIONS ALLOWED.

Hypothetical questions are permitted in which counsel may, for the purpose of having the opinion of experts, assume the facts as they claim them to exist, and an error in the assumption does not make the interrogatory objectionable if it is within the possible range of the evidence. Hartnett *v* Garvey. Opinion *per curiam.* [Decided June 13.]

INSURANCE—FIRE POLICY—CONDITIONS IN—RIGHT OF INSURER TO CANCEL.

A condition attached to a fire insurance policy provided that it should be void in case the property should be described so as to diminish the premium, or if the risk should be increased during its continuance, by any means within the control of the assured, in such case no premiums were to be returned. It also provided for a termination of the insurance at the election of the insurers upon notice to the insured and a repayment of a ratable proportion of the premium in case the risk should be increased by the erection or occupation of buildings upon neighboring premises, "or otherwise," and it also provided that "if for any other cause the company shall so elect, it shall be optional with the company to terminate the insurance," after the like notice and repayment of the unearned premium.

Held, that the principle of *noscitur a sociis* did not govern in the interpretation of the contract, and that under it the company had, upon notice and repayment of unearned premiums, the right to terminate a risk whenever they should desire so to do. International Life and Trust Co. *v.* Franklin Fire Ins. Co. of Philadelphia. Opinion by ALLEN, J. [Decided April 28.]

NEGLIGENCE—PROXIMATE CAUSE OF DEATH—WHAT IS NEGLIGENCE.

Plaintiff's intestate, a passenger on defendant's cars, was, while alighting from the cars, by the negligence of defendant's servants, so injured that the injury would be certain to produce death unless relieved. He employed surgeons of acknowledged competency to treat him, but he died. *Held*, that the defendant was liable for his death, and would not be relieved by the fact that a mistake in treatment may have been made by the surgeons, which contributed to the result, Sauter *v.* N. Y. C. & H. R. R. R. Co. Opinion by CHURCH, C. J.

The sudden jerking of a train backwards while passengers are rightfully passing out of the cars, is a negligent act, and a danger not presumptively to be apprehended by a prudent man. [Decided April 18.]—*Albany Law Journal.*

SUPREME COURT OF PENNSYLVANIA.

MENTZ *v.* LANCASTER FIRE INS. CO.

Error to the Court of Common Pleas of Crawford County.

Where agents are acting for an insurance company, and are held up to the public as such, the reasonable presumption is that they are authorized to act for the company in a general way, unless the company specify what may be their special duties and powers.

Opinion by SHARSWOOD, J.

It was admitted on the trial of the cause below that Murray and Clow were agents of the insurance companies at Titusville, of the defendants in error, and of the Armenia Fire Insurance Company. There was no evidence tending to show that their powers were special. It must be assumed then that they were authorized to act as general agents of the companies in all matters relating to the effecting of insurance on their behalf. It may be conceded that as such general agents they would have no power to waive any express condition in the policy. But the question was not of their power to do this, but whether their declaration of a fact, namely, that the condition had been actually complied with, would estop the company from controverting the fact. The evidence offered and rejected was that the agent had told the assured that the proper indorsement had been made on the policy. Now, such a declaration, made by a duly authorized agent or officer, would only operate as an estoppel. It lulled the party to sleep by the assurance that the conditions of the policy had been complied with, and that his indemnity was secured. In point of fact, then, local agents are held out as acting for the companies they represent in all respects except as to the actual issue of the policies. The companies will assuredly lose all public confidence if they shelter themselves behind the special character of the powers of such agents, when parties have relied upon their declarations.

The case of Worcester Bank *v.* Hartford Fire Insurance Company, 11 Cush., 265, is not in point. There the parties insuring were told by the agent that it would make no difference that the second insurance was not indorsed on the policy; that he would make a memorandum of the fact in his book, which would answer every purpose. The question there was whether the agent could avoid performance of the condition, which is a very different question from that presented on this record.

Judgment reversed and *procedendo* awarded.

—*Pac. Law Rep.*

CHICAGO LEGAL NEWS.

CHICAGO, JULY 29, 1876.

The Courts.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1875.

197.—FRANCIS L. MARKEY, ISAAC BRANCH, and DANIEL W. BRANCH, Appellants, *v.* W. C. LANGLEY, SAMUEL KEYSER, and C. D. COOK.

Appeal from the Circuit Court of the United States for the District of South Carolina.

POWER OF SALE—WHEN A SALE WILL BE SET ASIDE.

The court states the duty of a trustee or mortgage, in making a sale under a power, and holds that where a power coupled with a discretion has been exercised, a court of equity in the absence of fraud, should rarely interfere.—ED. LEGAL NEWS.

Mr. Justice SWAYNE delivered the opinion of the Court.

The statement of facts agreed upon by the counsel of the parties, has abridged our labor in this case. We shall confine our remarks to the points which, in our judgment, require consideration, referring to the facts only so far as is necessary for the elucidation of our views.

The validity of the two mortgages executed to Langley & Co. by the corporation known as the Kalmia Mills, is not questioned; nor can it be doubted that the power to sell, which they contained, was sufficient to warrant the sale of the mortgaged premises in the manner prescribed. Olcott *v.* Bynum, 17 Wall., 63. The good faith of Langley & Co. in making the sale, and of Cogswell, Evans & Mordecai in making the purchase, are undisputed. No ground is disclosed for doubt as to either of these points. All concerned acquiesced at the time and were apparently satisfied. This litigation has grown out of the large and unexpected depreciation of the property upon which both the appellants and appellees supposed their debts were abundantly secured, and out of the proceeds of which they expected to be paid, if a sale became necessary.

Upon the default of the mortgagor, the mortgages gave the mortgagees authority "to put the mortgaged premises into the hands of some good broker and auctioneer, to be sold for cash or credit, at the option and direction of the mortgagees, at public sale to the highest bidder, according to the custom of vendue, after advertising" as directed, and, further, "to do and perform all and every other act and acts, thing and things which shall or may be necessary and proper for the full and complete effecting and performing of the covenants and agreements herein contained."

The terms of sale advertised were a cash payment of one-third of the amount bid, and the balance in six, nine, and twelve months, secured by notes and a mortgage upon the premises. At the sale, the auctioneers announced that they were authorized to state "that the purchasers would be able to negotiate more favorable terms with the sellers, provided it was to their mutual interests."

The property was sold to Cogswell, for himself, Evans, and Mordecai, upon a bid of the amount due Langley & Co., and $20,000 in addition. One-third of the amount bid to be paid in cash, was $71,445.69. The buyers thereupon represented to Langley & Co. that it was impossible for them to make the cash payment, and asked for indulgence and a change of the terms of the sale with respect to the times when the payments were to be made.

Langley & Co., rather than re-advertise the property and take the risk incident to offering it for sale again, entered into an agreement with the purchasers, whereby it was stipulated as follows:

That the purchasers should give to Langley & Co. their four several promissory notes, one for $180,000, payable on the 12th of January, 1868, (being for the principal of the debt then due to them,) with interest, and three others, each for $4,779.92, payable respectively at five, six, and seven months, with interest, (being for interest then due on the principal debt,) and, in addition, another note for $20,000, payable with interest on the 3rd of April, 1868.

The title to the mortgaged premises was to be conveyed to Cogswell, first to pay the several notes for the purchase-money, and then in trust for such uses and purposes as Cogswell, Evans & Mordecai should appoint. They were also to give to Langley & Co. their bond secured by several mortgages upon their individual property, conditioned to pay any residuum that might be left due on the notes after exhausting the property covered by the deed of trust to Cogswell. This agreement was in all things carried out by the parties. The note of $20,000 was intended to meet the liabilities of the Kalmia Mills to its creditors, other than Langley & Co. The debt due to Markey & Co. was one of those intended to be thus provided for.

A few days before the sale Markey & Co. put on record a contract with the Kalmia Mills, under which they had been working upon the mortgaged premises. This gave them a mechanic's lien. They threatened to enjoin the proceedings to sell by Langley & Co. Cogswell, Evans & Mordecai thereupon gave them a guaranty that if the guarantors became the purchasers of the premises they would continue the contract under which Markey & Co. had been working, and indemnify them against any loss arising from the Kalmia Mills failing to pay the amount due on the contract. This being arranged, Markey & Co. interposed no obstacle to the sale. After the sale they entered into a contract with Cogswell, the trustee, whereby it was stipulated that they should be paid the sum of $18,000 for their work done and to be done. They continued to work under this contract, and received payments from time to time.

The enterprise in which Cogswell, Evans & Mordecai had engaged, with the premises they had bought as its basis, having failed, they requested Langley & Co. to take possession of the premises conveyed by the trust deed to Cogswell, and of the premises covered by the mortgages given by Cogswell, Evans & Mordecai, and to proceed to sell under the powers contained in those instruments. Langley & Co. thereupon advertised the Kalmia Mills property to be sold on the 10th of March, 1868.—Markey & Co. and other creditors threatened to interpose by injunction. Langley & Co thereupon filed this bill to settle their rights and those of the adverse parties. On the day fixed for the sale the Kalmia Mills property, by consent of parties, was bought by Langley for $160,000. Forty thousand dollars of the fund was reserved by order of the court to await the result of this litigation.—Subsequently, by the like consent of parties, the property mortgaged by Cogswell, Evans & Mordecai was sold and yielded the net sum of $52,148. The proceeds of both sales were less than sufficient to satisfy the amount due Langley & Co. by $6,152 13, leaving nothing to be applied to any other liability of the Kalmia Mills.

The contest in the court below was as to the application of the proceeds of these sales. The defendants claimed that Langley & Co. should be charged with the amount of the cash bid of Cogswell at the sale under the original mortgages, $71,449.69, as so much paid to them, because they had no right to waive its payment at the time of the sale and include it in the notes given for the purchase-money.

This, if done would leave a residuum of the proceeds of the sales large enough to pay the balance due Langley & Co., and also the amount due on the trust note of $20,000. Failing this, the defendants insisted that this note should be paid out of the proceeds of the Kalmia Mills property, and of the property mortgaged by Cogswell, Evans & Mordecai severally, *pro rata* with the other notes given for the purchase-money.

The court below decided against them upon both points. Here the same propositions have been urged upon our attention.

The first one cannot be maintained, for several reasons.

The mortgagor makes no objection to the sale as made. If it were defective, this would cure the defect and give it validity.—Taylor's Admr. *v.* Chowning, 3 Leigh, 654; Benham et al. *v.* Shaeffer et al., 2 Cal., 387. If the power require the sale to be for cash, and it is made for part cash and part credit, the departure from the power is beneficial to the mortgagor, and the sale is valid.—Hubbard *v.* Jarrell, 23 Md., 75. When the power is to sell for cash, and the sale is made accordingly, the mortgagee may allow time for the payment of the purchase-money, and whether this arrangement is made before or after the sale is immaterial.—Malone *v.* Williams, 39 Alab., U. S., 202.

Where mortgaged premises were offered for sale for cash under a power which required the sale to be so made they were struck off for $2,375. The purchaser tendered $1,200 cash, and offered to give any security that might be required for the payment of the balance when the sale was confirmed. The mortgagee declined to receive the money and security as not in conformity with the terms of the sale. The property was offered for sale again and bought by the mortgagee for $1,600.

The court said: "In determining upon the approval or rejection of the sale in such cases, the true question to be considered is not so much whether there has been *a literal or technical, as a fair and reasonable compliance with the terms of sale*, and a *bona fide* disposition of the property.

"Without intending to charge the mortgagee in this case with the willful violation of his trust, the circumstances disclosed by the proof show reasonable ground for the inference that he misapprehended the nature of his duty as trustee, which required *an advantageous sale of the property for the benefit of all the parties interested.*" The sale was vacated.—Horsey *v.* Hough, 38 Md., 139; see, also, Gibson's Case, 1 Bland's Chy., 144; Olcott *v.* Bynum, 17 Wall., 63.

Where a power coupled with a discretion has been exercised, a court of equity, in the absence of fraud, very rarely interferes.—Olcott *v.* Bynum, supra.

In this case the mortgagees were expressly authorized to sell for cash or on credit. This gave them authority to do either, or to combine them in the sale. What was done was a simple exercise of the discretion with which they were clothed. It was in pursuance of the notice given at the vendue. It was intended to promote the sale of the premises upon the best terms that could be procured. Such an exercise of the power was as competent after as before the property was struck off. In this respect the power is without restriction. The arrangement was apparently greatly beneficial to Markey & Co. and the unsecured creditors, as well as to Langley & Co. It does not appear that there was any bidder but the purchasers. It is clear that they could not have made the cash payment. If insisted upon, the sale would have fallen through. Besides the mortgaged premises, a large amount of additional property was pledged for the payment of the purchase-money. The light thrown backward by subsequent events shows clearly that it was the only way to secure the payment of the debt due to Langley & Co. and leave anything for the other creditors. The arrangement seemed to furnish the means of satisfying all demands. That it failed to do this was not the fault of Langley & Co.

A mortgagee, in such circumstances, is a trustee for the benefit of all concerned. He must regard the interests of others as well as his own. He should seek to promote the common welfare. If he does this, and keeps within the scope of his authority, a court of equity will in no wise hold him responsible for mere errors of judgment, if they have occurred, or for results, however unfortunate, which he could not reasonably have anticipated.—Hext *v.* Porcher, 1 Strob. Eq., 172.

The second proposition is also untenable.

The liens of the mortgages and the mechanic's lien attached to the proceeds of the sales in the same manner, in the same order, and with the same effect as they bound the premises before the sales were made.—Aster *v.* Miller and others, 2 Paige, 68; Sweet *v.* Jacobs, 6 Idem, 355; Brown *v.* Stewart, 1 Md. Chy. Decis., 87; Olcott *v.* Bynum, 17 Wall., 63.

In the view of equity, the new securities stood in substitution for the old ones, the liens of Langley & Co. being prior in point of time to all others, and first to be paid. As the case is developed in the record, such appears plainly to have been the intent of the parties. The note of $20,000 was the last to mature.

If the sale to Cogswell had been made by a master or a trustee other than those named in the power of sale, for cash or on credit, the money, when received, would have been paid over according to the priorities of the liens of the parties entitled to receive it. Langley & Co. would have been first paid.

The fact that the sale was made by the mortgagees, acting as trustees and performing the functions of a master, does not change the principle involved nor affect its application.

It appears that a question was raised in the court below as to the right of the unsecured creditors of the Kalmia Mills to share with Markey & Co. in the proceeds of this note. As there can be no such proceeds, we need not consider that subject.

The decree of the Circuit court is affirmed.

UNITED STATES SUPREME COURT.

No. 195.—OCTOBER TERM, 1875.

JACOB MAGEE and HENRY HALL, Plaintiffs in Error,
v.
THE MANHATTAN LIFE INSURANCE COMPANY.

In Error to the Circuit Court of the United States for the Southern District of Alabama.

BOND OF INSURANCE AGENT—RELEASE OF SURETY.

Held, That the agreement as to the commissions, and the circumstances that it was unknown to the sureties and not communicated to them by the insurance company, did not exonerate the sureties from liability upon the bond.—[ED. LEGAL NEWS.

Mr. Justice SWAYNE delivered the opinion of the court.

The defendant in error sued the plaintiffs in error upon a bond which recited that Henry Voorhes had been appointed an agent of the insurance company, and was conditioned for his paying over to the company all moneys belonging to it which he should receive.

The breach alleged was that he had received such moneys, which he had failed to pay over.

The defendants pleaded three pleas:

1. That Voorhes had paid over all moneys belonging to the company which he had received after the execution of the bond.

2. That at the time of the execution of the bond, Voorhes, as such agent, was indebted to the company, and that there was an agreement between him and the company that all moneys received by Voorhes should be credited upon this indebtedness; that these facts were concealed from the defendants, and that all the moneys so received were so credited.

3. That the plaintiffs required the giving of this bond as as a condition on which only they would retain Voorhes in their employment as such agent; that they required further, an agreement by Voorhes that all his commissions thereafter earned should be applied to his past indebtedness to the company; that they were so applied; that the defendants were ignorant of the indebtedness, and of this agreement; that if they had been informed of them, they would not have executed the bond, and that the agreement as to the commissions, and its execution were a fraud on them, and that the bond as to them was thereby avoided.

The third plea was demurred to, and the demurrer was sustained. Issue was taken upon the first and second pleas. The jury found for the plaintiff, and the court gave judgment accordingly.

The only question presented for our determination, is as to the sufficiency of the third plea.

The demurrer admits the substantial facts which the plea avers. Do the agreement as to the commissions, and the circumstances that it was unknown to the sureties and not communicated to them by the company, exonerate the sureties from liability upon the bond?

A surety is "a favored debtor." His rights are zealously guarded both at law and in equity. The slightest fraud on the part of the creditor, touching the contract, annuls it. Any alteration after it is made, though beneficial to the surety, has the same effect. His contract exactly as made is the measure of his liability, and if the case against him be not clearly within it, he is entitled to go acquit.—Ludlow vs. Symonds, 2 Caines'

Cases, 1; Miller vs. Stewart, 9 Wheat., 681.

But there is a duty incumbent on him. He must not rest supine, close his eyes and fail to seek important information within his reach. If he does this, and a loss occurs, he cannot, in the absence of fraud on the part of the creditor, set up as a defence facts then first learned which he ought to have known and considered before entering into the contract. —Kerr on Fraud and Mistake, 96.

Vigilantibus et non dormentibus jura subveniunt.

Where one of two innocent parties must lose, and one of them is in fault, the law throws the burden of the loss upon him.—Hearne vs. Nichols, 1 Salk., 289.

It may be well, before examining the question arising upon the plea, to advert to some of the points bearing upon the subject, which have been adjudged in authorritative cases.

A fraudulent concealment is the suppression of something which the party is bound to disclose.—Kerr, sup., 95.

To constitute fraud, the intent to deceive must clearly appear.—Spofford vs. Newson, 9 Iredell (Law), 507.

The concealment must be willful and intentional.—De Gol. on Guar. and Sur., 366.

The test is, whether one of the parties knowingly suffered the other to deal under a delusion.—2 Kent's Com. (Comst. ed.), 643.

The mere relation of principal and surety does not require the voluntary disclosure of all the material facts in all cases. The same rule as to disclosures does not apply in cases of principal and surety as in cases of insurance on ships or lives.—North Brit. Ins. Co. *v.* Loyd, 10 Exch., 533.

In this case a former guarantor was discharged and others taken in his place. The fact of the prior guaranty was not disclosed. The subsequent guarantors made no enquiry and they were held to be liable. If the surety desires information he must ask for it. The creditor is not bound to volunteer it. An undisclosed prior debt will not affect the validity of the contract.—Hamilton *v.* Watson, 12 Clarke & F., 119.

If the creditor be applied to he must make a full and frank communication.—De Golyar, sup., 367.

One took a note from another whom he knew to be insolvent, and did not disclose that fact to a person who became surety. It was held that the surety was bound and that the payee had a right to presume he was aware of the insolvency of the principal.—Ham *v.* Greve, 34 Ind., 18.

To render the general allegation of concealment sufficient in a pleading, it is necessary also to aver that the creditor either procured the surety's signature or was present when the instrument was executed, and then misrepresented or concealed essential facts which should have been disclosed, otherwise the allegation of fraud is only the pleader's deduction.—Burks *v.* Wonterlein, 6 Bush., 24.

In this case the court said: "The principal may have presented her" (the payee) "the note, signed in her absence, when she could have made no communication to the surety and could therefore have been guilty of neither misrepresentation nor concealment, and the general allegation of concealment does not negative the idea of her absence."—Ibid.

In such circumstances the creditor is under no obligation, legal or moral, to search for the surety and warn him of the danger of the step he is about to take. No case has gone so far as to require this to be done.—Wyethes *v.* Labouchere, 3 De Gex. & J., 609.

The creditor is not bound to inform the intended surety of matters affecting the credit of the debtor, or of any circumstances unconnected with the transaction in which he is about to engage. —Ibid.

It appears by the record in this case that the plaintiff was a corporation of the city of New York, that Voorhes was the agent of the company at Mobile, in the State of Alabama, and that the parties to the bond were all of that city.

The plea does not set forth any of the circumstances attending the execution and delivery of the bond. It does not aver that there was any misrepresentation, anything fraudulently kept back, or any opportunity to make disclosures on the part of the company, or any inquiry by the sureties, before the bond was delivered. Nor is it averred that the company was aware that the sureties were ignorant of the facts complained of. It is, perhaps, to be inferred from the plea that the fact was—as the record aside from the plea shows it to have been—that the bond was executed at Mobile and sent by Voorhes by mail to the company in New York. If this were so, the company upon receiving it was under no obligation to make any communication to the sureties. The validity of the bond could not depend upon their doing so. The company had a right to presume that the sureties knew all they desired to know, and were content to give the instrument without further information from any source. Under these circumstances it was too late after the breach occurred to set up this defence.

There is another objection to the plea. There was nothing fraudulent in the agreement. The obligation of the agent was simply to pay over the money of the company which he should receive. This the sureties guarantied that he would do. To do it was a matter of common honesty, not to do it was a fraud. The agreement of the agent to apply money belonging to him derived from any source in payment of a pre-existing debt to the company, had no such connection with what the sureties stipulated for as gave them a right to be informed on the subject, except in answer to enquiries they might have made. They made none, and there was no obligation on the part of the company to volunteer the disclosure.

On both these grounds the plea was bad, and the demurrer was properly sustained.

The judgment of the circuit court is affirmed.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1875.

198.—GAIUS WHITFIELD, Appellant, vs. THE UNITED STATES.

Appeal from the Court of Claims.

COTTON SOLD TO THE CONFEDERATE STATES—TITLE TO.

1. TITLE OF CONFEDERATE STATES IN COTTON.—That the Confederate States government could acquire title in cotton by purchase, and such cotton at the close of the war, passed to the United States.

2. SALE OF COTTON TO BE PAID IN CONFEDERATE BONDS.—In this case the appellant sold his cotton to the Confederacy, ond took their bonds in payment. He contributed directly to the means of prosecuting the rebellion. He thus knowingly devoted his cotton to the war, and his rights must follow its fortunes. He cannot recover in the courts of the United States, the purchase money due from the confederacy, upon the principle that a sale upon credit implies a guarranty of the solvency of the purchaser, until the payment is made.—ED. LEGAL NEWS.

Mr. Chief Justice WAITE delivered the opinion of the court.

During the war of the rebellion, Whitfield, a resident of the State of Alabama, being the owner of 177 bales of cotton raised by himself, sold it to the Confederate States government, agreeing to receive in payment the eight per cent. bonds of the Confederate States. In January, 1865, payment of the purchase price was made and accepted in bonds of the kind agreed upon, payable to bearer, and falling due in the years 1868, 1871, and 1880. Whitfield kept the bonds in his possession, and, at the trial of this case below, produced them in open court. The cotton was never taken away by the Confederate States authorities, but remained in the possession of Whitfield until September 1, 1865, when it was seized by the treasury agents of the United States, acting under color of the authority of the abandoned and captured property acts. After the seizure, 59 bales were restored to Whitfield, pursuant to an arrangement made with him, as compensation for putting the cotton in good order, and the remaining 118 bales were sent forward to New York, where they were sold by the cotton agent of the United States and the proceeds paid into the treasury. This suit was brought to recover these proceeds.

In U. S. *v.* Huckabee, 16 Wall., 414, we held that real property purchased by and conveyed to the Confederate States during the war passed to the United States at the restoration of peace, by capture, and we sustained the title of the United States thus acquired against a claim made by the vendors of the Confederate States, that the conveyance was obtained from them by duress. The same principle was recognized and acted upon in U. S. *v.* Titus, 21 Wall., 475.—We have thus decided that the Confederate States government could acquire title to real property by purchase, and it is not easy to see why a different rule should be applied to personal property. The ownership of that, even more than real property, was required for the operations of the Confederacy. Contracts of sale made in aid of the rebellion will not be enforced by the courts, but completed sales occupy a different position. As a general rule, the law leaves the parties to illegal contracts where it finds them, and affords relief to neither. A sale of personal property, when completed, transfers to the purchaser the title of the property sold.

Whitfield's sale in this case was not on credit, but for bonds when passed from hand to hand as money. The transaction in this respect was not different from a sale to the United States for any of their public securities payable at a future day. The sale was complete when the bonds were accepted in payment. The title then passed to the Confederate States without a formal delivery. From that time Whitfield ceased to be the owner of the cotton.

The claim, then, that he had the right to retain the possession of the cotton until the purchase-money was paid, because of the insolvency of the Confederate government, is not applicable to the facts established by the evidence, as the purchase money had been paid before the insolvency. But if this were otherwise, it is not easy to see how his claim, growing out of his illegal contract as it does, can be enforced against the United States in the Court of Claims. In Sprott *v.* U. S., 20 Wall., 463, it was decided that one owing allegiance to the government of the United States could not avail himself of the courts of the country to enforce a claim under a contract by which, for the sake of gain, he knowingly contributed to the "vital necessities of the rebellion." For that reason we refused to give effect to a purchase of cotton from the Confederate government. This case is not distinguishable from that in principle. Cotton, as we have often said, was, during the late war, as much hostile property as the military supplies and munitions of war it was used to obtain. When Whitfield, therefore, sold his cotton to the Confederacy and took their bonds in payment, he contributed directly to the means of prosecuting the rebellion. He says in his petition, it is true, that his sale was not made to aid the rebellion, but the purchase was clearly for that purpose and no other. This he could not but have known. Under such circumstances "he must be taken to intend the consequences of his voluntary act."—(Hanauer *v.* Doane, 12 Wall., 347.) By his sale he knowingly devoted his cotton to the war, and his rights must follow its fortunes. The courts of the country would not relieve him against one who held title by conveyance from the Confederate States and under that title had obtained possession. Neither would they interfere in behalf of a purchaser from the Confederate States to enforce possession under his sale. But when his possession has been lost by reason of his sale, no matter how, the courts will afford him no relief against the loss. Having by his acts entered the lists against his rightful government, he cannot, if he loses, ask it for protection against what he has voluntarily done. In this case, he seeks to enforce a right growing out of his contract of sale, which was tainted with the vice of the rebellion. It was a contract which could not have been enforced against him, and he is equally powerless under its provisions against others. He seeks, in effect, by this action to recover, in the courts of the United States, the purchase money due from the Confederate States, upon the principle that a sale upon credit implies a guaranty of the solvency of the purchaser until the payment is made. We have already seen that such is not his position here; but if it were, having lost his possession, he has no standing in court for relief. He is not the owner of the property, and his lien is not one the courts of the United States will enforce.

The judgment of the Court of Claims is affirmed.

Through the kindness of Jesse Holdom, of the Chicago bar, we have received the following opinion:

SUPREME COURT OF ILLINOIS.

OPINION FILED JUNE 30, 1876.

425.—FRANCIS BINZ *v.* JAMES E. TYLER, ET AL.

Appeal from the Superior Court of Cook.

PLEADING—DECLARING ON INSTRUMENT IN HAEC VERBA—STATING LEGAL EFFECT.

Where an instrument set out in *haec verba*, and the pleader misstated its legal effect, held, that the instrument being before the court, its legal effect was to be determined by the court, and that determination could not be influenced by the subsequent allegation, of the pleader, as to its legal effect, which was mere matter of conclusion.

Where judgment was on the demurrer for want of plea, and appellant assigned for error, that the verdict was against the evidence, *held*, that appellant, by permitting judgment thus to be given, was so far out of court that he was entitled to cross-examine witness for the purpose of reducing the damages only; and it was not admissable for him to make a defence to the action. The demurrer admitted every material allegation in the declaration, and nothing was left to be inquired into, but the amount of damages sustained.

This was an action of assumpsit by appellees against appellant. The first count of the declaration is as follows:

For that whereas, the said plaintiffs heretofore, to wit: on the third day of September, A. D. 1873, at the city of Chicago to wit, at the county of Cook aforesaid, demised and leased, by a certain indenture of lease bearing date the day and year last aforesaid, to "The South Chicago Turn Verein of the city of Chicago," certain premises, with appurtenances thereunto, belonging and appertaining for a certain term of years, to wit: for the term of from the 3rd day of September, A. D. 1873, for and during and until the first day of May, A. D. 1879, at a rental at the rate of one thousand dollars per annum, until May first, A. D. 1874, and thereafter, until the full end and termination of said lease at the yearly rent of two thousand dollars, which said rent was to be paid on the first day of each and every month in equal portions and instalments in advance, a copy of which said indenture is hereunto attached and marked exhibit "A," and is hereby made a part and parcel of this, the first count in this declaration and which said indenture was on to wit: the day and year last aforesaid, at the county aforesaid, duly executed by the said plaintiffs and the said "The South Chicago Turn Verein of the city of Chicago," and that thereupon the said "The South Chicago Turn Verein of the city of Chicago," went into and used, held, occupied and enjoyed said premises from thence hitherto, and is still in the occupancy of the same, and also, on to wit: the day and year, and at the county aforesaid, in consideration of the renting and demising of the aforesaid premises, and the making and executing of the indenture of lease last aforesaid, so he the said plaintiffs made and executed, by the said defendant, entered into and made the following agreement in writing, upon the back of said indenture of lease, and then and there, on the day and year, and at the place last aforesaid, signed, sealed and delivered the said writing to the said plaintiffs, which said writing is in the words, letters and figures, following, viz:

"In consideration of one dollar to me in hand paid, the receipt whereof is hereby acknowledged, I hereby guarantee to James E. Tyler, B. W. Phillips and Jacob Weil, their heirs, executors, administrators or assigns, the full payment of the sum or sums of money specified in the within lease, and also guarantee to said Tyler, Phillips and Weil, the prompt fulfillment of all the provisions, conditions and agreements therein mentioned, hereby binding myself, my heirs, executors, administrators and assigns."

(Signed.) F. BINZ. [SEAL.]

Witness, G. HEINRICE.

By which said writing the said defendant bound himself to pay the rent and fulfill and perform all and every of the covenants therein in said lease contained to be performed and fulfilled on the part and behalf of the lessees in said lease mentioned; that on to-wit: the first day of November, A. D., 1874, at, to-wit: Cook county aforesaid, a large sum of money became and was due, and payable to the said plaintiffs from the said "The South Chicago Turn Verein of the city of Chicago," by and under the terms of the said indenture of lease to them made as aforesaid, to-wit: the sum of

one thousand one hundred sixty-six and 66 100 dollars of rent aforesaid in said lease reserved, to be by them paid as aforesaid, that the said rent has been by the said plaintiffs demanded of the said "The South Chicago Turn Verein of the city of Chicago," and was by it refused the payment of the said last mentioned sum of money, and thereafter and upon, to-wit: the day and year last aforesaid, at the county aforesaid, the said plaintiffs notified the said defendant of the non-payment of said rent by said "The South Chicago Turn Verein of the city of Chicago," and then and there requested and demanded payment of the said last mentioned sum of money so due to the plaintiffs, as aforesaid, in pursuance and accordance with the terms and conditions of his said writing and guaranty, so by him made and executed to the said plaintiffs as aforesaid, but, to pay the same sum of money due as aforesaid the said defendant then and there failed and refused so to do. Following is the consolidated common counts: The appellant demurred to the special count, and for cause of demurrer assigned. First, that the plaintiffs have declared upon an undertaking of the defendants as though it was an ordinary undertaking, and not a conditional one. Second, that it appears from the instrument declared on that the action is premature. Third, also, that the declaration is in many respects uncertain, informal and insufficient.

The court overruled the demurer, and appellant electing to abide by his demurrer by argument of parties it was referred to the court to assess appellees damages, and the court thereupon proceeded to assess the same at $1,166.66, upon which judgment was given, and this appeal was prayed and perfected. The errors assigned are,

1st. The court erred in overruling the demurrer to the appellee's declaration.

2d. The verdict was contrary to the evidence.

3d. The plaintiff's evidence showed that the right of action, if any existed, belonged to James Tyler alone, and not in connection with the other appellees.

Opinion by SCHOLFIELD, J.

It is objected that the declaration treats the instrument by which defendant's liability is charged as an original undertaking, whereas it is collateral, and should have been so declared on. It is stated as matter of conclusion of the pleaders, that the defendant, by the writing previously set forth in *haec verba*, bound himself to pay the rent and fulfil and perform all and every of the covenants therein in said lease contained, etc. But the instrument itself being before the court, its legal effect was to be determined by the court, and that determination could not be influenced by the subsequent allegation of the pleader as to its legal effect. This allegation was therefore surplusage only, which did not affect the preceding material allegations in the count.

It is also objected that the action was prematurely brought, that appellee could not sustain an action for the rent until the expiration of the lease, which the declaration shows had not occurred when the action was commenced.

This has no support in anything in the declaration. The lease therein described requires the payment of rent at the rate of two thousand dollars yearly, on the first day of each and every month, in equal portions and instalments; and we are aware of no principle which will prevent a recovery for any instalment remaining unpaid after it is due. To hold there could be no recovery for rent until the expiration of the term, would require us to make a new contract for the parties, entirely different from the one they have made for themselves.

The guaranty is as broad in its terms as is the lease. The words "the prompt fulfilment of all the provisions, conditions and agreements therein mentioned," we think should be held to embrace, as they literally import, every obligation imposed by the lease in the lessee; apart from this, however, the undertaking that full payment shall be made "of the sum or sums of money specified in the within lease," can, in our opinion, be reasonably construed in no other way than that payments shall be made as the sum or sums shall become due, as provided by the terms of the lease.

When it is said payment shall be made of a debt, in the absence of any expression to the contrary, the reasonable, and indeed necessary implication is, that this shall be when the debt is due.

The remaining objection, urged that the verdict was contrary to the evidence, cannot be considered.

The judgment was on the demurrer for default of plea. The defendant, by permitting judgment thus to be given, was so far out of court that he was entitled to cross-examine witness for the purpose of reducing the damages only; and it was not admissable for him to make a defence to the action.

The demurrer admitted every material allegation in the declaration, and nothing was left to be enquired into but the amount of damages sustained by the plaintiff. Morton *v.* Bailey et al., 1st Scam. 213. Cook *v.* Skelton, 20th Ill 107. The judgment is affirmed.

ELDRIDGE & TOURTELLOTTE, for appellant.

JESSE HOLDOM and J. C. & J. J. KNICKERBOCKER, for appellees.

WE are under obligations to WALTER M. HOWLAND, of the Chicago bar, for the following opinion:

SUPREME COURT OF ILLINOIS.

OPINION FILED JUNE 30, 1876.

No. 596.—CITY OF CHICAGO *v.* B. F. BROPHY.

Appeal from Cook.

LIABILITY OF CITY FOR DAMAGES FOR OBSTRUCTIONS IN STREETS.

In this case, the evidence sustains the verdict.

An obstruction in a public street, eighteen inches high, and sufficient to overturn a baker's wagon, carefully driven, is dangerous.

It is presumed that when a sewer is placed in a public street of a city, that it is done by the proper authority of the city.

If the city does such work, it is bound to know the condition in which the street is left—whether dangerous or otherwise.

It is not error to refuse duplicate instructions.

A verdict for $1,500 for a broken limb, with a possibility of a permanent injury, though large, is not so excessive as to justify a reversal.

Opinion by CRAIG, J.

This was an action brought by the appellee against the city of Chicago to recover for an injury received in the public street of the city, alleged to have been caused by an obstruction placed in the street by the employees of the city.

A trial was had before a jury, which resulted in a verdict in favor of appellee for $1,500. The court overruled a motion for a new trial, and rendered judgment on the verdict.

Three grounds are relied upon by appellant to reverse the judgment:

1st. That the verdict is against evidence.

2nd. That the court erred in giving appellees third instruction, and in refusing appellants instruction No. four.

3d. That the damages are excessive.

The accident occurred on the 20th day of December, 1872, resulting in the fracture of appellee's leg, and otherwise severely injuring him. About six weeks before the injury the city had placed a sewer in West Eighteenth street, and two or three days before the accident a catch basin had been placed at the corner of West Eighteenth street and Ruble street, which was connected by a branch sewer with the main sewer which was in the centre of the street.

The dirt taken from the excavation in constructing the branch sewer was not removed from the street, but it was filled above the sewer leaving a ridge extending from the catch basin to the centre of the street, from a foot to eighteen inches in height. This ridge, the evidence tends to show, could not be seen when the accident occurred, for the reason the street was covered with snow which was somewhat drifted.

Appellee, who was driving a baker's wagon in the usual course of his business, his team going in a walk, encountered the ridge of dirt, the wagon was turned over and fell upon him, breaking his leg and spraining his ankle. We see nothing in the evidence from which it can be said appellee failed to use ordinary care and caution in passing over the street; he had been engaged in driving a bakers wagon for several years, and seems to have been a cautious driver.

While he was familiar with the condition of that part of the street where the main sewer was constructed, and had passed over it frequently. As we understand the evidence, he did not know the condition of the street where the branch sewer was constructed, and had not had occasion to pass over it after it had been finished until the day of the accident. Appellee was not aware of its dangerous condition, and had no reason to suspect it was unsafe.

It was proven by several witnesses that the street, in the condition in which it was when the accident occurred, was unsafe and dangerous.

No witness was called to show or explain why the obstruction was left in the street.

It is not denied that it is a duty resting upon the city authorities to keep the public streets free from obstructions and in a safe condition for all who may have occasion to travel over them.

While the city had the undoubted right to construct the sewer in the street, yet in making the improvement, it had no right to leave piles of dirt upon the street in such a condition that it would be unsafe or dangerous for wagons to pass. It does not appear from the evidence, that it was necessary in making the improvement, to leave the ridge of dirt over the sewer that appears to have been done; but even if it was, it would be negligence on the part of the city to do so, unless guards were put up, or notice of some kind given to warn travelers of the dangerous condition of the street. Nothing of the kind was, however, done in this instance.

We are therefore satisfied that the evidence before the jury was sufficient to warrant the conclusion that appellee was in the exercise of due care, and that the accident was from the negligence of the city in failing to keep the street free from obstruction. The third instruction given for appellee to which exception was taken is as follows: If the jury believe, from the evidence in this case, that the injury complained of was caused by a dangerous pile of dirt or earth left in Eighteenth street by persons employed by the city authorities to place a sewer or catch basin in such street, then the jury are instructed that it is not necessary that the plaintiff, in order to recover in this suit, should prove that the city authorities had actual notice that such pile of dirt or earth was in said street.

It is said that there is no evidence that any dangerous pile of earth existed in the street. We do not so understand the evidence. Several of the witnesses testify to the dangerous condition of the street, and the proof shows the ridge of dirt eighteen inches high extending from the catch basin to the centre of the street. These facts, in connection with the additional one that appellee's wagon in passing over the obstruction was overturned, was sufficient to justify the instruction. It is also urged that there was no proof that the persons who did the work were employed by the city.

This objection is fully met by the decision of this court in city of Chicago *v.* Johnson, 53 Ill. 91, in which it was held that it is a reasonable presumption when such work is done within the limits of the city that it is done by the proper authorities of the city. Nor is the objection to the last clause of the instruction tenable. If the city caused the work to be done it was bound to take notice of the character of the work and the condition in which it was left, whether safe or dangerous. As to the fourth instruction of appellant, which the court refused, its substance was contained in appellant's third instruction given, and even if it contained a correct proposition, it was not error to refuse it as it has been often held by this court not to be error to refuse duplicate instructions.

This brings us to the last point relied upon by appellant, that the damages are excessive, while the verdict is large, and we would have been better satisfied had it been smaller, yet under all the evidence it is not so excessive as to justify a reversal.

It appears that the larger bone of the leg was broken about midway between the knee and ankle joint, and at the same time the ankle joint was sprained.

At the time of the trial, appellee had not entirely recovered from the injury received, and it was by no means certain that he ever would entirely recover.—Under these circumstances, we cannot disturb the verdict on the ground that it is excessive. The judgment will therefore be affirmed.

Judgment affirmed.

EGBERT JAMIESON, Attorney for appellant.

WALTER M. HOWLAND, Attorney for appellee.

THROUGH the kindness of JOHN W. SHOWALTER, of the Chicago bar, we have received the following opinion:

SUPREME COURT OF ILLINOIS.

OPINION FILED JUNE 30, 1876.

No. 241.—CHARLES W. ALLEN et al. *v.* JOHN WATT.

Appeal from Cook.

EFFECT OF BEING GARNISHEED IN A FOREIGN STATE.

1. Full faith and credit must be given in Illinois, to judicial proceedings in Ohio.

2. The fact that a debt has been sued for, or that a judgment has been rendered in such suit, does not prevent the defendant from being garnisheed by a creditor of the plaintiff—even in another State.

3. When such garnishment proceeding is in another State, the garnishee is not bound to disclose there the fact of the pendency of the suit, or of the judgment against him in this State, unless, by statute in the former State, such matter is made a defense in the mouth of a garnishee.

4. Such garnishment in a sister State may be pleaded to the action in this State; if the latter suit has proceeded to judgment, the defendant may protect himself by injunction.

5. Watt, being defendant at the suit of W. & P. in the Superior court, pleaded that, since the last continuance, Allen & Ellis, who were creditors of his, had paid part of the debt sued for under a garnishment proceeding brought by W. & P. in Ohio; *held*, that on an application by A. and E. to stop the levy of an execution issued by Watt against them, on a judgment for the same debt, in the Circuit Court, Watt is estopped to dispute the propriety and validity of the payment in Ohio and its operation as a discharge of his judgment in the Circuit court.

Opinion by BREESE, J.

The questions raised in this record arise out of the following facts: John Watt commenced an action of assumpsit in the Cook Circuit Court, on the 13th of January, 1873, against Charles W. Allen and Almond D. Ellis, wherein, on the 29th March, 1873, a judgment was rendered against them for the sum of five hundred and forty-seven 66-100 dollars, together with the costs. On March 31, the plaintiff in the judgment assigned the same to Carlisle Mason, who, on the third day of May thereafter, placed the assignment on file in the clerk's office, and caused the assignment to be noted on the record. On February 20, 1874, a *firie facias* was issued on this judgment, and came to the hands of T. M. Bradley, Sheriff, to be executed. On March 10, 1873, the firm of Worthington & Power, doing business in Cincinnati, Ohio, under that name and style, and creditors of John Watt and one Johnson, commenced their action by attachment in the Court of Common Pleas of Hamilton county, State of Ohio, against Watt and Johnson, and at the same time Allen and Ellis were summoned as garnishees, as debtors of Watt, and such proceedings were had, that on March 22, 1873, to save costs, as is alleged, they filed their answer to said garnishment wherein they acknowledged they were indebted to Watt at the time of the service of the summons upon them, in the sum five hundred and forty-five dollars and sixty-six cents.

Watt was brought into court by publication against him and Johnson, and on June 30, 1873, a judgment was rendered against them for the sum of $808 26, and then and there it was ordered Allen and Ellis to pay the amount of this indebtedness to Watt, being $545.66, to the clerk of the court within ten days thereafter. This amount they allege they paid at the time to Worthington and Power, by direction of the clerk of the court; and this amount they allege is the identical claim sued for by Watt, and for which he recovered the judgment above mentioned. On February 20, 1873, Worthington and Power brought their action of assumpsit in the Superior court of Cook county against Watt and Johnson, for the same cause the attachment proceedings were instituted by them in the Court of Common Pleas of Hamilton county. To this action, Watt and Johnson, at the March term, 1873, pleaded the general issue, and filed therewith the affidavit of Watt that they, Watt and Johnson, had a good defence to the action to the extent of $689.25.—At the July term following, the defendants, Watt and Johnson, filed a special plea, setting up the rendering of the judgment in the Court of Common Pleas of Hamilton county, Ohio, against them for the same cause of action, for $808 26, and another special plea coming in bar as to $545.66, then setting out these attachment proceedings—the garnishment of Allen and Ellis, and the answer admitting a debt due by them to Watt, of $545 66; that at the June term, 1873, of the Common Pleas Court, judgment was

rendered against them for $808.26, and against Allen and Ellis for $545.66, in favor of Worthington and Powers, owning execution ordered against Allen and Ellis after ten days; that this judgment remains in full force, and that afterwards, in July, 1873, Allen and Ellis paid $545.66, pursuant to such order of court, and plead the same in bar of a recovery by Worthington and Power, to that extent, against them.

At the time of filing these special pleas, Watt filed an affidavit for a continuance, alleging as cause, that after the commencement of the suit the plaintiffs sued defendants for the same cause to the March term of the Court of Common Pleas of Hamilton county, Ohio, setting out briefly all those proceedings, and Allen and Ellis' answer to the garnishee proceedings—the recovery of the judgment against them, and against Allen aud Ellis; their information that Allen and Ellis had paid this judgment, alleging that this payment satisfied so much of plaintiff's claim sued for in this action then pending; that they can have the proof of this payment by the next term, wherefore a continuance is asked. A continuance was granted.

So far as the record informs us, this cause is still pending and undetermined in the Superior Court.

On Feburary 20, 1874, a writ of *fieri facias* issued on this judgment recovered by Watt and assigned to Mason, which came to the hands of T. M. Bradley sheriff, to be executed. Hence this bill of complaint and injunction by Allen and Ellis; and the question is, does the bill show any equities to justify relief against this judgment of the Cook Circuit Court?

The Circuit Court was of opinion it did not, and on the hearing dissolved the injunction and diminished the bill, and the complainants appeal.

After full consideration of the elaborate arguments submitted on both sides of this case, we are of opinion the decree of the Circuit Court should be reversed upon several grounds.

The Court of Common Pleas of Hamilton county, in the State of Ohio, in which these attachment proceedings were had, was, it is not denied, a court of competent jurisdiction of the subject matter, and acquired jurisdiction of the persons of appellants by service of process upon them, and the judgment of that court is entitled to full faith and credit in this State. This judgment, so rendered by a court of competent jurisdiction, has been paid and satisfied by appellants, and there is no justice in requiring them to pay it a second time. The fact that Watt had recovered a judgment against appellants made them no less his debtors when the garnishee process was served upon them; and we do not see in what respect it could have benefitted them had they set this up by plea in the Ohio court. The statute of that State is broad and comprehensive, and it makes the service upon the garnishee a lien upon the debt he owes the party defendant in the attachment. Chief Justice Kent said in Embree and Collins *v.* Hanna, 5 Johns, 100: That it was a settled and acknowledged principle in the English Courts, that whenever debt has been recovered of the debtors under the process of foreign attachment, the recovery is a protection in England to the garnishee against his original creditors, and he may plead it in bar.

The principle is distinctly recognized in Allen *v.* Dunday, 3 Dunford & East, 125. The Supreme court of Pennsylvania said, in McCarty *v.* Melvin, 2 Dallas 277, on general principles of justice and reason it would be difficult to satisfy the mind why money should not be attached in the hands of debtors, as well after as before the person to whom it is due has sued for it.

Surely it can make no difference if judgment is rendered in the suit, for as we have said, the debt remains. though in another form, and public policy fairly warrants it.

The attaching creditors having acquired a lien on this debt due by appellants prior to the alleged assignment of the judgment to Mason, he must be held to have taken the assignment subject to all the defences the judgment debtors might be able to establish against its payment, and no defence can be more available than payment under legal proceedings in a court of competent jurisdiction.

Watt, in his defence to the action brought against him and Johnson in the Superior court did not then claim or pretend this judgment had been assigned by him, but on the contrary he claimed the benefit of the proceedings against appellants as garnishees, and of the payment made by them on the order of the court therein, and this is another reason why the decree should be reversed. Watt is estopped, by taking advantage of this payment by appellants, as he did in this plea and affidavit for continuance. Had this judgment against appellants been in fact assigned, it is strange Watt should have claimed the benefit of the debt on which it was based, as a payment by him or his firm to the attaching creditors.

We have said this recovery and payment in the attachment proceedings might be pleaded in bar to a recovery in the action, but that action had proceeded to judgment, and no plea could be introduced. No other remedy could be pursued, than by injunction to stay the execution of the judgment. Of this appellants have availed and we are of opinion they were well entitled to the writ—that there is strong equity in their bill, and it should not have been dismissed on the hearing.

The claim that this recovery and payment by appellants in the attachment proceedings was collusive and colorable only, we do not think is sustained by the proofs, and we can see no injustice in being required to pay their debt to the creditors of Watt, rather than to Watt himself.

From the best consideration we can give this cause we are of opinion the decree should be reversed and the cause remanded.

JOHN W. SHOWALTER, for appellant.
M. W. ROBINSON, for appellees.

DICKEY, J., having been of counsel in this matter, did not participate in its consideration.

We have received from FRANCIS ADAMS, Assistant Corporation, the following opinion:

SUPREME COURT OF ILLINOIS.

OPINION FILED JUNE 30, 1876.

ALEXANDER E. GUILD. JR., *v.* THE CITY OF CHICAGO.

Appeal from the Superior Court of Cook Co.

TITLE TO ACT—SPECIAL ASSESSMENTS—ARTICLE 9 OF GENERAL LAWS.

1. TITLE TO ACT.—That the subject of the section of the act in question is sufficiently expressed in the title of the act.
2. IF LAW APPLY TO ONLY ONE CITY.—If the section of the law had been made to apply to some one city or village alone, there would have been force in the objection that it was a local or special law, and it would then have been a local and special law, changing or amending the charter of a city or village, but this provision is not one of that character. It is a general provision, alike applicable to, and affecting all cities and villages, and not within the provisions of this constitutional inhibition.
3. SPECIAL ASSESSMENTS—CONTIGUOUS PROPERTY.—That the word contiguous, as used in this constitutional provision, applies to special assessment as well as to special taxation, and that the special assessment therein contemplated is one upon contiguous property. But where the ordinance directs it to be levied upon the property to be benefited by the improvement, etc., without limitation to contiguous property, it would not for that reason be void if the assessment was, in fact, made upon contiguous property.
4. ARTICLE IX.—The court states the effect of a city adopting Article IX. of the General Law.—ED. LEGAL NEWS.

SHELDON, J.

This is an appeal from an order of confirmation by the Superior court of Cook county, of a special assessment which had been made by commissioners for the public improvement of opening and extending Dearborn street, in the city of Chicago, from Jackson street to Fourteenth street.

The assessment proceedings were had under the provisions of article 9 of an act of the General Assembly of this State entitled, "An act to provide for the incorporation of cities and villages," approved April 10, 1872, Laws, 1871-2, p. 218.

Section 54 of said article provides that "any city or incorporated town or village may if it shall so determine by ordinance, adopt the provisions of this article without adopting the whole of this act, and where it shall have so adopted this article, it shall have the right to take all proceedings in this article provided for, and have the benefit of all the provisions hereof." The common council of the city of Chicago adopted this article by ordinance passed September 2, 1872.

The first objection taken to this assessment is that the ordinance of adoption of this article is null and void, for the reason that said section 54, which provides for such adoption of the article is unconstitutional, because:

1. The subject of that section is not expressed in the title of the act, and so the section is in violation of that provision of the constitution that "no act hereafter passed shall embrace more than one subject, and that shall be expressed in the title."

The argument is that the title of the act is for the incorporation of cities and villages—the organization of municipalities—but that section 54 does not respect the organization of any municipality, but the amendment only of existing charters, which is a different subject. The act provides not only that existing cities and incorporated towns may adopt this 9th article of the act, but that they may become incorporated under the act. The argument employed would lead to the extent that the whole act is unconstitutional so far as it relates to existing cities and incorporated towns, it being amendatory of prior laws applicable to them. By the adoption of the entire act any existing city or incorporated town would become wholly incorporated under the act. By the adoption of the 54th section alone it might be regarded as incorporating to that extent under the act. Anything legitimately appertaining to the incorporation of cities and villages we regard as germane to the subject expressed in the title, and that this section does pertain to such purpose. See The People *v.* Wright, 70 Ill., 388.

2. Again said section 54 is claimed to be unconstitutional for the reason that the Legislature therein delegate the power of legislation to cities, towns and villages, which by the constitution it alone can exercise. We regard this question as settled in this State by former decisions of this court. In the People *v.* Reynolds, 5 Gilm, 12; and The People *v.* Salamon, 51 Ill., 55, the validity of laws was sustained, which depended for their going into effect upon the result of a majority of the votes of the people of the localities to be affected by the laws. It was there said that a law may depend upon a future event or contingency for its taking effect, and that contingency may arise from the voluntary act of others; that the contingency may as well be the result of the vote of the people of the locality to be affected by the law as any other. This article 9 alone, and by itself disjoined from the rest of the acts in order to have operation in any city, incorporated town or village depended for its going into effect upon the future event or contingency of the passage of an ordinance for its adoption. The contingency might as well be the adoption of the article by an ordinance as the adoption of it by a vote of the people. Under the principle of those decisions this 54th section does not conflict with the constitution in this respect claimed.

3. A further reason why section 54 is said to be unconstitutional is, that the Legislature therein attempt to exercise a power which by the constitution it is inhibited from exercising, viz: to change, extend or amend an existing charter.

The constitutional provision relied upon in this behalf is "The General Assembly shall not pass local or special laws * * * * incorporating cities, towns or villages, or changing or amending the charter of any city or village." Had the section been made to apply to some one city or village alone there would have been force in the objection. It would then have been a local and special law changing or amending the charter of a city or village. But this provision is not one of that character.—It is a general provision alike applicable to and equally affecting all cities and villages, and not within the provisions of this constitutional inhibition.—The People *v.* Wright, *supra.*

It is objected that the ordinance providing for this improvement is void, as it provides for the exercise of the taxing power in another and different manner from that prescribed by law.

Section 9 of article 9 of the constitution provides, "The General Assembly may vest the corporate authorities of cities, towns and villages with power to make local improvements by special assessment, or by special taxation of contiguous property, or otherwise."

Section 1 of article 9 of the act in question provides, "The corporate authorities of cities and villages are hereby vested with power to make local improvements by special assessment, or by special taxation, or both, of contiguous property or general taxation, or otherwise, as they shall by ordinance prescribe."

The ordinance directing the improvement provides: That said improvement shall be made and the cost thereof paid for by a special assessment to be levied upon the property benefited thereby, to the amount that the same may be legally assessed therefor, and the remainder of such cost to be paid by general taxation.

The point of the objection is that the law conferring the power to make local improvements by special assessments, limits its exercise to contiguous property, and that the ordinance entirely disregards this limitation.

There are other portions of this section 9, or article 9, which seem to contemplate that the assessment is to be made upon such property as may be specially benefited, without regard to whether it be contiguous or not. The law in this respect should receive a construction to make it conform to the constitution.

It is contended upon the part of appellant that the constitutional provision that corporate authorities may be vested with power "to make local improvements by special assessments or by special taxation of contiguous property or otherwise," confines the subject of special assessment to contiguous property—that the word "contiguous" here relates as well to special assessment as to special taxation, so that both special taxation and special assessment must be upon contiguous property. It is insisted on the other hand that the word "contiguous" does not apply to special assessment, but only to special taxation, so that it is only special taxation which is to be upon contiguous property, leaving the subject of special assessment unrestricted. That as before the adoption of the present constitution a valid special assessment had been recognized and defined by decisions of this court as an assessment upon all property specially benefited by the improvement, not more than the benefits conferred, and in proportion to benefits without any limitation to contiguous property, the constitution should be understood as having used the words "special assessment" in the same sense. After a full consideration of the respective arguments upon the question, we arrive at the conclusion, that the word "contiguous," as used in this constitutional provision, applies to special assessment as well as to special taxation, and that the special assessment therein contemplated, is one upon contiguous property. But although then it is to be regarded as the meaning of the constitution and statute, that the special assessment is to be upon contiguous property and the ordinance directs it to be levied upon the property to be benefited by the improvement, etc., without limitation to contiguous property. The ordinance would not for that reason be void. If the assessment was in fact made upon contiguous property it should be upheld, notwithstanding the general terms of the ordinance.

A point is made that the constitution does not confer the power to authorize local improvements to be made by "general taxation," and that the ordinance for the improvement, in so far as it provides that any part of the cost shall be paid by general taxation, is void. Were that even so, we fail to see the force of the objection as bearing upon the question here involved, which is not one respecting the imposition of any general tax, but a special assessment solely and the point is dismissed without further notice.

It is further objected that the assessment roll, as returned by the commissioners making the assessment, is defective in the respect that there is no map accompanying the same as by law required.

Section 25 of article 9 of the act as originally passed did require the commissioners to make a map showing the

(*Continued on page* 360.)

CHICAGO LEGAL NEWS.

Lex vincit.

MYRA BRADWELL, Editor.

CHICAGO, JULY 29, 1876.

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CHICAGO LEGAL NEWS COMPANY,

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We call attention to the following opinions, reported at length in this issue:

RELEASE OF SURETY ON BOND.—The opinion of the Supreme Court of the United States, by SWAYNE, J., as to what will operate to release the surety sureties on a bond.

COTTON SOLD TO THE CONFEDERATE GOVERNMENT.—The opinion of the Supreme Court of the United States by WAITE, C. J., holding that the Confederate government could acquire cotton by purchase, and the title in such cotton capture, during the war, passed to the United States; and that a party who sold cotton to the Confederate government, and took his pay in Confederate bonds, he keeping possession of the cotton until it was taken by the treasury agents of the United States, in September, 1865, had no claim on the government of the United States or the cotton, which he could enforce in the court of claims.

PLEADING—SETTING FORTH INSTRUMENT.—The opinion of the Supreme Court of this State by SCHOLFIELD, J., holding that where an instrument is set out in *haec verba* and the pleader misstates its legal effect, that the instrument being before the court, its legal effect is to be determined by the court, and that determination cannot be influenced by the subsequent allegation of the pleader as to its effect, which was mere matter of conclusion.

LIABILITY OF CITY FOR CONDITION OF STREETS.—The opinion of the Supreme Court of Illinois by CRAIG, J., as to the liability of a city for damages, for an injury caused by the obstruction of its streets.

GARNISHEE IN FOREIGN STATE.—The opinion of the Supreme Court of this State, by BREESE, J., as to the effect of being garnisheed in a foreign state.

SPECIAL ASSESSMENTS — CONTIGUOUS PROPERTY—ARTICLE IX.—The opinion of the Supreme Court of this State, by SHELDON, J., holding that the word "contiguous," as used in the provision of the constitution under consideration, applies to special assessment as well as to special taxation, and that the special assessment therein contemplated is one upon contiguous property, but, where the ordinance directs it to be levied upon the property to be benefited by the improvement, without limitation to contiguous property, it would not for that reason be void, if the assessment was in fact made upon contiguous property. The court states the effect of a city adopting Article IX., of the general law, and what is to be regarded as a general law.

LAND TAKEN FOR RAILROAD — DAMAGES.—The opinion of the Supreme Court of Pennsylvania, by SHARSWOOD, J., holding that the measure of damages for land taken by a railroad is the difference between the market value of the property before and after the construction of the road, so far as that difference was caused by the construction; that the market value of land is not a question of science and skill, upon which only an expert can give an opinion.

There are two excellent photographs, by C. D. Mosher, of Judges DRUMMOND and BLODGETT, in the photographic gallery at the Centennial. In tone, color and beauty of finish, Mosher's photographs are not excelled at the great Centennial.

We are indebted to the Hon. Carter Harrison for valuable congressional documents.

CHEAP POSTAGE.

The present congress has done a good thing for the public in changing the rates on third class matter so as to allow books, printed matter, etc., to go through the mails at one-half the former rates. This will enable lawyers and others in New Mexico, or any of the States or Territories of the Union, to receive their books, blanks, letter-heads and envelopes, with card printed thereon, from any of the cities of the Union, by prepaying the postage thereon at the rate of eight cents per pound. This change in the law will work a great change in the book and stationery trade in the country. The following is that part of the law which relates to the payment of postage on third-class matter. We are indebted to Hon. W. M. Springer for an official copy of the act as it passed Congress:

SEC. 15. That transient newspapers and magazines, regular publications designed primarily for advertising purposes, or for free circulation, or for circulation at nominal rates, and all printed matter of the third class, except unsealed circulars, shall be admitted to and be transmitted in the mails at the rate of one cent for every two ounces or fractional part thereof, and one cent for each two additional ounces or fractional part thereof, and the sender of any article of the third class of mail-matter may write his or her name or address therein, or on the outside thereof, with the word "from" above or preceding the same, or may write briefly or print on any package the number and names of the articles enclosed. Publishers of newspapers and periodicals may print on the wrappers of newspapers or magazines sent from the office of publication to regular subscribers the time to which subscription therefor has been paid. And addresses upon postal cards and unsealed circulars may be either written, printed or affixed thereto, at the option of the sender.

SEC. 16. That all acts or parts of acts in conflict with the provisions of this act are hereby repealed.

Approved, July 12, 1876.

Recent Publications.

REPORTS OF CASES ARGUED AND DETERMINED IN THE SUPREME COURT OF THE STATE OF KANSAS, by W. C. Webb, Reporter, Vol. XIV., containing cases decided at the July term, 1874, and January term, 1875, Topeka, Kansas. Geo. W Martin, Kansas Publishing House, 1876.

The manner in which this volume is brought out is creditable to the printer and the reporter. There are quite a number of opinions of interest contained in it. In Morris *v.* German, p. 221, it is held that on the foreclosure of a mortgage containing a stipulation to pay reasonable attorney fees, in case of foreclosure, it is error for the court without the hearing of any evidence, upon simply its own knowledge, to tax the amount of such fees. In Clark v. Spencer, p. 399, it is held that an agreement to withdraw the plea of usury is against public policy and cannot be sustained.

MY UNCLE TOBY: HIS TABLE TALKS AND REFLECTIONS. By an Attorney at Law. In forty-one table talks Uncle Toby treats a large number of subjects of general interest, and his healthy, honest, outspoken manner of dealing with these questions is worth listening to. We do not agree with him in all his convictions and opinions, but he is tolerant of free thought, and we shall not have any controversy with him. Indeed, Uncle Toby keeps so well up with true progress that a little encouragement would make him a first-rate reformer. We shall hope to hear from him again. For sale by Hitchcock & Walden, St. Louis.

Obituary.

The mails bring us the tidings of the decease at Geneva, Switzerland, on the 12th instant, of Joseph I. Taylor, Esq., a prominent member of the Bar of this State, many years a resident at Princeton, Bureau County. Mr. Taylor had but recently taken his family to Europe for a sojourn of some duration, and was himself about to return to Princeton to attend at the August term of Judge Leland's Court, when he was attacked by what has proved a fatal illness. Those who know Mr. Taylor and have witnessed his professional career in his adopted State during a period of over twenty-five years, describe him as an upright and faithful counsellor, a zealous and popular advocate, and an attorney whose honesty in matters of pecuniary trust had become proverbial among the people of his county. We are sure that his family, left as strangers in a strange land, will have the sincerest sympathy of all who hear of their sudden bereavement.

A VERY singular decision has just been given by the French court of appeals at Rouen in the case of the steamer Amerique, of the French Trans-Atlantic Co.'s line. This vessel, it will be remembered, was abandoned on the high seas by her commander, Capt. Roussan, and afterward picked up by a couple of English steamers, and carried safely into an English port.

The court of appeals has decided that the steamer Amerique was lost, not through any defect in her construction or equipment, nor yet through stress of weather, but simply "through the fault of the captain and crew, through bad handling and through an inadequate acquaintance with her steam engines and the working of her pumps." The court has been obliged to recognize the validity of a clause in the company's bills of lading, which frees the company from responsibility in case of accidents resulting from any fault of the captain; but it holds the insurance companies liable, as these companies insure freighters against risk arising out of the misconduct or barratry of the master of the vessel.

LAW SCHOOLS.—We call the attention of law students to the advertisements of law schools on the first page of this issue.

SUPREME COURT OF ILLINOIS.

ABSTRACT OF OPINIONS FILED AT SPRINGFIELD, JUNE 30TH, 1876.

135.—Catlin Preston impleaded, etc. *v.* Joseph M. Williams et al.—Appeal from Clark.—Opinion by CRAIG, J., affirming. [SCHOLFIELD, J., not taking part in the decision.]

CORRECTION OF MISTAKE IN A DEED—RULE AS TO VOLUNTARY CONVEYANCE—DEED CONSTRUED AS TO ITS BEING A VOLUNTARY CONVEYANCE—NOTICE OF PRIOR CONVEYANCE TO A SUBSEQUENT PURCHASER.

STATEMENT.—Bill in equity to correct mistake in the description of premises in a deed.

It was contended that the deed was a mere voluntary conveyance by Peter G. Cooper, to his two children. The mother had obtained a divorce from Cooper, and the custody of the children was assigned to her, and an allowance of an annual payment of alimony during her life. He proposed to give her a gross sum, in full discharge of the decree of alimony, and she accepted it and received this deed to the children, in full satisfaction. *Held*,

1. That, although it is a rule that equity will not decree the specific execution of a contract unless the contract is based upon a fair and valuable consideration; and, on the same principle, will not rectify a mistake in a voluntary contract without consideration, as against the party who executed the instrument, yet, in such a case as this at bar, the grantees are not to be considered mere volunteers; since the grantor deeded the land in discharge of a valid obligation resting upon him, and the mother had the right to have the deed made to the children instead of herself.

2. Appellant having had notice of this prior conveyance when he accepted his deed from Cooper, for these same premises, does not occupy the position of an innocent purchaser, and is not entitled to protection. However defective the prior deed to the children might be, a court of equity will not permit him to profit by the mistake therein, he having had notice of it before taking his own conveyance.

138.—Almon B. Ives *v.* Walter Vanscoyoc.—Error to McLean.—Opinion by SCHOLFIELD, J., reversing and remanding.

WHAT BILL OF EXCEPTIONS MUST SHOW AS TO INSTRUCTIONS—PARTNERSHIP ASSETS IN GARNISHMENT PROCEEDINGS—MISTAKE IN PARTNERSHIP SETTLEMENTS NOT TO BE RECTIFIED BY A JURY IN GARNISHMENT.

STATEMENT.—This case turned on the refusal of instructions asked by appellant. In the Supreme court it was maintained that as the bill of exceptions did not contain all the instructions given on either side, as well as those refused, the court could not decide thereon. In regard to this it was, *Held*,

That where it does not appear from the bill of exceptions that there were any instructions given, there is nothing upon which to base a presumption that any were given comprising the substance of those refused—although, where it appears, from the bill of exceptions, that some were given and others refused, and only the latter are set out, *non constat*, but that those actually given comprised the substance of those refused, so that the court cannot say the refusal was error.

As to the instructions refused, the court *Held*,

That it is proper to instruct a jury that in an action of garnishment, an unsettled partnership account cannot be considered by them; and, also, that if a settlement were made, but there were mistakes therein, the jury could not correct the mistakes.

139.—The Governor etc., for use, etc. *v.* Levi A. Dodd et al.—Appeal from Ford.—Opinion by WALKER, J., reversing and remanding.

NON-FEASANCE OF CLERK OF CIRCUIT COURT—CONSTRUCTION OF OFFICIAL BOND—LIABILITY THEREON.

STATEMENT.—Suit on appellee's official bond, as clerk of the Circuit court, for a debt lost, as was claimed, in consequence of his failing to enter the amount of a judgment recovered against the defendant in the suit. An execution was issued, and was levied upon a large

amount of personal property, but the property was taken from the sheriff, in consequence of the informality of entering the judgment.

The Supreme court *Held*,

1. That, where a mistake of this kind causes loss, the clerk and his sureties are liable on his bond—the statute requiring the bond to be conditioned for the faithful performance of the duties of his office, and not merely that the clerk shall not wilfully violate his duties or be guilty of malfeasance. The obligation can only be met by faithfully performing those duties, so that they are liable for his *non-feasance*, as well as for *mis-feasance* or *mal-feasance*.

2. It is the duty of clerks of courts of record, to enter all the orders, judgments and decrees as soon as practicable; failing in which they are liable on their bonds. In regard to the principle of liability, there is no difference between the clerk and a sheriff, or constable.

142.—Dunfee R. Wilson et al. *v.* Elizabeth H. Turner.—Appeal from Champaign.— Opinion by SCOTT, CH. J., affirming.

NOTE GIVEN IN ANOTHER THAN THE REAL NAME—AVERMENT THEREON.

STATEMENT.—The declaration was on a promissory note, containing one count, which averred that the note sued on was given to the plaintiff, (appellee) as "Lizia H. Turner." Pleas were entered of non-assumpsit, and set off. *Held*,

1. That as one name and the middle initial were given correctly, a court will presume that the word "Lizia" is a contraction of Elizabeth — the appellee's name.

2. That the pleas virtually admitted that the note was given to the plaintiff by that name, and the note, as there was no variance between it and the declaration, might be properly read in evidence.

145.—Joseph Edgington, Administrator, etc., *v.* Henry C. Hefner, et al.—Appeal from Ford.—Opinion by BREESE, J., reversing and remanding.

ACCORD AND SATISFACTION UNDER MORTGAGE CLAIM — VARIOUS REMEDIES OF MORTGAGEE—PROMISE OF RELEASE MUST HAVE A CONSIDERATION.

STATEMENT.—Appellant's intestate held a mortgage on land in Iowa, executed by appellees. Appellees sold portions of the land, the mortgagee releasing the mortgage as to the portions sold, when the sales were made—supposing the remainder would be sufficient security, and desiring to accommodate the Hefners. In this action, they set up such release, as operating in the way of an accord and satisfaction, and so discharging the notes, *pro tanto*. *Held*,

1. That there was no such effect following upon such releases, nor would there have been, if the whole mortgage had been abandoned. For a mortgagee has several concurrent remedies, although he can obtain but one satisfaction. He needs not look to the land mortgage, for his debt; but he can proceed at once on the note thus secured, and subject the debtor's general property to its payment; or he may bring ejectment on condition broken; or make a peaceable entry—or, if he prefer, he may have in equity a strict foreclosure, or foreclosure and sale.

2. If even there had been a promise that these notes should be paid by the releases, the promise could not be enforced, as it would be without consideration.

146.—Gustave Sandberg *v.* Peter Papineau.—Appeal from Ford.—Opinion by WALKER, J., affirming.

MONEY PAID ON CONDITIONAL GARNISHEE JUDGMENT — CREDITING ON GENERAL JUDGMENT—GENERAL PRINCIPLES AS TO THE POWER OF COURTS TO ORDER CREDITS.

STATEMENT.—The court ordered to be credited upon a judgment against appellant the amount paid on a conditional garnishee judgment by appellee, under a supposition that he was legally bound to pay it. *Held*,

1. That a court has power, in all cases, to compel credits on judgments or executions, where it would be illegal, or inequitable, to proceed to collect the amount claimed. A court of justice will never permit a plaintiff, simply because he has acquired an unjust advantage by obtaining an execution, to retain and enforce it.

2. However, the payment of a conditional judgment by a garnishee is at his peril, since should the conditional judgment not be made absolute, he would be liable afterwards to pay the debt to his own creditor—the defendant in the original suit.

147.—Joshua M. Clevinger *v.* John F. Curry et al.—Appeal from Champai n.—Opinion by SHELDON, J., reversing.

IMPEACHMENT OF WITNESSES—CREDIBILITY —ASSUMING INSTRUCTIONS.

STATEMENT.—Berry, a party, was impeached as a witness in his own case. Afterwards, this instruction was given:

"The court instructs the jury that if they believe from the evidence that the reputation of Berry is, in any manner, impeached for truth and veracity, his credit as a witness should be restored in matters where he is corroborated by the unimpeached statement of the other credible witness." *Held*,

1. That this instruction was wholly wrong (1), In that it assumed that there were other credible witnesses who corroborated the impeached witness in some matters; and that their statements were unimpeached. (2), In that it declared, in such matters, the witness' credit should be restored, so far as corroborating testimony was adduced. (3), In that it took the credibility of the witnesses, at least, in part, from the consideration of the jury to whose province it peculiarly belongs.

2. There is no artificial rule of belief to control the minds of a jury. And a court cannot properly instruct whom to believe or disbelieve.

150.— Hiram Baker *v.* The Town of Normal.— Appeal from McLean.— Opinion by DICKEY, J., affirming.

MUNICIPAL ORDINANCE AS TO SHADE TREES.

Held, 1. That a municipal corporation can pass and enforce an ordinance forbidding the hitching of horses to shade trees, or fences, upon any street; or upon private premises.

2. Where one plants out trees, by permission, in front of his own lot, he has only the same interest therein that other citizens have; and has no title or control therein as against the public, and he is, therefore, liable to the same restrictions and prohibitions and regulations, that others are.

149.—The People use, etc., *v.* Henry S. Herr et al.—Appeal from McLean.— Opinion by CRAIG, J., affirming.

SUIT ON BOND OF J. P. — TIME LIMITED THEREON BY STATUTE—DEMURRER.

STATEMENT.—Suit on a bond of a J. P. for money collected and not paid over. A demurrer to the declaration was sustained. The declaration showed on its face that the suit was brought more than five years after the expiration of the term of office; which the statute in force when the bond was executed forbade. It was objected that this being a statute of limitations, in effect, it therefore must be pleaded, and could not be availed of by demurrer. *Held*,

1. That, although in an action on a penal statute, a statute of limitations must be pleaded, yet the statute under which the bond was executed, declared that the bond should have no force after five years, and was not a statute of limitation merely.

2. Nor does the provision of the statute that the bond shall continue until all the business the justice is required to perform shall be done, and the suit for the mere payment of the money, is not such unfinished business as the statute contemplates. Whenever the money was collected, it was the duty of the justice to pay it over; and if he failed, his sureties were immediately liable for the breach, and if sued for within the time prescribed by the statute, the liability could be enforced.

151.—The Board of Supervisors of Logan County *v.* The City of Lincoln.— Appeal from Logan County.—Opinion by SCOTT, Ch. J., affirming.

PROPORTIONING TAXES BETWEEN COUNTY AND CITY—LIMITATIONS—ESTOPPEL AS TO MUNICIPAL CORPORATIONS.

STATEMENT.—Suit by the city to recover amount due from the county, under its charter providing as follows: "That an accurate account shall be kept of all expenditures made for county purposes, in which shall be charged all expenditures for county purposes, except for the making and repairing of roads and highways, and the building and repairing of bridges in the county, with the city, ratably to the county and the city of Lincoln, in proportion to the taxes collected for county purposes within the city, and paid into the county treasury by each respectively. And the surplus of all such taxes shall be divided between the city and the county, in proportion to the amount of taxes collected for county purposes within the city, and in the county, without the city, and paid into the county treasury by each respectively."

The declaration contained only the common counts; and the pleas were the general issue, and statute of limitations. *Held*, 1. That it was within the power of the Legislature to pass a statute authorizing such ratable division.

2. If not paid the statute of limitations would not run against it, because it was in the nature of a trust fund, held by the county for the city.

3. Neither could the doctrine of *estoppel in pais* apply. The non-action of city officers, even for an unreasonable length of time, can not cut off the rights of the corporation. Before the doctrine of estoppel can be invoked, there must be some positive acts by the municipal officers which may have induced the action of the adverse party, when it would be inequitable to permit the corporation to stultify itself by retracting what its officers had done.

152.—Thomas H. Cusey et al. *v.* Caswell Hall et al.—Appeal from McLean.— Opinion by BREESE, J., affirming.

SPECIFIC PERFORMANCE OF A PAROL CONTRACT FOR CONVEYANCE OF LAND.

Held, that a specific performance of a parol contract for the conveyance of land cannot be claimed as a matter of right in either party, but is a matter resting in the sound and reasonable discretion of the court; and the circumstances attending each particular case will be particularly regarded.

Trustees of Schools, T. 24 *v.* Trustees of Schools, T. 25.—Appeal from McLean. —Opinion by WALKER, J., affirming.

MONEY BELONGING TO A SCHOOL TOWNSHIP HELD BY ANOTHER.

STATEMENT.—Appellants held certain moneys for appellees, until appellees were organized. But, without claiming the funds to be their own, they mixed them with their own, and loaned them and treated them as their own, and even when a schedule was presented from T. 25 to the appellants, they refused to pay it. And although they declared they would pay over the funds if the county board should so order, yet when the county board did so order they refused. The supreme court animadverts very severely upon appellees' conduct; and in regard to their excuse that they desired to know that they should be protected in paying over the funds, remarked, that the decree of the court below would have been ample protection; and yet they had appealed from the judgment; and that it was their duty to pay over the money whenever 25 became a legal school township, it being previously only a half township by joining with the north half lying in Livingston county.

157.—John H. Smalley *v.* James Smalley, who sues, etc.—Appeal from Vermillion.—Opinion by SCHOLFIELD, J., affirming.

MALICIOUS MISCHIEF—ACTION ON THE CASE THEREON, AND EVIDENCE IN SUCH ACTION —MEASURE OF DAMAGES.

STATEMENT.—Action on the case for the malicious burning of a house. Judgment for $800, the full value of the house; in which the mother had a dower interest. *Held*,

1. That in such an action, a preponderance of evidence is sufficient; and it may be circumstantial. There is no need that it be direct and positive.

2. Prior statements and acts of the defendant, are competent evidence therein.

3. The jury, in assessing damages, are not confined to merely compensatory damages, because the act was malicious; and, therefore, may properly be visited with punitive damages.

158.—P & D. R. R. Co. et al. *v.* William W. Raub.—Error to Vermillion.—Opinion by CRAIG, J., .affirming.

PARTIES IN FORECLOSURE SUIT FOR PURCHASE MONEY—AVERMENTS AS TO PARTY CORPORATION—WHAT MAY BE ASSIGNED AS ERROR.

STATEMENT.—Suit in chancery against John C. Short, P. & D. R. R. Co., and New York Trust and Loan Co., to foreclose a mortgage given by Short, for the purchase money of land.

It was assigned as error that the court overruled a demurrer to the bill; made, it seems, on the ground that the bill did not aver that the Trust and Loan Company (which did not join in error), was a corporation; also, that Short's wife should have been made a party; also, that the affidavit of non-residence of the Trust and Loan Co., and the publication notice were defective. *Held*,

1. That, as the Trust and Loan Co. was only brought in because of an interest acquired after the execution of the mortgage, and was, therefore, a proper party, it was not necessary to aver that it was a corporation; whether it possessed corporate powers, or, if so, what was the extent of those powers, was a question of no importance, in a proceeding of this character.

2. Where a mortgage is given for purchase money, the wife of the mortgagor needs not be a party to a suit for foreclosure.

3. Whether the Trust and Loan Co. had sufficient notice by publication, or not, does not concern these plaintiffs in error, and they cannot complain of any defect therein. A party can only complain of an error affecting his own rights.

160.—Samuel A. Buckmaster *v.* James Gowan.—Appeal from Clark.—Opinion by DICKEY, J., affirming. [SCHOLFIELD, J., having been of counsel, took no part.]

PARTNERSHIP AGREEMENTS ONLY ENFORCIBLE INEQUITY.

STATEMENT.—Action of assumpsit by appellant against appellee. Demurrer to the declaration sustained by the court under these facts:

Gowan, Buckmaster and Patterson agreed to enter into a partnership in performing a construction contract, to be secured with a railroad company—the latter two to do the work; the former to furnish necessary money for carrying on the work—the final profits to be equally divided.

The contract was afterwards obtained, the work in part accomplished, but not completed because of Buckmaster's failure to furnish money, appellant claiming to have laid out $1,000 of his own money, and alleging a loss in prospective profits of $50,000.

Held, that the demurrer was properly sustained since the breach was not that of a promise to become a partner; but the partnership was actually formed, and the loss occurred from Gowan's failure as a member of the firm to contribute to the capital stock; so that the wrong can only be ascertained by a final settlement of the affairs of the firm, which can be had only in a court of equity, and not by an action at law.

162.—Mary J. Jordan *v.* Henry P. Clark et. al., etc.—Appeal from Sangamon.— Opinion by SCOTT, Ch. J., affirming.

ANTE-NUPTIAL CONTRACTS IN LIEU OF DOWER—EFFECTS OF DIVORCE THEREON.

STATEMENT.—These parties entered into an ante-nuptial agreement, by which the wife was to have at the husband's death, should she survive him, $2,000, in lieu of all dower claims. They were married, and, after two years she deserted him without any apparent cause. He procured a divorce thereon, and afterwards died—she surviving him. She brought in her claim on the ante-nuptial contract, on which the court in decreeing divorce had not passed. The claim was disallowed in the county court, and then on appeal in the circuit court. The supreme court *Held*,

1. Although, in this case the ante-nuptial contract does not strictly fall within the statutory definition of a jointure, yet it is in the nature of a jointure, being expressly in lieu of dower.

2. As the statute declares that a divorce for the fault of the wife destroys her claim for dower, so this ante-nuptial contract must fall under the same rule, since it was in lieu of dower.

3. The contract was based upon the assumption that, she surviving would be left his widow, which implied condition

was never fulfilled, as she never was his widow, and, therefore, had no claim to the $2,000.

163.—Gustavus L. Dana *v.* James L. Short.—Appeal from Sangamon.—Opinion by BREESE, J., affirming.

CONTRACT BY LETTER—ENTIRE CONTRACT WITH STATED PAYMENTS DURING THE TIME OF SERVICE—LIABILITY FOR DISCHARGING EMPLOYED WITHOUT FAULT.

STATEMENT.—Appellant sent a letter to appellee, proposing to give him work through the winter, at ten dollars per week. Appellee accepted, but was discharged without fault, long before the expiration of the time. Failing to secure other employment, he brought suit for damages. *Held*,

1. That the proposal and acceptance by letter constituted a valid contract; the terms of which was work through the winter at ten dollars per week.

2. That the contract was an entirety, notwithstanding the payment was to be weekly; and the appellant is justly liable to appellee for the damages the latter sustained by his discharge without fault.

165.—Thomas G. Kessinger et al. *v.* Lewis Whittaker et al.—Appeal from Montgomery.—Opinion by SHELDON, J., affirming.

CONCURRENT POSSESSORY REMEDIES—WRITS OF ASSISTANCE ISSUED IN VACATION—REQUISITES OF SUCH WRITS.

STATEMENT.—After foreclosure and sale of mortgaged premises, the chancellor, on application of the purchaser, made an order, in vacation, that one who entered into possession of the premises after the sale under the mortgagor by conveyance of quit claim, should deliver up the possession. Also proceedings were instituted before a justice of the peace, in action of forcible entry and detainer, to recover the possession. It was objected that this action of forcible entry and detainer barred the issuance of a writ of assistance, and that such order must be made in term time, and not in vacation; and must be preceded by an injunction to deliver up the possession. *Held*,

1. That the issuance of a writ of assistance, and the action of forcible entry and detainer, were concurrent remedies; and either, or both, might proceed until a satisfaction was had—which would then bar further proceedings.

2. The subsequent action at law could not oust the equity jurisdiction previously acquired.

3. Issuing an order for a writ of assistance is not the instituting of a new suit, but is only another step in the foreclosure suit. It cannot be said that the case is no longer *lis pendens* after the foreclosure and sale, and conveyance executed thereon. The court of chancery is not *functus officio* until the decree is executed by a delivery of possession.

4. And *pro hac vice*, the purchaser is a party to the decree. And whoever meddles with the property, which is the subject of the decree, becomes, by that act, a party to the decree.

5. The statute expressly allows a judge in vacation "to hear and determine motions, . . . to make all necessary orders to carry into effect any decree previously entered, including the issuance of necessary writs therefor.

6. It is only necessary to make an injunction to deliver up possession before the issuance of a writ of assistance, where the decree of foreclosure contains no order for the surrender of the possession.

Isaac Partridge et al. *v.* Isaac Chapman et al.—Appeal from Montgomery.—Opinion by WALKER, J., affirming.

DELIVERY OF DEED AND MORTGAGE IN CONFLICT — POSSESSION — BONA FIDE PURCHASER.

STATEMENT.—This was a conflict as to whether a deed or a mortgage was delivered first, to the grantee or mortgagees, respectively. In the deed, the date was first written March 18, but was erased, and 19 substituted. The mortgage bore date March 18. The mortgage was left by the mortgagor with the recorder for record on the 23rd, and then on the 26th sent by the recorder to the mortgagor, who forwarded it to the mortgagees at New York. They returned it to the mortgagor to have it executed and acknowledged by his wife. This was done and again it was sent to the mortgagees. On the 19th and 20th of March, the grantee in the deed removed to the premises, and took possession, although his deed was not yet recorded. *Held*,

1. That taking open and visible possession of premises is an equivalent to recording the deed. And that this being before the recording of the mortgage, the deed had thereby priority, and the mortgagees took with notice, and as subsequent purchasers.

2. As the mortgagees negotiated immediately with the mortgagor, there was no delivery of the mortgage until it reached them in New York. The mortgagor could not deliver to himself for the mortgagees, and he did not deliver to the recorder for them, since the mortgage was returned to him and he himself sent it on to mortgagees.

It was contended in respect to the deed, that one could not be regarded as a *bona fide* purchaser until he had paid the full amount of the consideration. *Held*,

3. That this doctrine does not prevail under our registry laws.

169.—Samuel C. Conwell *v.* S. & N. W. R. R. Co.—Appeal from Mason.—Opinion by CRAIG, J., affirming.

LEGAL EFFECT AND CONSTRUCTION OF RELEASE TO R. R. OF LANDS ON WHICH TO LOCATE TRACK—PAROL EVIDENCE.

STATEMENT.—Appellant executed to appellee the following release:

"Know all men by these presents, that I, S. C. Conwell, of the county of Mason, and State of Illinois, in consideration of one dollar, to me in hand paid, by the Springfield and Northwestern Railroad Company, the receipt of which is hereby acknowledged, do hereby agree to release and convey unto the said company the right of way over any lands owned by me in Mason county, Illinois, and to execute and deliver to said company a proper release and conveyance of the same as soon as the road is located. In witness whereof," etc.

"Witness, outside of Havana—

Not to include any town property."

On this, the following instruction was given in a trial for the condemnation of property of appellant:

"You are instructed that the release, read in evidence, given by Conwell, releases all his damages which might otherwise have accrued by means of the construction and operation of the road over his lands, and he will be entitled to no damages, and the jury will so find."

It was contended, however, that the company, at the time the release was executed, contemplated two routes for the location of the road, and the release was only intended to embrace lands of Conwell along the route finally abandoned by the company in laying the road. *Held*,

1. That parol evidence could not be introduced to explain, vary, or change the terms of the instrument, in which there is no ambiguity.

2. Under the release, it was the duty of appellant to execute a proper conveyance whenever the road was located.

3. And where one held an equitable title, under a bond, to any of the lands, at the time the release was executed, the legal title remaining in the releasor, then, if the bond should afterwards be forfeited, the release would cover the land thus reverting to the legal owner.

4. The release was a complete bar to any recovery for damages; and the instruction of the court below was correct.

174.—Adams Express Co. *v.* Milton L. Wilson.—Appeal from Clay.—Opinion by SCOTT, Ch. J., affirming.

EXPRESS COMPANIES—LIABILITIES—THROUGH CONTRACT—SUBSEQUENT RECEIPT.

STATEMENT.—A package of goods delivered to appellant, to be conveyed from Flora to Decatur. The appellant's line only extended part of the way; but its agent took the pay for the whole distance. The package was lost on the route.

It was contended that appellant having, at the end of its line, given the package to another carrier, its responsibility there ceased. *Held*,

That the company could thus have limited its liability, by a special contract with the shipper; but, in the absence of such special contract, and when the company accepted the payment of the entire through charges, the liability continued to the place of destination. Nor could a receipt given after the loss occurred (no receipt being given when the goods were delivered to the company), in any manner affect the liability of the company, or relieve it of any portion of its common law responsibility as a common carrier.

181.—Josephus Scott *v.* Samuel Kenton.—Appeal from Edgar.—Opinion by SHELDON, J., reversing and remanding.

SUIT FOR USE OF DIVISION FENCE—RECOUPMENT.

STATEMENT.—Suit for the use of a division fence. The defendant presented a counter claim for damages, by the plaintiff's cattle breaking through the division fence, and destroying defendant's (Scott's) corn.

As a part of the verdict, the jury returned this special finding of a matter of law—which should have been decided by the court: "We, the jury, find, from the evidence, that the damages claimed to have been done by plaintiff's cattle to defendant's corn, is not a proper subject of recoupment in this case." *Held*,

1. That the doctrine of recoupment tends to promote justice, and prevents needless litigation. It avoids circuity of action, and multiplicity of suits. It adjusts, by one action, adverse claims growing out of the same subject matter. A claim originating in contract may be set up against one founded in tort. And, consequently, damages for tort in relation to the same subject matter, in which a suit on contracts is brought, may be recouped.

2. As, herein, the plaintiff's claim is for the value of the use of the fence, and the defendant's for damages suffered by reason of its insufficiency, the latter claim has an important bearing upon the former, and is a proper subject of recoupment in the case.

SUPREME COURT OF PENNSYLVANIA.

PENNSYLVANIA AND NEW YORK CANAL AND RAILROAD COMPANY *v.* BUNNELL.

1. The measure of damages for land taken by a railroad is the difference between the market value of the property before and after the construction of the road, so far as that difference was caused by the construction.

2. The market value of land is not a question of science and skill, upon which only an expert can give an opinion.

3. Evidence as to the price offered and paid for other property in the neighborhood should not be received.

Error to the Court of Common Pleas of Susquehanna county.

Opinion by SHARSWOOD, J., May 8th, 1876.

The first two assignments of error are to the admission of an offer by the plaintiff below to ask a witness what was the fair market value of the plaintiff's farm before and after the construction of the road upon it, only as affected by such construction. The objection was that it left the witness to allow speculation and consequential causes of depreciation, instead of purely legal ones, in his estimate. That the true measure of damages is the difference between the market value of the property before and after the construction of the road, so far as that difference was caused by the construction, is not denied. It is not easy to see how the question could have been more accurately framed. Market value is what the property would sell for. It was said by the court, in Schuylkill Navigation Co. *v.* Hebrum, 7 S. & R., 622, "the only safe rule is to inquire what would the property, unaffected by the obstruction, have sold for at the time the injury was committed? What would it have sold for as affected by the injury? The difference is the true measure of compensation. This accords with all that has been held in subsequent cases, of which it will be enough to refer to Brown *v.* Covey, 7 Wright, 495; Delaware, Lackawanna and Western R. R. Co. *v.* Benson, 11 P. F. Smith, 369; East Pennsylvania Railroad Company *v.* Northwestern, 11 Wright, 28. Another objection was, that it did not appear that the witnesses had competent knowledge to speak upon the subject. The market value of land is not a question of science and skill, upon which only an expert can give an opinion. Persons living in the neighborhood may be presumed to have a sufficient knowledge of the market value of property, with the location and character of the land in question. Whether their opinion has any proper ground to rest upon, or is mere conjecture, can be brought out upon cross-examination. Such opinions have always been received. "It is a kind of evidence," said Chief Justice Tilghman, in Kellogg *v.* Krauber, 14 S. & R., 142, "so commonly admitted, without dispute or objection, that I have no doubt of its legality. Brown *v.* Covey, 7 Wright, 506; Pennsylvania Railroad Co. *v.* Henderson, 1 P. F. Smith, 321.

The third assignment is, that the plaintiff was allowed to ask a witness whether the location and construction of this railroad upon the plaintiff's farm was an advantage or disadvantage to it, and in what way. It seems to be considered that this question calls for an opinion which would embrace law as well as fact. It may be that there are consequential damages, for which the law allows no recovery; but when the witness is asked in what way the road was an advantage or disadvantage, surely the answer must show whether it would fall within the rule. It would be hard to frame a question that would not either be open to this objection or to a more decisive one of being leading. White Deer Creek Improvement Co. *v.* Sallaman, 17 P. F. Smith, 421.

The fourth, fifth, and sixth errors assigned may be considered together. There was no inconsistency in the rulings of the court. The fact that before the railroad was constructed the canal afforded the plaintiff a cheap and sufficient means of conveying his products to market, was surely material, and the fact that it belonged to the plaintiffs, and might be abandoned by them, did not vary the aspect of the case. In the damages which the plaintiff originally received for the construction of the canal, it is to be presumed that the advantage he derived from it as a highway to market was duly considered. It may be that the abandonment of the canal by the defendants was *damnum absqui injuria*. But the fact that it was there was an element in the assessment of the damages which was important; nor was it material how much the plaintiff had demanded or received for the construction of the canal.

As to the seventh assignment, the question, "how much (if any) does the burden of fencing the railroad detract from the value of the farm?" was entirely proper. Value meant market value. That was what the attention of the witness had been called to just before. The question then was the same as that which the learned counsel for the defendants thought ought to have been put: "How much less would the whole farm sell for in market on account of additional fencing made necessary by the road?" The question was in the very words used in the charge of the judge below, and afterwards in this court in Delaware Railroad Company *v.* Benson, 11 P. F. Smith, 380.

We find no error in the rejection of the evidence that after the construction of the railroad the post-office was moved to a point nearer to the farm. That could not have affected the market value, or if it did, it is not easy to see how it was brought about by the construction of the railroad. It might be removed by the government at any time.

As to the eighth error, which relates to the striking out of the defendants' evidence in relation to the prices offered and paid for other properties in the neighborhood, it is sufficient to say that this ruling of the learned judge below is fully supported by the determination of this court in East Pennsylvania v. Hunter, 4 Wright, 53, in which it was held that in such a proceeding as this evidence of the price paid or amount received for land in the neighborhood in particular is inadmissible. The only proper test is the opinion of witnesses as to the value of the land taken, in view of its location and productiveness, its market value, or the general selling price of land in the neighborhood.

We are of opinion that the answer of the court to the defendant's first point was correct. The plaintiff was not concluded by the amount claimed in his first petition, which the court granted him leave to amend. That the court had power to allow the amendment is clear: Pennsylvania Railroad Company v. German Lutheran Congregation, 3 P. F. Smith, 445. The learned judge properly admitted it as persuasive evidence to the jury of the estimate the plaintiff had himself put upon his damages.

The qualification of the affirmance of the defendants' fourth point was entirely right in view of the evidence in regard to

the fence erected by the defendants as not sufficient for the purpose.

We do not fully understand the criticism made in the thirteenth assignment to that part of the charge in which the court instructed the jury to be "particular to inquire whether the increase in value came in the railroad or some other cause." It is not objected that it was wrong, but that it was emphatic. That rather involves a question of taste as to style, which we do not sit here to consider. But the clause thus extracted and objected to forms but part of a sentence, and the whole, taken together, is not even subject to the objection of being too emphatic. It was but a very proper caution to the jury. The judge said: "In arriving at a conclusion you may properly inquire what the property would have sold for immediately before and after the road was constructed and in successful operation, being particular to consider whether the increase in value, if any, arises from the improvement in question, or from some other cause."

On the whole find no error in the record.

Judgment affirmed.

Messrs. Littles & Blakeslee, for plaintiff in error.

W. H. Jessup, Esq., for defendants in error.—*Legal Intelligencer.*

N. Y. COURT OF APPEALS.

NEGOTIABLE INSTRUMENT—WHEN INDORSER NOT LIABLE.

While an indorser by his indorsement guarantees the genuineness of all preceding signatures, yet where he indorses upon the false representation of the holder of the note that a forged signature is genuine, he is not so liable, and the transferee of the note after it is due, without consideration, stands in no better position than the former holder. Turner *v.* Keller. Opinion by CHURCH, C. J. [Decided April 25.]

PRACTICE—REMOVAL OF CAUSE FROM STATE TO FEDERAL COURT.

The provision of the act of July 27, 1866 (14 U. S. Stats. at Large, 306), for the removal of causes from a State to the United States Court in a case where the action is against more than one defendant, one of whom is a citizen of a State other than the one in which the suit is brought, and as to whom a final determination of the controversy as to him may be had without the presence of the other parties; *held*, not to apply to a case where at the time the attempted removal is made the party applying therefor is the only defendant. Vose *v.* Yulee. Opinion by CHURCH, C. J.

Where in the original action the claim was against several defendants upon a joint liability in equity, and when it went back from the appellate court it was substantially an action at law against one defendant who was a non-resident of the State; *held*, that although if the action had originally been brought against him in that form he might have been entitled to a removal under the act of 1787; this would not aid him in making a case under the act of 1866. [Decided March 21. Reported below 4 Hun, 628.]

RAILROAD—ACQUIRING LAND FOR PURPOSES OF COMPANY—BURDEN OF PROOF.

Where a railroad company institute proceedings under the law of 1869, amending the general railroad act, to acquire additional lands, the question as to whether such lands are required for the use of the petitioner, is a judicial one to be determined by the courts (R. & S. R. R. Co. *v.* Davis, 43 N. Y. 328), and where the fact is disputed by the landowner, the onus of proving that they are so required is upon the petitioner. Matter of application of N. Y. C. & H. R. R. R. Co. *v.* Armstrong. Opinion by RAPALLO, J. [Decided June 20.]

TRADE-MARK—WHAT CONSTITUTES.

Plaintiff, who was a packer of lard, used as a trade-mark a print of the domestic hog. Defendant, who was also a packer of lard, placed upon his packages a representation of a wild boar upon a globe. There was no resemblance between the two marks, and no attempt to represent the packages as being plaintiff's, and there was no probability of defendant's mark being mistaken for that of plaintiff's by one acquainted with plaintiff's mark. *Held*, that plaintiff could not maintain an action to restrain defendant from using the label adopted by him. Popham *v.* Cole. Opinion by Allen, J.—*Albany Law Journal.*

(*Continued from page* 356.)

lots to be benefitted by the improvement, and to mark on each lot shown in the map, the amount assessed against it. Laws 1871-72, p. 251. This section was repealed by an act approved April 25, 1873, in force July 1, 1873. Laws 1873, p. 66, Section 26 of Article 9, which as originally passed required the commissioners to certify the map with the assessment roll to the court, was amended by an act which took effect March 30, 1874, and by the section as amended no map is necessary to accompany the roll. Rev. Stat., 1874; Sec. 140. The assessment in question was made in 1875. The title of the repealing act of 1873 is "An act to repeal section twenty five, and to amend sections twenty-seven and twenty-eight, of an act entitled 'An act to provide for the incorporation of cities and villages.' Approved April 10, 1872."

The position taken is that this repeal and amendment do not change the law as respects the city of Chicago. That upon the adoption by the Common Council of the city of Chicago, of article 9 of the act, that article as respects the city of Chicago, ceased to be article 9 of an act entitled "An act to provide for the incorporation of cities and villages," but became from that time forth a part of and one of the provisions in the city charter of the city of Chicago; that the repealing act is limited to the general law as it does not profess to extend to any city charter which the city had adopted, and made article 9 a part of its charter; that upon the familiar principles applicable to general and particular statutes the repeal cannot be held to extend to any such city charter. The same argument would apply to the case of a city which had become incorporated under and adopted the whole of the act, and no amendment simply of the act or repeal of any of its provisions would apply to such city, unless it were included by express reference.

We know of no good ground upon which to rest for support such a position. By the process of adoption by a city of this article of the act, the article is not taken out of the act, and no longer a part thereof and incorporated into and made a component part of a different law, to wit: the city charter. The act still remains operative in all its parts, in respect to all cities and villages in the State. Any unqualified amendment of the article, or repeal of any of its provisions, affects the article in its application universally to all the cities and villages in the State, irrespective of the circumstance of its having or not been previously adopted by any city or village.—The only effect in this wise of any such adoption of the article, is to make it operative in a city or village where it was not operative before. The heading and subject matter of this article 9 is "Special assessments for local improvements." In the making thereof since the adoption of this article, the city of Chicago, for its authority and guide of action, looks to article 9 of "An act to provide for the incorporation of cities and villages," and not to its city charter as a distinct thing therefrom. And it is governed by article 9, not as it was at the time of its adoption by the city, but as it is at the time when action comes to be taken thereunder.

At the time of the making of the assessment in question, the commissioners for information as to their duty had recurrence to article 9 of this act of the General Assembly. They found there no provision requiring a map to be made or returned with the assessment roll. True there was such a provision therein at the time of its adoption by the city, but it had since been repealed, and the article contained no such provision at the time when the commissioners acted, and they were not required to make or return a map with the assessment roll. The effect of the construction contended for would be to thwart the purpose of the act in securing uniformity in the charters of cities and villages, as every change in the law by the Legislature would operate to produce differences in such charters.

It is claimed that the ordinance directing this improvement was void for the reason that the Board of Public Works of the city of Chicago, had never made a report recommending or disapproving the work with a statement of the expense thereof, as formerly required by the charter of the city. According to section 20 of article 9, the city council are required to appoint three of its members or any other three competent persons to estimate and report the cost of the improvement contemplated.

Whether or not the city council might have pursued in this respect the former provision of the city charter, we can have no doubt there was a right here to proceed under article 9, and there was no more required than to follow the mode there prescribed. The report of the Board of Public Works was not necessary; it was not required under any of the provisions of article 9.

It is objected that there is no proof showing that the common council ever passed any ordinance directing this improvement. The court excluded the ordinance when it was offered in evidence before the jury, and rightly. It was not competent evidence to go to the jury under the issues. The only issues to be determined by the jury were whether the property of the appellant was assessed more or less than it was benefited, or more or less than its proportionate share of the cost of the improvement, and the amount for which it ought to be assessed. Sec. 31, art. 9.

The same remarks are applicable to the exclusion of the report of the Board of Public Works as evidence before the jury. The ground of its exclusion by the court was "that the report was already before the court and jury as pleadings." Any question arising upon the report as well as the ordinance was one for the court. The transcript of the record does not contain the original petition in the condemnation proceeding, nor the supplemental petition in the assessment proceeding, nor does it purport to be a complete copy of the record. A certified copy of the ordinance must have been a part of the original petition for condemnation, section 5 of article 9 requiring that the petition shall contain the same. This assessment was in that *same proceeding*. Sec. 53, art. 9. The supplemental petition for the assessment is required to recite the ordinance for the improvement and the report of the commission as to its cost. Sec. 22, art. 9. Appellant in the court below recognized and treated the ordinance as a part of the record. Before the impannelling of the jury he moved to dismiss the proceedings, because the ordinance providing for the improvement was illegal and void, and the same reason was made one of the grounds of his motion in arrest of judgment. The objection is without merit.

It is insisted that the court below erred in not awarding appellant a separate trial. The language of section 34, article 9, taken in connection with prior sections relative to the proceedings on application for judgment, would seem to show that a single hearing and a single judgment, several in effect, was contemplated by the law.

We think at most that the allowing or not of a separate trial was but a matter of discretion with the court below, and there is no ground to think the discretion of the court was improperly exercised.

It is assigned as error that the witness Benze, one of the commissioners who made the assessment, was not permitted to answer the questions whether, in the assessments of property along the line of Dearborn street, he had established some scale, increasing and decreasing as he went toward and from the contemplated improvement, and how, in assessing the north and south half of appellant's lot, he arrived at a difference of one dollar and twelve cents.

Appellant's counsel state that they rest the propriety of these questions upon the decisions of this court in City of Chicago *v.* Larned, 34 Ill., and Crote *v.* City of Chicago, 56 Ill., 428, where in the former case it was held that an assessment, not in proportion to benefits but in proportion to frontage, is unconstitutional; and in the latter that evidence offered to show that the cost of an improvement was assessed in proportion to frontage, was competent. The application of the cases is not perceived. The questions asked were not whether the assessment was made in proportion to frontage. The decisions were under a different law. Section 24, article 9, prescribes the basis upon which assessments shall be made, which conforms to the decisions of this court as to what is the right basis. Even if the commissioners, in making their assessments, proceeded upon a wrong basis, their assessment was not controlling. Sec. 31, art. 9 provides that on the hearing either party may introduce such other evidence as may tend to establish the right of the matter.

The question upon the hearing was whether appellant's land had been assessed more than it was benefitted, or more than its proportionate share. And it was gone into at large by the evidence of quite a number of witnesses on both sides introduced before the jury. There is no ground for the objection.

Appellant's 5th objection in the court below to the application for judgment on the assessment, was that the objector's land was not contiguous to the improvement and could not be assessed, and upon his attempting to prove that it was not so contiguous, that fact was admitted by the appellee. This admitted away the case of the appellee, as we hold that under the constitution and statute the authority was to make special assessments only on contiguous property, and this assessment not having been made on contiguous property, it was unauthorized and illegal.

But we do not adopt appellant's definition of the term contiguous, that it is to be used in its strictly etymological meaning of touching, and to be confined to property abutting on the improvement. Webster, in his dictionary, does define "contiguous" as "touching," but adds that the word is sometimes used in a wider sense, though not with strict propriety, for *adjacent* or *near* without being absolutely in contact. We think that it is in this wider sense in which the word is used in the constitution, and that it is not necessary to come within the meaning of "contiguous property," that the property should abut on the improvement. It may be that the property assessed was in fact contiguous property according to the scope which we would give to the term "contiguous," but the admission is fatal.

On the ground of this admission the refused instruction on this head should have been given, and the motion for a new trial should have been granted instead of being overruled.

The judgment is reversed and the cause remanded.

Judgment reversed.

ABE. LINCOLN, COUNTRY LAWYER AND PRESIDENT.

We clip the following from an exchange:

Some years since, James F. Joy, before he became president of the Michigan Central Railroad Company, was the attorney of the road. While acting in this capacity, he found it necessary to employ a lawyer to defend a suit, brought in one of the Illinois courts, against the company. As it turned out, the lawyer employed for this purpose was one Abraham Lincoln, of that State. Lawyer Lincoln successfully defended his railroad client, and sent in a bill to Mr. Joy of $75 for his services.

This bill Mr. Joy refused to pay, alleging that it was not customary for "country lawyers" to charge or receive such a fee for such services. Lawyer Lincoln, however, nothing abashed by such a distinguished rebuke, brought suit for the bill against Mr. Joy, as attorney for the M. C. R. R., and obtained a verdict for the full amount of his bill.

Time rolled on, and in 1861, this same "country lawyer" became President of the United States. A year or two afterward, a vacancy occurred on the bench of the Supreme Court of the United States, and Mr. Joy, among others, became a candidate for the Presidential appointment. When the application was made to the President by Mr. Joy's friends, Lincoln "told a little story" about one Mr. Joy, attorney for the M. C. R. R., and a certain "country lawyer" in Illinois, and after telling it, declined to make the appointment. Naturally enough, Mr. Joy did not relish Mr. Lincoln's "little joke," and never, afterward, spoke very favorably of Mr. Lincoln's personal or administrative qualities.

Mexico has one piece of silver at the Centennial valued at seventy-two thousand dollars.

CHICAGO LEGAL NEWS.

CHICAGO, AUGUST 5, 1876.

The Courts.

SUPREME COURT OF THE UNITED STATES.

No. 186.—OCTOBER TERM, 1875.

ROBERT A. PHILLIPS, Plaintiff in Error,
v.
CHARLES W. PAYNE.

In Error to the Supreme Court of the District of Columbia.

DE FACTO GOVERNMENTS—RETROCESSION OF PART OF THE DISTRICT OF COLUMBIA.

1. RETROCESSION.—This suit was brought to determine the validity of the retrocession by Congress, to the State of Virginia, of that part of the District of Columbia, as originally constituted, which was ceded by Virginia to the United States. *Held*, that the plaintiff in error is estopped from raising the point which he seeks to have decided. That he cannot force upon the parties, an issue which neither of them desires to make.

2. THE DE FACTO CONDITION OF THINGS.—In this litigation, the court is constrained to regard the *de facto* condition of things which exist with reference to the county of Alexandria, as conclusive of the rights of the parties before the court.

3. DE FACTO GOVERNMENTS.—That a government *de facto*, in firm possession of any country, is clothed, while it exists, with the same rights, powers and duties, both at home and abroad, as a government *de jure*. The court considers the nature of governments *de facto* and *de jure*, and states the practice of the United States in recognizing such governments.—[ED. LEGAL NEWS.

Mr. Justice SWAYNE delivered the opinion of the court.

This suit was brought to determine the validity of the retrocession by Congress to the State of Virginia, of that part of the District of Columbia, as originally constituted, which was ceded by Virginia to the United States. The plaintiff in error was the plaintiff in the court below. The case upon which he relies is thus set forth in his declaration:

In pursuance of the Constitution of the United States, Virginia, by an act of her legislature of December 3, 1789, ceded to the United States that part of her territory subsequently known as the county of Alexandria. Congress passed an act accepting the cession. Maryland ceded to the United States the county of Washington, and Congress accepted that cession also. The two counties constituted a territory ten miles square, which Congress set apart as the seat of the government of the United States, and organized as the District of Columbia, over which the Constitution of the United States required that Congress should exercise exclusive legislation in all cases whatsoever. Thereafter, on the 9th of July, 1846, Congress, in violation of the Constitution, passed an act purporting to authorize a vote to be taken by the people of Alexandria county, to determine whether the county should be retroceded to the State of Virginia, and declaring that in case a majority of the votes should be cast in favor of retrocession, the county should be retroceded and forever relinquished in full and absolute right and jurisdiction. A majority of the votes were cast for retrocession, whereupon, without any further action by Congress, the State of Virginia passed an act declaring that the county was reannexed and formed a part of the State. Since that time, the State has assumed to exercise full jurisdiction and control over the county, and to authorize the election of officers for the county, among whom is one known as the collector for the township of Washington. The defendant was elected such collector, and assumed to exercise the duties of his office. The State has also assumed to enforce the assessment and collection of taxes upon persons and property in the county. The plaintiff resides in the county and owns a large amount of real estate and other property there. The defendant alleged that an assessment had been made upon this property; that there was payable to him as such collector, upon the assessment, the sum of $165.18, and he demanded payment. In the event of refusal to pay, he would have sold the property pursuant to the law of the State. To prevent the sacrifice which this would have involved, the plaintiff paid the money under protest, notifying the defendant at the time, that he regarded the exaction as illegal and unauthorized, upon the ground that the county of Alexandria was not within the jurisdiction of the State of Virginia, but that it was within the District of Columbia. He avers that the act of Congress of 1846, before mentioned, every thing done under it, and the law of Virginia re-annexing the county to the State and extending her jurisdiction over it, are contrary to the Constitution of the United States, and illegal and void.

He therefore claims to recover the amount so paid to the collector.

The defendant demurred. The court below sustained the demurrer, and gave judgment for the defendant.

The question presented for our determination is whether there was error in this ruling.

The law of prescription applies to nations with the same effect as between individuals.—Lawrence's Wheaton, 303, 304; Vatel, Book 2. ch. 11, secs. 141, 146, 147, 149.

In cases involving the action of the political departments of the government, the judiciary is bound by such action.—Williams *v.* The Suffolk Ins. Co., 13 Pet., 420; Garcia *v.* Lee, 12 Pet., 511; Kennet *v.* Chamberlain, 14 How., 38; Foster *v.* Nelson, 2 Pet., 209; Nabob of the Carnatic *v.* The East Ind. Co., 2 Vesey, Jr., 60; Luther *v.* Borden, 7 How., 1; Rhode Island *v.* Massachusetts, 12 Pet., 714.

The judiciary recognizes the condition of things with respect to the government of another country which once existed as still subsisting, unless the political department of its own government has decided otherwise.—Kennet *v.* Chambers, 7 How., 38.

For certain purposes the States of the Union are regarded as foreign to each other.—Buckner *v.* Finley, 2 Pet., 590; Warden *v.* Arrel, 2 Wash. Va. Rep., 298.

Under certain circumstances, a constitutional provision may, like a forfeiture, be waived by a party entitled to insist upon it.—6 Hill, 48; 24 Wend., 337; 3 Comst., 199, 511; 18 Barb., 585.

The acts of an officer *de facto*, within the sphere of the powers and duties of the office he assumes to hold, are as valid and binding with respect to the public and third persons, as if they had been done by an officer *de jure*.—Elwood *v.* Monk. 6 East, 235; King *v.* Corp. Bedford, 6 East, 368; Tucker *v.* Aiken, 7 New H., 134; Fowler *v.* Babe, 9 Mass., 231; Com. *v.* Fowler, 10 Mass., 291; People *v.* Collins, 7 J. R., 549. These propositions were referred to in the discussion at the bar, and we have not overlooked them.

But we do not invoke their aid, and have found it unnecessary to consider the effect of either of them in this case.

We shall place our judgment upon another and a different ground, and shall confine our further remarks to that subject.

The State of Virginia is *de facto* in possession of the territory in question. She has been in possession, and her title and possession have been undisputed, since she resumed possession, in 1847, pursuant to the act of Congress of the preceding year. More than a quarter of a century has since elapsed. During all that time she has exercised jurisdiction over the territory in all respects as before she ceded it to the United States. She does not complain of the retrocession. The political departments of her government, by their conduct, have uniformly asserted her title, and the head of her judicial department has expressly affirmed it.—McLaughlin *v.* The Bank of Potomac, 7 Gratt., 68. The United States have not objected. No murmer of discontent has been heard from them. On the contrary, Congress, by more than one act, has recognized the transfer as a settled and valid fact.—Act of July 5, 1848, chap. 92, 9 Stat., 244; Act of Feb. 2, 1871, ch. 33, 16 Stat., 402; Rev. Stat. U. S., sec. 1795. Both parties to the transaction have been and still are entirely satisfied. If the objection taken by the plaintiff in error were maintained in the length and breath insisted upon, serious consequences would follow. In that view a part of them would be that all laws of the State passed since the retrocession, as regards the county of Alexandria, were void; taxes have been illegally assessed and collected; the election of public officers and the payment of their salaries were without warant of law; public accounts have been improperly settled; all sentences, judgments, and decrees of the courts were nullities, and those who carried them into execution are liable civilly, and perhaps criminally, according to the nature of what they have severally done.

A government *de facto*, in firm possession of any country, is clothed while it exists with the same rights, powers, and duties, both at home and abroad, as a government *de jure*. It may send embassadors and make treaties. Such treaties bind the nation and descend in full force upon any succeeding government that may be established. The assailants of a king *de facto* in England are liable to be punished for treason. Such was the rule of the common law, and the celebrated statute of Henry 7th only re-affirmed it. The legislative and judicial authorities called into existence may proceed as if the prior government had not been displaced. All municipal functions may be performed without regard to the origin of the new polity. Cromwell's embassadors were received everywhere. Hale accepted from him the place of a judge of the common pleas. After the restoration, Charles the 2d made him Chief Baron of the Exchequer, and subsequently Chief Justice of the King's Bench. The Code Napoleon was the work of a ruler whose government rose amid the ruins of a revolution and was subsequently overthrown. The governments of both these rulers were doubtless regarded by the other governments of Europe as only *de facto*. Whether they were or were not *de jure* also is a question which, in this case, it is unnecessary to consider.

In all cases where the United States have been called upon to recognize the existence of the government or the independence of any other country, they have looked only to the fact, and not to the right. Such has been the uniform course of our government. 1 Kent's Com. (Comst. ed.) 170; Vatel, Book 2, ch. 12, secs. 196, 197; Id., Book 4, ch. 2, secs. 14, 18; 1 Hale's P. C., 101; Foster's Crown Law, pp. 397, 399; Camp. Lives of Chief Justices, 526; Lawrence's Wheat., 49, note; Id., 471, note.

The plaintiff in error is estopped from raising the point which he seeks to have decided. He cannot, under the circumstances, vicariousiy raise a question, nor force upon the parties to the compact an issue, which neither of them desires to make.

In this litigation we are constrained to regard the *de facto* condition of things which exists with reference to the county of Alexandria, as conclusive of the rights of the parties before us.

The judgment of the Supreme Court of the District of Columbia is affirmed.

UNITED STATES SUPREME COURT.

No. 216.—OCTOBER TERM, 1875.

JAMES P. CARROL, A. BAXTER SPRINGS, WILLIAM B. STANLEY, CHARLES LOGAN and ARTHUR W. KENNEDY, Appellants,
v.
JOSHUA and THOMAS GREEN.

Appeal from the Circuit Court of the United States for the District of South Carolina.

LIABILITY OF STOCKHOLDERS FOR DEBTS OF CORPORATION—STATUTE OF LIMITATIONS.

1. LIABILITY OF STOCKHOLDERS.—The appellees filed the bill in June, 1872. The bill seeks to make appellants individually liable, as stockholders of the Exchange Bank of Columbia, which was incorporated by an act of the legislature of South Carolina, in 1852; by this act it is alleged the Exchange Bank "was endowed with the same rights and privileges, and made subject to the same duties and liabilities, provided for the Planters' and Mechanic's Bank," and that by the 4th section of the act incorporating the last-named bank, it was declared "that in case of the failure of said bank, each stockholder, copartnership, or body politic, having a share in such bank at the time of such failure, or who shall have been interested therein at any time within twelve months previous to such failure, shall be liable and held bound, individually, for any sum not exceeding twice the amount of his, her or their share or shares."

Held, 1. After commenting upon the statutes of South Carolina extending the statute of limitations, that more than four years having elapsed since the time from the last extension commenced running, an action at law would be barred, and an action at law being barred, a bill in equity would also be barred.

2. That the statute of limitations in force when this cause of action accrued, and under which this cause must be decided, was that of 1712; that that statute contains no exception as to actions on the case, save for slander.

3. That in an action at law, case was the proper action, and not debt, to recover of a shareholder for the debts of a corporation.—[ED. LEGAL NEWS

Mr. Justice SWAYNE delivered the opinion of the Court.

A number of important questions arising in this case have been fully argued, which we shall pass by without remark. We have not examined any of them exhaustively, and have not found it necessary to do so. Our judgment will be placed upon the defence of the statute of limitations, and our opinion will be confined to that subject.

The appellees filed this bill, and the subpœnas were issued in the court below, on the 18th of June, 1872. The bill seeks to make the appellants individually liable as stockholders of the Exchange Bank of Columbia, which was incorporated by an act of the legislature of South Carolina, of the 16th of December, 1852. It is alleged in the bill that by this act the Exchange Bank "was endowed with the same rights and privileges, and was made subject to the same duties, liabilities, obligations, and restrictions provided for the said Planters' & Mechanics' Bank," and that by the fourth section of the act incorporating the last-named bank it was declared "that, in case of the failure of said bank, each stockholder, copartnership, or body politic, having a share in such bank at the time of such failure, or who shall have been interested therein at any time within twelve months previous to such failure, shall be liable and held bound, individually, for any sum not exceeding twice the amount of his, her, or their share or shares."

It is conceded for the purposes of this opinion that the provision, quoted from the act of 1852, applies to the stockholders of the Exchange Bank as well as to the bank itself.

The master found and the court below affirmed, the finding as correct, that the Exchange Bank failed in the month of February, 1865, and never resumed business after that time.

The defendants severally set forth in their answers "that the cause of action stated in the bill did not accrue within four years before the exhibiting of said bill." The complainants replied and took issue. It appears that the bank suspended specie payment several years before its failure at the time specified by the master, and some stress is laid upon this fact by the counsel for the appellants in discussing the case in this aspect. We have preferred to adopt the finding of the master because it is the view most favorable to the appellees, because the proof as to that period brings the case clearly within the terms of the statute, while the proof is further that the bank paid specie until its suspension was legalized, and that if it had been put in liquidation on the first of February, 1865, it could then have met all its liabilities and redeemed its outstanding bills in specie or its equivalent.—Rec., 63. Its subsequent losses arose from the war. According to the statute the liability of "each stockholder" arose upon "the failure of the bank." The liability gave at once the right to sue, and, by necessary consequence, the period of limitation began at the same time. From the last of February, 1865, four years expired on the first of March, 1869. But there are certain interruptions of the running of the statute to be taken into account. An act of the legislature of the State, of the 21st of December, 1861, suspended the statute of limitations until the close of the first session of the next general assembly. This suspension was continued by successive acts. The last one was passed on the 22d of December, 1865, and prolonged the suspension "until the adjournment of the next regular session of the general assembly." The supreme court of the State held that these acts arrested the effect of the statute of limitations from December 21, 1861, until December, 1866.—Wardlow *v.* Buzzard, 15 Richardson, 158.

It does not appear in the case at what time in December, 1866, the general assembly adjourned. From December, 1866, the statute was in full force. Four years from that time expired in December, 1870. The war in South Carolina ended on the 2d of April, 1866.—The Protector, 12 Wall., 701.

The Circuit Court of the United States for South Carolina was open for business on and after the 12th of June, 1866.

In any view of the facts that can be taken, more than four years elapsed after the statute began to run before this suit was instituted.

The statute of limitations of South Carolina, in force when this cause of action accrued, and under which the case must be decided, was that of 1712.—Angel on Lim., Appendix, p. xcviii.

The sixth section declares, among other things, "that * * * all actions of account *and upon the case*, (other than such accounts as concern the trade of merchandise,) * * * * * all actions of debt *grounded upon any* lending *or contract without specialty*, all actions for arrearages of rent reserved by indenture, all actions of covenant * * * which shall be brought at any time after the ratification of this act, shall be commenced and sued within the time of limitation hereafter expressed, and not after —that is to say, *the said actions upon the case* other than for slanders, and the said actions for accounts, * * * * *and the said actions for* * * * *debt*, * * * within three years next after the ratification of this act, or within four years next after the cause of such actions or suits, and not after." The statute contains no exception as to actions on the case, save that for slander. All others are expressly barred at the expiration of the time named.

The section of the act of 1852 above quoted, which is said to create the individual liability here in question, is silent as to who shall sue The suit was, therefore, necessarily to be brought by and for the benefit of the parties injured.—2 Inst., 650; Com. Dig., Debt, A., 1.

Individual liability is repugnant to the law of corporations, and qualifies in this case an exemption which would otherwise exist. Stockholders in such cases are liable according to the plain meaning of the terms employed by the legislature, and not otherwise. The section is silent as to a preference to any class of creditors. All, therefore, in this case stood upon a footing of equality, and were entitled to share alike in the proceeds of the litigation. The remedy against the stockholders was necessarily in equity.—Pollard *v.* Bailey, 20 Wall., 521.

They were severally compellable to contribute according to the amount of the stock they respectively held and the liabilities of the bank to be met, after exhausting its means, the maximum of the liability of each stockholder not to exceed in any event twice the amount of his stock.—Iglehart *v.* The Bank of Circleville and others, 6 McLean, 568.

It is obvious from this statement that if there had been a suit at law against the stockholders, debt could not have been maintained.

The action of debt lies on a statute where it is brought for a sum certain, or where the sum is capable of being readily reduced to a certainty. It is not sustainable for unliquidated damages.—1 Ch. Pl., 108, 113; Stockwell *v.* The U. S., 13, Wall., 542.

"The action of debt is in legal contemplation for the recovery of a debt *eo nomine, and in numero*." "Case, now usually called assumpsit," is founded on a contract express or implied.—1 Chy., 99; Metcalf *v.* Robinson, 2 McLean, 364.

Let us apply these tests to the case in hand. Certainly the amount sought to be recovered was not certain, and could not readily be reduced to certainty, and there was clearly an implied promise on the part of the stockholders.

The legislature created the corporation, and prescribed certain terms to which the stockholders should be subjected. This was an offer on the part of the State. It could be accepted or declined. There was no constraint. By taking the stock the terms were acceded to, the contract became complete, and the stockholders were bound accordingly. The same result followed, which would have ensued under the like circumstances between individuals. The assent thus given, and the promise implied are of the essence of the liability sought to be enforced in this proceeding. If a remedy at law were necessary clearly it must have been case.

Case is a generic term, which embraces many different species of actions. "There are two, however, of more frequent use than any other form of action whatever. These are assumpsit and trover."—Steph. Plead., 18.

"The more legal denomination of the action of assumpsit is trespass on the case upon promises."—3 Woodison's Lectures, 168. This form of action originated, like many others, under the statute of Westminister 2, 13 Ed. 1, ch. 24, sec. 2. Its establishment was strenuously resisted through several reigns.—2 Reeves' Hist., pp. 394, 507, 608. It was sustained, upon full consideration, in Slades' Case, 4 Coke, 92, which was decided in 44th Elizabeth. When the statute of South Carolina of 1712, here in question, was enacted, the term *case* was as well understood to embrace assumpsit as anything else in the law of procedure to which it is now held to apply.

Blackstone thought that one of the most important amendments of the law during the century in which he lived was affected "by extending the equitable writ of *trespass on the case*, according to its primitive institution, by King Edward the First, to almost every instance of injustice not remedied by any other process."—4 Commen., 442.

But if debt were the proper form of action if this were a suit at law, the result must be the same. The act bars "all actions of debt" grounded upon any lending *or contract without speciality*—also "after the lapse of four years." The contract here was of the class last designated. The statute was only inducement. The implied promise of the stockholders to fulfill its requirements was the agreement on their part, and it was without specialty.

Where a deed poll was executed by a lessor, and the lessee entered and enjoyed the premises, it was held that he was liable according to the terms of the lease, but that he was suable only in assumpsit.—Goodwin *v.* Gilbert, 9 Mass., 484; Newell *v.* Hill, 2 Metcalf, 180.

So where one conveys land by deed, pursuant to a parol agreement, the law implies a promise by the grantee to pay the purchase-money, and it may be recovered, but the action must be in case, and not debt on the specialty.—Butler *v.* Lee, 11 Alabama, 885; Bowen *v.* Bell, 20 John., 338; Wilkinson *v.* Scott, 17 Mass., 249.

In Lindsay *v.* Hyatt, 4 Ed. Ch., 104, the act of incorporation declared that the directors and stockholders might be sued for the debts of the corporation, either at law or in equity, as if they were joint debtors or co-partners. The Vice-Chancellor said: "It appears to me that the six years within which actions on simple contract indebtedness must be brought does apply."

Speaking of a suit at law, he said: "In such an action the declaration must be in case founded on the statute." * * * "The form of the action and the nature of the liability to be enforced fall within the provisions of the statute which takes away the right to sue after six years."

Corning *v.* Horner & McCullough, 1 Comst., 58, was a suit at law against stockholders upon a similar statute and involving the same statute of limitations. It was said that the action must "necessarily be an action on the case at common law upon the liability of the stockholders for the debt of the company." The same conclusion was reached as to the time when such actions were barred as in Lindsay *v.* Hyatt.

Baker *v.* the Atlas Bank, 9 Metc., 182, was a bill in equity founded upon a statute making the stockholders liable in the cases specified. The defendants relied upon a statute of limitations which declared that "all actions founded upon any contract or liability not under seal shall be commenced within six years next after the cause of action shall accrue, and not afterwards." It was held that the statute applied in equity as well as at law, and that after the lapse of six years, the bar was complete.

The Commonwealth *v.* The Cochituate Bank, 3 Allen, 42, was also a case in equity involving a statute creating a liability on the part of the stockholders of the bank, and the same statute of limitations. The same conclusions were reached by the court as in the preceding case.

It is insisted by the learned counsel for the appellees that while the limitation act of 1712 provided that "actions of debt upon any lending or contract, without specialty," should be brought within four years, it did not limit actions of debt upon specialties, and that the liability here in question being created by a statute, is to be regarded as falling within the latter class.

It is said that an obligation to pay money, arising under a statute, is a debt by specialty. In support of this point Bullard *v.* Bell, 1 Mason, 243, has been pressed upon our attention. Fully to examine that case would unnecessarily extend this opinion. It was cited in Baker *v.* The Atlas Bank and in Corning *v.* McCullough without effect. We think it is distinguishable from the case in hand in several material points. If it be in conflict with the cases to which we have referred, in this connection, we think the results in the latter were controlled by the better reason.

If a claim like that of the appellees sued at law, would have been barred at law, their claim is barred in equity. This proposition is too clear to require argument or authorities to support it.

The decree of the circuit court is reversed, and the cause will be remanded with directions to dismiss the bill.

UNITED STATES DISTRICT COURT, W. D. WISCONSIN.

OPINION, JULY 15, 1876.

In re WORTHINGTON.

In Bankruptcy.

JUDGMENT ON A HOLIDAY—BANKRUPTCY—ADVERSE CLAIM—VOLUNTARY SUBMISSION.

1. *Held*, Following the construction placed upon the statute by the State Supreme Court, that a judgment entered on a day which is a legal holiday, is void, and that where a judgment was entered on the 24th of December, and a transcript thereof filed in a foreign county on the 25th of December, which was a legal holiday, the filing of the transcript created no lien upon the land in that county.

2. That, although a party claiming an adverse interest cannot be brought in by petition, by an assignee, in a summary way, to have the claim determined, such claimant may voluntarily come in by petition, and submit his claim to the decision of the court.—[ED. LEGAL NEWS.

Opinion by HOPKINS, J.

This is an application of Charles E. Storm and others, judgment creditors of the bankrupt, for an order directing the assignee to sell certain real estate of the bankrupt, situate in the county of Wood, and to apply the proceeds upon their judgment and for leave to prove as unsecured creditors any balance that remains upon the judgment after applying said proceeds thereon.

They show in their petition that on the 24th of December, 1874, they recovered judgment against the bankrupt for $3,464.11 in the Circuit Court of Milwaukee county, and that on the 25th day of December a transcript was filed and the judgment docketed in Wood county, and they claim that thereby it became a lien upon the real estate of the bankrupt situate in that county.

They represent that the real estate in Wood county which they want sold is not of sufficient value to pay their judgment, and pray that the assignee may be directed to sell it free of the lien and to pay the proceeds to them, and that they be allowed to prove up the deficiency as an unsecured debt.

The assignee opposes the granting the order, on the ground that the judgment is not a lien on the bankrupt's real estate in Wood county, for the reason that it was docketed there on the 25th day of December, which is by the statute of this State declared to be a legal holiday. Laws of 1862, chapter 248.

This raises the question as to the operation of a statute declaring a certain day a holiday. The act does not in terms prohibit any act from being done on that day; it simply declares that the day shall be a holiday. Does that make the official act of the clerk in docketing the judgment on that day void? For only upon that ground can this court consider the question. If it is voidable, the party must go to the State courts for redress.

The question is settled in Lampe *v.* Manning, 38 Wis., 673; it seems to me that the clerk had no authority to docket the judgment on that day, and, if not, the entry was void, and no lien was created thereby. The court there hold that the term "holiday" imports *dies non juridicus*, and that no authority exists on that day to do any official act, although no express prohibition is contained in the act. That a prohibition is implied in the term holiday.

This is a decision of the State court upon the effect of the statute, and it may be unnecessary for this court to go further in search of authorities to support it. If declaring the 25th of December to be a legal holiday, *ipso facto*, made it no day in law, we are to look to the common law to see what acts, if any, could be performed on such days.

Sunday, at common law, was regarded as a *dies non juridicus*. In Becloe *v.* Alpe (Sir William Jones, 126), the court say that Sunday was not a *dies juridicus* for the awarding of any process, *nor for entering any judgment of record*. 12 John., Van Vechten *v.* Paddock, 177.

Lord Coke in Mackally's Case, 9 Coke, 66, took a distinction between judicial and ministerial acts, performed on that day, but in Hoyle *v.* Cornwallis, 1 Strange, 387; that distinction was overruled, so that at common law both ministerial and judicial acts were prohibited on such days.

Now by adopting the decision of the Supreme court as the authorative interpretation of the act, it follows that the entering of the judgment on that day was void, and hence no lien was created thereby.

See also for a further discussion of this question, Story *v.* Elliott, 8 Cow. R., 27; Houghtailing *v.* Osborn, 15 John., 119; Butler *v.* Kelsey, id. 177. If the judgment was a lien, it is preserved by the bankrupt law, and it is the duty of this court to protect it as such. But in determining that question we have to look to the State statutes and the construction placed upon them by the State courts, and if by those the judgment is a valid lien, it is our duty to give it its full force and operation.

The filing of the transcript and docketing of the judgment in Wood county were necessary to give a lien on the bankrupts' real estate in that county, 2 Taylor Stats., p. 1509, sections 61 and 62, and such filing and docketing having been on the 25th of December, they were not legally done, and must be regarded a nullity, which leaves the petitioners as to those lands in no better situation than any other creditor of the bankrupt.

As the entry constitutes an apparent cloud on the title they should cause a cancellation of the docket entry so as to remove the colorable lien created thereby. The asignee is therefore ordered to sell the real estate in Wood county free of any lien of the petitions by virtue of the said judgment, and to hold the proceeds for distribution among all the unsecured creditors; and in order to further protect the purchaser or purchasers thereof from the assignee, I shall direct that an injunction issue out of this court perpetually enjoining and restraining the petitioners and their attorneys and agents from selling or offering to sell such real estate or any portion by virtue of said judgments, or from enforcing or attempting to enforce the same upon said real estate.

The petitioners having voluntarily appeared and moved the court to enforce the pretended lien, the court thereby has acquired jurisdiction to proceed and dispose of the whole matter in this summary way, which it could not have done upon summary petitions of assignee. But the authorities hold, that although a party claiming an adverse interest cannot be brought in by petition by assignee in a summary way to have the claim determined, that such claimant may voluntarily come in by petition and submit his claim to the decision of the court without resorting to the form of a plenary action.

The petitioners have leave to prove for the full amount of the judgment being valid for ought that appears to the court now, the lien on real estate in Wood county alone being void. An order and injunction will be issued in accordance with this opinion.

JENKINS, ELLIOT & WINKLER,
For Judgment Creditors.
H. M. LEWIS, CARY & COTRELL,
For Assignee.

WE have received from WM. H. KING, of the Chicago bar, the following opinion:

SUPREME COURT OF ILLINOIS.

OPINION FILED JUNE 30, 1876.

No. 306.—BENJAMIN F. SHERMAN, Appellant, *v.* LOUIS BUSH et al., Appellees.

Appeal from the Superior Court of Cook.

No. 307.—LOUIS BUSH et al., Appellants, *v.* BENJAMIN F. SHERMAN et al., Appellees.

Appeal from the Superior Court of Cook.

DEFENDANT ABSENT IN REBELLION—RELEASE—AGREEMENT TO RELEASE MORTGAGE—ADVERTISEMENT UNDER TRUST DEED—WHAT IT SHOULD CONTAIN—WHEN PROPERTY AFTER SALE IS AGAIN SOLD TO TRUSTEE—ACQUIESCENCE IN SALE, A WAIVER OF IRREGULARITIES.

1. ABSENCE OF MORTGAGOR IN REBELLION.—That the question of the right of a creditor, when the mortgagor was absent voluntarily in the re-

bellion, to enforce the payment of his debt, has been put at rest by the former decisions of this court.

2. AGREEMENT TO RELEASE.—That an agreement to release a portion of the mortgaged property without consideration, would be a mere gratuity, and could not be enforced. When acted upon, it would be binding upon the parties, even if there was no consideration for the agreement.

3. ADVERTISEMENT OF SALE.—That it is sufficient if the notice of sale contains enough to show that there has been a default in the condition; and also that it recites any fact the mortgage itself may provide it shall contain. More than this is mere redundancy, and can answer no good purpose.

4. TRUSTEE PURCHASING AFTER SALE.—After the trust has been fully performed, and all fiduciary relations ceased, the law has not forbidden the trustee to deal with what had been trust property, as strangers may do, and acting in good faith he may become its owner, by purchase or otherwise.

5. ACQUIESCENCE A WAIVER.—That acquiescence in the sale, unexplained for any considerable time, will be deemed a waiver of all mere irregularities that may have intervened.—[ED. LEGAL NEWS.

STATEMENT OF THE CASE.

On the 23d day of May, 1856, Winchester Hall, one of the complainants, purchased of Ayers and Hamilton, a block of ground which included within its limits the lands involved in this controversy. A portion of the purchase money was paid down, and the remainder, represented by six promissory notes, was secured by mortgage upon the premises, containing a power of sale. The notes matured in sets of two of equal amount, in one, two and three years from the date of the sale. According to the testimony of Bush, the real estate was bought on the joint account of himself, Hall and Richard, since deceased, whose heirs, by an amendment to the bill, have been made complainants, and that an agreement in writing showing the interests of the several parties, was signed at the time; but for convenience the title was taken in the name of Hall, who resided or was about to reside, in Chicago, the other partners both residing in the State of Louisiana. It was not disclosed to the vendors any person other than Hall had any interest in the purchase, nor was the alleged agreement made a matter of record. So far as the public could know, or had any reason to believe, Hall was the sole owner. He treated the property as having the exclusive ownership, making contracts in relation thereto and not disclosing that any one else had any interest in it. On the 23d day of March, 1857, Hall sold the west half of the block to Joseph Smith, but the incumbrance created by the prior mortgage resting upon the entire premises, Smith would not consummate the purchase unless Ayers and Hamilton would agree that that portion he was proposing to buy might in some way be released from the mortgage indebtedness, so that he might acquire a clear title when he should pay for the same. Hall procured an agreement from Ayers and Hamilton that in the event of payment to them at maturity of the installments to become due on the 23d day of May, 1857, they would agree to hold the west half of the block liable for only one-half of the residue of the unpaid purchase money, with the distinct reservation, however, that Hall was not to be released from the payment of any portion of the mortgage indebtedness. That arrangement was satisfactory to Smith, and was endorsed on the back of his contract with Hall, both of which were recorded on the following day.

The installments maturing on the 23d day of May, 1857, were fully paid, and subsequently one half of the residue of the purchase money, but no application was made to have the holder apply it in discharge of the mortgage indebtedness on the west half of the block which had been sold to Smith, nor was it ever so applied.

In the mean time Sherman had bought of Ayers and Hamilton such of Hall's notes as were unpaid, and took an assignment of both the notes and mortgage, and thereafter controlled them.

After making some payments, Smith found he would be unable to comply with his contract, and for a nominal consideration re-conveyed the property to Hall, losing all benefit of what he had paid.

On the 6th day of June, 1860, Hall conveyed by deed all his interest in the premises to Bush, to be by him held in trust for the parties originally interested, except so far as Hall's interest was concerned, that was to be as security for his indebtedness to Bush.

But that indebtedness has long since been adjusted, so that Hall now claims to be the equitable owner of one-third of the estate. Although this latter deed was upon record, it does not appear Sherman had any actual knowledge of its existence until about the time he was making the sales under the mortgage.

In April, 1861, all of Hall's notes given to ——— for the property, except one for $3,445, had been paid, either to Ayers and Hamilton, or to Sherman after he became the owner. At the request of Hall, and for a consideration, Sherman extended the time of payment on this latter note until 1861, and upon a like request consented to a further extension until May 1, 1862, upon the positive agreement no further extension should be asked. Before the day of payment last agreed upon had arrived, open hostilities between the North and the South had commenced. Louisiana had in the month of January, 1861, passed an ordinance seceding from the Union, which was a matter of public interest, and was, of course, known to Hall. Immediately after the fall of Fort Sumpter, Hall left the State of Illinois for his former home at Thibodeaux, in Louisiana, with the avowed purpose to cast his lot with the people of the South. Previous to his departure Hall made no arrangements whatever for the payment of the balance due Sherman on the mortgage indebtedness. Perhaps in May, 1862, after New Orleans had come into the possession and under the control of the federal armies, and communication had been established by rail and by water between Thibodeaux and New Orleans, Sherman wrote to Hall at the latter city to know if he could do anything toward paying his note. That letter was subsequently returned to him from the dead letter office with the post mark of New Orleans upon it. One reason why Hall did not receive that letter was, he had previously entered the military service of the South, and passed within the rebel lines. Had he remained at Thibodeaux, his place of residence, he would have been within the Union lines all the time, except a period of about six weeks in the summer of 1863, and had he been loyal to the government he could have been in constant communication with New Orleans and with Chicago, where his property was situated. After waiting many months and hearing nothing from Hall, Sherman advertised the property, and by virtue of the power of sale contained in the mortgage, on the 3d day of February, 1863, sold part of the premises to D. C. Nicholes, and made him a trustee's deed for the same. Upon a like notice on the 10th day of March following, he sold another portion of the property to Eben Colfax, and also executed to him a deed. The aggregate amount of these sales was about sufficient to discharge the mortgage indebtedness, perhaps a small balance remained Both Nicholes and Colfax conveyed that portion of the property purchased by them respectively at the trustee's sale to Mrs. Cleaver, and it is under titles derived from her that defendants claim the property involved in this litigation. This bill was filed to have the trustee's deeds to Nicholes and Colfax, and their deeds to Mrs. Cleaver, set aside and complainants let in to redeem the property on payment of what was due on the mortgage, and if for any reason that specific relief could not be granted they might have a decree for compensation. On the hearing the court dismissed the bill as to all defendants, except Sherman, and found that under the bill was due complainants from him $6,714.65, and that he was chargeable on the ground of constructive, but not actual fraud. From that decree Sherman, as well as complainants, appealed.

Both appeals are now to be considered as one case on errors assigned by the respective parties.

Opinion of the court by SCOTT, C. J.

Although made a ground of relief in the bill, it is not insisted in argument it was any obstacle in the way of the execution of the power of sale contained in the mortgage, that the mortgagor was within the enemy's lines during the late war. His absence from the State was voluntary, and was with a view to cast his lot with a people then in rebellion against the government. Had he remained at the home he selected in the South after open hostilities had commenced, he would still have been within the federal lines and within access to his creditors. The question of the right of a creditor, under such circumstances, to enforce payment of his debt, has been put at rest by the former decisions of this court. Mixer *v.* Sibly, 53 Ill., 61; Willard et al *v.* Boggs, 56 Ill., 163; Harper *v.* Ely, 56 Ill., 179; Seymore *v.* Bailey, 66 Ill., 288; Hall *v.* Conn. Mut. Life Ins. Co. (Sep. T. 1873.)

Unless, therefore, the mortgage had been released as to the west half of the property, no valid reason existed why the creditor could not exercise the power of sale contained in the mortgage, to foreclose and cut off the mortgagor's equity of redemption. Sherman was the assignee of the mortgagee, the legal holder of the indebtedness secured, and was the only party that could rightfully exercise the power of sale. Pardee *v.* Lindly, 31 Ills., 174; Strother *v.* Law, 54 Ills., 413.

Had any portion of the property been discharged from the operation of the mortgage, it is very clear no sale could thereafter be made, that would legally affect the title. Whether any portion of the property included in the mortgage had been released prior to the trustee's sale, depends upon the construction that shall be given to the agreement of Ayers and Hamilton of the 23rd of March, 1857. The position assumed is that by reason of the agreement with the superadded facts of the payment of the installments due May 23rd, 1857, and the subsequent payment of one-half of the residue of the purchase money, the west half of the property became released and was discharged from the effects of the mortgage, long before Sherman undertook to execute the power of sale. We do not think the position is warranted by any fair construction of the agreement, certainly not in view of what subsequently transpired between the parties.

It will be remembered that Ayers and Hamilton were induced to consent to the agreement to release that portion of the property as a matter of mere favor to Hall and Smith to facilitate the making of the contract of sale between them. No consideration whatever was paid them, and no advantage in any respect accrued to them in consequence of making the agreement. On their part it was a mere gratuity. No doubt the object the parties had in view was that any payment made by Hall might be in reduction of the incumbrance on the west half of the property, until it should be released by the payment of one-half of the debt secured on the whole property, so that Smith might obtain an unincumbered title for that portion he had contracted to buy. It was a mere privilege to the parties to have all payments subsequent to the installment due on the 23rd day of May, 1857, so applied, and nothing more. When acted upon it would be binding upon the mortgagees notwithstanding there may have been no consideration for the agreement. After Smith had invested his money upon the faith of the previous consent of the mortgagees to permit future payments to be applied in a particular way, they would be estopped to retract such consent. It would be inequitable and against good conscience. But the agreement was for Smith's benefit and was in no sense for the benefit of Hall. Consent was given upon the express condition, Hall was not to be released from the payment of any portion of the unpaid mortgage indebtedness. Before any further payments had been made on the installments maturing after the 23rd of May, 1857, Smith being unable to complete his contract, re-conveyed the west half of the property back to Hall. Hence there was no necessity for having future payments made by Hall applied in reduction of the incumbrance on that portion of the property, and neither Hall nor anyone else ever asked to have them, nor were they ever so applied. Plainly it was no interest to Hall to have the payments so appropriated, and he consequently gave himself no concern about them. His obligation was to pay the entire mortgage indebtedness, and it was a matter of no consequence to him whether it rested on the east or west half of the property.

It is a misconception of the meaning of the agreement to suppose that Hall, by reason of the reconveyance of the property to him by Smith, obtained it with the privilege of having future payments applied in reduction of the incumbrance upon the west half. Clearly, any one claiming under Smith, as grantee, would be entitled to the benefit of the contract, but Hall claimed nothing as the grantee of Smith. What was done was the cancellation of the contract of sale. That was the effect of the reconveyance. After the reconveyance Hall held the property under the deed from Ayers and Hamilton, the same as though no contract had ever been made with Smith.

The circumstances proven establish, most conclusively, the parties themselves understood the agreement was for the benefit of Smith, and not Hall, after the reconveyance payments were made, without any reference as to how they were to be applied. Although the agreement was on record, it appears Sherman had no actual notice of it until about the time he was making the sales, under the power contained in the mortgage. Hall procured Sherman to release from the operation of the mortgage portions of the east half of the property, without disclosing to him that he understood the west half had already passed from under the mortgage. When the release of portions of the east half was made for Hall's convenience, it was expressly agreed Sherman reserved and retained his lien upon all the rest of the premises mentioned in the mortgage for the then unpaid amount secured thereby. Had it been the understanding of Hall the west half of the property had been or could be released on payment of one-half of the unpaid balance of the purchase money, it would have been a gross fraud on Sherman to procure from him a release of portions of the east half while he was under the belief all the rest of the premises remained subject to the mortgage, without diclosing that fact to him. On every principle of justice, it seems to us, in view of what transpired between the parties, Hall is estopped to insist there was any release of the west half of the property, under the agreement with Ayers and Hamilton. The acts of the parties are wholly inconsistent with any such theory. Neither Hall nor Smith ever asked to have the subsequent payments applied on the west half of the property, that it might be discharged from the mortgage lien, and they never were so appropriated. But could it, by any fair construction, be held that Hall could avail of the agreement with Ayers and Hamilton, it might, with great justness, be said, there was no consideration for it, and neither they nor their assigns were bound to perform it, so far as he is concerned. Hall was in no position to be prejudiced by the non-performance, and he could evoke no principle of estoppel as against them. He was not induced by any action on their part to place himself in a position he would not have done had it not been for the agreement, and there could therefore be nothing inequitable in permitting them to retract, had they chosen to do so.

Most difficult of all the questions arising from the record, is whether the sales made by Sherman, under the power contained in the mortgage, were effectual to foreclose the equity of redemption of the parties interested in the estate.—Should it appear the power was rightly exercised, the sales will not only bar the rights of Hall, but those of parties claiming the property under him as grantee or otherwise. One objection taken is the advertisement under which the sales were made was designed to mislead parties as to the amount remaining unpaid on the mortgage. Only one note, the last in the series, was unpaid, but the notices published recited in general terms default had been made in payment of the mortgage indebtedness, without specifying in what particular.—Who were interested in that question? Only Hall and those claiming under or jointly with him. They knew what amount had been paid, and of course were not misled. Strangers were in no wise interested in that question. So far as the public were concerned, and those that desired to become bidders or purchasers at the sale, it was enough that default had been made in the conditions of the mortgage. No complaint is made the trustee sold the property for more than was actually due. How then were defendants prejudiced by what is alleged to be a defective notice, and no creditors are complaining they were misled by it? But aside from this view we are not aware the law has made it obligatory upon the trustee to state in the notice of

the sale the exact amount due under the mortgage, nor does the contract of the parties, as set forth in the mortgage, require it to be done. It would seem to be sufficient if the notice contains enough to show there has been a default in the condition, and also that it recites any fact the mortgage itself may provide it shall contain. More than that is mere redundancy, and can answer no good purpose.

Another point relied on with great confidence, as effecting the validity of the sale, is that the trustee was both buyer and seller at his own sale, in violation of a well known rule of law. Upon this ground the right of complainants is based, to be let in to redeem the property, and in case the specific relief cannot be obtained, they may have a decree for compensation against the offending trustee, and those confederating with them. One remarkable feature of the case is, there is not a particle of direct evidence in the record to sustain the allegation of the bill on this most important branch of the case, and the acts of the parties are all susceptible of an explanation consistent with the entire fairness in the sale. There is no conflict in the testimony. The answers of the trustee and purchasers, as well as the first grantee of the purchasers, were all called for under oath. So far as they are responsive to the allegations of the bill they are evidence, and were read on the hearing for that purpose. All the other testimony on this branch of the case comes from defendants examined as witnesses. The broad and unequivocal denials in the answers of any collusion between the trustee making the sale and the buyers are fully sustained by the testimony, and no contradictory evidence appears in the record. The buyers bought and paid for the property with their own money without any previous understanding with the trustee. Nicholes, who bought at the first sale himself made an arrangement with Cleaver to sell the property to his wife, and in pursuance with that contract it was afterwards conveyed to Mrs. Cleaver. With the preliminary negotiations Sherman had nothing to do. Cleaver called upon Nicholes in reference to another piece of property, and it was then for the first time he learned this property was for sale. All the proof is the property was sold for a high figure, perhaps more than it was really worth. But a small cash payment was made and the balance of the purchase money secured upon the property with no additional security. It was understood Cleaver was not then pecuniarily responsible, and unless the property appreciated in value it was not thought any thing could be realized out of the sale except the payment in hand. Afterwards, for a nominal consideration, Nicholes transferred to Sherman the securities taken from Cleaver and all benefit of the sale, and Sherman refunded to him the amount of his bid. It is shown Colfax bought at the second sale for himself and paid for the property at the time without any previous understanding with the trustee. Both Nicholes and Colfax according to the testimony, were abundantly able to buy the property and pay for it. Soon after the second sale Colfax entered into nogotiations with Cleaver, to sell him the part of the property he had bought. Under the belief he had effected a sale, he made a deed of the property, which was regularly acknowledged, but Cleaver for some reason refused or neglected to complete the sale. Colfax it seems had then left the State and the deed was placed in Sherman's safe, simply for safe keeping. Being unable to effect a sale, Colfax desired to get his money out of the speculation, that he might keep it at interest to defray current expenses. Sherman at the request of Colfax paid him back the amount of his bid and took the property off his hands. Sometime afterwards, the trade with Cleaver was consummated and for the purpose of making the conveyance, the old deed made by Colfax, was used. Although this latter deed bears date in July, 1863, it was not in fact delivered until the trade was consummated in June, 1864, about the time the deed was recorded. Complainants have challenged the fairness of the sales to Nicholes and Colfax made by the trustee under the power contained in the mortgage. The burden of proof was upon them to establish the fraud and collusion between the seller and the buyers. There is a total failure of evidence to establish the charges in that behalf. All the proof is the other way, and absolutely nothing to militate against it. Both the buyers and the seller declare under oath the sales were in good faith and without any collusion or previous understanding. The bidders bought on their own account and not for the trustee, nor in his interest. The sales were open and all the world were at liberty to bid. It is not even suggested the sales were not openly and publicly conducted.

Assuming it to be proven, as we must do, from the testimony, the sales were fairly conducted and the purchasers *bona fide*, no reason can be assigned why they were not effectual to cut off the equity of redemption of Hall and all claiming the same estate through him. What contracts Sherman may have afterwards made in relation to the property could not vitiate the sales. When his trust had expired, there is no reason in law or public policy, why he could not contract in relation to the property the same as any stranger could do. At the time he negotiated with Nicholes and Colfax in regard to the property, his duties as trustee had ceased and he occupied no confidential relations to Hall or any one claiming the property. After the trust had been fully performed and all fiduciary relations ceased, the law has not forbidden the trustee to deal with what had been trust property as strangers may do, and acting in good faith he may become its owner by purchase or otherwise. In the case at bar the equity of redemption had been cut off by a sale in all things substantially correct. The property had passed into the hands of third parties and beyond the reach of the mortgagor. Upon principle, how could the former owner be affected by any dealing of his former trustee with the property.

No policy adapted to preserve the utmost fairness between a trustee and the *cestui qui trust*, has inhibited the trustee after their relations have wholly ceased to deal with the property as any other person might do. This view of the law is warranted by the previous decisions of this court. We had occasion, in the recent case of Munn *v.* Burgess, 70 Ill., 604, to examine this branch of the law, and it was there said "jealous as courts of equity are, watching the conduct of a trustee in connection with the objects of his trust, he is only forbidden by them from dealing with the trust property for his own benefit so long as the trust continues. The moment it ceases he occupies precisely the same relation to it that strangers to the trust do, and acting in good faith, he may become the owner by purchase or otherwise." The principle of this case is conclusive on this point, in the case we are considering.

When Sherman took an assignment to himself of the property bought by Nicholes and Colfax, his duties as trustee had been fully discharged. He had not previous to that time, dealt in the trust property, for his own benefit, and what he did afterwards could by no possibility prejudice complainants. On the principle, they had no interest in the property that could be misappropriated by him who had been their trustee. The deeds had been delivered, and the property had passed irrevocably from the trustee, and the *cestui qui trust* into the hands of *bona fide* purchasers, and they could sell it for any consideration they chose to whomsoever would buy. Whether Sherman paid any adequate consideration for the property, is a matter of no consequence and does not affect the decision. Whether he did or not affords no grounds for relief in their favor.—There is yet another consideration that bears strongly on the decision of the case. Should it be conceded the irregularities insisted upon actually existed, still the sale would not be absolutely void, but only voidable at the election of the parties interested in the estate.

Acquiescence in the sale, unexplained for any considerable time, will be deemed a waiver of all mere irregularities that may have intervened. Whatever may have been the status of Bush, or Richards or his heirs, in consequence of the civil war, they can assert no rights in this court that Hall could not maintain, had he been the sole complainant. Succeeding to his rights under the mortgage, whatever would bar relief as to Hall would cut off relief as to them. More than four years elapsed after the sales alleged to be irregular were made, before any steps were taken to set them aside. If Hall did not know of the existence of the facts which he now insists vitiate the sales, it was because of his own voluntary conduct. The exigencies of the war of the rebellion can afford no excuse for the delay in asserting whatever rights he may have had in the premises. Voluntarily he placed himself beyond the protection of the laws and the government under which he had acquired his claim to the property he now seeks to have appropriated to him by a court of equity.

The State to which he removed had already by ordinance manifested a purpose to withdraw from the federal Union. He deliberately elected to cast his lot with the people of the South, and abandoned his property in the North to the chances of war. Whatever may have been his declared intention, it was of his own choice he placed himself in a position where he would be subject to be drafted into the armies organized for the destruction of the government, and if he had not volunteered he no doubt would have been compelled to enter the military service. He chose the former alternative, and enlisted in the armies of the South. Had he remained at Thibodeaux, the place selected for a home for himself and family, he would still have been, as we have seen, within the federal lines, with the exception of a brief period in the summer of 1863. Direct communication was kept open by rail and by water between Thibodeaux and New Orleans, and from thence to Chicago, where his property was situated. Had he remained in the vicinity of this property it would doubtless be conceded he allowed an unreasonable time to elapse before bringing his bill, and surely it cannot be asked for him in a court of conscience the application of a more liberal rule, because he was absent through many years, engaged in a war for the destruction of the government. On what principle of justice can he invoke the application of a less stringent rule than would be applied to a citizen who had contributed by his presence and his means to the maintenance of those laws, under which all property is secured? Without justifiable cause he abandoned his property to what he called the "chances." No provision was made for removing the incumbrance he knew was liable to be foreclosed in a summary manner that would cut off whatever claim he had to the property. He paid neither interest nor principal, and manifested no disposition to do so. Nor did he make any provisions for the payment of taxes which was necessary to preserve the property for the parties interested in it. Most clearly he abandoned all his interests in the property to the vicissitudes of war. As was forcibly said by Mr. Justice Davis in McQuiddy *v.* Ware, 20 Wall, 14: "Here then is a "case of a party engaging in the re- "bellion without provision for his "debts, to which there was no de- "fense, asking a court of equity after "the lapse of many years, without suf- "ficient excuse for the delay to interfere "in his behalf, because his creditors "adopted the wrong methods for the en- "forcement of their claims against "him."

Adopting the language of this court in Hall *v.* Conn. Mu. Life Ins. Co. as most appropriate, it is an anomalous excuse for a party to offer in a court of equity, for not asserting at an earlier period whatever rights he may have had in the premises, "that he was voluntarily away engaged in a warfare for the destruction of the government." In Hamilton *v.* Lubukee, 51 Ill., 415, it was said, "even if the mortgagee himself had been the purchaser through the aid of a third person to whom he could have conveyed and then taken the title from him, such title would not be absolutely void, but voidable only; and if immediate steps should not be taken by the *cestui que trust*, the mortgagor, on his obtaining a knowledge of the sale, to set it aside, a ratification by him would be implied. Such a sale can be set aside only at the option of the *cestui que trust*, and that must be determined in apt time."

The case of Munn *v.* Burgess, cited *supra*, has some elements in common with the one we are considering. It was there said: "At most the irregularity complained of in the sale, only rendered the title voidable, and an application to set it aside for that cause, should have been made within a reasonable time, and before the rights of innocent third parties had intervened." Numerous cases in this court declare the doctrine of *laches* as applicable to the case at bar. Dempster *v.* West, 69 Ills., 613; Cox *v.* Montgomery, 36 Ills., 398; Winchester *v.* Edwards, 57 Ills., 46: Seymore *v.* Bailey, *supra*.

The principle that lies at the foundation of all cases in this court upon this subject is, the party who challenges a sale on account of irregularities that may have intervened, must be diligent in his discovering that which he alleges will avoid the sale, and diligent in his application for relief. Unreasonable delay, not explained by equitable circumstances, has always been declared evidence of acquiescence in the sale, and a waiver of all mere irregularities. A party will not be permitted to delay, to enable him to speculate on the chance of an appreciation in values of the property, and elect to avoid the sale only when it will be profitable to do so. He must make his election at the earliest practicable moment.

In the case at bar complainants are only seeking to enforce equitable rights. Default had been made in the conditions of the mortgage, and all that remained to them under the most favorable construction, was the equity of redemption in the property. Relief in no view could be had except in a court of chancery, and upon terms that should be just to all parties.

At the sales under the power contained in the mortgage, the property sold for its full cash value. Since then it has increased many times in value, so that now it would be desirable to redeem the property. No great speculation could have been anticipated shortly after the sales. All the facts complainants now know upon which they base the theory the sales are invalid, would have been in the reach of Hall had he not voluntarily gone beyond the federal lines while the war was in progress, when it was impracticable to return. Such facts were matters existing on the public records, and were readily accessible to any one seeking to know them. Actual hostilities ceased between the North and the South in the spring of 1865. Shortly thereafter communication was fully established between all sections of the country. The mails were established, and travel was entirely safe. It was practicable for complainants, had they instituted inquiry, to have obtained all the information they now possess in the year 1865. Yet this bill was not filed until December, 1867. Perhaps one reason is the property had not then appreciated in value to so great an extent. Complainants have shown no equities superior to those of defendants. Now since the law has been established that gives value and permanent security to property, they seek to recover that which had been deliberately abandoned. Previously no effort had been made to discharge the incumbrance resting upon the property. This, it seems to us, would be inequitable, and especially after the lapse of so great a period, even if it should be conceded complainants may have had equitable rights in the premises had they asserted them in apt time. After a most careful examination we discover no grounds for relief in any view of the case that can fairly be taken.

The decree will therefore be reversed and the bill dismissed.

Decree reversed.

WILLIAM H. KING and GEORGE F. BAILEY, for appellant, Benjamin F. Sherman, in case No. 306, and for Sherman, Nicholes and Colfax, in case No. 307.

WAITE & CLARKE, for Gibbs and Higginson.

MONROE, BISBEE & BALL, for Loomis, et al.

CHARLES M. HARRIS, for Bush and Hall.

HITCHCOCK & DUPEE and DAVID FALES, for heirs of Victor Richard.

CHICAGO LEGAL NEWS.

Lex vincit.

MYRA BRADWELL, Editor.

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We call attention to the following opinions, reported at length in this issue.

DE FACTO GOVERNMENTS—RETROCESSION OF PART OF DISTRICT OF COLUMBIA.—The opinion of the Supreme Court of the United States by SWAYNE, J., in a case brought to determine the validity of the retrocession by Congress to the State of Virginia of that part of the District of Columbia, as originally constituted, which was ceded by Virginia o the United States. The court states the rights of *de facto* governments, and that it has been the practice of the United States to recognize them.

LIABILITY OF STOCKHOLDER FOR DEBTS OF CORPORATION—STATUTE OF LIMITATIONS.—The opinion of the Supreme Court of the United States, by SWAYNE, J., as to the liability of stockholders for the debts of a corporation, construing the statutes of South Carolina, extending the statute of limitations, and stating which is the proper form of action to bring against such stockholder to establish his individual liability.

JUDGMENT ON A LEGAL HOLIDAY VOID—BANKRUPTCY—ADVERSE CLAIM.—The opinion of the United States District Court for the western district of Wisconsin by HOPKINS, J., holding, following the construction placed upon the statute by the Supreme Court of Wisconsin, that a judgment entered on a day declared to be a legal holiday by statute is void; that although a party holding an adverse interest cannot be brought in by petition by an assignee in a summary way, to have the claim determined, such claimant may voluntarily come in by petition and submit his claim to the decision of the court. We fear that the learned judge, for whose opinions we have the greatest respect, has gone too far in holding that no lien is created by a transcript because it is filed on Christmas day. We are constrained to believe that he would not have made the decision if it had not been for the construction placed upon the statue by the Supreme Court of Wisconsin. In this connection we refer the reader to an able and exhaustive opinion of our Supreme Court in Langaber *v.* The Fairbury, Pontiac & N. W. R. R. Co., et al., delivered by the learned judge BREESE, reported 6. CHICAGO LEGAL NEWS, 190, where it was held that in certain cases a bill in chancery might be filed and an injunction issued and served on Sunday; that anciently courts of justice did sit on Sunday; that the early Christians of the sixth century and before, used all days alike for the hearing of causes, not sparing Sunday itself; but in the year 517 a canon was promulgated exempting Sundays, and other canons were afterwards adopted exempting other days, which were all adopted by the Saxon kings, and all confirmed by William the Conqueror and Henry the Second, and in that way became a part of the common law of England; that by these canons other days were declared unjudicial, as the day of the purification of the blessed Virgin Mary, the feast of the ascension, the feast of St. John the Baptist, and All Saints and All Souls days. These were as much unjudicial days as Sunday. Yet the most devoted admirer of the common law would not hesitate to say that the proceedings of a court of justice in this State on either of those days would be valid. Judge Breese so ably sets forth the necessity for courts of justice to be able on Sunday, in certain cases, to exercise judicial restraining power, that we give the concluding portion of his opinion, which is as follows:

"Here this *dies non juridicus*, was selected by the railroad company as the proper day to commit a great outrage upon private and public rights, believing the arm of the law could not be extended on that day to arrest them in their high-handed and unlawful design. To the complainants, the acts they were organized to perpetrate on that day, were fraught with irreparable injury. Feeble indeed would be the judicial arm if it could not reach such miscreants. To save a debt of twenty dollars, judicial acts can be performed on Sunday, and ministerial as well. To prevent the ruin of an individual such an act must not be done! Lame and impotent conclusion. In Comyn's Digest, title '*Temp*,' under the head *Dies non juridicus*, it is said the Chancery is always open. So the Exchequer may sit upon a Sunday or out of term; p. 333 (c. 5.) There is nothing, to an intelligent mind, revolting in this.—Suppose, in times of high political excitement, a citizen is indicted for treason, and judgment of death pronounced against him by a servile judge, who, not a slave of the Crown, as were Trevelyan, Scroggs, and Jeffries, but yet the slave of an enraged populace, on an indictment never returned into court or found by a grand jury, and defective in every essential, and this judgment pronounced on Saturday, and the time of his execution fixed on the following Monday. To arrest this proposed judicial murder, an application is made to a member of the appellate court on the intervening Sabbath; who would justify the judge should he fold his arms, and on the plea the day was not a judicial day, suffer the victim to be led to execution? The necessity of the case would be the law of the case. The judge who has no respect for this principle is unworthy of the ermine, and an unfit conservator of the rights of the citizen. The case before us is not one of life or death, but involves irreparable injury to property. An imperious necessity demanded the prompt interposition of chancery. On that principle the act is fully justified. This is the dictate of right, of reason, of common justice and common sense.

The decree of the court below, quashing the writ of injunction and dismissing the bill, is reversed, and the cause remanded for further proceedings.

DEFENDANT ABSENT IN THE REBELLION — RELEASE — ADVERTISEMENT UNDER TRUST DEED—RIGHT OF TRUSTEE TO PURCHASE.—The opinion of the Supreme court of Illinois by SCOTT, C. J., holding that the question of the right of a creditor, when the mortgagor was absent, voluntarily in the Rebellion, to enforce the payment of his debt, has been put to rest by the former decisions of the court; that an agreement to release a portion of the mortgaged premises without consideration is a mere gratuity and cannot be enforced, but when acted upon will be binding upon the parties. The court states what an advertisement of a trustee's sale should contain, and holds that after the trust has been fully performed and all fiduciary relations ceased, the law has not forbidden the trustee to deal with what had been trust property, as strangers may do, and acting in good faith, he may become its owner by purchase or otherwise; that acquiescence in the sale unexplained for any considerable time will be deemed a waiver of all mere irregularities that may have intervened.

DRAINS AND SEWERS—ACT UNCONSTITUTIONAL.—The opinion of the Supreme Court of this State by SCOTT, J., holding that commissioners appointed under the act in question, have no rightful authority under the statute, to construct a levee as a principal work, independently of a system of drainage, nor can they under the statute, at the expense of land owners, erect and maintain at great expense, an immense levee on the banks of a river subject to overflow, when such levee is not connected with any system of drainage or ditches; that the Legislature possesses no power under the constitution to vest the commissioners or juries selected by the county court, with authority to assess and collect taxes or special assessments for such contemplated improvements; that the General Assembly has power under the constitution to vest cities, towns and villages only with power to make local improvements by special taxation upon contiguous property, benefitted by such improvement. All other taxation must be uniform in respect to persons and property within the jurisdiction imposing the same.

NOTES TO RECENT CASES.

ENACTING CLAUSE OF STATUTE.

The Constitution of Nevada provides that the enacting clause of every law shall be as follows: "The People of the State of Nevada, represented in Senate and Assembly, do enact as follows." The Supreme Court of that State, in State *v.* Rogers, 3 Am. L. T. Rep., 339, *held*, that this clause is mandatory, and that the omission of the words "Senate and" from the enacting clause of an act of the legislature, renders the act unconstitutional and void.

NATIONAL BANKS—ILLEGAL INTEREST.

The United States Circuit Court for the District of Kansas, in Crocker *v.* First National Bank, 3 Am. L. T. Rep, 350, *held*, where a national bank located in Kansas, charged and received interest at the rate of eighteen per cent. per annum, that it was liable, under the National Banking Act, to pay back twice the amount of interest so received; that if the person who paid such illegal interest is adjudged a bankrupt, the right of action passes to his assignee in bankruptcy; that the amount of the recovery is twice the full amount of interest paid, and is not limited to twice the *excess* of interest paid over the legal rate.

WITNESS — COMPETENCY OF — WHAT LAW GOVERNS.

The Supreme Court of Ohio, in John *v.* Bridgman, 27 O. St., 23, *held*, when at the time the action was brought, a witness would have been incompetent, but an amendatory law in force at the time of the trial makes him competent, that the law in force at the time of the trial governs the question; that such a law, so applied, is not retroactive within the prohibition of the Constitution.

BANKRUPTCY—VOID TRANSFER OF PROPERTY

The Supreme Court of Minnesota in Stevenson et al., *v.* McLaren et al., 3 Cent. Law Journal, 478, held that under the thirty-fifth section of the Bankrupt Act of 1867, the transfers of property mentioned by it are, as against bankrupt proceedings instituted within the prescribed time, absolutely void, and the property so transferred may be taken by the marshal under a provisional warrant issued in such proceedings.

THE RIGHT FOR ONE DOG TO KILL ANOTHER.

The Supreme Court of Michigan is Heisrodt *v.* Hackett, 3 Cent. Law Journal 479, held that a statute permitting "any person," and requiring police officers, to kill unlicensed dogs, does not justify one dog in killing another of his own motion. We judge from the opinion of the court that it would have been held to be a legal killing if the dog had been set on by a police officer or a constable.

CHECK ON BANKER—ASSIGNMENT OF DEBT.

The English Court of Common Pleas Division in Schroder et al. *v.* The Central Bank of London, 34 L. T. Rep., N. S., 735, held, that a check is not an assignment by the drawer to the payee of a debt or chose in action, within the meaning of the Judicature Act, 1873, sec. 25, sub. sec. 6., and therefore the payee of a check has no right of action for its dishonor against the banker on whom it is drawn.

BLACKSMITH SHOP IN CITY.

The Supreme Court of Pa., in Raub *v.* Tamany et al., 3 Monthly Western Jurist, 209, held that the erection of a blacksmith shop in a town or city is not a nuisance *per se*. We are not aware of any decision on this question in Illinois, but we do know that there are several blacksmith shops in the most populous portions of the city. We have no doubt the court here would hold with the Pennsylvania court, that they are not a nuisance *per se*.

SPEECHES OF LORD ERSKINE, WHILE AT THE BAR. Edited by James L. High, Counselor at Law, Volume I. Chicago: Callaghan & Co., 1876. Price bound in half calf, $4.50; sheep, $3.50; cloth, $3.00.

These speeches, edited by Mr. High, comprise four volumes. The first and second are now before us. The third and fourth will follow in about four weeks. Great credit is due the publishers, Messrs. Callaghan & Co., for the magnificent style in which they have presented these volumes to the profession. It is with a feeling of pride as well as pleasure that we say these volumes were printed upon the Legal News press, from plates made in the Legal News stereotype foundry. The paper is heavy and of a superior quality. The binding, in three styles, half-calf, sheep and in cloth, is from the bindery of Cox & Co., and is fully equal to that of any similar work ever published in the West. In the preparation of these speeches for publication, Mr. High has exercised that good taste and judgment for which he has become so celebrated as an author. The first volume contains a well written memoir of Lord Erskine, by Mr. High, in which the principal events in the life of the learned jurist and eloquent orator are briefly sketched. We know of no work better calculated than these speeches to give a lawyer a correct idea of State trials, or prosecutions by the government. In the prosecutions for libel we see the same efforts to convict the smaller criminals by the evidence of the greater, and to allow the latter to go unwhipped by justice, as in the late whisky prosecutions. By reading these speeches the lawyer will see the importance of not giving too much weight to the evidence of self-convicted criminals. The present is the most complete collection of Lord Erskine's speeches that has ever been published, as it contains many that have never before been given to the reading public, and is believed to contain all his legal arguments of every na-

ture which were ever reported. Each speech is prefaced with a concise statement of the facts in the case, to enable the reader to better understand the argument which follows. In some instances extracts from the pleadings or testimony are given, but in all cases the learned editor has kept brevity and conciseness constantly in view. In addition to the statements of cases, notes are added to aid in a fully understanding of the text, or to elucidate some obscure reference, but in no case has the text been altered. Mr. High in concluding his preface says, "the extent and variety of the topics covered by these speeches, the vast research and fertility of genius which they display, not less than their lofty eloquence and an ardent love of liberty manifest throughout them all, fix their place as legal classics, to which the lawyer will forever turn with increasing delight."

REPORTS OF CASES ARGUED AND DETERMINED IN THE SUPREME COURT OF THE STATE OF WISCONSIN, with Tables of the Cases and Principal Matters. O. M. Conover, Official Reporter. Volume XXXIX., containing Cases determined at the August term, 1875, and the January term, 1876. Chicago: Callaghan & Company, Law Publishers. 1876.

The mechanical execution of the volume is excellent, and reflects credit upon our Chicago publishers from whose house it emanates. They fully appreciate the necessity of having the opinions of a court of last resort of a State, placed in the hands of the bar as soon as possible after they are delivered. The present volume contains all the cases not previously reported, which were ripe for reporting on the 6th of June last, including all those finally determined before that date; in accordance with the views of the court, where there was oral argument in the Supreme Court, the counsel who appeared there, are alone named in the report of the argument; where submitted on briefs, the names of counsel are given as found upon the briefs. The opinion of the court refusing to admit Miss Goodell to the bar, the propriety of rendering which the newspapers have hardly ceased to discuss, is here given in full, and occupies fifteen pages. In Siegbert et al. *v* Stiles, it is *held*, under the Wisconsin statute, that commercial paper maturing on Sunday, or on a legal holiday, becomes due on the next preceding secular day; and by analogy to this statute, where any other contract, by its terms, matures on a Sunday, it will be held to mature on the next preceding secular day.

In Hopkins *v.* Hopkins, it is *held*, that in actions for divorce, the courts of Wisconsin have no authority to take the custody and control of the child from both parents, and give it to a stranger.

THE FLUSH TIMES OF ALABAMA AND MISSISSIPPI. A series of sketches, by Joseph G. Baldwin. Eleventh thousand. San Francisco: Sumner, Whitney & Co., 1876.

This is a neat volume of 330 pages. It contains sketches of lawyers and anecdotes relating to legal matters, some of which are quite amusing.

ENDOWED LAW PRIZES.

At a recent meeting of the board of management of the Union College of Law, a communication was received from Callaghan & Co., whereby that firm proposed to permanently endow an annual prize of $100 to such member of the graduating class of each year as should be found by a committee of attorneys to have attained the highest proficiency in his legal studies. The letter accompanying the proposal stated that the donors were attracted by the past success and future promise of the college to believe that it would aid in rendering Chicago the legal centre of the country. The offer was accepted with thanks, and a resolution adopted that the Callaghan prize of $100 be published as one of the regular prizes of the college. The Horton prize of $50 for the best brief or essay on some legal topic, which was awarded for the first time at the last commencement, called forth from the students several highly meritorious efforts, though it was announced too late in the year to admit of full preparation for the contest. The Callaghan prize will add zest to the examinations of the coming college year, and will stimulate the class of 1877 to its utmost efforts. Two other prizes are under consideration, and will probably be announced before the opening of the term on Sept. 15, next. One of these will be for highest legal attainments in the junior class, and the other for oratory in either class.

SUPREME COURT OF ILLINOIS.

ABSTRACT OF OPINIONS FILED AT SPRINGFIELD, JUNE 30TH, 1876.

185.—Louis Farndenstein *v.* Calvin D. McNear, et al.—Appeal from De Witt.—Opinion by CRAIG, J., reversing and remanding.

NON-FEASANCE OF CONSTABLE—SICKNESS AS AN EXCUSE.

STATEMENT.—McNear, as constable, having an execution, was notified that at a certain date, the defendant in the execution (who lived in another county) would be in the county of McNear with property, subject to execution. The defendant remained several days in the county, but no levy was made. On the trial of suit upon the official bond, against the objections of plaintiff, McNear was allowed to allege and prove in excuse of his non-action, that he was sick at the time with chills and fever. *Held*,

1. That as to the official acts of the constable, his official bond, and the statute in force when it was executed, must be taken to be the contract between him and his sureties on the one hand, and the public on the other.

2. Sickness is no excuse for non-performance of a constable's duty, since he could turn the business over to another officer, if unable to attend to it himself; or, at least, could notify the plaintiff in execution and the J. P., so that they could take the necessary steps.

Herein, DICKEY, J., (SCOTT, Ch. J., concuring with him) concurred with the other judges in reversing this case; but thought the rule that sickness could not excuse the non-performance of an official act, was stated too broadly by the opinion in the case.

196.—Joseph R. Shaw et al. *v.* The Wilson Sewing Machine Co.—Error to McLean.—Opinion by DICKEY, J., affirming.

SURETIES' LIABILITY UNDER SPECIAL STIPULATIONS.

STATEMENT.—Appellee, constituting Shaw an agent for selling machines, took from him a bond, with security, (Dunlap) which provided: "The undersigned agree and consent that the Wilson Sewing Machine Company may, in their discretion, take and receive from said Shaw any security whatever at any time, and grant any extension to said Shaw, without in any way affecting the liability of the signers hereto, or either of them, or discharging, or releasing of them, or either of them, from the obligation of this bond."

Shaw, becoming delinquent in payment to the amount of over $1,000, the company settled with him, and took his note payable in six months, with interest. Suit was brought afterwards on the bond. Shaw was not served, and Dunlap, the surety, pleaded to the declaration

It was strenuously maintained that the settlement with Shaw released the obligation of the bond; but *held*,

That this might have been so, if the surety had not expressly stipulated that he guarantied not only present, but all future liabilities, and that the taking of other security or granting extension, should not release the obligation of the bond; and, although it seems to be a very improvident act for the surety to enter into such a stipulation, the court cannot relieve him from the results of his own folly.

200.—Henry Schwabacker et al. *v.* Emory L. Rush et al.—Appeal from McLean.—Opinion by SCOTT, Ch. J., affirming.

EVIDENCE REQUISITE IN ATTACHMENT, AS TO INTENT TO DELAY, ETC., CREDITORS—FRAUD.

STATEMENT.—Attachment against Rush, in which the affidavit alleged, that within two years defendant fraudulently conveyed and assigned the property attached, with intent to hinder and delay creditors. *Held*, that if the sale called in question, was a fair transaction on a valuable consideration, the attachment cannot be maintained under that allegation, even if there had been no sufficient delivery to pass the title to the purchaser, as against execution creditors of the vendor. Under the allegation the fraudulent intent must be proved, and the assignment of the property must be actually fraudulent, to maintain the attachment.

203.—John H. Francin *v.* Peter Kerker.—Appeal from McLean. Opinion by BREESE, J., reversing and remanding.

DISTRESS FOR RENT, WHERE PREMISES SOLD DURING THE TERM—PLEA OF SET OFF.

STATEMENT.—Distress for rent in $640, for a lease of farm. During the term the landlord sold the farm, and then afterwards instituted these proceedings to collect arrears. Defendant pleaded a set-off of $5,000. He made no attempt to prove the plea, but was permitted under it, against objection, to show the sale of the farm—although the purchaser had neither received nor demanded any rent of him, nor had he attorned to the purchaser. *Held*,

1. That a plea of set off is an acknowledgment of the justice of the plaintiff's demand, and where it fails in the proof, the judgment must be for the plaintiff's demand.

2. As the defendant had not attorned to the purchaser, he could not deny his landlord's title, nor interpose any matters between his landlord and the purchaser, as a defence.

208. Delinquent lands of Ford County, etc., 1874 *v.* The People, etc.—Appeal from Ford.—Opinion by SHELDON, J., affirming.

REQUISITES OF PROCEEDINGS TO SELL LANDS TO PAY TAXES—CONTESTANTS—BURDEN OF PROOF—PRESUMPTIONS—FORM OF JUDGMENT.

STATEMENT.—Application for judgment against delinquent lands. James Mix (the real appellant) filed 36 objections, of which only a few were considered by the Supreme court, as conclusive of the case.

It was insisted that it was incumbent on the People to show a compliance with all the various provisions of the statute under which the objections were made. *Held*,

That the collector's report of the list of delinquent lands makes a *prima facie* case; and devolves the burden of proof upon a contestant.

It was objected that the record showed no sufficient advertisement nor certificate. *Held*,

That, as the clerk had certified that the newspaper containing these was lost, and as the bill of exceptions states that the paper showing the publication of the delinquent list, with certificate, was given in evidence, the presumption is that the advertisement and certificate were sufficient.

It was objected that it did not appear the collector filed with the county clerk the list of delinquent lands five days before the commencement of the term, as required by statute. *Held*,

The presumption is that the collector performed his duty in this respect.

It was objected that the form of the judgment entered, varied from that prescribed by the statute. The statutory form is, first, a judgment against the land for the taxes; and then an order for the sale thereof for the taxes. But herein the form of judgment against the land was omitted, and only the order entered. *Held*,

That this was a substantial compliance with the statute, since the order amounted to a determination of what was the amount of taxes due upon each tract, and an order of sale thereof for the payment. *Held*,

Also, that costs may properly be taxed against a contestant failing to make good his objections.

213. Andrew J. Roberts *v.* William Parlin, et al.—Appeal from Mason.—Opinion by SCHOLFIELD, J., Reversing.

REQUISITES OF OFFICIAL BOND UNDER STATUTE OF 1872.

STATEMENT.—Suit on official bond, dated April 8, 1873, in the following form:

"Whereas, Andrew J. Roberts was, on the first day of April, 1873, elected constable for the town of Manito, county of Mason, and State of Illinois; Now, therefore, we, Andrew J. Roberts, as principal, and John C. Rocker and M. W. Rogers, as securities, jointly and severally, agree to pay to each and every person who may be entitled thereto, all such sums of money as the said constable may become liable to pay on account of any execution which shall be delivered to him for collection, by virtue of his office; and all such damages as each and every such person may sustain by reason of any *mal-feasance*, *mis-feasance*, or *non-performance* of duty on the part of said constable." *Held*,

1. That, although under the law of 1861, this bond would have been valid and binding as a statutory bond, yet, by the act of July 1, 1872, superseding the former, it is provided that "every constable, before he shall enter upon the duties of his office, shall execute and deliver to the county clerk of the proper county, within twenty days after his election, a bond, to be approved by said clerk, with two or more good and sufficient securities, in the sum of not less than $2,000, nor more than $10,000, conditioned that he shall faithfully discharge the duties of his office, etc. The said bond shall be made payable to the people of the State of Illinois."

As there was no compliance with this statute therein, the bond is invalid as a statutory bond.

2. Nor is it a good common law bond, because therein it is indispensable that there shall be an obligee, as well as an obligor, and that it shall be for the payment of a certain sum of money.

3. Nor is it good as the evidence of a contract enforcible at common law, because there is the absence of necessary parties; contracts cannot be made by one party alone.

4. The bond cannot be enforced in any way, but is void.

214.—Jerome B. Massey *v.* William S. Hardin.—Appeal from Mason.—Opinion by CRAIG, J., affirming.

FORECLOSURE OF CHATTEL MORTGAGE—ESTOPPEL OF MORTGAGEE THEREIN.

STATEMENT.—Appellant foreclosed a chattel mortgage on personal property of appellee, who had executed the mortgage, and at the sale bid in the property and left it in charge of appellee. A part of the stock died, part was sold on attachments against appellant, and the remainder sold by appellee to pay him for keeping the property.

Appellant claimed that the foreclosure sale was not absolute, and was not intended to transfer the title; but only to continue the lien until he should succeed in borrowing money for appellee. Appellee maintained that the sale was absolute. *Held*,

1. That it was a question of fact for the jury, whether a note is satisfied by a sale of mortgaged property.

2. Appellant cannot be allowed to say that he did not conduct the sale according to law, and that he did not, in good faith, bid in the property at the foreclosure sale. He is estopped by his own conduct; and must be held to his engagement at the sale.

180.—John Jones *v.* John Warner.—Appeal from De Witt.—Opinion by WALKER, J., affirming.

SUIT ON COVENANTS IN WARRANTY DEED—LACHES OF GRANTEE—CONSTRUCTION OF COVENANTS—IRREGULARITY OF JUROR'S CONDUCT.

STATEMENT.—Appellant took a deed of warranty from appellee, of lands in Missouri, which he failed to have recorded. Afterwards, a decree was made in the county where the land was situated, divesting appellee of all title in this land, under a bond he executed to one Devarel, more than two months after the date of the deed to appellant. Service was by publication. Appellant brought suit on the covenant of seizins and good right to convey, and also general warranty. *Held*,

1. That these are covenants *in presenti*,

and if broken at all, are broken immediately on the delivery of the deed.

2. If, afterwards, the grantor sells the land again, and through the negligence of the grantee the subsequent sale is allowed to take effect, he is without remedy on the covenants of seizin and right to convey.

3. Under the covenant of general warranty, it must be shown that the covenantee has been evicted by an outstanding title, and not by his own acts or negligence; or, that he is unable to obtain possession under the title derived from covenantor, by reason of the fact that the title he has received is inferior to the title under which the land is held adversely. An exception to this may be where the covenantor, by his prior or subsequent acts, defeats the title he has covenanted to warrant and defend.

4. But the Missouri decree might be impeachable, under the general doctrine that a judgment or decree is only *prima facie* evidence of facts recited beyond the State where the decree was rendered.—But if the decree was fraudulent, it would give plaintiff no right of action on the covenants in the deed. In impeaching the decree, no especial plea was necessary, the fact being merely matter of evidence.

5. Where it is apparent that no harm could have proceeded from the irregular conduct of a juror, a verdict will not thereon be set aside, even if permitting the irregularity might be a proper ground for punishing the officer having the jury in charge.

216. Elizabeth Work *v.* John Cowhick, Adm'r, etc.—Appeal from Scott.—Opinion *per curiam*, affirming; DICKEY, J., concurring, placed his decision on different grounds.

STATUTE OF FRAUDS—SIGNING—DAMAGES ON FAILURE TO FULFIL A BID FOR LANDS AT ADMINISTRATOR'S SALE.

Held, 1. That where, directly after a bid at an administrator's sale of land, the administrator draws up a deed and signs it, and the bidder signs a note, and both are left with a third party, with directions to deliver the deed when the requisite personal security on the note was given, and a mortgage executed and delivered on the land, as required by the conditions of sale; this is a sufficient signing under the statute of frauds, to bind the parties.

2. Where the bidder then fails to fulfil the conditions, and the land is afterwards sold at a reduced price from the amount of the first bid, he is liable to make up the loss.

James W. Martin *v.* S. Corning Judd.—Error to Fulton.—Opinion by CRAIG, J., affirming.

POSSESSION UNDER LIMITATION ACT OF 1835 AND ACTUAL RESIDENCE BY TENANT—GENERAL CONSTRUCTION OF THE ACT.

Held, 1. That, under the limitation act of 1835, the seven years actual residence on the land of which the title is deducible of record according to the terms of the act, may be by tenant, as well as in person.

2. This construction of the law is confirmed by the decisions in the State of Kentucky, from which State the law of 1835 was derived, it being a familiar rule of law that where one State adopts a statute in force in another, which has been construed by the courts of the State where the statute was in force, the act is adopted with the construction given it by such courts.

3. In Kentucky, it has been decided that, under the occupying claimant's law, where a tenant occupies a portion of the time, and then the landlord comes in, immediately on the expiration of the term, he should be "permitted to avail himself of the protection which the statute would have afforded the tenant, had he continued his possession; in the same manner that a vendee is allowed the benefit of the previous possession and settlement of his vendor. The design of the statute equally requires the protection of the landlord who comes in after the tenant's time may have expired, and, therefore, an interpretation of the statute, according to its spirit, is, that the settlement and possession of the tenant should ensue to the benefit of the landlord and be accorded him. * * * The actual occupancy of the land by settlement of seven years, under a title deducible of record, constitutes the bar which the statute intended to provide; and whether there be one or more occupants during the seven years is immaterial, provided they are connected with the same title, and hold under one another in succession, or for each other."

4. Where there is a contest between a purchaser under a senior judgment and a purchaser under a junior judgment against the same debtor and owner, and then the latter lets the land to the debtor as his tenant, the possession of the latter is adverse as to the former purchaser, and is a possession by tenant of the latter purchaser.

5. Where, between the latter purchaser and the former owner, there is a contract of sale, under which the former owner enters into possession under the contract, the possession, on the same principle, is that of the vendor. By the purchase, he recognizes the vendor's title, and, like a tenant, in all proceedings for the recovery of the possession by the vendor, he is estopped from disputing his title. He enters and holds under the title of the vendor, and his occupancy is subservient and subordinate to that title; and, from this relation, and for the same reason, his possession becomes as fully that of the vendor as does that of the tenant become that of the landlord.

6. Where, in such case, the vendee dies, leaving his tenant in possession, and the widow takes only such control as is temporary, and without making any claim on her own behalf, and turns over the possession to the vendor, there is no break thereby in the continuity of possession, as to the vendor; and he can claim the benefit of the statute.

219.—James H. Roberts *v.* George R. H. Hughes et al.—Appeal from Cook.—Opinion by SCOTT, Ch. J., affirming.

TOO LARGE A BID AT A JUDICIAL SALE BY A JUDGMENT CREDITOR, NOT RELIEVABLE.

Held, That where an equity of redemption has been levied upon, on a judgment against a mortgage, and one bids at the sale without thinking of, or knowing of, the existence of the mortgage, though on record, and bids an amount much too high for the interest sold, he has no standing in a court of equity to apply for relief from his mistake. It was his own negligence merely, in not examining the records, which caused his loss, and herein the doctrine of *caveatemptor* fully applies. And it makes no difference that the bidder was the judgment creditor himself, for whom the levy was made.

224.—William H. W. Cushman *v.* Franklin Oliver.—Appeal from McLean.—Opinion by BREESE, J., reversing and remanding.

TRESPASS ON SWAMP LANDS—PRINCIPLE OF LIABILITY.

STATEMENT.—Appellee purchasing swamp lands from Livingston county, and failing to make payment, the contract of purchase was rescinded, and the land resold to appellant. Afterwards, appellee employed a large number of choppers and cut timber off the land, knowing that appellant had the legal title. *Held*,

That, while it is necessary in order to subject any one to the penalties of the statute against thus cutting timber, it must be proved that he knew the land was not his own, and that he did not merely cut timber honestly believing the land to be his after taking reasonable pains to ascertain his boundaries; yet, as all the circumstances in this case tend to show appellee committed a wilful trespass in the cutting, he is liable to the penalties of the statute.

225.—Joseph C. Morrison *v.* James C. Smith.—Appeal from McLean.—Opinion by WALKER, J., reversing and remanding.

STATEMENT.—These parties being partners, deposited money with bankers. There being some dispute between them, fearing that appellee would get control of this money, and thus compel him to sue for a settlement, appellant went to the bank to draw it himself. But one of the bankers said he could not pay it, but would give him a draft, on a bank in Chicago, but told him he had no funds there, and it would not be paid if presented. But to control the funds as to appellee, he took the draft, giving the banker his check. Afterwards the bank failed, and appellant returned the draft, the firm receiving credit for the amount on which appellant received dividends from the assignee in bankruptcy, which he offered to share with appellee; but which appellee refused to receive, but filed a bill for an account, under which it was decreed that appellant pay him one-half of the entire amount deposited to the credit of the firm. It was contended that the appellant, by these transactions, had appropriated and converted the money to his own use. *Held*,

That there was no act or intention of a conversion of the funds; that either of the parties had a right to draw them for the use of the firm; that appellant had a right to do so in order to compel his partner to sue for the settlement rather than do so himself; that there was nothing done by appellant that contributed to the loss by bankruptcy; that the presumption of a settlement with the bankers by taking the drafts, was fully explained and rebutted; and that, therefore, there was no such liability on the part of appellant as that placed upon him by the decree of the court below.

226.—James Gill *v.* Clinton Woods, Adm'r, et. al.—Appeal from Clark.—Opinion by SHELDON, J., affirming.

SEPARATE PROPERTY OF WIFE BY GIFT OF HUSBAND—SERVICES OF HUSBAND AS AGENT IN REGARD TO SUCH PROPERTY.

STATEMENT.—Suit in chancery to recover certain moneys, notes and property, claimed to belong to the estate of Rosanna G. Gill, deceased. She and appellant were married in 1853—she being then a widow—and owning 80 acres of land in fee, and 40 acres life estate, as dower, and some household property.—Appellant never claimed his marital rights, but the property was kept separate, the land was rented separately, and when appellee sold the grain proceeds, he gave her the money. The decision rests on grounds prior to the act of 1861. *Held*,

1. That, in equity, a gift from the husband to the wife will be supported, even where no trustees are interposed.

2. The gift may be inferred from acts and circumstances as well as words—that is by some clear, unequivocal act of the husband by which he divested himself of his property and engaged to hold as trustee for the separate use of his wife. (Several authorities of other States cited in confirmation, as also English decisions.)

3. Herein the separation of the rents, and his drawing up the notes payable to her when she loaned the money derived therefrom, were acts conclusive of the intention to treat this as her separate property. And these notes which he was decreed to deliver up were of this character. He having thus divested himself, in her favor, of the title to the property, could not again reclaim it.—And where he had separate grain rents at the time of her death, on lands, and afterwards sold these, he could not be allowed to retain the money.

4. Notwithstanding the gift is void at law, yet it will be upheld in equity, when the gift is complete and the setting apart of the grain executed his intention, and made the gift therein complete.

5. Nor can appellant be allowed for services in takin care of the separate property, unless it appears that, at the time the services were rendered, they were intended to be charged for and were not gratuitous.

[SCHOLFIELD, J., having been of counsel, took no part in the decision.]

SUPREME COURT OF ILLINOIS.

JANUARY TERM, 1876.

WILLIAM UPDIKE, et al., *v.* ANDREW J. WRIGHT.

DRAINS AND LEVEES.—ACT UNCONSTITUTIONAL.

HELD, That commissioners appointed under the provisions of the act, have no rightful authority under the statute, to construct a levee as a principal work, independently of a system of drainage, nor can they, under the statute, at the expense of land owners, erect and maintain at great expense, an immense levee on the banks of a river subject to overflow, when such levee is not connected with any system of drainage by ditches.

That the General Assembly possesses no power, under the constitution, to vest the commissioners or juries, selected by the county court, with authority to assess and collect taxes or special assessments for such contemplated improvements.

The General Assembly has power, under the constitution, to vest cities, towns and villages only with power to make local improvements by special taxation upon contiguous property, benefited by such improvement. All other taxation must be uniform in respect to persons and property within the jurisdiction imposing the same.

SCOTT J.—It is stipulated the demurrer to the bill in this case shall raise the following questions, and none other:

First.—The constitutionality of the act of the General Assembly of the State of Illinois, entitled "An act to provide for the construction and protection of drains, ditches, levees, and other works," approved April 24, 1871.

Second.—The power of the commissioners to construct a levee as a principal work.

Third.—The power of the commissioners to issue bonds directly to the laborers in payment of labor.

Our inquiry will first be directed to the second proposition, viz: Have the commissioners any rightful authority under the statute to construct a levee as a principal work, independently of a system of drainage? That section of the statute under which the construction of the levee in this case was undertaken, provides that whenever one or more owners or occupants of said land shall desire to construct a drain or drains across the lands of others for agricultural and sanitary purposes, they may present a petition to the county court, setting forth the necessity of the work, with a description of its or their starting points, route and terminus, and then it is added: "And if it shall be "deemed necessary for the drainage of "the lands of such petitioners, that a "levee or other work be constructed, "the petitioners shall so state, and set "forth a general description of the same, "as proposed." R. S. 1874, chap. 42, Sec. 1. This statute was evidently passed in view of that clause of the constitution which declares: "The General Assem"bly may pass laws permitting the own"ers or occupants of lands to construct "drains and ditches for argricultural "and sanitary purposes across the lands "of others." Art. 4, Sec. 31, Const. 1870.

Apparently an effort was made to have the law enacted conform to the constitutional provisions in every particular. Hence it is declared the work to be done is the construction of drains and ditches for agricultural and sanitary purposes, and if it becomes necessary in the construction of a system of drainage that a "levee or other work" be adopted to make that system available, such levee or other work may be constructed under the provisions of the statutes. But it is nowhere intimated the owners or occupants of lands may undertake, under the provisions of this law, the building and maintenance of an immense levee, on the borders of a river not connected with any system of drainage by ditches; neither the constitution nor the statute contemplates any such work. What was in the minds of the framers of the constitution and the legislators who enacted the law in pursuance of its provisions, must have been the drainage of lands by means of drains and ditches, and what is said in the statute on the subject of a "levee or other work," is always in connection with a system of drainage in that mode. The work outlined by the constitution and the statute is comparatively insignificant, and may be done at no great cost; but that which is undertaken in this case, is the construction of a levee on the banks of the Wabash river of many miles in length, and estimated to cost a great many thousand dollars. No system of drainage by drains and ditches was planned or deemed necessary for agricultural and sanitary purposes. The representation to the county court is the lands of petitioners are subject to overflow from the Wabush river, that their fences and crops are liable to be swept away and destroyed by such overflow, and that the same can be prevented by an earth work levee. The undertaking is one of great magnitude, and will require the expenditure of large sums of money. The assessment on complainant's lands is over $10,000, and the allegations in the bill is that unless all future assessments proposed to be made be arrested, the levee will cost more than the land is worth. Any construction of the statute that would warrant the owners or occupants of lands to enter upon such an immense and costly work, seems forced and unreasonable. It is only in connection with drainage for agricultural and sanitary purposes, that "levees or other works" may be undertaken as auxiliary to the damage of the lands. Our opinion is, this is the only construction the statute will bear consistently with the constitution, otherwise one owner whose lands are subject to overflow at certain seasons of the year from a river, could set in motion the proceedings for the er-

ection of a levee sufficient to protect his lands, no matter how expensive, and have the costs levied upon lands of others in the vicinity which commissioners appointed by the court might deem benefitted by the improvement. Such a work can not be said to be draining lands by drains and ditches over the lands of others, nor is such a levee in any just sense in the language of the statute "necessary to the drainage of the lands." The work of constructing a great levee along the banks of a river subject to overflow, which defendants are about to do, is not embraced within the provisions of the statute, and is therefore without authority of enabling law.

But the decision may be placed on the other ground indicated; that the General Assembly possesses no power under the constitution to vest the commissioners or juries selected, or the county court, with authority to assess and collect taxes or special assessments for the contemplated improvement, section 5, article 9 of the constitution of 1848, which declared, "the corporate authorities of "counties, townships, school districts, "cities, towns and villages, may be "vested with powers to assess and col- "lect taxes for corporate purposes; such "taxes to be uniform in respect to per- "sons and property within the jurisdic- "tion of the body imposing the same," was always construed by the decisions of this court as a limitation upon the powers of the general assembly to grant the right to assess and collect taxes to any other than the corporate or local authorities of the municipality or district to be taxed. Board of Directors *v.* Huston, Jan. 7, 1874; Howard *v.* The St. Clair & Ill. Levee and Drainage Co., 51 Ill., 130; South Park Com. *v.* Solomon, 51 Ill. 37; Gage *v.* Graham, 57 Ib. 144; Hesler *v.* Drain Com. 53 Ib. 105. It was also held that power in the Legislature was subject to the future limitation that a local burden of taxation or special assessments could not be imposed upon a locality without the consent of the tax-payers to be affected. That section of the Constitution of 1870, upon this subject provides, "The General Assem- "bly may vest the corporate authorities "of cities, towns and villages the power "to make local improvement by special "assessments, or by special taxation of "contiguous property or otherwise. For "all other corporate purposes, all munic- "ipal corporations may be vested with "authority to assess and collect taxes, "but such taxes shall be uniform in re- "spect to persons and property within "the jurisdiction of the body imposing "the same." This clause in the present constitution, like that in the constitution of 1848, must be construed as a limitation on the power of the legislature. Giving it that construction, the General Assembly can only vest cities, towns and villages with power to make local improvements by special assessments or special taxation upon contiguous property benefited by such improvement. By necessary implication it is inhibited from confering that power upon other municipal corporations or upon private corporations, only cities, towns and villages are within the constitutional provisions, and although other municipal corporations may be vested with powers to assess and collect taxes for corporate purposes, the limitation is absolute; such taxes shall be uniform in respect to persons and property within the jurisdiction imposing the same; with equal propriety this clause of the present constitution, like the same provisions in the former constitution, must be regarded as restricting the General Assembly in conferring the power to levy and collect taxes, either general or special, to the mode and manner therein indicated. We do not understand the Legislature possesses powers unlimited and unrestricted, to invest whomsoever it may choose with authority to assess and collect either special assessments or taxes for every conceivable purpose. As we have seen, only cities, towns and villages may levy special assessments or special taxation for local improvements, and all other municipalities can only be vested with jurisdiction to assess and collect taxes for corporate purposes, and that, too, under the positive inhibition, such taxes shall be uniform in respect to persons and property. It would seem, therefor, to follow as a corrollary from the propositions stated, that neither the commissioners or the juries selected, nor the country court, are such bodies as under the constitution may be given power to make local improvements by special assessments or special taxation upon contiguous property.

There is still another consideration that has an important bearing on the decision of the case. The clause of the constitution we have been considering, like that of the constitution of 1848, must be understood in the light of the decision of this court as forbidding the General Assembly from imposing a burden by taxation upon any locality without the consent of the citizens affected. Under this law the people whose property is subject to taxation or assessments, have never given any consent to it, if we exclude those who may have signed the petition addressed to the county court. No opportunity was afforded them to do so, nor does the law make any provisions for submitting the questions to a vote to ascertain the will of those whose property is to be subjected to this local burden. It is imposed upon them under the statute by the decisions of the county court, obviously that section of the constitution that declares the General Assembly may "pass laws, per- "mitting the owners or occupants of "lands to construct drains or ditches for "agricultural and sanitary purposes," implies that the community whose property is to be taxed may have the right of election in the matter. Otherwise an owner's burden may be imposed upon them without their consent, and such proceedings might be had as would result in the deprivation of property. How can the land owners be permitted to construct drains and ditches, unless some election is guaranteed to them?

The language employed implies voluntary action. Illustration will make the inconsistency of the present law apparent: For example: the privilege is given to any occupant as well as the owner of land, of presenting a petition to the county court. Should the construction contended for prevail, a tenant residing upon land adjacent to a river subject to overflow, might present a petition, and under decision of the court, the work of erecting a levee miles in length and costing large sums of money, might be entered upon, and the expenses assessed upon the property in proximity to the river that might in any degree be deemed benefitted. An intention to confer such unwarranted power upon one man who would himself be subject to none of the burdens imposed, ought not to be imputed to the Legislature. Any laws not permitting an election as to the propriety of undertaking the work, are vicious and within the inhibition of the constitution. It does not militate against this construction that the land owner may appear before the county court when the petition is presented and resist the application, or may contest the assessment upon his property when made; whether the contemplated work shall be undertaken and his property subjected to taxation, is not made to depend upon this election but upon the decision of the courts. It would be a solecism to call that privilege an election.

In the case at bar this immense work, which, if completed on the plan proposed, will subject all the property in the vicinity that in the judgment of the commissioners or juries selected may be benefitted, to a heavy and burdensome taxation, was commenced under the decision of the court as to its propriety, and not any election of the people upon whom the burden will fall. Such a law is in contravention with the constitution, as well as with the plainest principles of right and justice. The former decisions of this court, cited *supra* sustains this construction.

Entertaining these views, which are conclusive of the whole case, it will not be necessary to discuss the other branch of this case suggested.

The decree will be affirmed.

Decree affirmed.

RIGHT OF EXECUTOR TO TRANSFER NOTES AND INVEST FUNDS OF TESTATOR.—A decision was given this week in the United States Circuit Court by Judge Blodgett in the case of Palmer C. Smith *v.* J. C. Ayer & Co., of Lowell, Mass., and in the case of Smith *v.* The Bank of Westborough, Mass. These cases were brought to restrain the collection by the defendants of two promissory notes of the amount of $39,250 each, one of which was held by Ayer & Co., and the other by the Westborough Bank under the following circumstances: In 1872 Job R. Renick held the title as naked trustee of the W. ½ of the S. W. ½ of Sec. 10, 39, 13. It was claimed by the complainants that it was held for the estate of Renick Huston, who died in 1864, leaving a will, Thomas T. Renick being the executor. J. R. Renick held the land in trust for T. T. Renick to the extent of certain outlays and expenses which had been incurred by him about the property to the amount of from $20,000 to $30,000. In July, 1872, T. T. Renick made a sale of the land to J. D. Harvey, and J. R. Renick executed a conveyance therefor. One-quarter of the purchase price was paid in cash, and for the remainder notes were given to T. T. Renick for $39,250 each, due in one, two, and three years, secured by trust deed. In 1873, T. T. Renick died in Ohio, leaving a will in which he made B. F. Renick executor. Prior to his death he became a partner in a manufacturing business at Canton, O., and in the will he bequeathed the interest in the business to B. F. Renick for the benefit of himself and certain nephews and nieces, with a direction to continue the business, and manage and control the same according to his discretion so long as he should think best.

Subsequently to the death of T. T. Renick, B. F. Renick purchased the interest of one of the partners in the business at the time of T. T. Renick's death, and the firm name was changed from Tower, Claassen & Co., to B. F. Renick & Co., the business in other respects being continued the same as before. A considerable indebtedness existed at the time of T. T. Renick's death, against the firm of Tower, Claassen & Co., and B. F. Renick, in May, 1875, obtained a loan from Ayer & Co. of $39,250, giving the note of B. F. Renick & Co. therefor, secured by the note of Harvey for the same amount, which was to become due July 14, 1874. In June, 1875, B. F. Renick made a loan of $30,000 from the First National Bank of Westborough, giving the note of B. F. Renick & Co., secured by the note of Harvey for $39,250, falling due in July, 1875. Both these notes of Harvey had been in September, 1874, extended for a period of two years from the time when they respectively fell due.

The questions raised were, first, as to whether J. C. Ayer & Co. were chargeable with notice of the equities as in case of overdue paper, in respect to the note taken by them, they having taken it after its maturity. Second, as to the estate of T. T. Renick, whether B. F. Renick, as executor, had any right to dispose of the notes, and whether the transferring of them by him as such executor gave notice to Ayer & Co., and the bank, that he was doing it as executor. Third, whether B. F. Renick, as executor of T. T. Renick, had power, under the will, to put in additional assets into the business in which T. T. Renick was partner before his death.

The Judge held that as to the first point, Ayer & Co., having fully informed themselves that the makers of the note claimed no equities then against them, and stating that they expected to pay it when due, Ayer & Co. were not bound to enquire as to any further equities. As to the second point, the Judge said the executor had the same legal power over the notes to transfer them in the way he did that T. T. Renick would have had if he had lived. Lastly, as to the power of the executor, it was held that the powers under the will were ample, and that the executor had the right to use any assets that came into his hands which belonged to the estate in payment of the debts against him, or the firm debts, and in protection of the business. The bill was therefore dismissed.

MILLER & FROST for Complainants.

GOUDY, CHANDLER & SKINNER; BONNEY, FAY & GRIGGS, and LAWRENCE, CAMPBELL & LAWRENCE, for Defendants.

TIME OF EXAMINATION OF APPLICANTS FOR ADMISSION TO THE BAR.—At the September term, 1875, of the Supreme Court, Rule Forty-three was amended by striking out the word "Friday." The rule, as amended, will read: "Thursday of the first week of each term, shall be the day on which such examination shall be made"—examination of applicants for license to practice in the courts of this State. The next examination will be on Thursday, the 14th of September. Applicants will do well to remember this fact, and not wait till Friday, and find the examination was concluded on Thursday.

TRESPASSING IN COAL MINES—MEASURE OF DAMAGES.

OTTAWA, Ills., July 31, 1876.

An important case affecting the interests of coal miners and owners of coal lands has just been terminated in the Circuit Court of this county. The case involved from $60,000 to $75,000 in money, but much more which might be involved in damages real, consequential and vindictive, or in the way of punishment. The case was that of Mathiessen & Hegder, the well known Zinc firm of La Salle *v.* The Northern Coal and Iron Company, of La Salle.

The Zinc Company claimed that the Coal Company had undermined grounds of the plaintiffs, in getting coal. The proofs were against the defendants, and conclusive. The rule of law laid down to the jury by Judge Leland, viz: "The rule of damages is that the value of the coal mined is what it is at the mouth of the shaft, *less* the expense of transporting it from the place mined to the mouth of the shaft," left only the question of damages, which the jury fixed at $25,000. The defendants claimed that the rule of damages should be so much per acre in the coal vein, according to the measurement of the coal in the vein. Trespassers in coal lands of another should take warning. A.

LVI. NEW HAMPSHIRE.

We are indebted to John M. Shirley, Official Reporter, for advance sheets of the 56th volume of New Hampshire Reports.

CONSTRUCTION OF GRANT.

Stevenson v. *Wiggin*, p. 308.

In a warranty deed of land was the following clause: "Also conveying the right to draw water from any and all the springs on said Clement's [the grantor's] land, easterly and above the aforesaid described premises, with the right to conduct the same by aqueduct to said premises, for all uses or purposes forever."

Held, that the grantee was entitled to take all the water from the springs, provided the same was in good faith required for use on the granted premises.

Held, that the grantee was entitled to make such reasonable arrangements about the springs as were reasonably necessary to enable him to use all the water.

WAY OF NECESSITY.

Pingree v. *McDuffie*, p. 306.

A party having conveyed a portion of his land over which was the only means of access to the remaining land. *Held*, that a right of way by necessity to the remaining land was reserved.

GUARDIAN AND WARD — JURISDICTION OF PROBATE COURT.

Critchett v. *Hall*, p. 324.

The jurisdiction over the settlement of guardian's accounts is in the probate court. The declaration in an action in favor of a ward against his guardian, or of a guardian against his ward, must show that the account has been settled in the probate court.

FROM STRAFFORD PROBATE COURT.

REPLEVIN—FILING NEW BOND.

Briggs v. *Wiswell*, p. 319.

The court, upon a proper case being made, may permit the plaintiff to file a new or additional bond, so that the security may be double the actual value of the property replevied.

The plaintiff alleged in his writ that the value of the property replevied was $5,000, and filed a bond in the sum of $8,000. *Held*, that he might be permitted to show that the value did not exceed $4,000; also, that he might file an additional bond for $2,000, or a new bond for $10,000.

Upon the trial, the value of the property alleged in the writ is not conclusive against the plaintiff.

CHICAGO LEGAL NEWS.

CHICAGO, AUGUST 12, 1876.

The Courts.

SUPREME COURT OF THE UNITED STATES.

No. 196.—OCTOBER TERM, 1875.

SARAH CHAUNCEY SAVAGE, Executrix of William Savage, deceased, Appellant,
v.
THE UNITED STATES.

Appeal from the Court of Claims.

POWER OF SECRETARY OF TREASURY—TREASURY NOTES—PAYMENT OF IN LEGAL TENDER NOTES—PROTEST—SUBSCRIPTION AGENT.

1. AUTHORITY OF SUBSCRIPTION AGENT.—In regard to the alleged error, that the subscription agent had no lawful authority to make the statement contained in the advertisement, that the treasury notes were payable in gold, the court say that, independently of that question, the acceptance and payment of the same in legal tender notes, was a waiver of the claim put in to have them paid in gold.
2. PROTEST.—The effect of the protest against receiving payment in legal tender notes, considered.
3. NO RIGHT OF ACTION.—That the court below did not err in holding the plaintiff, as executor of the decedent, had no right of action as against the defendants, to recover the difference in value at that time, between the legal tender notes and gold.—[ED. LEGAL NEWS.

Mr. Justice CLIFFORD delivered the opinion of the court.

Power was conferred upon the Secretary of the Treasury, by the act of the seventeenth of January, 1861, to borrow two hundred and fifty millions of dollars, for which he was authorized to issue bonds or treasury notes, the treasury notes to be of any denomination fixed by the Secretary, not less than fifty dollars, and to be payable three years after date, with interest, at the rate of seven and three-tenths per centum per annum, payable semi-annually. Section three provides that the Secretary shall cause books to be opened for subscription to the treasury notes, for fifty dollars and upwards, at such places as he may designate, and under such rules and regulations as he may prescribe, to be superintended by the assistant treasurers, at their respective localities, and at other places, by such depositaries, postmasters, and other persons as he may designate, giving notice thereof as therein directed.—(12 Stat. at Large, 259.)

Pursuant to the authority conferred, the secretary appointed Jay Cook one of the special agents, to open a book for subscriptions to the treasury notes, and it appears that the secretary addressed to him, as such special agent, a circular letter of instructions, in which, among other things, he stated that "all payments must be made in the lawful coin of the United States, and whenever the amount subscribed shall not be paid within the period prescribed, the first payment shall be forfeited to the United States."

Sufficient appears in the finding of the court to show that the special agent opened a book for subscriptions, and that he published an advertisement, describing what the denominations of the notes would be, and giving the date when they would be issued, and that he stated that the notes would be "payable in gold in three years, or be convertible into a twenty-year six per cent. loan, at the option of the holder. That each note would have interest coupons attached, which could be cut off and collected in gold at the mint, every six months, and at the rate of interest therein prescribed."

Subsequent to the publication of that advertisement, the testator of the plaintiff, then in full life, became the purchaser of treasury notes to the amount of fifteen thousand dollars, of the description named in the act of Congress and the advertisement, dated as described in the finding of the court, and it appears that all of the notes were in the following form: Three years after date the United States promise to pay to the order of —— dollars, with interest at 7 3-10 per cent., payable semi-annually.

On the tenth of December, 1864, the secretary gave notice that the department was ready to redeem the notes on presentation, and that he would pay the same, in lawful money, or by converting the same into bonds as authorized by law, and that interest would cease on all such notes, not so presented after three months from that date, at which time the right of conversion would also cease.

Throughout the testator of the plaintiff insisted that it was his right to have the notes paid in gold, and on the third of March, 1866, he caused the notes to be transmitted here to certain bankers, with instructions to present the same at the treasury and ask for the payment of the same, with interest, in gold, and with directions, that if the payment in gold was refused, to accept the currency, under protest. Payment in gold was subsequently refused, and the agents accepted the principal and interest after maturity in legal-tender notes, under protest, as directed by their employer.

Gold, at the time the notes were presented, was worth in the market at a premium of thirty-two cents on the dollar over the legal-tender notes accepted in payment by the agents acting for the testator of the plaintiff. He demanded payment in gold, but his agents accepted the currency under protest, by his directions, the payment in gold having been refused.

Based on these facts the executrix of the decedent instituted the present suit in the Court of Claims to recover the difference in the market value of gold and legal-tender notes at the date of the payment made by the United States to the testator of the plaintiff. Judgment was rendered for the defendants in the court below and the plaintiff appealed to this court. Appended to the finding of facts are the conclusions of law reported by the court, which, in the view taken of the case, it will not be necessary to reproduce for separate examination.

Four errors are assigned by the present plaintiff: (1) That the court below erred in holding that the subscription agent had no lawful authority to make the statement contained in the advertisement, that the treasury notes were payable in gold. (2) That the same court erred in holding that the statement, and what appears in the record in connection therewith, did not in law bind the defendants to pay the notes in gold. (3) That the court erred in holding that the notes were lawfully paid by the defendants in the legal-tender notes. (4) That the court erred in holding that the plaintiff, as executrix of the decedent, had no right of action, as against the defendants, to recover the difference in value at that time between the legal-tender notes and gold.

Questions not necessarily involved in the matters of fact found by the court below will not be re-examined, even though they are presented in the assignment of errors. Controversies between parties usually depend, in the first instance, upon the matters of fact, out of which the controversy in the particular case arises, and it often happens, even when it is suggested that the decision depends upon the legal questions presented, that it is nevertheless important to examine the facts with care, in order to ascertain whether the supposed legal questions do actually arise in the case.

Payment of the treasury notes was accepted by the testator of the plaintiff, and it appears that he, at the time the payment was made, then being in full life, surrendered the notes to the secretary for cancellation. Neither deception, mistake, nor undue advantage is suggested, but the whole record shows that it was an honest difference of opinion between the secretary and the decedent as to the rights of the parties, and that it terminated by the voluntary acceptance of the legal-tender notes, on the part of the agents of the decedent, in lieu of gold, as offered by the secretary, and by the surrender of the treasury notes to him for the United States. Such an acceptance of payment was a waiver of the claim antecedently made, and amounted to a full discharge of the same, independently of the question whether the notes accepted in payment are or are not a legal tender, as insisted by the counsel for the defendants.

Had not the treasury notes held by the decedent been surrendered to the United States, the effect of the acceptance of the currency notes in payment might possibly have been different, but it is clear that a protest under such circumstances is utterly insufficient to qualify the effect of the waiver evidenced by the acceptance of what was offered in payment of the treasury notes in lieu of gold. Gold was claimed, but the secretary refused to pay in that medium, and the agents of the decedent, acting in pursuance of his instructions, accepted the medium offered by the secretary, knowing full well that it was offered in full discharge of the treasury notes, and it appears that they not only accepted the medium of payment offered by the secretary, but surrendered the treasury notes to the secretary as the well-known financial agent of the United States.

Actual surrender of the treasury notes to the secretary was a condition precedent to the right of the secretary to redeem the same, and that fact was as well known to the agents of the decedent as to the secretary, and it must be that they knew full well that the payment of the treasury notes could not be made unless the surrender was absolute and unconditional.

Viewed in the light of these suggestions, it must be held that the protest, being unauthorized by law, was a mere ex-parte act, without any legal efficacy to qualify the voluntary surrender of the treasury notes, which both parties understood to be absolute and unconditional.

Due protest at the time of paying custom duties, has the effect to give the merchant the right to sue the collector to recover back duties illegally exacted, because the act of Congress provides that the protest in such a case shall have that effect. (5 Stat. at Large, 727.) Congress might, doubtless, give a corresponding effect to such a protest, in a case like the one before the court; but it is scarcely necessary to remark that there is no such statutory provision, and in the absence of it, the ruling must be that the protest is wholly insufficient to qualify the absolute and unconditional surrender of the treasury notes.

Enough appears to show that the surrender was made with a full knowedge of all the circumstances, and without the least compulsion; that the secretary gave public notice that the department was ready to redeem the notes, on presentation, by paying the amount in lawful money, or by converting the same into bonds, as authorized by law. Treasury notes of the kind, to a large amount, were over due, and the holders of the same were given the option to accept payment in legal tender notes or in the bonds authorized by law, and they were informed that interest, on all such as should not be presented within the next three months, would cease from the expiration of the period allowed for their presentation.

Fifteen thousand dollars of the treasury notes were held by the decedent, then in full life, and he claimed that he should be paid in gold, and it appears that the secretary refused to make the payment in that medium, and insisted that the United States had the right to redeem the same, or make the payment in the manner proposed in the published notice. Payment in gold being refused, the decedent transmitted the over-due notes to their agents here, with instructions to accept payment, under protest, in accordance with the terms proposed by the secretary, and the finding of the court shows that his agents obeyed his instructions, and that the whole amount of the notes presented, including the interest thereon after maturity was paid in the medium proposed by the secretary.

Prompt payment, no doubt, was desired; but the decedent was under no legal compulsion to accept any other medium of payment than that which he demanded. Both he and his agents were, doubtless, convinced that the secretary would not recede from the position he had taken, but he was at perfect liberty to reject the terms proposed, and to refuse to surrender the over-due securities which he held.

Duress, if proved, would rebut the presumption of assent, and would, doubtless, be sufficient to relieve a party in such a case from the effect of a compromise procured by such means, but the burden of proof to establish such a charge, in every case, is upon the party making it, and if he fails to introduce any such evidence to support it, the presumption is that the charge is without any foundation.

Unconditional acceptance of a medium of payment different from that promised by the United States, or absolute acceptance of a smaller sum from the Secretary of the Treasury than the one claimed from the United States, even in a case where the amount relinquished is large, does not leave the United States open to further claim on the ground of duress, if the acceptance of the different medium or the smaller sum is voluntary, and without intimidation, and with a full knowledge of all the circumstances; nor is the case changed if it appears that the claimant was induced to accept the different medium or the smaller sum in full, as a means to secure an earlier payment of the claim than he could otherwise hope to procure. (Mason *v.* U. S., 17 Wall., 74.)

Parties having claims against the United States, which are disputed by the officers authorized to adjust the same, may compromise the claim and may accept payment in a different medium from that promised, or may accept a smaller sum than that claimed, and where it appears that the claimant voluntarily entered into a compromise, and accepted payment in full in a different medium from that promised, or accepted a smaller sum than that claimed, and executed a discharge in full for the whole claim, or voluntarily surrendered to the proper officer, the evidences of the claim, for cancellation, he cannot subsequently sue the United States, and recover in the Court of Claims for any part of the claim voluntarily relinquished in the compromise. (Sweeny *v.* U. S., 17 Id., 77; U. S. *v.* Child, 12 Id., 244; U. S. *v.* Justice, 14 Id., 549.)

Decisions of the kind, by this court, are quite numerous, and they show beyond all doubt, that parties may adjust their own controversies in their own way, and that when they do so voluntarily and with a full knowledge of their rights and all the circumstances, no appeal lies to the courts to review their mutual decision. Courts cannot make contracts for parties, and if parties understandingly contract to adjust a controversy between them in a particular way, and actually execute the contract, they are both bound to regard the controversy as at an end.

Taken as a whole, the findings of the court below, show beyond all doubt that the decedent, voluntarily and with a full knowledge of all the circumstances, elected to accept payment of the treasury notes in the manner proposed by the secretary, and that the surrender of the same to the United States was absolute and unconditional. Nothing less can be inferred from the communications of his agents inclosing the securities, when the same were transmitted for redemption, in which his agents say that they "present the notes for payment in accordance with the terms proposed" by the department. Such an acceptance, if intended to waive every variation from the terms antecedently demanded, could hardly be more complete or explicit, nor is its real character changed in any respect by the fact that the agents asked leave, in the same communication, "to enter protest, under their instructions, against payment otherwise than in gold."

They surrendered the securities, and asked leave to enter the protest in the same communication, which was in effect saying, our principal still thinks he ought to be paid in gold, but inasmuch as the department declines to pay in that medium, he has decided to accept payment in the medium which you propose.

Suppose the controversy had respect to the sale and purchase of an article of personal property, instead of the redemption of treasury notes, and that it appeared that the price asked by the owner was one hundred dollars, and that a person desiring to purchase the same, had offered the owner ninety dollars for it, which the owner, at the time, declined to accept. Of course the bargain, in that state of the case, would not be complete; but suppose the owner of the article should subsequently forward the same to the person who made the offer, informing him that he would accept the offer, no one, it is presumed, would hesitate to decide that the voluntary acceptance of the offer concluded the bargain, if the person who made the offer elected to pay the money, even though the seller might have written in the same communication, that he ought to have ten dollars more, and should protest that the article was worth the whole amount he asked for it in the prior negotiations. Remarks of the kind would not have the effect to qualify the accep-

tance of the offer and the unconditional delivery of the article.

Apply that rule to the case before the court, and it is clear that the protest of the agents did not have the effect to qualify the voluntary acceptance of the terms proposed by the secretary, and the absolute and unqualified surrender of the securities to the United States, and that there is no error in the record.

Judgment affirmed.

UNITED STATES DISTRICT COURT, W. D. WISCONSIN.

OPINION, AUGUST 4, 1876.

In re SAUTHOFF AND OLSON, Bankrupts.

CREDITOR'S RIGHTS IN BANKRUPT'S ESTATE—POWER OF COURT TO DIRECT OUT OF WHICH FUND LIEN CREDITOR SHALL BE SATISFIED.

1. Where a creditor held several judgment notes against a person who was afterwards declared a bankrupt, and held several mortgages and two insurance policies as collateral security for their payment, and a few days before the filing of the petition in bankruptcy, the creditor caused judgment to be entered upon such judgment notes, and execution to be issued thereon, *held*, that the bankrupt court had power to so marshal the assets as to require such creditor to foreclose a mortgage before resorting to the general fund; but that this rule would not extend to a mortgage that was loaned to the bankrupt to be used as a security for the payment of the judgment notes. That the rights of the assignor of such a mortgage would be superior to those of the assignee in bankruptcy.

2. POLICY PAYABLE TO WIFE.—That the same principle applies in the case of the policy payable to the wife. She is to be regarded as a security to that extent, and entitled to protection in preference to the assignee, as the representative of the general creditors. But the mortgage of the bankrupt Sauthoff and wife to the petitioner, and the policy payable to the bankrupt, fall within the general rule on the subject of marshaling securities, and the petitioner, to that extent, is to be regarded as doubly secured, and should be required to first exhaust his remedy on them, and be allowed out of the general fund in court, the balance remaining after applying the proceeds of those securities upon his debts.

3. THE HOMESTEAD.—The rule, as to the homestead, stated.—[ED. LEGAL NEWS.

HOPKINS, J.

This is an application by John J. Suhr, for an order directing payment of three judgments in his favor against the bankrupts, entered on the 3d day of April, 1876, upon their promissory notes, by virtue of separate warrants of attorney attached to each. The judgments in the aggregate amount to about $3,000. No question is raised as to the validity of the judgments. The facts as admitted being that the notes were discounted in the usual course of business by petitioner, who is a banker, and that the warrants to confess judgment were attached and accompanied by the notes, and were given more than two months before the petition against the bankrupts was filed. There is no charge that the bankrupt in any way procured the entry of judgment except by giving the warrants of attorney to confess.

On the day the judgments were entered executions were issued on each, and a sufficient portion of the bankrupts' stock in trade was seized to satisfy them.

The other creditors instituted proceedings in bankruptcy, on the 6th of April, and after an assignee was appointed, the parties agreed that the goods might be sold by the assignee, and the proceeds be kept separate, and deposited in the registry of this court, and that the lien of the executions should be transferred to the fund in court with the same force as it existed on the goods by virtue of the levy.

The petition further shows that as collateral security to the debt of the petitioner, the bankrupt, Sauthoff, assigned to him a policy of insurance upon the life of his wife, payable to him, and that he and his wife assigned another policy upon his life payable to his wife, and that the bankrupt procured his brother, Wm. Sauthoff, to assign as further collateral security a note and mortgage belonging to him upon the homestead of the bankrupt, upon which there was due one thousand dollars, and that the bankrupt and his wife gave as further collateral security another mortgage upon the homestead of $1,000. All which were duly transferred to and held by the petitioner, as collateral security for his debt against the bankrupts. By means of which and of these judgments, he had ample security, and will get his pay in full, while the other creditors will not get to exceed one-half of theirs.

The assignee has sold the property for enough to pay all of the judgments out of which petitioner makes this application for payment.

The assignee opposes the application, and insists that the petitioner should be required, first, to exhaust the other security that he has and only receive out of the fund in court, the amount that may remain after applying the avails of the other securities.

He insists upon the application of what he claim to be the rule in equity, that as the petitioner has security upon two funds for his debt, while the general creditors, represented by the assignee, have security on but one, he should be required to resort, first, to his security upon which the other creditors have no lien.

The general rule in equity is, that where there are several creditors having a common debtor, who has several funds, all of which can be reached by one creditor, and only a part by the others, the former shall take payment out of the fund to which he can resort exclusively, so that all may be paid. This principle enforces the right of the creditor having a lien upon all the funds to be paid in full, but it requires him to obtain it out of such portions of the funds as will cause the least inconvenience and injury to the creditors whose liens are confined to one fund. In this way no wrong is done to the one who has all the funds within his reach. His lien is not impaired as to either fund. The authority of the courts over him only extends to directing him, which he shall first appropriate to his claim, restraining him, during such reasonable time as may be necessary to successfully make such application, from proceeding to appropriate the other. Keeping the other sacred, however, in the mean time, to make up any deficiency.

The common debtor cannot complain of this rule, for he is benefitted by having a larger portion of his debts paid by pursuing this course, than if all the funds were needlessly exhausted by a single creditor.

But it is uniformly held that courts should not exercise this power to the material injury or prejudice of the creditor holding both funds. But this restriction does not extend so far as was contended by petitioner's counsel, as to deprive the court of the exercise of the power in all cases where the creditor may be somewhat delayed in his remedies, or where the time of obtaining payment may be somewhat postponed. If it did, it would defeat the operation of the rule in most cases, for in almost every conceivable case, some time would be necessarily required in converting a security of any kind into money, and a delay of some extent is therefore inevitable in the practical application of the doctrine of marshaling securities. But a mere delay or postponeing of payment is not regarded in such cases as a material injury, for the interest on the claim is deemed an adequate compensation to the party for such delay. Interest is deemed a sufficient compensation for the delay of payment, which is incident to all judicial proceedings.

The remedy to render available the security should also be certain and direct, before a party should be required to adopt it, and defer other remedies that he is entitled to, in order to obtain satisfaction of his debt.

In this case the remedy of the petitioner is quite simple. An action to foreclose a mortgage and sell the property, is not a difficult or uncertain remedy, and a party could hardly maintain the position that a security so easily converted into money as a mortgage, and by so expeditious a method as exists in this State, was a doubtful remedy, or would unreasonably delay him or materially injure or prejudice his rights.

Courts of equity exercise this power in such cases—not as an independent equity that exists against the creditor. For, as the writers on this subject say, no equity can be created against the creditor holding the double fund security by a party who has an imperfect security. But they say it is an equity against the debtor, for to allow the doubly secured creditor to take the doubly charged estate, would enable the debtor to get back the singly secured estate discharged of both debts.

This would be literally true in this case, for when the special sureties are released from the petitioner's claim, they will all go back to the debtor, and they cannot be reached by the assignee in his hands. So that the right sought to be enforced is rather an incident to the equity against the common debtor, and is free if judiciously applied, from all objection or charge of injustice. Adams' Equity, 272; Willard's Equity, 337; Story's Eq. Ju., § 634, et seq. This doctrine is analogous to that which gives a surety the right to compel the creditor to exhaust this remedy against the principal's property before resorting to him. Now what application is to be made of this doctrine in this case.

First, is the mortgage assigned by William Sauthoff to the petitioner such a security as that the assignee can require the petitioner to apply it upon his debts before using the general fund?

I think not. That transaction was in effect, but a loan of this mortgage to the bankrupt for that purpose, and that William occupies the position of a surety to that extent, and as such his rights are equal, if not superior, to the rights of the assignee, and if his rights are equal, the claim of the assignee is defeated. But I think they are paramount, and that he has a right to require that the petitioner exhaust all property of the bankrupts that he has a claim upon, to secure the same debts first, and the rights of the assignee as to this mortgage, are subordinate to his.

The same principle applies in the case of the policy payable to the wife. She is to be regarded as a security to that extent, and entitled to protection in preference to the assignee as the representative of the general creditors. But the mortgage of the bankrupt Sauthoff and wife to the petitioner and the policy of insurance payable to the bankrupt, fall within the general doctrine above stated on the subject of marshalling securities and the petitioner to that extent is to be regarded as doubly secured, and should be required to first exhaust his remedy on them and be allowed out of the general fund in court the balance remaining after applying the proceeds of those securities upon his debt.

The petitioners' counsel contended for the right to take the whole pay out of the general fund and to leave the assignee to his rights of subrogation. But I do not deem that just in this case. The estate should not be burdened with litigation which would involve new and intricate questions, that would not arise in suits prosecuted by the petitioner. I can see no hardship in requiring him to collect those claims himself.

The petitioners counsel also claims that as this mortgage was on the bankrupt homestead, which was not liable for his debts in this State, and could only be encumbered or conveyed by the wife's joining her husband in a conveyance of it, that it should be considered in the nature of a security furnished by the parties, the wife particularly, that was equally entitled to protection as the securities I have before referred to.

He cited and relied principally upon the case of *Dickson v. Chom*, 6 *Iowa*, 19, as sustaining this position. In regard to that case it is only necessary to remark that, it was decided mainly upon the statute of that State and therefore cannot be regarded as an authority where the statute dees not exist.

In that case the creditor had a mortgage on the insolvent's homestead, which he cancelled voluntarily and sought full payment of the debt originally secured by the mortgage out of the general assets.

The court ruled that as the statute required a creditor secured by a mortgage on a homestead to exhaust his remedy against the other property of the mortgagor before selling the homestead, the creditor had a right and it was his duty to collect his pay out of the general assets if he could before he could resort to his mortgage. This case therefore when properly understood does not contravene the general equity doctrine hereinbefore laid down.

The Supreme Court of this State have, in two cases, considered the question substantially involved here. First, in Jones *v.* Dow, 18 Wis., 241; and again in White *v.* Polleys, 20 Id., 530—and they do not recognize any such right in a mortgagor of a homestead in this State, as is contended for in this matter by petitioner's counsel.

In the case of Jones *v.* Dow, supra, the mortgage covered the homestead and a business block, and the mortgagor insisted that the business block should be sold first. But the court, it appearing that there were judgment creditors, who had a lien upon the block, and not upon the homestead, denied his claim, and the Chief Justice, in delivering the opinion of the court, says: "Until the Legislature shall declare the obligation to preserve the homestead superior to that of paying one's honest debts, we must hold the equity of the creditor at least equal to that of the debtor in cases like this." And, in the other case, the question arose between a mortgagor, whose mortgage covered his homestead and other property, and a judgment creditor having a lien upon the other property only, and the court there held that the debtor had no right to have the property not included in homestead first exhausted, in order to preserve to him the homestead.

That a part of the property being a homestead, did not change the equity rule that required a party having security on two funds, to first exhaust his remedy upon the fund he was alone secured upon, where there was another party having security on the other.

I fully concur in these views, and shall follow the doctrine of those cases in my disposition of this question.

The legislature has, since that decision, in suits to foreclose mortgages covering the mortgagor's homestead and other property, required the sale of the property not included in homestead first. But this is not such a suit, and the statute, in terms, does not include a proceeding of this nature, or suits in equity for the marshaling of assets, and as it is in derogation of a long established principle of equity jurisprudence, I do not feel at liberty to extend its operation by construction beyond its plain reading.

I shall therefore order petitioner to collect and to exhaust his remedy upon the mortgage of F. Sauthoff and wife and the policy of insurance payable to the bankrupt, and to apply the avails upon his claim, and that he be paid from the general fund only what shall remain after such application. But as it is apparent that enough will not be realized therefrom to pay it in full, I shall order that he be paid now $2,000 to apply thereon, retaining enough to meet any balance, if there should be any. Perhaps the assignee and petitioner may be able to agree upon a valuation of these securities and upon a sum at which the petitioner will be willing to take them, in which case, if approved by the court, the matter may be at once closed.

The clerk will enter order in accordance with the terms of this opinion.

SLOAN, STEVENS & MORRIS, for petitioners.

H. M. Lewis for assignee.

THROUGH the courtesy of the law firm of TENNEYS, FLOWER & ABERCROMBIE, of this city, we have received the following opinions:

SUPREME COURT OF ILLINOIS.

OPINION FILED JUNE 30, 1876.

No. 132.—THE FIRST NATIONAL BANK OF SIOUX CITY *et al. v.* GEORGE W. GAGE.

Appeal from Superior Court of Cook.

1. CREDITOR'S BILL—WHEN IT MAY BE FILED.—*Held*, That a creditor's bill may be filed at any time against a defendant, after an execution has been issued and returned, in whole or in part, unsatisfied; that the sheriff may take the responsibility to make his return before the expiration of the ninety days, and when a return of *nulla bona* has been made, the creditor may exhibit his bill.

2. FOR WHAT BILL IS GOOD.—That the bill is good as a bill of discovery, but would not warrant the issuing of an injunction, or the appointment of a receiver, as there is no distinct charge of fraud, or that defendants have any particular property.—ED. LEGAL NEWS.

Opinion by SCOTT, C. J. Complainant having obtained judgment at law against defendants, on the same day filed their bill to discover assets in the hands of defendants, for an injunction and for the appointment of a receiver. No reason is perceived why the bill may not be good as a bill of discovery, and to that extent defendants ought to have been required to answer it. The allegations are sufficient for that purpose.

Objection is made, there is no proper return of *nulla bona*, to the executions issued on the judgments, and hence the bill was prematurely filed. The allegation is, on the same day the judgments were rendered, that thereafter executions were issued, and afterwards returned by the sheriff, wholly unsatisfied—that he could find no property of the de-

fendants in his county out of which to satisfy the executions. It plainly appears all this took place before the bill was filed. Our statute on this subject provides, that whenever an execution shall have been issued against the property of a defendant on a judgment at law or in equity, and shall have been returned unsatisfied in whole or in part, the party suing out such execution may file a bill in chancery against such defendant, and any other person, to compel the discovery of any property or thing in action belonging to defendant. R. S. 1874, p. 203, sec. 49.

Under this statute, what reason can be assigned why the sheriff shall retain the execution for any particular time? The law requires him to make return within ninety days. He may, however, take the responsibility to make his return before the expiration of that period, and when a return of *nulla bona* has been made, the creditor under the statute may exhibit his bill. The demurrer admits the allegations of the bill; there had been a return of *nulla bona* previously made on the executions issued on the judgments at law, and that is all the law requires. Bowen *v.* Parkhurst, 24 Ills., 257.

While this bill is good, and may be maintained as a bill of discovery, we do not think the bill or the accompanying affidavits contain anything that would warrant the court in granting an injunction and in appointing a receiver. The bill contains no clear and distinct charge that defendants have any particular property or things in action in their possession, and there can be no necessity for a restraining order of court; and still less reason can there be for the appointment of a receiver.

There is no necessity shown by this bill for the appointment of a receiver, for there is no distinct charge of fraud, nor does it appear from the affidavits accompanying it with clearness and distinctness, that there is any property or things in action to be preserved for the benefit of the judgment creditors. A receiver should be appointed in no case, unless it is made to appear there is an imperative necessity for the step, to preserve some particular property for such parties as shall be entitled to the benefit. No such case is made by this bill and affidavits.

For the error indicated in sustaining the demurrer to the bill, purely as a bill of discovery, the decree will be reversed and the cause remanded.

SUPREME COURT OF ILLINOIS.

OPINION FILED JUNE 30, 1876.

DAVID A. GAGE *v.* GEORGE C. SMITH *et al.*

Appeal from Superior Court of Cook.

CREDITOR'S BILL—INJUNCTION—RECEIVER.

1. WHEN A RECEIVER WILL BE APPOINTED.—That the section under consideration by the court, was adopted almost literally from a prior statute of New York, under which it was held, that the appointment of a receiver follows as a matter of course, where the equity of the bill is not denied on the hearing.
2. CONSTRUCTION OF OTHER STATE.—The court states the rule, where a statute is adopted from another State, which has received a construction, and cites from the New York cases to show, in case of a creditor's bill, where the return of the execution unsatisfied pre-supposes that the property of the defendant, if any he has, will be misapplied, and entitles the complainant to an injunction in the first instance; that it seems almost a matter of course to appoint a receiver to collect and preserve the property pending the litigation.
3. DECREE.—The decree in this case construed.
—[ED. LEGAL NEWS.

STATEMENT.—Appellees filed their bill in chancery, in the office of the clerk of the Superior Court of Cook county, alleging that at the November term, 1874, of the Superior court, they obtained a judgment against appellant for $1,486.14; that on the 18th day of November, 1874, an execution was issued thereon to the sheriff of Cook county, which was returned by him on the 23d day of December, 1874, unsatisfied, and that the judgment is still in force.

It is further alleged, that on or about January 1st, 1874, appellant was engaged in the hotel business in Chicago; that appellees are informed and believe that in the course of said hotel business, divers persons became indebted to him in a large amount, and that the defendant, at the time of filing the bill, had debts due him to a large amount, and for which he holds divers securities and evidences to a large amount, and has divers goods, wares and merchandise, and other articles of personal property of value, which belong to him, or in which he is in some way or manner beneficially interested, and that he has equitable interests and things in action of some nature or kind which might or ought to be applied to the payment of appellee's judgment.

It is further alleged, that appellant is the owner of, or in some manner beneficially interested in, some real estate in this or some other State, or some chattels real of some nature or kind, or some contract or agreement relating to real estate, or the rents, issues and profits of some real estate; and also that appellant is owner of or in some way beneficially interested in the stock of some company or co-partnership; and that also he has in his possession some money in coin or bank bills, or that he has money deposited in some bank, or elsewhere to his credit, or that he has money or securities held by some other person in trust or otherwise for his benefit.

And it is charged, on belief, if appellant has made any sale, assignment or transfer of his property or effects, or any part thereof, such sale, assignment or transfer is merely colorable, and made with a view of protecting the property or effects of appellant so assigned, and placing the same beyond the reach of appellee's judgment, and enabling appellant to control and enjoy the same, and the avails thereof, or to hinder and delay appellees in the collection of their debt, and that so it would appear, if appellant would state and set forth where, and to whom such sale, etc., was made, and what was the amount in value of the property or effects so sold, and what were the terms of such sale, etc.

Appellees claim a full discovery of all such property belonging to appellant, and of all trusts whereby any property or effects were held for him, and of any sale, assignment or transfer which appellant has made of his property, and of the persons to whom such sale, etc., has been made, and the trusts upon which such sale, etc., was made.

It is charged, that appellees have reason to believe, and do believe, that appellant had property, etc., of the value of $100 and upwards, exclusive of all prior first claims, and which orators have been unable to reach by execution.

It is also alleged that the bill is not exhibited with collusion, etc.; that appellees have reason to believe, and do believe, that George Taylor has property, things in action or effects, held in trust for appellant, and that George W. Gage and John A. Rice are indebted to him, and hold property in trust for him.

The prayer is that appellant answer; that he be prohibited from making any assignment of his property, and from confessing any judgment for the purpose of giving any preference to any other creditors over appellees to obtain his property; that a receiver be appointed, and for general relief.

The affidavit annexed to the bill is as follows:

State of Illinois, } ss.
Cook County, }

On this 29th day of December, one thousand eight hundred and seventy-four, personally came before me D. K. Tenney, who, being duly sworn, saith that he is one of the attorneys of the complainants; that he has heard the foregoing bill of complaint, read and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters and things therein stated upon information and belief, and as to those he believes it to be true,

[SEAL.] N. BACON,
Notary Public.

Appellants demurred generally and specially, to the bill, and assigned for cause:

1st. Want of equity.

2d. That the bill is not signed and sworn to according to the rules and practice of the court.

3d. That the charges in the bill are in the alternative, and not positive.

The court overruled the demurrer and appointed a receiver, and directed that appellant assign, transfer and convey to him all his property, equitable interest, things in action and effects, except as aforesaid, and all books, papers, and vouchers relating thereto, and that he submit to be examined, etc.

The final decree recites that the bill was taken as confessed for want of an answer, and it decrees that appellees recover of appellant $1,492.89, with interest thereon from the 18th day of November, 1874, together with costs; that the receiver pay the amount of the same out of the proceeds of the property of appellants which has been or may be assigned to him pursuant to the order of the court, according to the equitable priority of appellees, as between them and the complainants' other creditor's suits against appellant, and that he bring the residue of the proceeds of the property into court, to abide the further order thereof, etc.

Opinion by SCHOLFIELD, J.

We are of opinion, the sufficiency of the affidavit to the bill to authorize a preliminary decree for injunction, and the appointment of a receiver, is not properly before us. No such use was made of it. Appellant appeared and demurred to the bill, and upon the demurrer being overruled, he refused to answer further, whereupon the court rendered a decree *pro confesso*, and the only question, therefore, is whether the allegations of the bill are sufficient to authorize the decree.

The forty-ninth section of the chancery code, (R. S. 1874, pp. 203-4,) provides, "whenever an execution shall have been issued against the property of a defendant, on a judgment at law or in equity, and shall have been returned unsatisfied in whole or in part, the party suing out such execution may file a bill in chancery against such defendants and any other person, to compel the discovery of any property or thing in action belonging to the defendant, and of any property, money or thing in action due to him, or held in trust for him, and to prevent the transfer of any such property, money or thing in action, or the payment or delivery thereof to the defendant, except when such trust has in good faith been created by, or the fund so held in trust has proceeded from, some person other than the defendant himself. The court shall have power to compel such discovery, and to prevent such transfer, payment or delivery, and to decree satisfaction of the sum remaining due on such judgment, out of any personal property, money or things in action, belonging to the defendant or held in trust for him, with the exception above stated, which shall be discovered by the proceedings in chancery, whether the same were liable to be taken in execution at law or not. This section was adopted almost literally from a prior statute of the State of New York. Edwards on Receivers, p. 269, 70, under which it was held, that the appointment of a receiver follows, as a matter of course, where the equity of the bill is not denied on the hearing.—See Edwards on Receivers, *supra*; Bloodgood *v.* Clark, 4 Paige, 574; Corning *v.* White, 2d Paige, 567; Congden *v.* Lee, 3d Edwards, 304; Bank *v.* Schermerhorn Clarke, 214; Austin *v.* Fegueira, 7 Paige, 56.

In the first cited of the above cases the chancellor said: "In these cases of creditors' bills, where the return of the execution unsatisfied presupposes that the property of the defendant, if any he has, will be misapplied, and entitles the complainant to an injunction, in the first instance it seems to be almost a matter of course to appoint a receiver to collect and preserve the property pending the litigation."

We have repeatedly recognized the rule of construction, that in adopting the statute of another State, it is presumed the general assembly intends that it shall receive the construction given by the courts of the State, from which it is adopted, unless such construction is inconsistent with the spirit and policy of our laws. Campbell *v.* Quinlin, 3 Scam. 288; Rigg et al. *v.* Wilton, 13 Ills. 15; Streeter *v.* The People, 69 Id. 598.

No such inconsistency being apparent in the present instance, the construction adopted by the courts of New York should be followed.

The existence of the judgment, and the return of the execution unsatisfied, are distinctly and positively alleged in the bill; and it is also alleged on information and belief, that appellant has property, etc., of the value of more than $100, exclusive of all prior claims, which appellees have been unable to reach by execution. If this was untrue, appellant should have answered and denied it. It comes with an ill grace from him, after having refused to answer and disclose the facts with regard to the property, which it is claimed he conceals and withholds from the payment of his debts, to say that the quality of such property is not alleged with sufficient certainty. If it were known precisely what property he has, how concealed and where, it would be unnecessary to call upon him for discovery.

The remaining objection urged, is to the form of the decree, in directing that the amount of the judgment shall be satisfied by a sale of the property to be discovered, before any property is in fact discovered. We do not perceive how appellant is injured by this. It is very clear, even under the terms of the decree, there can be no satisfaction of the judgment until something is discovered out of which it can be satisfied. And whether the receiver is vested with the power to make sale subsequent or prior to the discovery, would seem to make no possible difference. He can only execute the power when there is something upon which it can act, and appellant cannot be heard to object, unless the receiver shall attempt to satisfy the decree out of property exempt from seizure for that purpose, or shall unnecessarily sacrifice or waste property liable to be so seized. When, if ever, this shall happen, the law will afford an adequate remedy, but until it does, it can scarcely be considered important to discuss it.

In our opinion, there is no error in the record, and the decree will therefore be affirmed.

Affirmed.

THROUGH the kindness of the law firm of COOPER & BASSETT, of Peoria, we have received the following opinion:

SUPREME COURT OF ILLINOIS.

OPINION FILED JUNE 30, 1876.

JOHN W. TURNER *et al. v.* NEWTON JENKINS, *use of* JULIUS S. STARR.

Error to Peoria.

PRACTICE—BILL NOT SIGNED—TAKING TESTIMONY—NOTICE TO GUARDIAN AD LITEM—MASTER'S REPORT—RECITALS OF SERVICE IN RECORD.

1. BILL NOT SIGNED.—The fact that a bill was not signed, cannot, for the first time, be insisted on in the Supreme Court. At most, it is a mere irregularity, and will be deemed to have been waived by answer, even by guardian *ad litem*.
2. SERVICE OF SUMMONS.—It is stated what will be considered a good return of service.
3. MASTER'S REPORT.—The finding of the court was based "upon proof taken before the master," and that proof showing no facts that would sustain the decree, it is reversed.
4. NOTICE TO GUARDIAN AD LITEM.—That the testimony contained in the master's report was improperly considered, for the reason it was taken without notice to the guardian *ad litim*.
5. "WERE DULY SUMMONED."—*Held*, That the finding in the decree of a court of general jurisdiction, defendants "were duly summoned," will be *prima facie* evidence of the existence of that jurisdictional fact.—[ED. LEGAL NEWS.

This was a bill in chancery, filed Sept. 8, '68, in the Peoria Circuit Court, by Jenkins *for use of* Starr, against John Turner and plaintiffs in error, and the allegations are, that at the June term, 1868, of said court, Jenkins obtained judgment against said John Turner, who is the father of plaintiffs in error, for $1,358, debt, and $121.46 costs, which is still in force and unsatisfied. Said judgment being mostly for money loaned by Jenkins to John Turner, to purchase lands in the bill described, which he had contracted of Jeremiah Harker for $35,000. That John Turner purchased said lands with his own money, but to defraud complainant and creditors, took the deed to his said children, aged 16 and 12 years at the date of said deed, April 10, 1867. That John Turner is insolvent, etc. The bill prays, among other things, that John Turner be held to answer; that a guardian *ad litem* be appointed to answer for said minors; that on proof of the allegations in the bills, the court will set aside the deed from Harker to said infants, or decree that said lands be held as aforesaid, against said John Turner, etc. The bill is not signed by complainant or counsel. The summons is made returnable on the 4th Monday of September, 1868. Decree taken Nov. 11, 1868, recites defendants were duly summoned, etc. John Turner defaulted; that the guardian appeared for said minors, and filed answers, admitting minority, and prayed protection of the court; the case had been referred to the master, who had made his report, which was all the evidence in the case; court finds equities with complainant, that the land mentioned in the bill was purchased with John Turner's money, a large portion of which he had borrowed from

Jenkins, and none of it furnished by said minors; also, said judgment and insolvency of John Turner. Bill taken as confessed as to Turner. Orders that Turner pay complainant the amount proved in said bill, it being the judgment and costs, in twenty days, and in default thereof, that said lands be sold, or so much as necessary to satisfy said judgment and costs. Lands were sold in a lump, and bought in by Starr, he bidding therefor, debt and costs.

Opinion by SCOTT, C. J.

The fact the bill may not have been signed, either by complainant or counsel, can not be insisted upon for the first time in this court; at most it is a mere irregularity, and will be deemed to have been waived by answer, even by guardian *ad litem*. It is a question that pertains to practice, and the right of an infant defendant will not be considered prejudiced, if the guardian *ad litem* answers without suggesting the omission which would be equivalent to an express waiver. No substantial defect is perceived in the service upon the minor defendants. The officer returns; he served the summons by reading and delivering a true copy "to the within named defendant, John W. Turner and Mary Turner." A similar objection taken to the service on the defendants, in Greeman *v.* Harvey, 53 Ill., 386, was declared to be untenable. So in this case, as in that, it may reasonably be inferred from the language used, a copy of the summons was delivered to each defendant named.

Confessedly, the service upon John Turner to the September term of court, was defective. Without any steps having been taken, the cause was continued. At the ensuing term the decree recites, defendants "were duly served ten days before the first day of the October term." Only the summons to the September term is found in this record, *non constat*, but a summons may have been issued to the October term, duly served on defendants, and lost from the files. Every reasonable presumption will be indulged in favor of the jurisdiction of a court of general jurisdiction, and its finding in the decree, defendants "were duly summoned," will be held to be *prima facie* evidence of the existence of that jurisdictional fact. Nothing appears in this record that rebuts the presumption in favor of the jurisdiction of the court, as indicated by the finding in the decree. This bill was to subject lands, the legal title to which was in the minor defendants, to the payment of a judgment in favor of complainant, against John Turner, on the ground he was the equitable owner. The judgment debtor made no defence in the court below, nor does he join in this writ of error. The usual answer was filed by a guardian *ad litem*, admitting the minority of the defendants named, and invoking the protection of the court. The cause having been referred to the master, he made a report of testimony taken by him, "and from the proof taken before the master," the court finds certain facts, which in its opinion establish the equities of complainant. No other evidence is found in the record, except that contained in the master's report. And indeed, the recitals in the decree exclude the idea any other testimony was heard. All the findings of the court are based on the proof taken before the master. Aside from the objection, the testimony was taken before the master, without notice to the guardian *ad litem*. We do not think the evidence is sufficient to support the decree. There was no legitimate testimony to establish the existence of a judgment in favor of complainant and against Turner, unsatisfied and subsisting at the time the proof was taken. No record of any judgment in any court was exhibited. The decree only finds complainant obtained judgment against Turner, but when, in what court, and whether it was unsatisfied, and a lien upon the judgment debtors' equitable estate, it is silent. But the testimony contained in the master's report was improperly considered, for the reason it was taken without notice to the guardian *ad litem*, whose business it was to defend for the minor defendants, and whose interest in the property was about to be cut off by the decree. This position is not answered by the suggestion. Infants are bound by the acts of their guardian in all matters relating to the practice in the court. No doctrine is better settled than that a guardian *ad litem* cannot admit away any of the substantial rights of infants, who are always in chancery regarded as the wards of the court. But conceding the correctness of the rule asserted, there must be an express waiver of an irregularity in practice, or some positive act from which a waiver may be inferred. Mere non-action on the part of the guardian, will not be considered as a waiver of anything in favor of infants, whether it relates to mere practice or to the substance of the defence. In this case the guardian did nothing by which the infants would be bound. He had no notice the testimony was to be taken, and he could not be present, nor did he do any act that could be construed into a waiver of the irregularity that intervened after the testimony had been reported in court.—Hence the testimony was not admissible as against the infant defendants, for want of notice, notwithstanding their guardian may have failed to make any positive objection on the hearing. It would be otherwise, had defendants been adults. Had they made no objection, they would have been considered as having waived the want of notice as to taking the testimony.

Independently of the "proof taken before the master," the court found no facts that would sustain the decree against the infants.

The decree will be reversed and the cause remanded.

COOPER & BASSETT, for Plaintiffs in error.

MCCULLOCH, STEVENS & NELSON, for Defendants, in error.

WE are under obligations to the law firm of FULLER & SMITH, for the following opinion:

SUPREME COURT OF ILLINOIS.

OPINION FILED JUNE 30, 1876.

H. G. POWERS *v.* A. C. BRIGGS et al.

Appeal from Cook.

WHEN A NOTE SIGNED BY THE TRUSTEES OF A CHURCH WILL BE REGARDED AS THEIR INDIVIDUAL NOTE.

Where a note, in the body, runs, "one year after date, we, the trustees of the Seventh Presbyterian Church, promise to pay to the order of H. G. Powers," etc., and was signed "Trustees. A. H. Briggs, Louis B. Kelly,' et al., *held*, that this note bound the defendants only as individuals, and did not bind the church.—[ED. LEGAL NEWS.

Opinion by SCHOLFIELD, J.

Suit was brought on two promissory notes for $600 each, one payable in one year, and the other payable in two years from date, but in other respects precisely the same in form. That payable in one year from date is as follows:

$600. Chicago, May 17, 1870.

One year after date, we, the trustees of the Seventh Presbyterian Church, promise to pay to the order of H. G. Powers, six hundred dollars, value received, with interest at six per cent. per annum.

A. H. BRIGGS,
LOUIS B. KELLEY,
JOHN CORBETT,
F. D. MARSHAL,
} Trustees.

Evidence was admitted by the court below, over the plaintiff's objection, showing that at the time the notes were executed, the defendants were trustees of the Seventh Presbyterian Church of Chicago, and that the *the* notes were given for the difference in value between church organs, which they had exchanged.

The court gave judgment for the defendants, and the correctness of that judgment depends upon the single question, whether the notes bind the defendants individually, or only the corporation of which they were trustees.

The authorities are not entirely harmonious on the question; but, after a careful examination of the numerous cases cited in the elaborate briefs filed by the respective counsel, our opinion is the court erred in finding that the defendants were not individually liable on the notes.

The general rule appears to be, when the names of the principal and agent both appear upon the instrument, it will be held to be the bill or note of him who signs it, unless it satisfactorily appears that he signed it in a mere ministerial character, intending to bind another. "Unless," said Lord Ellenborough, in Leadbetter *v.* Farrow, 5 M. & S. 45, "he says plainly, 'I am the mere scribe,' he will be bound."

The rule is thus stated by Shaw, C. J., in Bradlee *v.* Boston Glass Co., 16 Pickering, 350: "As the forms of words in which contracts may be made and executed are almost infinitely various, the test question is, whether the person signing professes and intends to bind himself, and adds the name of another to indicate the capacity or trust in which he acts, or the person for whose account the promise is to be made; or whether the words referring to the principal are intended to indicate that he does a ministerial act in giving authenticity to the act, promise, and contract of another. Does the person signing apply the executing hand as the instrument of another, or the promising and engaging mind of a contracting party?" See also Morrill *v.* Codding, 4 Allen, 403; Leach *v.* Blow, 8 Smedes & Marshall, 228; Chick *v.* Trevett, 20 Maine, 462; Fogg *v.* Virgin, 19 Id., 252; Sturdivant *v.* Hull, 59 Id., 172; Barker *v.* M. F. Ins. Co., 3 Wendell, 94; Hills *v.* Bannister, 8 Cowen, 31; Moss *v.* Livingston, 4 Comstock, 208; Dewitt et al. *v.* Walton, 5 Selden, 571; Savage *v.* Rix et al., 9. New Hampshire, 263; Tucker Manufacturing Co. *v.* Fairbanks et al., 98 Mass., 103.

Testing these notes by this rule it would seem clear they are binding only on the defendants as individuals. Although the words "the trustees of the Seventh Presbyterian Church" appear in the body of the notes, and the word "trustees" is appended to the defendant's signatures, there are no words used implying an undertaking on the part of the corporation. The corporation is not assumed to be acting by or through the defendants, nor does it even appear the defendants act for or on behalf of the corporation. The language clearly indicates that the defendants were trustees when they signed the notes, but not that the corporation promised to pay them.

Nor do we consider the facts proved here outside of what appears on the face of the papers change the result. True, they show plaintiff knew the defendants were trustees, and the consideration of the notes was the church organ. But it does not follow from this that the plaintiff was giving credit to the corporation, or that he knew the defendants intended by the notes that he should do so; and there is no other evidence tending to show he gave credit to the corporation. It was not unreasonable that the defendants having the charge and control of the finances of the corporation and being acquainted with its resources, would give their paper for property of the corporation, intending to protect themselves against loss, from its funds, and the notes themselves are the most satisfactory evidence that they did do so.

In this view of the case it is unnecessary to express any opinion as to the admissibility of the parol evidence.

The judgment is reversed and the cause remanded.

Scott and Sheldon, JJ., dissent.

FULLER & SMITH for the appellant.

U. S. DISTRICT COURT, E. D. PENNSYLVANIA.

THE U. S. *v.* RHAWN.

The law under which the National Banks are incorporated does not exempt them from examination by the Internal Revenue Officers mentioned in Section 3177 of the Revised Statutes.

A clerk of a Supervisor of Internal Revenue is, however, not such an officer.

This case was tried at the last November Sessions of the court, before Judge Cadwalader, who charged the jury as follows:

Charge by CADWALADER, J.

Section 3177 of Revised Statutes of the United States enacts, that any collector, deputy collector, or inspector, may enter in the day time, any building or place where any articles or objects subject to tax are * * * kept within his district, so far as it may be necessary for the purpose of examining said article or articles, and that any owner or person having the agency or superintendency of such building or place, who refuses to suffer such officer to examine such article or articles, shall for every such refusal, forfeit five hundred dollars. Sect. 3163 enacts, that every supervisor, under the direction of the commissioner, shall see that all laws and regulations relating to the collection of internal taxes, are faithfully executed and complied with, &c.

The present suit is to recover $500, a penalty alleged to have been incurred by the defendant, who is president of a National Bank, by refusing to suffer a person who was acting under the direction of Mr. Tutton, the Supervisor of Internal Revenue, to examine such checks of customers of the bank as were kept in it, in order to discover whether any, and which of them were unstamped, contrary to the provisions of the internal revenue law upon the subject.

It is alleged that there was an application to defendant, to suffer such an examination to be made, and that the defendant refused to suffer this to be done.

The defendant contends that the revenue officer had no right to make the examination requested. The ground of this contention is, that the law under which the National Banks are incorporated provides for the occasional examination of their affairs, and for reports of their condition to the Controller of the Currency, and enacts, that they shall not be subject to any visitorial powers other than are authorized by the act, or are vested in the courts of justice.

These banks are fiscal agents of the Government of the United States, and it would be most extraordinary that Congress should have exempted their customers from a necessary and proper scrutiny under the revenue laws in a matter which has no legitimate connection whatever with the affairs of the banks. As to the position thus taken by the defense, I am of the opinion that it is wholly unreasonable and unfounded in law. If you believe the testimony of Mr. Tutton, he told the defendant that there was no desire or intention to examine into the affairs of the bank, or the accounts of its customers, and stated that the sole purpose was to ascertain whether checks in its keeping were unstamped.

If unstamped, they were subject to tax under the revenue law.

The visitorial powers over a corporation are the subject of a distinct head under the law of corporations. The examination of such checks under the revenue law is not the exercise of a visitorial power under the Act of Congress relative to the banks. This part of the defense, therefore fails in law.

It appears, however, that the person who asked to make the examination in this case was a clerk of the supervisor. Such a person is not an officer within the meaning of the law. The words of section 3177 are, "any collector, deputy collector or inspector;" and a clerk to the supervisor is not included in this description.

If the supervisor was himself authorized to make such an examination, he could not delegate this power to the clerk.

Your verdict should therefore, for this reason, be for the defendant.

WE have received from C. C. BONNEY, of the Chicago bar, the following opinion:

CIRCUIT COURT OF COOK CO., ILL.

JULY TERM, 1876.

SPRINGER et al. *v.* GIBBONS et al., and MULVY *v.* THOMPKINS et al.

BURNT RECORD CASE—STRICT FORECLOSURE—REDEMPTION—RIGHTS OF PURCHASERS—WHAT IS A FINAL DECREE.

1. COMPLAINANTS' TITLE.—That complainants have failed to make out the title they claimed.

2. RIGHTS OF PURCHASERS.—That purchasers had a right to rely upon the judgment of the court, and were not required to run any risk on account of any errors in that judgment. If a court having jurisdiction, says a title is good, purchasers have a right to say so too, and to hold the property, no matter how many errors there may be. Such judgment is conclusive, between the parties, until reversed or set aside.

3. WHAT IS A FINAL DECREE.—The court states what is to be regarded as a final decree, in a suit for strict foreclosure, and the effect upon the right of the defendant to redeem of not entering a final or confirmatory order.—[ED. LEGAL NEWS.

FARWELL, C. J.

In these Burnt Record cases in which the complainants ask for a decree of the court declaring them the owners in fee simple of the property in question, I have examined all the authorities cited on the hearing, and have endeavored to satisfy myself as to what are the legal rights of the parties. Upon the whole I am of opinion that the complainants have failed to make out the title they claim. The important facts in the case are as follows, viz:

(*Continued on Page* 376.)

CHICAGO LEGAL NEWS.

Lex vincit.

MYRA BRADWELL, Editor.

CHICAGO, AUGUST 12, 1876.

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We call attention to the following opinions, reported at length in this issue.

POWER OF SECRETARY OF TREASURY—TREASURY NOTES—LEGAL TENDER NOTES.—The opinion of the Supreme court of the United States, by CLIFFORD, J., as to the power of the secretary of the treasury and the subscription agent, to advertise that treasury notes were payable in gold, and the effect of a protest against receiving payment of the same in legal tender notes. The court holds independently of the question whether they were payable in gold or legal tender notes, that the party by receiving legal tender notes in payment waived any right he might have had to receive payment in gold, and that no action could be maintained by the party to recover the difference between payment in gold and payment in legal tender notes.

CREDITORS' RIGHTS IN BANKRUPT'S ESTATE—LIEN CREDITORS.—The opinion of the United States District Court for the Western District of Illinois, by HOPKINS, J., defining the rights of creditors in a bankrupt's estate, and holding that the District court has the power to marshal the securities of a bankrupt's estate, and in certain cases to direct out of which fund lien creditors shall be paid, and to direct them to foreclose mortgages before resorting to the general fund.

CREDITORS BILL—WHEN IT MAY BE FILED.—The opinion of the Supreme Court of this State by SCOTT, C. J., holding that a creditor's bill may be filed at any time after the return of an execution, *nulla bona*, in whole or in part; that in order to obtain an injunction or the appointment of a receiver, the bill should charge that the defendant has some particular property. There has hardly been a creditors bill filed in this State before the expiration of ninety days from the date of the execution, but what the defendant has demurred, claiming on this ground it should be dismissed. The bar will be glad that this question is put to rest in this State. We would in this connection call attention to the opinion of the court by SCHOLFIELD, J., involving some of the same questions as in this case. In determining when an injunction will be issued and a receiver appointed, the two opinions should be construed together, and the New York decisions, construing the statute of that State, from whence our statute was derived, should be consulted.

BILL NOT SIGNED—TAKING TESTIMONY—NOTICE TO GUARDIAN—RECITALS OF SERVICE.—The opinion of the Supreme court of Illinois by SCOTT, C. J., holding that the objection that the bill is not signed cannot be made for the first time in the Supreme Court; that the testimony contained in the master's report was improperly admitted, for the reason it was taken without notice to the guardian *ad litem;* that where the finding in the decree of a court of general jurisdiction is that the defendants "were duly summoned," such recital will be *prima facia* evidence of that jurisdictional fact. In some of the circuit courts of the State a very loose practice has grown up, and the appointment of a guardian *ad litem* is regarded as a mere matter of form.—This timely opinion of the Supreme Court will have a tendency to cause the lower courts to see that guardians properly defend the interests of minor defendants submitted to their care.

NOTE SIGNED BY TRUSTEES—WHEN IT BINDS THEM AS INDIVIDUALS.—The Opinion of the Supreme Court of Illinois by SCHOLFIELD, J., as to when a note signed by the trustees of a church will be regarded as their individual note. Church trustees will do well to see, in making notes, that they promise "as trustees."

INSURANCE—NOTICE—PROOF OF LOSS.—The opinion of the Supreme Court of this State by CRAIG, J., in an insurance case deciding several questions relating to the notice to be given and the proof of loss to be made in case of the destruction of the property covered by the policy.

NATIONAL BANKS—EXAMINATION: The opinion of the United States District Court for the Eastern District of Pennsylvania by CADWALADER, J., holding that National Banks are not exempt from examination by the Internal Revenue Officers, mentioned in section 3177 of the Revised Statutes, but that a clerk of Internal Revenue is not such an officer.

STRICT FORECLOSURE—DECREE—FINAL ORDER—RIGHTS OF PURCHASERS.—The opinion of the Circuit Court of Cook County by FARWELL, C. J., as to what will be regarded as a final decree in a suit for strict foreclosure, and the effect of omitting to enter in such suit the final or confirmatory order, and holding that purchasers have a right to rely upon the judgment of a court having jurisdiction, and are not required to run any risk on account of any errors in such judgment. If a court having jurisdiction says a title is good, purchasers have a right to say so too, and to hold the property, no matter how many errors there may be. Such judgment is conclusive between the parties until reversed or set aside. The court also states what is to be regarded as a final decree in a suit for a strict foreclosure, and the effect upon the right of the defendant to redeem of not entering a final or confirmatory order. The case of Wadhams et al *v.* Gay, referred to by Judge Farwell, is one of the most celebrated legal contests to settle the rights of purchasers under a decree, ever had in this country. This case was several times before the Supreme Court with varying results. But the law of the case was finally established as Mr. Kales claimed it should be, in his original brief before the Supreme Court. The final opinion is reported 7 CHICAGO LEGAL NEWS, 169.

NOTES TO RECENT CASES.

COMPENSATION OF ATTORNEY.

The U. S. District Court for the District of New Jersey in 14 N. B. R., 150, say in the case of Drake, that the compensation of the assignee's attorney must be reasonable and proportioned to the value of the estate. This will do very well to talk about, but the fact remains that attorneys in bankruptcy cases are in the habit of not only charging very heavy fees, but of collecting them. This practice is not confined to attorney s but it extends very generally to persons who have the handling of the bankrupt's estate. We need a bankrupt law, but not such a law as the present one. The fees should be lowered, the practice should be simplified. There should no be one blank required where there are ten now. It takes about a hun dred blanks to get a man through bankruptcy.

BANKRUPTCY—WIFE'S CLAIM—EVIDENCE OF HUSBAND.

The United States District Court for the eastern district of Pa. *in re* Bean, 14 N. B. R. 182, held that a bankrupt may testify to support a claim of his wife against the State, where such testimony would be competent under the State laws in force prior to the first of December, 1873.

BANKRUPTCY BILL OF SALE.

The U. S. District Court for the District of Vermont, in Allen *v.* Whitmore, 169, held that if a bill of sale is recorded in the clerk's office at one place, upon a representation by the bankrupt that he resided there, it will bind the assignee, although the bankrupt actually resided at another place.

CUSTOM OF TRADE—PACKER—GENERAL LIEN.

The English Court of Appeals *ex-parte* Shubrook, 34, L. T. Rep., N. S., 785, held that a packer has a general lien for the amount of his charges upon the goods of a customer in his hands. Not only in respect of the particular goods, but also in respect of any other goods of the same customer.

Recent Publications.

COMMENTARIES ON THE LAWS OF ENGLAND. By Herbert Broom, LL. D., of the Inner Temple, Barrister-at-law; Reader in Common Law to the Inns of Court; Autbor of "A Selection of Legal Maxims," etc., and Edward A. Hadley, M. A., of Lincoln's Inn, Barrister-at-law; Late Fellow of Trinity College, Cambridge. In two volumes. Vol. I., with Notes by William Wait, Counselor-at-law, Albany, N. Y. John D. Parsons, Jr., Law Book Publisher, 1875.

This work is in two substantial volumes, making over eighteen hundred pages. These Commentaries pursue the order adopted, and contain much of the matter to be found in Blackstone's Commentaries. Messrs. Broom and Hadley say they are meant to be such as Blackstone would, if now living, have reproduced; amending where amendments were needed, adding from the Reports and Statute Books, and modifying his style in accordance with modern usage. They treat of the Rights of Persons, the Rights of Things, Private Wrongs and Public Wrongs. Under the first of these heads are considered, not merely the absolute rights of individuals, such as the Right of Liberty and that of Property, but also the nature of those institutions, which, by the framers of our law, were deemed essential for asserting and maintaining them. Under the second of the above heads, are included the classification and legal nature of real property, the tenures and titles of its occupants, the various species of estates, the modes of acquiring and transferring them. Personalty is likewise here noticed; the property in and title to it. The third division is devoted to the redress of private wrongs, the courts which administer it, their jurisdiction and mode of procedure; while the fourth division treats of acts which are criminal, in kind with offenses against the Crown, the commonwealth, the community, the manner of repressing and of punishing them. An epitome follows on the rise and progress of the law in England. This edition contains all the citations to the English cases. The American editor has illustrated the doctrines laid down in the text, by extensive notes and citations to the American cases. Where the English law is in harmony with the American, the cases cited in the notes will show that fact, and the prominent distinctions or differences. These Commentaries are a mine of law—a library of themselves, which will prove useful and instructive to any lawyer or student who thoroughly consults their pages.

POCKET MANUAL OF RULES OF ORDER for Deliberative Assemblies. Part I., Rules of Order. A compendium of parliamentary law, based upon the rules and practice of Congress. Part II., Organization and Conduct of Business. A simple explanation of the method of organizing and conducting the business of societies, conventions, and other deliberative assemblies. By Major Henry M. Robert, Corps of Engineers, U. S. A. Seventh Thousand, Revised. Chicago: S. C. Griggs and Company. 1876.

This neat little volume of about two hundred pages is furnished for seventy-five cents. The arrangement of Robert's Rules of Order, is most admirable. The propositions of parliamentary law are clearly and concisely stated. It only requires to be read to be appreciated. We have no doubt it will be brought into general use.

SUPREME COURT OF ILLINOIS.

ABSTRACT OF OPINIONS FILED AT SPRINGFIELD, JUNE 30TH, 1876.

228. Casper Kemper *v.* President, Trustees, etc.—Error to Morgan.—Opinion by SCHOLFIELD, J., affirming.

MOTION TO DISMISS APPEAL FROM J. P.—NATURE OF APPEAL BONDS—WAIVER, ETC.

STATEMENT.—Appeal bond in a J. P. case, filed Sept. 8, on a judgment rendered August 18th. Motion to dismiss because the bond was not filed in twenty days. *Held,*

1. That the removal of causes from an inferior to a superior court for a trial *de novo*, are unknown to the common law, and can only be prosecuted where they are given by statute, which statute must be strictly complied with.

2. Nevertheless, appeal bonds are in the nature of process to remove a cause from a justice of the peace to the Circuit court, and hence any objection may be waived by the parties; and any appearance not limited to the purpose of objecting to the sufficiency of the steps taken to perfect the appeal, will be deemed a waiver of all objections in that regard.

3. Where the records of court simply show that a continuance in an appeal case was by "order of court," it will not be presumed to have been by consent of parties, nor are affidavits admissible to supply any records thereon, except in a direct proceeding to reform the record. And where a continuance is thus merely by order of court, a party may appear at the subsequent term for the purpose of moving to dismiss on proper grounds.

230.—William H. Broadwell *v.* Alfred H. Paradise.—Error to Morgan.—Opinion by SHELDON, J., reversing and remanding.

DAMAGES ON RETURN OF GOODS REPLEVIED TO AN OFFICER.

STATEMENT.—Appellee replevied goods levied upon by appellant, a sheriff. Afterwards, he dismissed his suit, and the court ordered a return of the property. Defendant then entered a motion to have the damages assessed. After several continuances, the matter was referred to a jury, which returned a verdict that they found no damages to assess. Motion for new trial overruled. *Held,*

1. The sheriff held a special property for the benefit of the general owner in the goods seized, and he was entitled to have assessed as damages the value of the use of the goods, the rule being that, in trespass or trover, if the property be taken by a stranger, the whole value

may be recovered by the special property man, he holding the balance, beyond his own interest, in trust, for the general owner. But if the suit be between him and the general owner, the latter is entitled to a reduction of the value of his interest. Under this rule, the sheriff ought to have had the full value of the use of the property, although he himself had no beneficial interest therein, and personally sustained no damage, Paradise being regarded as a mere stranger, although the property had been taken from him by the levy.

It was, however, contended that, as neither the officer nor the execution creditor could be allowed to use the property levied upon, no damages could properly be assessed on this account. But, *held*,

2. That although it may be that neither of them suffers any damage by a deprivation of the use of the property, that the accruing interest on the judgment may indemnify the execution creditor, yet the general owner is to be regarded as sustaining damages during the time the property is taken, and held from being applied upon the execution; he loses the interest on its value, which runs against him, in the meantime, on the judgment, and as an equivalent to the interest, he ought to have damages.

3. The recovery by the defendant is, in respect of the entire interest in the property, that of both the special and general owner, and the damages recovered for the use of the property, if not for the benefit of the special owner, will be for the benefit of the general owner. All that the officer realizes in respect to the property, whether damages for its use or the proceeds of its sale, will be applied and held for the benefit of the general owner. All things that may remain after satisfying the execution against him, will be held in trust for the general owner.

231.—Frank Lohman et al. *v.* The People, etc.—Appeal from Cass.—Opinion by DICKEY, J., affirming.

PROSECUTIONS UNDER PENAL STATUTE — ELECTION UNDER.

STATEMENT.—Action for penalties for violation of 6th section, ch. 43, R. S. 1874. It was contended that the court erred in not compelling plaintiff, before going to trial, to elect, specifically, what particular offence under section 6 the defendants were to be required to answer. But, *Held*,

That, as there was no evidence offered except under one clause of that section, so that defendants were not called upon to meet offences under different clauses, the judgment cannot be disturbed on that ground.

235.—Charles T. Hillyer *v.* Delia O. Lewis et al.—Appeal from Ford.—Opinion by SCOTT, Ch. J., affirming.

IRRELEVANT EVIDENCE ADMITTED IN CHANCERY—RULE THEREON—PRESUMPTION.

STATEMENT.—Suit for foreclosure—the contention was whether a certain note under the mortgage had been paid. On this the evidence was conflicting. *Held*,

That, where, on excluding all evidence admitted, which is claimed to be improper, enough remains to sustain the decree of the court, it will be presumed that the court, on the hearing, considered only legitimate evidence, and excluded from consideration all testimony not properly admissible found in the record. In chancery causes, it is not error for which a decree should be reversed, that the court admitted irrelevant testimony.

231.—John C. Crabtree, et al. *v.* Sarah Dodsworth, ex'r et al.—Appeal from Morgan.—Opinion by BREESE, J., affirming.

PARTIES WHEN NOT ALLOWED TO TESTIFY.

STATEMENT.—Crabtree, and his securities on a promissory note, were sued. One of the sureties pleaded that the time had been extended to the principal debtors without his knowledge, and proved the fact by Crabtree himself. *Held*,

That the principal debtor, being a party to the suit, wherein the opposite party sued in a fiduciary character, was not, under the statute, a competent witness, even in behalf of a co-defendent. The design of the statute is, that where parties testify, they shall be on equal ground, and the representatives of a deceased party would be greatly at a disadvantage, if opposing parties were permitted to testify.

285.—Richard Towl *v.* Benjamin Wilson et al.—Error to Madison.—Opinion by WALKER, J.

FAILURE OF COVENANTS IN DEED—INJUNCTION—NEGLECT TO DEFEND IN EQUITY SUIT—FRAUDULENT REPRESENTATION.

STATEMENT.—Wilson represented that he owned the title to lands he sold to Towl, whereas he only owned an undivided share of four-sevenths in one portion, and of three-sevenths in another. Towl paid two notes, given for the purchase money. But, failing in the third, suit for foreclosure was brought, and no defense being made, a decree was obtained. Towl consulted a lawyer while the suit was pending, who advised him that he could not make a defense unless he could show that Wilson was insolvent. After decree obtained, Towl brought a bill to enjoin the foreclosure sale and execution of the decree. *Held*,

1. That, as he failed to interpose a defense to the foreclosure suit while pending, his bill for injunction cannot be maintained. And it is no excuse that he was misadvised by his attorney. He and his attorney were bound to know the law.

2. He has a remedy at law on the covenants in the deed, to the extent of the deficiency in the amount of the interest conveyed, and he must be left to that remedy.

3. Wilson was not necessarily guilty of fraud in the representation, as he might not have known the defect of his own title, and the extent of his interest. In order to constitute a fraudulent representation, the party making it must know it to be false.

286.—Jane C. Crane *v.* William H. Crane et al.—Error to Vermillion.—Opinion by SHELDON, J.

CHANGE OF VENUE ON ACCOUNT OF PREJUDICE IN THE JUDGE — MOTION, WHEN MADE—HOMESTEAD.

STATEMENT.—Bill brought to set aside a deed executed by appellant and her husband (appellee) and the legal representatives of the grantee therein, on the ground that it was procured by threats, menaces, and duress. This turned wholly on the evidence, against appellant.

There are, however, two points of law made; (1) that the court refused a motion to change the venue on account of the prejudice of the judge; (2) there was no formal waiver of homestead rights in the premises conveyed. *Held*,

1. That a motion to change the venue on account of the prejudice of a judge, comes too late on the trial of a cause, after all the evidence has been heard, and ought not then to be entertained. Nor is it a sufficient ground that the prejudice was unknown to the applicant until the day previous.

2. The deed having been made before the amendatory act of 1857, comes under the act of 1851, relative to homesteads. This act related only to forced sales by judicial process, for which a formal release was necessary to subject the premises to the forced sale, but no prohibition whatever rested on a voluntary alienation of the homestead.

289.—Robert McCann *v.* Rachel Roach.—Appeal from Champaign.—Opinion by DICKEY, J., reversing and remanding, SCOTT, Ch. J., dissenting.

TESTIMONY OF DAMAGE IN LIQUOR PROSECUTION.

Held, That under a prosecution for selling liquor to a husband, it is improper to allow testimony concerning the former value of the husband's estate, and the diminution thereof. The statute gives an action only on the ground that the wife is injured in her person, her property, or her means of support.

290.—Laura A. Dickinson *v.* C., B. & Q. R. R. Co.—Error to Fulton.—Opinion by SCOTT, Ch. J., reversing and remanding.

AMENDING DECLARATION—VENUE OF ACTION AGAINST RAILROAD COMPANY.

STATEMENT.—Appellant brought a suit for injuries received, jointly with her husband, and recovered judgment. On appeal, the Supreme Court reversed the case on the ground that the husband was not a proper party. Then the husband was dismissed out of the case, and the defendant company pleaded in abatement that the venue was laid in the wrong county (Fulton), the injury being received in McDonough, there being a change in the law after the original suit was commenced, requiring a local venue. *Held*,

1. That dismissing the husband out of the suit, and not alleging any new cause of action, did not constitute a new suit.

2. That as the law, when the action was originally brought, allowed it to be brought as it was brought, the court did not subsequently lose jurisdiction previously acquired, by reason of the amendment as to parties.

291.—Elisha B. Steere et al. *v.* Robert Prewett.—Error to McLean.—Opinion *per curiam*, affirming.

SETTLEMENT ON WIFE BY HUSBAND, AS TO CREDITORS.

Held, That as the husband, at the time this property was settled on his wife, retained enough to satisfy his indebtedness, and as the wife had an equitable interest in the premises by reason of her means having been employed in its purchase, the settlement was justifiable, and cannot be impeached.

Peter Papineau *v.* Maxime Belgrade.—Appeal from Ford.—Opinion by WALKER, J., affirming.

SECURITY FOR COSTS — AVERAGING BY A JURY.

Held, 1. That notwithstanding the statute requiring residents to give security for costs, etc., is peremptory, yet its application is discretionary with the court, and error cannot be assigned on the decision of a motion thereon.

2. A jury may properly calculate, and find a medium in their estimates of amounts, provided there is no agreement that the result shall be binding as a verdict.

293.—I. B. & W. R. R. Co. *v* Isaac H. Strain et al.—Appeal from De Witt.—Opinion by SHELDON, J., affirming.

RESPONSIBILITY OF COMPANY BEYOND THEIR LINES UNDER STIPULATION—NEGLIGENCE.

Held, That where there is a shipment of stock under a stipulation, that the responsibility of the railroad company shall cease at the end of their line, and the loss occurs beyond the end of their line, but in consequence of their negligence in providing an insufficient car for the shipment, the company are responsible for the loss, notwithstanding the stipulation.

209.—Manning A. Bruce *v.* Maria J. Doolittle et al.—Appeal from Scott.—Opinion by CRAIG, J., reversing and remanding.

STATUTE OF LIMITATIONS AS TO CITATION TO GUARDIAN—SETTLEMENTS IMPEACHABLE—JUDGMENT ENTRY IN VACATION.

Held, 1. The statute of limitations does not apply to a citation to a guardian to settle his accounts.

2. A guardian's settlement may be impeached, notwithstanding its approval by the court is a judicial act.

3. After a court has heard the evidence in a cause, it cannot properly adjourn, and enter the judgment in vacation. [The Supreme Court, however, remanded this case, with directions to the court to enter the judgment when court again convenes.]

296.—Evan Worth *v.* Margaret P. Worth. —Appeal from Logan.— Opinion by DICKEY, J., affirming.

PAROL PROMISE FOR A CONVEYANCE OF LANDS.

STATEMENT.—Bill in chancery by the widow and daughter of Otho North, who occupied land in his lifetime, and improved it, under a parol promise of his father to give him a deed for it. He died, and the father brought an action of ejectment against the widow and daughter. The bill prayed an injunction of the action at law, and a decree that the father should convey the land to the daughter, subject to the widow's dower. The decree was granted, and the Supreme Court, *Held*,

That the decree was correct.

300.—Thomas E. Clark *v.* Aaron Hatfield.—Appeal from Menard.—Opinion by SHELDON, J. affirming.

PENAL ACTIONS—NEW TRIAL.

Held, That the general rule, in penal actions, and in actions for a libel and defamation, and other actions vindictive in their nature, is, that a new trial will not be granted, merely because the verdict is against the weight of evidence, and in favor of the defendant.

OUR thanks are due B. D. MAGRUDER, of the Chicago bar, for the following opinion:

SUPREME COURT OF ILLINOIS.

OPINION FILED JUNE 30, 1876.

THE KNICKERBOCKER INS. CO., of Chicago, *v.* JOHN S. GOULD *et al.*

Error to DuPage.

INSURANCE — PROOF OF LOSS — NOTICE — EVIDENCE.

1. NOTICE—PROOF OF LOSS.—The court construes the clause in the policy providing for immediate notice and proof of loss.

2. THE WORD "IMMEDIATE."—The court gives the word "immediate" a liberal construction.

3. PROOFS OF LOSS AS EVIDENCE.—That it was proper to introduce in evidence, for the purpose of establishing the fact that such proofs of loss were made and delivered to the company, as was required by the terms of the policy.

4. PAROL PROOF.—That it was competent to establish by parol proof, the fact that plaintiffs were insured in other companies, and the evidence of the amount of such insurance, cannot be said to be proving the contents by parol.

5. DUE DILIGENCE.—The court states the proper manner of proving the loss of the property insured, and what will be considered "due diligence."

6. DEFECTIVE PROOF.—That if defective proofs of loss are handed into the company within the time required by the policy, and no objection is made to them, it will be considered as waived. But this rule does not apply when defective proofs are handed in after the time named in the policy.

7. INTEREST ON POLICY.—That the policy was a contract for the payment of money at a certain time, and, as such, it was proper for the jury to allow interest on it in making up their verdict.—[ED. LEGAL NEWS.

Opinion by CRAIG, J.

This was an action of assumpsit brought by John S. and William Gould in the Superior Court of Cook county, against the Knickerbocker Insurance Company of Chicago, on a policy of insurance of $2,500 on certain goods contained in the mill of the plaintiffs, located at the corner of Beach and Polk streets, in Chicago, which was destroyed by the Chicago fire of October, 1871.

On the motion of the defendant, the venue of the cause was changed to Du Page county, when a trial was had before a jury, resulting in a verdict and judgment in favor of the plaintiffs for $2,905.41.

It is first urged that the judgment cannot be sustained, because timely notice of the loss was not given by the insured to the company.

The policy provides that, "in case of loss the assured shall give immediate notice thereof in writing, and shall render to the company a particular account of said loss in writing under oath, stating the time, origin, etc."

The goods mentioned in the policy were burned on the 8th or 9th of October, 1871. After the fire an inventory of the goods destroyed was made out and delivered to the secretary of the company on the 13th day of November following. No objection whatever was made by the company in regard to the form of the proof, nor was any objection interposed that previous notice of the loss had not been given, but the proofs of loss were retained. Nothing was paid on the policy, nor did the company take any action in regard to the claim.

It will be observed that the language employed in the policy in regard to notice and proof of loss is peculiar. "In cases of loss the assured shall give immediate notice thereof in writing, and shall render to the company a particular account of said loss in writing."

The language used would seem to indicate that it was the intention that notice of loss and proofs of loss should be furnished the company at the same time, as the two portions of the sentence are closely connected by the word "and." It is not indicated in the first clause to whom the notice shall be given, nor is there any time specified in the last clause when the proof of loss shall be rendered.

If this construction be the correct one, then the word "immediate" must receive a liberal construction, in order to carry out the manifest intent of the parties, as it is apparent that it was impossible immediately to furnish proofs of loss.

This view seems more reasonable by referring to another provision in the policy, which is as follows: "do insure, etc., to the amount of $2,500 against all such immediate loss or damage as may occur by fire, etc., to be paid sixty days after *due notice* and proofs of the same, made by the assured and received at the office of this company."

The word "due" notice, not "immediate" notice, is used, and the loss that

may occur is to be paid sixty days after notice and proofs are received.

If it had been within the contemplation of the contracting parties not to require notice and proofs of loss to be given at the same time, it is but reasonable to presume the payment of loss would have been specified to be made sixty days after notice of loss given, or in sixty days after proofs of loss. When all the provisions of the policy are considered together, we therefore feel warranted in giving the word "immediate" a liberal construction. This, too, is in harmony with the authorities.

In the Peoria Marine and Fire Ins. Co. *v.* Lewis, 18 Ill., 553, when the question arose whether the notice of loss had been given within the time required by the conditions of the policy, it was said: "The provision in the conditions, that notice is forthwith to be given of the loss, means within a reasonable time under the circumstances—the use of due diligence."

May, in his work on insurance, states the rule in regard to notice of loss, thus: "If the notice be required to be forthwith, or as soon as possible, or immediately, it will meet the requirements if given with due diligence under the circumstances of the case, and without unnecessary and unreasonable delay, of which the jury are ordinarily to be judges.

Under the rule here announced which is substantially the same as held by this court in the case cited *supra*, the question presented is whether the notice given under the circumstances was a substantial compliance with the provision of the policies.

The fire which consumed plaintiffs' property was a general conflagration. It spread over and consumed more than one hundred acres of the principal business portion of the city of Chicago.

Business of all kinds was demoralized and to a great extent suspended. The office of the defendant together with its books and papers were destroyed.

The plaintiffs, who had been engaged in a large manufacturing business, held a large number of policies of insurance on this property. Time was absolutely necessary for them to arrange their papers, procure the necessary blanks and learn the location of the offices of the insurance companies before they could give notice of loss and furnish proofs.

Under all the circumstances of the case, we cannot say there was an unreasonable delay.

To give the word "immediate" a literal interpretation would defeat the ends of justice, and in a case of this kind require of the insured an impossibility, as the office of the company had been destroyed and the plaintiffs had no information as to the location of the officers or agents of the company, and hence it was impossible forthwith to give the notice and furnish proofs of loss.

It is also urged that the averments of the declaration were not sufficient as to the value of the property destroyed and the amount of other insurance on the same.

Whether the declaration would have been regarded sufficient on demurrer, is a question that does not arise, as no demurrer was interposed.

We perceive no variance between the proof introduced and the declaration, and we are aware of no ground upon which the court could have sustained the motion of the defendants to exclude the evidence from the jury.

Had the defendants regarded the declaration insufficient, the proper mode to reach the defect was by demurrer.

It is also claimed that the court erred in permitting the proofs of loss to be introduced as evidence of the kind, value and amount of property destroyed.

Upon an examination of the record, we do not find the proofs were introduced for the purpose indicated.

The record discloses the fact that the proofs were offered in evidence, for what purpose however the record is silent; they were objected to, but upon what grounds does not appear; the objection was overruled and the evidence was admitted to the jury.

It was proper to introduce in evidence the proofs of loss, for the purpose of establishing the fact that such proofs were made and delivered to the company as was required by the terms of the policy, and such no doubt was the object and purpose of the evidence.

The amount of loss seems to have been fully established by testimony entirely independent of the proofs of loss.

Nor do we see any force in the objection that parol proof was admitted of the amount of insurance held by the plaintiffs on the property in other companies.

It was certainly competent to establish by parol proof, the fact that plaintiffs were insured in other companies, and the evidence of the amount of such insurance cannot be said to be proving the contents of a writing by parol.

There was no issue involved which required the production of the policies held in other companies, their terms and conditions were of no importance, and it was not necessary to establish their contents.

It is next urged that the court erred in giving plaintiffs 3 and 4 instructions, which were as follows:

3. If the jury believe from the evidence, that there was such a loss of property described in the declaration herein, as is therein set out, then they are authorized in determining for themselves, from all the facts and circumstances of this case as developed by the evidence, whether or not, after said loss, the plaintiffs gave immediate notice thereof in writing to defendant.

4. If the jury believe from the evidence that there was a loss of property described in the delaration, as therein stated, and that after said loss the plaintiffs did not give immediate notice thereof in writing, yet if they, at the same time, find from the evidence that on or about November 13, 1871, the plaintiffs submitted to defendant proofs of said loss as required by the policy of insurance herein introduced, and defendant accepted the same, and retained the possession thereof from thence thereafter, and made no objection to the plaintiffs not having given immediate notice of said loss in writing, either at the time said proofs were submitted, or at any time thereafter, then the jury are authorized in finding that defendant waived such immediate notice in writing, as is above mentioned.

Whether due diligence has been used in giving the required notice may be regarded a question of fact which is ordinarily left to the jury to be determined from all the circumstances in the case bearing upon the question. May on Insurance, Sec. 462; Edwards *v.* Baltimore Insurance Company, 3 Gill, (Md.) 176. But when there is no dispute in relation to the facts and circumstances bearing upon the question of diligence in giving the notice, then the question may be regarded as one of loss for the court. May on Insurance, Sec. 462; Kimball *v.* Howard Fire Insurance Company, 8 Gray, 33. The facts in regard to the diligence, used in this case were not conceded, but were controverted before the jury, and therefore we see no error in the 3d instruction.

As to the fourth instruction we are satisfied it is erroneous.

If a notice of loss was given defective in form, and the company received it and pointed out no defect and made no objection thereto, such would no doubt be regarded as a waiver of a sufficient notice, but a failure to give notice in time rests entirely upon a different ground from a failure to give notice in due form.

The reason is obvious where a defective notice is given; if the company points out the defects, the insured can supply them by a new notice; and if the company fails to point out the objections they may very properly be regarded as waived, but a notice not served in time rests on a different principle. If the company makes objection the insured cannot remedy the defect; it is too late, and hence there is neither reason or necessity for the company to speak nor be concluded by its silence.

We do not think that an insurance company is concluded by a notice of loss not issued in time, for the reason that no objection is interposed at the time service is made, and, therefore, the instruction, as given, was not correct.

But while the instruction failed to lay down the rule correctly, it could do no injury to the defendant, as notice of loss was, under all the circumstances, given within the time required by the policy. We cannot, therefore, reverse on account of the error contained in the instruction.

The first instruction of plaintiffs is objected to because it authorized the recovery of interest, in case the verdict should be in favor of the plaintiffs.

After the amount of money named in the policy became due, we are aware of no reason why it would not draw six per cent. interest. The policy was a contract providing for the payment of money at a certain time, and, as such, it was proper for the jury, in fixing the amount of the verdict, to allow interest; this point was expressly decided in the Peoria Marine and Fire Ins. Co. *v.* Lewis, 18 Ill., 553, and we observe no reason to change the rule there announced.

The last point relied upon by the defendant, is that the court erred in refusing a new trial on the ground of newly-discovered evidence.

Upon an examination of the affidavits presented in the motion, we are satisfied the testimony newly discovered, is, in part, in the nature of impeaching evidence, and the rest is merely cumulative.

We understand the rule to be well settled, that a new trial will not be granted when the evidence is of this character.

After a careful examination of the whole record, we are satisfied it contains no substantial error.

The judgment will, therefore, be affirmed.

B. D. MAGRUDER, for defendants in error.

A. C. STORY, for plaintiffs in error.

FROM LVI. NEW HAMPSHIRE.

DIVORCE— EXTREME CRUELTY—COMPETENCY OF CHILDREN AS WITNESSES.

Day v. *Day*, p. 316.

Upon the trial of a libel for divorce on the ground of extreme cruelty, only two assaults upon the libellant by the libellee were proved, and those of not a very aggravated nature. It was in proof that the libellee used very violent language towards the libellant, cursing her, and applying indecent epithets, and conducting himself so as to terrify his wife and children, and make living with him intolerable. *Held*, that these facts furnished evidence from which the judge who heard the cause was authorized to find that the charge was supported.

Upon such trial, a boy ten years old was offered as a witness. He appeared to have no knowledge of the nature of an oath. Having been first instructed by the court upon that point, he was permitted to testify. *Held*, that he was properly admitted.

If a child under the age of nine years is found, after examination by the court, to possess a sufficient sense of the wickedness and danger of false swearing, he may be sworn, and admitted to testify.

INSURANCE—MISTAKE CURED BY THE STATUTE.

Tuck v. *Hartford Fire Ins. Co.*, p. 326.

Under General Statutes, ch. 157, sec 2, an omission by one applying for insurance to state fully and truly the state of the title to the property upon which insurance is sought will not avoid the policy, unless such omission was intentional and fraudulent.

The plaintiff's policy was on the interest of mortgagors in mortgaged premises. There was another policy on the same interest in another company, and also an insurance of the interest of mortgagees in a third company. The plaintiff's policy contained a provision that the assured should not be entitled to recover of the defendants any greater proportion of the loss than the amount insured by their policy bore to the whole sum insured on said property, without reference to the solvency or liability of other insurers. *Held*, that the jury were properly directed to apportion the loss between the defendants and the other company having insurance on the same interest, without taking into account the value of the interest of the mortgagees on the insurance on that interest.

AUTHORITY OF INSURANCE AGENT.

The London *Law Times* of July 8th says: "The United States Supreme Court has in the case of *Hoffman* v. *Hancock Mutual Life Insurance Company*, reported in a recent number of the *Chicago Legal News*, affirmed a principle of law familiar enough to the English lawyer. The Insurance Company employed a general agent named Thayer. In the exercise of his authority he appointed a sub-agent, who, whilst acting as insurance broker, was to receive for such applications as he might bring to Thayer 30 per cent. of the first premium paid for the insurance. Sometime after his appointment the sub-agent applied for an insurance for Hoffman, to whom he gave a receipt, setting forth that he had received from him a sum specified, being the first annual premium on an insurance of 8,000 dollars on the life of Hoffman. From the evidence at the trial it appeared that the sum mentioned as the first premium was made up of a sixty day note, a cancelled debt due from the sub-agent to Hoffman, a premium note, and a horse valued at about £80. The application was reported to Thayer, but nothing said of the receipt. Hoffman subsequently called upon Thayer for the policy, and then for the first time produced the receipt. The latter refused to ratify the conduct of the sub-agent.—Hoffman thereupon brought an action against the company for the property delivered by him to the sub-agent, and a verdict was entered for the defendant. Upon a re-hearing, a verdict was entered for the plaintiff. The defendant then moved for a new trial, which was granted. Meanwhile Hoffman died. His widow then filed a bill, praying that the company should be compelled to deliver the policy to her, and to pay the amount of the insurance specified. The company never received any part of the property delivered to the sub-agent. "Life insurance," said the learned judge who delivered the opinion of the court, "is a cash business. Its disbursements are all in money, and its receipts must, necessarily, be in the same medium." Then having pointed out that if the agent had authority to take the horse in part payment, he could have taken other horses, and his authority would extend to the doing of everything necessary for the keeping of the horses until they were sold, such, for instance, as the building of stables, or at any rate the hiring of labor and room, he went on to say, "The exercise of such a power by the agent was liable to two objections. It was *ultra vires*, and it was a fraud as respects the company. Hoffman must have known that neither Goodwin (the sub-agent) nor Thayer had any authority to enter into any such arrangement, and he was a party to the fraud. No valid contracts could arise from such a transaction. This objection is fatal to the appellant's case." The facts of the case were in conflict, but they were sufficiently clear to permit of the application of the plain principle that an agent has *prima facie* power to bind his employer only when he acts within the scope of his authority. It is needless to dilate upon the reason of the rule, or to dwell upon the beneficial grounds on which it rests. We have from time to time touched in these pages upon the maxims and principles of the law of agency, but of no rule and of no principle is the knowledge more important to the community in general than of the broad rule which should guide people in dealing with persons who profess to act for others. The main features of that branch of law are clear and well defined. They are easily within the comprehension of every mind capable of transacting the ordinary business of commercial intercourse, yet it is surprising how often men act to their own detriment through ignorance of its simplest principles."

PRIZE-VESSEL CAPTURED IN VIOLATION OF NEUTRALITY LAWS.

The opinion of the Supreme Court of the District of Columbia, in the case of Collins et al. *v.* The Steamer Florida, is reported 3 Washington Law Reporter 173. The rebel cruiser, Florida, while anchored in the neutral waters of Bahia, was captured by a war vessel of the United States, and brought into Hampton Roads, by a prize-crew, where she was accidentally sunk; Brazil demanded and received satisfaction from the United States for the violation of her neutrality; and this circumstance in connection with the illegality of the seizure, was held to conclude the rights of the captors, and that she could not be condemned as a prize.

(*Continued from Page* 372.)

Wiltberger held a mortgage upon land to secure the payment of money, and filed a bill to foreclose, and obtained a decree of strict foreclosure to the effect that if the defendants did not, within thirty days, pay the amount due, they should be forever foreclosed of all right and equity of redemption. The thirty days expired and the money was not paid, but no other, or further, final, or confirmatory, or absolute order of foreclosure was entered. Wiltberger, or persons claiming under him, then sold and conveyed the lots in question in this suit, being a portion of the mortgaged property, to the complainants in this suit; they paid the full value of the lands, and supposed they were getting a good title. After such sale and conveyance, some of the defendants to the foreclosure suit took the record by writ of error to the Supreme Court, and the decree of the court below was reversed and the cause remanded, and the bill for foreclosure was finally dismissed by Wiltberger, the complainant therein. Now upon this state of facts, what are the rights of the complainants? Must they stand in Wiltberger's shoes? or, on the other hand, are they entitled to protection as persons purchasing under or relying upon the final decree of a court having jurisdiction of the parties and of the subject matter?

It was urged by counsel on the hear ing, that the decree was erroneous upon its face, and was liable to be reversed, and was in fact reversed as soon as the Supreme Court could get hold of it, and that purchasers claiming under it were bound to take notice of its infirmities. I think not. They had a right to rely upon the judgment of the court, and were not required to run any risk on account of errors in that judgment. If a court, having jurisdiction, says a title is good, purchasers have a right to say so too, and to hold the property, no matter how many errors there may be. Such judgment is conclusive between the parties until reversed or set aside. And if, while it is in full force and before any steps are taken to set it aside, third persons purchase and pay their money, relying upon the validity of the judgment, they are to be protected. This doctrine is recognized in Waddams *v.* Gay, recently decided by the Supreme Court.

The important and difficult question in the case is this:—Was this foreclosure decree, within the meaning of the law, such a final decree or adjudication as operated, upon the expiration of the thirty days and the default in payment, without further order by the court, to absolutely bar the right to redeem, and to clothe Wiltberger with a perfect title both at law and in equity? It was final enough to enable the parties to go to the Supreme Court, and to get a decision there upon the merits. If it was final enough for that purpose, was it not final enough to enable a purchaser to rely upon it?

Were there no controlling decisions in point, and were I left to decide this question upon general principles, I should, in view of the rule generally applied to determine whether or not a decree is final, say that this decree is final, inasmuch as it seems to give all the relief prayed for, and does not necessarily call for any further action of the court. But there are rules applicable to this class of cases, which must control—rules long since established by the decisions and practice of the courts, and now generally recognized as binding. The whole law relating to mortgages is peculiar, and is to be found in the decisions of the courts, rather than in the contract of the parties or in the language of decrees, viewed only in the light of general rules of law and practice. In order to ascertain whether or not the mortgagor has lost all right to the mortgaged property, it will not do to merely see how the mortgage reads, or how the decree reads, but we must also see what, if anything, the courts have decided as to the effect of such language.

A mortgage, *vadium mortuum*, is upon its face a very plain and simple document. It is an absolute conveyance of property, subject to the condition of being defeated by the payment of the money on the day agreed upon. If the money is not paid, the land is lost to the mortgagor, and becomes *dead* to him forever. But the courts have interposed for the relief of the suffering, and for the protection of the weak, and have so changed the legal effect of the instrument that it is no longer what it purports upon its face to be, nor what it was originally intended to be by those who first used it.

This decree of strict foreclosure is very much like the mortgage. It reads plain enough and seems strong enough to cut off all right and equity of redemption in case of non-payment.

But what is the language of the books? In Daniel's Chancery Practice, Vol. 2, p. 1248 (* p. 1204) it is said, "There are many cases of decrees, which, although they are final in their nature, require the confirmation of a further order of the court, before they can be acted upon. * * * The most ordinary case in which a further order is necessary to complete the decree, is that of a decree of foreclosure. * * If the defendant does not pay the money the plaintiff's right to the estate will become absolute. He must, however, in order to complete his title, procure a final order for confirming it, otherwise the decree of foreclosure will not be pleadable. The same practice is also to be observed in the case of decrees for the redemption of a mortgage," etc. See to the same effect, Seton on Decrees, p. 140 & 144. In Thompson *v.* Grant, 4 Maddock's R., 232, it is held that, until the final confirmatory order of foreclosure, the mortgagee has no title that will pass under a clause in his will devising lands.

Bolles *v.* Duff, 43 N. Y., 469, is a recent case, and directly in point. There had been a former suit on a bill to redeem, and a decree had been entered allowing redemption, finding the sum due, and fixing the time within which the money should be paid, and decreeing that in case of failure to pay within the time prescribed, "the plaintiff's complaint be and do from thenceforth, stand dismissed out of this court." The money was not paid, but no further order was obtained. In Bolles *v.* Duff, that decree was relied upon as a final decree of foreclosure, but the court held it insufficient, and Johnson, J., in his opinion says: "The authorities in England are quite uniform, that this final order is necessary in a strict foreclosure, and that until that final order is obtained, the mortgage is not foreclosed, and no title passes to the mortgagee." * * "Without extending this rule beyond the cases to which it is now applied, I think it sound in its application here, to a strict fore closure implied from a dismissal of a bill to redeem. Until that order be obtained the records of the court do not show which party has finally obtained the judgment or who is the owner of the land. Until that order is obtained the complainant may apply to have the time to pay the amount decreed to be due, extended."

Such seems to be the law, and I find no decisions to the contrary.

Decrees of strict foreclosure are not viewed with favor, and are not often allowed. If parties choose to rely upon them, they must see to it that their proceedings are regular. The decisions of the courts show no tendency to dispense with any of the precautions heretofore required in such proceedings.

A decree may be prepared in favor of the defendants.

JOHN BORDEN, for complainants.

C. C. BONNEY, for Gibbons, Tompkins et al.

AYER & KALES, for South Park Commissioners.

KNOWLTON & WEBBER, for Reid, et al.

BROGDEN v. MILLER.

Few defences can be imagined of a more unsatisfactory character than that of an objection to the sufficiency of a stamp on a policy of insurance. Insurance companies generally pride themselves on their honor in meeting their liabilities, irrespective of technical objections that might be raised in their favor; and consequently we do not often meet with any attempt on their part to set up purely technical defences in court, unless there is some substantial defence on the merits as well. An objection to the stamp on a policy is simply discreditable, and it is usually viewed in this light in the courts as well as in the mercantile world. The English Judges "are wont to show no great favor to stamp objections," (Pitt Tylor, p. 402); and a recent report furnishes a memorable instance of the style in which they receive them when urged on behalf of an insurance company. In Brogden *v.* Miller, it will be recollected that the defendant, who represented the Victoria Insurance Company, successfully resisted an action on a contract for insurance of a steamship, on the ground that the contract was expressed in a slip, and that the slip not being stamped, the contract was void. There can be no doubt that the decision of the Court of Appeal on this point was wrong; but it is not the least striking feature of the case that the Judges rigidly abstained from expressing any opinion as to the character of the defence. Neither in the judgment delivered nor in the course of the argument, did they express any sense of disgust with the objection raised; although it is impossible to read the report of the case without expecting to meet at every line of it a sharp expression of their opinion on the point. How the English Judges meet the objection is shown in a very similar case which came before the Queen's Bench Division of the High Court of Justice, in January last—Sassoon *v.* Harris, (*Law Times*, 22 Jan. 1876, p. 216). The action was brought on a marine policy of insurance, and one of the grounds of defence was that the policy was insufficiently stamped, and therefore void. A verdict having been given for the plaintiff, a rule was afterwards obtained to enter a nonsuit or a verdict for defendant. At the argument, counsel for the defendant expressed their regret at being obliged by their instructions to insist upon this ground of defence. The Judges referred to it in the course of their judgment as follows:

COCKBURN, C. J.—"As to the stamp question, I grieve to say that our judgment must be for the defendants. I regret that a body of underwriters should have so lowered the standard of insurance morality as to insist upon the objection, but as it has been taken we have no alternative but to give effect to it."

BLACKBURN, J.—"When the history of this case is published, it will frighten foreign houses from English business, and the statute will thus turn out to have been impolitic as well as harsh. And there appears to have been no desire to cheat in this case; there was merely a mistake resulting in a loss to the revenue of some four or five shillings; however, the law would be the same if the loss were threepence only. The legislature has enacted that the whole benefit of the insurance shall be lost in such a case. The penalty is utterly disproportionate, and the principle impolitic as well as immoral, for it holds out inducements to mean men to take mean advantages, and makes those who pass such a law guilty of the immorality of it. For myself, when at the Bar, I have often been told by clients that they had it in their power to take objections of this kind, but declined to do so on the ground of prudence, from fear of losing their business. In Wolff *v.* Hardcastle, 1 B. & P., 3, 8, it appears that no objection was taken for want of compliance with statutory formalities." And I find Buller, J., expressing himself as follows: 'Time was when no underwriter would have dreamed of making such an objection; if the solicitor had suggested a loophole by which he might escape, he would have spurned at the idea. He would have said, is it not a fair policy? Have I not received the premium? And shall I not now, when the loss has happened, pay the money? This would have been his answer, and he would immediately have ordered his broker to settle for the loss.' I quite agree with Buller, J., and I give judgment for the defendant with the greatest reluctance. I almost feel myself partner in the moral guilt of the statute. I have tried hard to find some way out of it, but the law is clear and the facts are clearly within it."

This is refreshing. It is equally so to read that, "the defendant, immediately after the delivery of the judgment of the court in his favor, wrote to the *Times* announcing that it was never his intention to take advantage of the stamp objection, and further that he had himself, since the judgment, written to the plaintiff requesting him to present the policy again for his settlement of the claim." We may suggest that the attention of the Minister of Justice might well be directed to the reports of these two cases, with a view to the amendment of those provisions of the Stamp Act which relate to policies for sea insurance. It is quite possible to protect the revenue without opening a door to rascality, and making the legislature a party to the dishonesty of unscrupulous corporations.—*The New Zealand Jurist.*

AMERICAN FUNEREAL ORATORY.—The *London Law Times* has had frequent articles commenting severely upon speeches made by members of the American Bar upon funereal occasions, and not always without some reason. The speeches made at such meetings of the Bar should always be in accordance with the truth. The *Law Times* of July 20th says:

We have more than once given our readers some examples of funereal oratory in America on the occasion of the deaths of lawyers of reputation. Judge Lynd, of the Pennsylvanian Court of Common Pleas, died recently, whereupon the Bar had a meeting. Judge Lynd, judging from the speeches, has never had an equal in virtue, integrity, industry, and ability. "No man," we are told, "is necessary to the public;" but, nevertheless, the loss of Judge Lynd is "irreparable." There would appear to be some mysterious process in Philadelphia for detecting corrupt judges, for one speaker says that Judge Lynd passed through life without reproach. "There was no smell of fire upon his garments." Judge Ludlow was particularly brilliant, thus describing the decease of the late Judge: "The pale horse and his rider ranged through the world at all times, but as the hours of this fatal day rolled into the flood of time with savage fury, on every moment of each he wrote 'Death's Own!'" Judge Briggs was less happy, and positively found a flaw in his deceased brother. "As a speaker," he says, "he was not so successful. He gave conclusions, but without his reasons, thus leaving his hearers to work up to them as best they might." This is rather severe. The Hon. Charles Gibbons also forgot the solemnity of the occasion, for he made a fierce attack on "that beggarly system of economy that is practised in this country, that refuses to public servants a decent compensation for public services." The climax of misery, however, was reached by Judge Ludlow, who sent his hearers away with this pleasant interrogatory, "friends and brothers, who will fall next?"

REMOVAL OF CAUSES—COSTS.

The United States District Court for the Eastern District of Michigan, in Scripps *v.* Campbell et al., 1, American Lawyer, 10, held in suits commenced in the State Courts and removed into the Federal Court, the right to costs is not determined by R. S., sec. 968, but by the statute of the State; that where the plaintiff, in an action on the case commenced in the State Court and removed into the Federal Court, recovered less than one hundred dollars, the defendant is entitled to costs under compiled Laws, sec. 7390, as a matter of right.

IMPORTED ARTICLE—PAYMENT OF DUTY—SUBROGATION.

In re Kirkland, et al. 14 N. B. R. 139, the United States Circuit Court of Maryland held that if a party purchase an imported article, duty free, and is subsequently compelled to pay the duty in order to get possession of the article, he is entitled to be subrogated to the priority of the United States.

The head note to *Blackman v. Bainton* 15 C. B. N. S. 432, is quaint: "Twenty-five witnesses and a horse on one side against ten witnesses on the other. *Held*, not such a preponderance of 'inconvenience' as to induce the Court to bring back the venue from the place where the cause of action (if any) arose."

BANKRUPTCY—PROOF OF DEBT—NOTARY PUBLIC.—Among our new bankruptcy blanks we have a blank for proof of debt, prepared expressly for notaries public.

CHICAGO LEGAL NEWS.

CHICAGO, AUGUST 19, 1876.

The Courts.

SUPREME COURT OF THE UNITED STATES.

Nos. 199 and 200.—OCTOBER TERM, 1875.

No. 199.—BRANCH, SONS & COMPANY, and the SOUTH CAROLINA RAILROAD COMPANY, Appellants,
v.
THE CITY COUNCIL OF CHARLESTON et al.

No. 200.—THE CITY COUNCIL OF CHARLESTON et al., Appellants,
v.
BRANCH, SONS & COMPANY.

Appeals from the Circuit Court of the United States for the District of South Carolina.

CONSOLIDATION OF RAILROAD COMPANIES —ITS EFFECT UPON TAXATION OF THE PROPERTY OF SUCH ROADS.

Mr. Justice BRADLEY delivered the opinion of the court.

These cases require but very little discussion, as they have already been before the court and substantially settled in Tomlinson *v.* Branch, and The City of Charleston *v.* Branch, reported in 15th of Wallace, pp. 460, 470. The result to which we came in those cases was substantially this: that the respective roads and the property of the two companies, which had become consolidated in the hands of the South Carolina Railroad Company, namely, that of the Canal and Railroad Company, and that of the Louisville and Charleston Railroad Company, respectively retained their original status toward the public and the State, the same as if they had not been consolidated under a single proprietorship. As one of these roads has become taxable and the other has not, the rights of the State and the public growing out of this accidental diversity may sometimes raise questions of some embarrassment. This occasions this occasions the only difficulty to be solved in these cases. From Branchvills to Charleston there is but one road, and that is a part of the original road of the Canal and Railroad Company, used in common for both branches of the property. The Louisville and Charleston Railroad Company had a chartered right to extend their road to Charleston; but were met by the exclusive privileges of the elder company, and hence the purchase of its property, and the ultimate consolidation. Now the fact that the elder company had this exclusive privilege shows that even if the consolidation had not taken place, the old road would have continued to do the work of both companies between Branchville and Charleston, and this part of the line would have been now subject to taxation. It does not follow, therefore, that this part of the road, though used for the accommodation of both branches, should be regarded as divisible into proportional parts, one subject to taxation, and the other not. It is to be regarded as simply the road the property of the old company, in the hands of the new company it is true, but subject to all the liabilities of its original charter. Hence we held that the entire line of road between Branchville and Charleston is subject to taxation; and that *prima facie* the railroad terminus and depot in Charleston and the property accessory thereto, belong to the elder portion of the joint property. But inasmuch as the charter right of the present company extended to Charleston, we further held that if it could be fairly shown that any of the company's property there was acquired by the present company for the accommodation of the business belonging to its original roads or for the joint accommodation of the entire system of roads under its control, such property would *pro tanto*, and in fair proportion, be exempt from taxation. This was intended to meet the case of such property as the present company might have acquired in Charleston either separately or in conjunction with the old company, had no consolidation taken place, and had the line between Branchville and Charleston used by both, remained the property of the old company. Of course, in carrying out this principle, any repairs or improvements made on the old line or the property of the old company would become a part thereof, and be subject to taxation. But newly-acquired property might not be. This is the general principle. The method of carrying it out in detail admits of some latitude for the exercise of deliberation and judgment. We have examined the report of the special master to whom the matter was referred, and the review of that report by the court below, and we think that a result was reached corresponding in the main to the principle which we have endeavored to establish. There is but one item which we regard as calling for any interference with the decree appealed from. That is the item of twenty-five thousand dollars for replacing the tracks and side tracks within the city limits, which we think fairly belongs to the old road, and should have been taxed in toto, and not *pro tanto*.

With this modification the decree of the Circuit court is affirmed.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1875.

STOTT et al. *v.* RUTHERFORD.

PRESUMPTION—LEASE.

In Error to the Supreme Court of the District of Columbia.

Where the recital in a lease as to the character in which the lessors acted, is not inconsistent with their holding the legal title in trust, if such be necessary to its validity the presumption will be in favor of the validity of the instrument. The rule of law that a lessee is estopped from disputing the title of his lessor, followed.

Mr. Justice SWAYNE delivered the opinion of the court.

This is an action of covenant brought upon an indenture of lease, executed by the plaintiffs in error and one P. D. Gurley, since deceased, to the defendant in error. The declaration sets out sundry breaches of stipulations contained in the lease. The defendant pleaded *non est factum* and satisfaction of the claim of the plaintiffs by payment. Upon the trial several bills of exception were taken by the defendant. They show that he made numerous points, all of which were overruled by the court. But one of them requires any consideration. He objected to the admission of the lease in evidence, upon the ground that it showed upon its face that the lessors had no title to the premises, and that the instrument, was, therefore, a nullity. The court admitted the evidence, and an exception was regularly taken.

A verdict was rendered for the plaintiffs. The defendant moved for a new trial, and the case was heard by the full court in general term. The court ordered a judgment to be entered for the defendant *veredicto non obstante*. The plaintiffs have brought the case before this court for review The judgment of the court below proceeded solely upon the ground of the invalidity of the lease, and that subject is the only one argued here.

The lease created a term beginning on the 1st day of February, 1864, and to continue five years. It recites that the lessors, in making the lease "were acting as a church extension committee, by authority and on behalf of the general assembly of the Presbyterian Church, old school." The leasehold premises are described as "being lot number four and part of lot number five," etc., "as now held by the parties of the first part," etc. The lessee covenants, among other things, "that he will well and truly surrender and deliver up the possession of said premises to the said parties of the first part, their successors and assigns, in accordance with the stipulations herein contained, whenever this lease shall terminate." It was provided that the lessors might terminate the lease for nonpayment of rent, or otherwise, at their option, by giving the requisite notice. The language of the grant was, "have granted, demised, and to farm let." The words "grant" and "demise" in a lease for years create an implied warranty of title and a covenant for quiet enjoyment. Burney *v.* Keith, 4 Wend., 502; Grannis *v.* Clark, 8 Cow., 36; Young *v.* Hargrave's Adm., 7 Ohio Rep, part 2, 68.

The declaration avers "that by virtue of which said indenture the said defendant immediately thereupon entered into the occupancy and enjoyment of said premises and appurtenances, and was possessed thereof until about the first day of October, 1869, when he vacated such possession and occupancy, and the term of said lease was determined." This is not denied by the defendant's pleas, and is, therefore, according to the settled rule of the law of pleading, to be taken as admitted. The lessors executed the lease in their own names, and not as agents. They demised the premises in the same way. The rent was stipulated to be paid to them in their own right. The covenants of the lessee were all to them personally. If there had been a breach of the covenants of title and for quiet enjoyment, they would have been personally liable for the damages. The lessee entered into possession and remained in possession, enjoying that possession as long as he chose to do so. He had on his part the full benefit of the contract. When called upon to pay and perform, as he had covenanted to do, he answered that the lessors had no title, and that he was in no wise responsible to them.

In Laws *v.* Purser, 6 Ellis & Bl., 932, the plaintiff, a patentee, had licensed the defendant to manufacture the article covered by the patent. After having done so, he refused to pay the royalty. The patentee sued him. He pleaded "that the letters-patent were void, and that he had a right to make and sell the article without the plaintiff's permission." The plaintiff demurred. The court said: "It would be monstrous if the defendant, after such an agreement acted upon, could on this ground refuse payment." The demurrer was sustained.

There are two answers to the defense relied upon in this case.

The recital in the lease as to the character in which the lessors acted, and all that is said upon the subject in the bill of exceptions, are not inconsistent with their holding the legal title in trust, to enable them the better to discharge the duties touching the property with which they were clothed. Every reasonable presumption is to be made in favor of the validity of the instrument which they executed. The act done pre-supposes the prior act necessary to give it validity. It is not stated in the bill of exceptions that the lessors had no paper title, but, "that they possess no estate whatever in said lands, except such as pertained to the office of such committee, and have no estate therein in their individual capacity." The legal title in trust would be just such an estate as is here exceptionally and negatively indicated. We are all of the opinion that it is a fair inference from this language that the lessors had such an estate, or some other title in trust, sufficient to warrant their giving the lease and to render it valid.

We think the principle that the lessee cannot dispute the title of his lessor also applies. We see nothing to take the case out of this long-settled and salutary rule. Williams *v.* Mayor, etc., 6 H. & J., 529; Stewart *v.* Roderick, 4 Watts & S., 189; Coburn *v.* Palmer, 8 Cushing, 627. The rule applies with peculiar force where the lessor was in possession and transferred that possession upon his faith in the validity of the lease to the lessee. Taylor's Landlord and Tenant, sec. 707.

Whether the testimony set forth in the bill of exceptions, as to the title of the plaintiffs in error, was competent, is a question not raised before us, and upon which we therefore express no opinion.

According to the views upon which the judgment below was given, the lessee could not only refuse performance of all his covenants, but, at the end of the term, he could have held possession in defiance of his lessors, and he could have contined to hold possession until they showed a valid title in a suit brought to enforce it, or until such a title in such a suit was shown by some other party. This, we think, would be contrary alike to reason, justice and the law.

The judgment of the Supreme Court of the District of Columbia is reversed, and the case will be remanded to that court, with directions to enter a judgment upon the verdict in favor of the plaintiffs in error.

NEW YORK COURT OF APPEALS.

[JUNE 6, 1876.]

BLAIR *v.* ERIE RAILROAD COMPANY.

LIABILITY OF RAILROAD COMPANY FOR THE INJURY OF MESSENGERS.

Appeal from the Fourth Department.

This is an appeal from a judgment affirmed by the General Term of the Fourth Department, upon a verdict in plaintiff's favor, the exception of defendant having been ordered to be heard in the first instance at the General Term. The cause was tried at the Steuben County Circuit, the Hon. James C. Smith, Justice, presiding. The plaintiff proved that the intestate resided at Hornellsville; that he was employed by the United States Express Company to deliver freight about town; that he had formerly been an express messenger of said company; that on the second day of April, 1874, at the request of one Bowles, who was then express messenger of said company, the intestate took his place as such express messenger of said company, and started upon a train of defendant's from Hornellsville, as such express messenger; that he paid no fare; that he was riding on the front end of the baggage car; that his business as such express messenger was to distribute packages; that while so riding, and in charge of the property of said United States Express Company, in said car, the said train was run into by a construction train operated by the defendant's servants, by reason of the negligence of the defendant's servants operating said construction train, and the intestate was killed in consequence of said collision. The defendant read in evidence two contracts set out in full in its answer, and proved that they were in force as alleged in the answer at the time of said collision. The answer sets out two contracts, —one dated August 2, 1858, between the New York and Erie R.R. Co. and the United States Express Co., and the other dated March 14, 1871, between the Erie Railway Co. and the said express company. It was conceded that prior to the execution of the contract of March 15, 1871, the defendant has succeeded as lessee to all the rights, business and franchises of the New York and Erie Railroad Company. The contract of March 15, 1871, is a modification of that of August 2, 1858, and assumes the condition of the prior contract, except as modified, so that both may be considered as one contract made by the defendant. By one of the provisions of the contract of March 15, 1871, it is agreed that the Erie Railway Company "shall assume the usual risks taken by railroads on the express matters of the parties of the second part, except that the railway company shall not assume any risk or loss on any money, bank notes, bonds, gold bullion or jewelry packages, and for which, with the express company's safes and messengers, no charge for carriage is to be made by said railway company." And further, "that the officers and messengers of the express company shall pass free of charge on the said railway and branches." By the contract of August 2, 1858, it is also provided as follows: "The party of the first part" (the railroad company) "further agrees to transport, free of charge, to and from Jersey City, Dunkirk and Buffalo, and such other points on the line of their road as the second party" (the express company) "may deem expedient in order to accommodate their business, their money, safes, contents, and messengers; the party of the first part assuming no liability whatever." It was conceded upon the trial that the intestate, at the time of the collision, was a messenger of the United States Express Company within the meanings of said contracts. The defendant's counsel asked the court to direct a verdict for the defendant upon the ground that, by reason of said contracts, the defendant was not liable in this action, but the court decided that said contracts afforded no defense to the action, and that the only question in the case was a question of damages, and refused to direct the jury to find a verdict for the defendant, to which decisions and refusal, and each of them, the defendant's counsel duly excepted. The court then charged the jury that the only question for them to decide was the amount of damages to which the plaintiff was entitled. And the defendant's counsel excepted to such charge upon the ground that, by reason of said contracts, the plaintiff was not entitled to recover. The jury found a verdict of $4,000 in favor of plaintiff. The Court of Appeal has affirmed the judgment, with costs.—*N. Y. Daily Register.*

SUPREME COURT OF THE UNITED STATES.

No. 513.—OCTOBER TERM, 1875.

THE UNITED STATES, Plaintiffs, *v.* JOHN W. NORTON.

On a certificate of divison in opinion between the Judges of the Circuit Court of the United States for the Southern District of New York.

EMBEZZLEMENT—P. O. MONEY ORDERS—REVENUE LAWS—INDICTMENT—WITHIN WHAT TIME MAY BE BROUGHT.

1. That the indictment was found under the eleventh section of the "Act to establish a Postal Money-Order System," passed May 17, 1864, which act is not a revenue law within the meaning of the third section of the act of 1804, and, therefore, the defendant cannot be tried or punished, unless the indictment shall have been found within two years from the time of the committing of the offense, and that the indictment is not for crimes arising under the revenue laws, etc.—[ED. LEGAL NEWS.

Mr. Justice SWAYNE delivered the opinion of the Court.

It appears by the record that Norton was indicted for the embezzlement at different times of money belonging to the money-order office in the city of New York, he being a clerk in that office when the crimes were committed.

The indictment was found on the 21st of February, 1874. He pleaded "that the several offenses did not arise, exist, or accrue, within two years next before the finding of said indictment." To this plea the United States demurred. Upon the point thus presented as to the sufficiency of the plea, the judges were divided in opinion.

The indictment was founded upon the eleventh section of the "Act to establish a postal money-order system," passed May 17, 1864.—13 Stat., 76.

The "Act for the punishment of certain crimes against the United States," of the 30th of April, 1790. (Sec. 33, 1 Stat., 119,) declares: "Nor shall any person be prosecuted, tried, or punished, for any offense not capital, nor for any fine or forfeiture under any penal statute, unless the indictment or information for the same shall be found or instituted within two years from the time of committing the offense or incurring the fine or forfeiture aforesaid."

The act of the 26th of March, 1804, "in addition to the act entitled 'An act for the punishment of certain crimes against the United States,' enacts (Sec. 3, 2 Stat., 291) "that any person guilty of crimes arising under the revenue laws of the United States, or incurring any fine or forfeiture by breaches of said laws, may be prosecuted, tried, and punished, provided the indictment or information be found at any time within five years after committing the offense or incurring the fine or forfeiture, any law or provision to the contrary notwithstanding."

The substantial question presented for our determination is, which of these two provisions applies as a bar to a prosecution for the offenses described in the indictment. The solution of this question depends upon the solution of the further question, whether the "act to establish a postal money-order system" is a revenue law within the meaning of the 3rd section of the act of 1804.

The offenses charged were *crimes arising* under the money-order act. The title of the act does not indicate that Congress in enacting it had any purpose of revenue in view. Its object, as expressly declared at the outset of the first section, was "to promote public convenience, and to insure greater security in the transmission of money through the United States mails." All moneys received from the sale of money-orders, all fees received for selling them, and all moneys transferred in administering the act, are "to be deemed and taken to be money in the treasury of the United States. The Postmaster-General is authorized to allow the deputy postmasters at the money-order offices, as a compensation for their services, not exceeding "one-third of the whole amount of fees received on money-orders issued," and at his option, in addition, "one-eighth of one per cent. upon the gross amount of orders paid at the office." He was also authorized to cause additional clerks to be employed, and paid out of the proceeds of the business, and to meet any deficiency in the amount of such proceeds during the first year, one hundred thousand dollars, or so much of that sum as might be needed, was appropriated.

There is nothing in the context of the act to warrant the belief, that Congress in passing it was animated by any other motive than that avowed in the first section. A willingness is shown to sink money, if necessary, to accomplish that object.

In no just view, we think, can the statute in question be deemed a revenue law.

The lexical definition of the term *revenue* is very comprehensive. It is thus given by Webster: "The income of a nation derived from its taxes, duties, or other sources, for the payment of the national expenses."

The phrase, *other sources*, would include the proceeds of the public lands, those arising from the sale of public securities, the receipts of the Patent Office in excess of its expenditures, and those of the Post Office Department, when there should be such excess as there was for a time in the early history of the government. Indeed, the phrase would apply in all cases of such excess. In some of them the result might fluctuate, there being excess at one time and deficiency at another.

It is a matter of common knowledge that the appellative *revenue laws* is never applied to the statutes involved in these classes of cases.

The Constitution of the United States, article 1, sec. 7, provides, that "all bills for raising revenue shall originate in the House of Representatives."

This construction of this limitation is practically well settled by the uniform action of Congress. According to that construction, it "has been confined to bills to levy taxes, in the strict sense of the words, and has not been understood to extend to bills for other purposes which incidentally create revenue."—Story on the Const., § 880. "Bills for raising revenue," when enacted into laws, become *revenue laws*. Congress was a constitutional body sitting under the Constitution. It was, of course, familiar with the phrase "bills for raising revenue," as used in that instrument, and the construction which had been given to it.

The precise question before us came under the consideration of Mr. Justice Story, in the United States *v.* Mayo, 1 Gall., 396. He held that the phrase *revenue laws*, as used in the act of 1804, meant such laws "as are made for the direct and avowed purpose of creating revenue or public funds for the service of the government." The same doctrine was reaffirmed by that eminent judge, in the United States *v.* Cushman, 426.

These views commend themselves to the approbation of our judgment.

The cases of the United States *v.* Bromley, 12 How., 88, and the United States *v.* Fowler, 4 Blatchford, 311, are relied upon by the counsel for the United States. Both those views are clearly distinguishable, with respect to the grounds upon which the judgment of the court proceeded, from the case before us. It is unnecessary to remark further in regard to them.

It will be certified, as the answer of this court to the circuit court—that the indictment against Norton charges offenses for which, under the limitation provided in the thirty-second section of the act of Congress, approved April 30, 1790, entitled "An act for the punishment of certain crimes against the United States," the defendant cannot be prosecuted, tried, or punished, unless the indictment shall have been found within two years from the time of the committing of the offenses; and that the indictment is not for crimes arising under the revenue laws, within the intent and meaning of the third section of the act approved March 26, 1804, entitled, "An act in addition to the act entitled an act for the punishment of certain crimes against the United States."

UNITED STATES SUPREME COURT.

No. 6.—OCTOBER TERM, 1875.

JOSEPH A. WALKER, Plaintiff in Error, *v.* CHARLES S. SAUVINET.

In Error to the Supreme Court of the State of Louisiana.

REFUSING TO FURNISH REFRESHMENTS TO A MAN OF COLOR—TRIAL BY JURY.

1. This was an action brought by the defendant in error, against the plaintiff in error, a licensed keeper of a coffee-house in New Orleans, for refusing him refreshments when called for, on the ground that he was a man of color.

2. TRIAL BY JURY.—That the trial by jury in suits at common law, pending in the State courts, is not a privilege or immunity of national citizenship, which the States are forbidden, by the Fourteenth Amendment, to abridge.—[ED LEGAL NEWS.

Mr. Chief Justice WAITE delivered the opinion of the court.

This is an action brought by Sauvinet against Walker, a licensed keeper of a coffee-house in New Orleans, for refusing him refreshments when called for, on the ground that he was a man of color.

Art. 13, of the constitution of Louisiana, provides that "All persons shall enjoy equal rights and privileges upon any conveyance of a public character; and all places of business or of public resort, or for which a license is required by either State, parish or municipal authority, shall be deemed places of a public character, and shall be open to the accommodation and patronage of all persons, without distinction or discrimination on account of race or color." On the 23rd February, 1869, an act was passed by the general assembly of the State, entitled "An act to enforce the thirteenth article of the constitution of this State, and to regulate the licenses mentioned in said thirteenth article." Sec. 3 of this act is as follows:

"SEC. 3. That all licenses hereafter granted by this State, and by all parishes and municipalities therein, to persons engaged in business, or keeping places of public resort, shall contain the express condition that the place of business or public resort shall be open to the accommodation and patronage of all persons, without distinction or discrimination on account of race or color, and any person who shall violate the condition of such license shall, on conviction thereof, be punished by forfeiture of his license, and his place of business or public resort shall be closed, and, moreover, shall be liable at the suit of the person aggrieved to such damages as he shall sustain thereby, before any court of competent jurisdiction."

On the 27th February, 1871, another act was passed entitled "An act to regulate the mode of trying cases arising under the provisions of article thirteen (13) of the constitution of Louisiana, or under any acts of the legislature to enforce the said article thirteen of the said constitution, and to regulate the licenses therein mentioned."

Secs. 1 and 2 of this act are as follows: "SECTION I. *Be it enacted by the senate and house of representatives of the State of Louisiana in general assembly convened*, That all cases brought for the purpose of vindicating, asserting, or maintaining the rights, privileges, and immunities guaranteed to all persons under the provisions of the article thirteen of the constitution of Louisiana, or under the provisions of any acts of the legislature to enforce the said article thirteen, and to regulate the licenses therein mentioned, or for the purpose of recovering damages for the violation of said rights, privileges, immunities, shall be tried by the court, or by a jury if any party of the suit prays for a trial by jury.

"SECTION II. *Be it further enacted, &c.*, That if the jury do not agree or fail to render a verdict, either for the plaintiff or defendant, the jury shall be discharged, and the case shall be immediately submitted to the judge upon the pleadings and evidence already on file, as if the case had been originally tried without the intervention of a jury; and it shall be the duty of the judge to decide the case at once, without any further proceedings, arguments, continuance, or delay; each party having the right to appeal to the Supreme Court in all cases where an appeal is allowed by law."

Walker, in his answer, denied all the allegations in the petition, and prayed for a trial by jury. The cause was thereupon tried to a jury, who failed to agree. This having been entered upon the minutes, Sauvinet, by his counsel, moved that the court proceed to decide the case under the provisions of Sec. 2 of the act of 1871. To this Walker objected, alleging for cause that the act was unconstitutional, but without specifying in what particular. Time was given counsel to file briefs upon the constitutional question, and, at a later day, after consideration, a judgment was rendered against Walker for one thousand dollars. That judgment was affirmed upon appeal to the Supreme Court of the State, and this court is now called upon to re-examine the judgment of affirmance.

So far as we can discover from the record, the only federal question decided by either one of the courts below, was that which related to the right of Walker to demand a trial by jury, notwithstanding the provisions of the act of 1871 to the contrary. He insisted that he had a constitutional right to such a trial, and that the statute was void to the extent that it deprived him of this right.

All questions arising under the constitution of the State alone are finally settled by the judgment below. We can consider only such as grow out of the Constitution of the United States. By article VII. of the amendments, it is provided that "in suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved." This, as has been many times decided, relates only to trials in the courts of the United States.—Edwards *v.* Elliott, 21 Wall., 557. The States, so far as this amendment is concerned, are left to regulate trials in their own courts in their own way. A trial by jury in suits at common law pending in the State courts is not, therefore, a privilege or immunity of national citizenship, which the States are forbidden by the fourteenth amendment to abridge. A State cannot deprive a person of his property without due process of law, but this does not necessarily imply that all trials in the State courts affecting the property of persons must be by jury. This requirement of the Constitution is met if the trial is had according to the settled course of judicial proceedings. Murray's Lessee *v.* Hoboken L. & I. Co., 18 How., 280. Due process of law is process due according to the law of the land. This process in the States is regulated by the law of the State. Our power over that law is only to determine whether it is in conflict with the supreme law of the land, that is to say, with the Constitution and laws of the United States made in pursuance thereof, or with any treaty made under the authority of the United States. Art VI., Const. Here the State court has decided that the proceeding below was in accordance with the law of the State, and we do not find that to be contrary to the Constitution, or any law or treaty of the United States.

The other questions presented by the assignment of errors, and argued here, cannot be considered, as the record does not show that they were brought to the attention of either of the courts below.

The judgment is affirmed.

Mr. Justice CLIFFORD dissenting.

I dissent from the opinion and judgment of the court in this case, and I am requested to say that Mr. Justice FIELD also dissents both from the opinion and judgment.

SUPREME COURT OF THE UNITED STATES.

No. 222.—OCTOBER TERM, 1875.

THE FRANKLIN FIRE INSURANCE COMPANY OF PHILADELPHIA, Plaintiff in Error,

v.

JAMES L. VAUGHAN.

In Error to the Circuit Court of the United States for the Eastern District of Arkansas.

INSURANCE—INTEREST OF ASSURED—OVERVALUATION.

1. PROOF OF LOSS.—That in seeking to recover the amount insured upon his goods destroyed by fire, the insured was bound only to prove his policy, his loss, and the service of preliminary proofs.

2. INTEREST IN PROPERTY INSURED.—The effect of making a mistatement, in answering that there was no incumbrance on the property insured, stated.

3. OVERVALUATION OF PROPERTY.—When the defense of overvaluation of the goods will prevail —[ED. LEGAL NEWS.

Mr. Justice HUNT delivered the opinion of the court.

In seeking to recover the amount insured upon his goods destroyed by fire, the insured was bound to prove only his policy, his loss, and the service of preliminary proofs. This proof he made.

The insurance was for $2,500. The jury found the value of the goods destroyed by fire to be $7,204.

Defence is made on the ground of a violation of that condition of the policy which provides that "if the interest of the assured in the property is not absolute, it must be so expressed in the policy, otherwise the insurance shall be void," and of a misstatement in answering that there was no incumbrance on the property insured.

The insured had bought the goods of one Flowers. They were in the store of

Harris & Co., auctioneers, at the time of the purchase, and were left there for sale by and under the direction of Vaughan, the purchaser. It was agreed by him that the first proceeds of the sale should be paid to the vendor to the amount of $3,150, and if the auctioneers advanced money upon the stock they were authorized to retain the possession and control of the goods as their security. There is no evidence, or claim, that any such advance was made.

We see nothing in the writing produced to justify the claim that the property insured was incumbered, or that any person other than the vendor had any interest in it, or that the title of the insured was not absolute. The property was sold to the insured in April, 1873, and the evidence showed that when so sold it was in the auction store of Harris & Co., for sale. The goods remaining there the purchaser took possession, and proceeded to make sale of them, as was also proved on the trial. The writing produced contains no limitation of Vaughan's title, and expresses no right of possession or control in any person other than himself, except in the event that Harris & Co. should make advances. The paper stipulated that Harris & Co. might hold the possession and control of the goods as security for their advances. There was no such stipulation in favor of the vendor. He did not profess to retain any right in the goods or any control over their possession. So far as he was concerned, Vaughan had the full power of disposition. His claim was upon the money realized from the sales. To bring his claim into enjoyment, it was necessary that sales should first be made, and Vaughan, and Harris & Co. as the agents of Vaughan, were entrusted with this duty. The goods were, and the proceeds of the goods when sold would be, the property of Vaughan. His agreement as to the proceeds did not affect his title or estate. While it is possible that, in the event of a fraudulent combination to defraud him, Flowers might have invoked the aid of a court of equity in securing the proceeds of the sales, there is nothing to affect the present title of his vendee. It may be likened to the familiar case of an insurance upon a house in the name of the mortgagor, which he promises to hold for the benefit of the mortgagee. While, under certain circumstances, equity would interfere in behalf of the mortgagee, it can scarcely be doubted that, until the occurrence of such circumstances, the mortgagor is the owner of the policy and its fruits.

A defence was also sought to be made on the ground of the over-valuation of the goods by Vaughan when he obtained the insurance. The policy was preceded by an application in this form: "Application of James L. Vaughan for insurance, etc., in the sum of $6,000, on the property specified — the value of the property being estimated by the applicant. Valuation on stock, etc., $2,000; sum to be insured, $6,000; rate, 3 10 of 2 per cent.," which statement was signed by Vaughan and agreed to be true, so far as it was known to him, and so far as it was material to the risk. This was on the 23d of March, 1873. The fire occurred on the 5th day of May, 1873.

The sale of goods after the purchase, and before the fire, amounted to the sum of $653. The jury found the goods, which were actually destroyed, to have been worth $7,204. These two sums show the value of the goods, to wit, $7,857.

The value of the goods was to be estimated by the applicant. He gave this estimate at $12,000 and there is not the slightest evidence that such was not his honest estimate of their value. Insurance agents, as well as other persons, know with what partiality most men estimate their property, and how much more valuable they esteem it when their own than when it is their neighbor's. They do not object to this principle when the premiums are received for issuing policies. It is only when losses occur that they seek to apply the more rigid test of actual value.

The value of a stock of goods is not always, nor usually, indicated by its purchase price. Such goods are often bought in the country to sell at retail, and at a profit. What may be expected to be obtained for them under such circumstances may reasonably be considered their value, and that the owner and purchaser should estimate them at much more than he gave for them, and should hope and expect to make large gains and and profits upon their sale, was, no doubt, understood by the agent making the insurance.

The counsel for the plaintiff in error, in his brief concedes that it is not every over-valuation which will avoid a policy, but he objects to the charge of the judge, that to produce this result the over-valuation must be "grossly enormously" in excess of truth. It is hardly just to the judge holding the circuit, or to the claimant, that the charge should rest upon this statement. The judge undoubtedly said, "that if the valuation was grossly enormously in excess of the value of the goods, then the burden is cast on the plaintiff of showing that he acted honestly and in good faith in making the valuation, and that it was not made for any fraudulent purpose or with any fraudulent intention, but was an honest and unintentional error." He did not, however, say that nothing less than this would have that effect. He said, also: "The law exacts the utmost good faith in contracts of insurance, both on the part of tne insured and the insurer, and a knowing and willful over-valuation of property by the insured, with a view and purpose of obtaining insurance thereon for a greater sum than could otherwise be obtained, is a fraud upon the insurance company that avoids the policy." * * "It is a question of good faith and honest intention on the part of the insured, and though he may have put a value on his property greatly in excess of its cash value in the market, yet if he did so in the honest belief that the property was worth the valuation put upon it, and the excessive valuation was made in good faith, and not intended to mislead or defraud the insurance company, then such over-valuation is not a fraudulent over-valuation that will defeat a recovery."

Looking at the whole charge, as we must do, we think the jury were correctly instructed, and that there was nothing said to which the committee can properly except.

The judgment should be affirmed.

We have received from Col. Vallette, of the Chicago bar, the following opinion:

SUPREME COURT OF ILLINOIS.

Opinion Filed June 30, 1876.

No. 473.—Charles E. Grant *et al. v.* John J. Bennett *et al.*

LIS PENDENS — CONSTRUCTIVE NOTICE OF DECISION OF SUPREME COURT—PURCHASER IN GOOD FAITH.

1. Lis Pendens.—That the filing of a bill in chancery is not to be regarded as *lis pendens* before the service of the summons or subpœna.
2. Constructive Notice of Decision.—That, under the evidence in this case, Grant, the purchaser, was not chargeable with constructive notice of the decision rendered by the Supreme Court, in the case on appeal.
3. Purchaser in Good Faith.—That the purchase of the premises by Grant, was made in good faith, and for a valuable consideration.—[Ed. Legal News.

Opinion by Craig, J.

This was a bill brought by John J. Bennett, et al., appellees, in the Circuit Court of Cook county, against Charles E. Grant and others, to set aside as a cloud upon their title a certain deed, purporting to have been executed on the 4th day of March, 1869, by Mary A. Newcomb, to Charles E. Grant, for certain property in Hyde Park, in Cook county. The cause came to a hearing upon the pleadings and evidence, and the court rendered a decree in favor of the complainants in the bill, to reverse which this appeal has been brought.

The property originally belonged to Abraham J. Rockafellow, who in 1868 conveyed it to Mary A. Newcomb, but on the 4th day of March, 1869, he filed his bill against her in the Circuit Court of Cook county, to compel a re conveyance. The bill was filed about noon of the 4th; summons was issued and served on the following day; the deed from Newcomb to Grant was delivered one or two hours subsequent to the filing of the bill.

The bill filed by Rockafellow, was, upon the hearing, dismissed, and he appealed, which resulted in a decision reversing the decree, with directions to the Circuit Court to enter a decree in favor of the complainant. On the 18th day of June, 1871, a final decree was rendered in the Circuit Court; prior to this however, and on the 16th day of March, 1871, the deed to Grant was placed upon record; after the rendition of the decree on the 18th day of June, appellees purchased of Rockafellow, and claiming title under him, file this bill.

Three questions arise upon the record.

First. Whether the filing of the bill by Rockafellow *v.* Newcomb, can be regarded as *lis pendens* before the service of subpœna?

Second. Was Grant chargeable with constructive notice of the decision rendered in this court in the case on appeal?

Third. Was the purchase of the premises by Grant made in good faith, for a valuable consideration?

It is clear, from the evidence, that Grant received a deed of the premises from one to two hours after the bill was filed. If, therefore, the finding of the bill can be held to be *lis pendens*, without the service of subpœna, it follows that the conveyance to him would be held subject to the final result of the bill.

We have examined the authorities bearing upon the question, with that degree of care that the importance of the subject demands, and we are satisfied that in the Courts of Chancery in England, and in the States where the common law prevails, *lis pendens* does not exist until a summons or subpœna has been duly and regularly served upon the defendants in the bill, except where the common law rule has been changed by statute.

The service of subpœna alone is not sufficient, but a bill must also be filed, and where a bill has been filed and a subpœna served whether the bill was filed before or after service, *lis pendens* began from the date of the service, and not from the filing of the bill.

In Sugden on Vendors, vol. 3, page 322, the rule is stated thus: "A subpœna served is not, however, a sufficient *lis pendens*, unless a bill be filed; but when the bill is filed, the *lis pendens* begins *from* the service of the subpœna."

Freeman, in his work on Judgments, sec. 195, says: "*Lis pendens*, except when some statute prevails otherwise, begins from the service of the process or subpœna, and not before."

The same doctrine is announced and sustained in the following authorities: Anon, 1 Verm, 318; Murray *v.* Ballou, 1 John, Chancery, 576; Hayden *v.* Bachlin, 9 Paige, ch. 513; Hemmington *v.* Hemergton, 27 Mo., 560; Allen *v.* Mendiville, 26 Miss., 397; Leich *v.* Wells, 48 N. Y., 611; Powell *v.* Wright, 7 Beaven.

Has the Common Law rule been changed by our statute, which declares the mode of commencing suit in chancery, shall be by filing a bill of complaint with the clerk of the proper court, setting *forth* the nature of the complaint?

While this statute prohibits the practice which has prevailed in some places, of suing out a summons in chancery by merely filing a *præcipe*, yet it by no means follows that the filing of a bill is to be regarded a *lis pendens*. The mode of commencing a suit in chancery or taking the first step in that direction is one thing, but the effect to be given to that act is another question.

While the statute has clearly and in emphatic terms declared the manner in which a suit in chancery shall be instituted, it is silent in regard to the effect to be given to the filing of the bill, on the rights of persons not parties to the action. The result is, the Common Law rules that govern courts of chancery is still in force and must prevail. The case of Hodgen *v.* Gridley, 58 Ill., 431, cited and relied upon by appellee has no bearing upon this question. The point there decided was, that process could not issue without filing the bill, and if process was issued, or publication made without a bill being filed, the court acquired no jurisdiction over the defendants. In the other decisions of this court, cited by appellee, the question here involved did not arise and was not discussed. In regard to the second question, we are satisfied if a final decree had been rendered in the Circuit Court, or this court, in the case of Rockafellow *v.* Newcomb, transferring the title to the premises from the latter to the former, before Grant filed his deed for record, such decree would have defeated the title of Grant.

But the judgment rendered in this court, although prior to the filing of the deed for record, was not a final disposition of the case. It is true the decision rendered settled the rights of the parties, but the decree of the Circuit Court was reversed and the cause remanded, with instructions to the Circuit Court to render a decree that upon Rockafellow re-conveying certain property to Miss Newcomb, that she re-convey the property in question to him.

It needs no argument to show that the decision, while it settled the rights of the parties in the pending litigation, yet it was not a final judgment, in the sense that term is used, to be a lien and binding on the property of a defendant.

We now come to the last point in the case: Whether Grant purchased in good faith, and for an adequate consideration. While it is clear from the evidence that at the time Miss Newcomb conveyed to Grant she was aware that Rockafellow would institute proceedings to obtain the land from her, and she no doubt sold the premises for that reason, and while her conduct in defending the action in her own name, without disclosing the fact that she had conveyed, is not commendable, yet the record is barren of evidence that establishes the fact that Grant was actuated by any improper motives in making the purchase, or that he had any knowledge that Rockafellow had any claim to the property, or that there was danger of litigation over the title.

Grant testified that he bought the property of Miss Newcomb, about the 15th day of January, 1869, for $2,000; that a Mr. Reed, who was a mutual friend, had called upon him and stated she was in every way reliable, and was in need of money and desired to sell the property. He paid $300 when the bargain was made, and agreed to pay the balance when she made out a deed. On the 4th day of March, 1869, she delivered him a quit claim deed, and he paid her the remaining $1,700 in currency. He also testified, when he received the deed he had no knowledge that any difficulty existed between Miss Newcomb and Rockafellow, and did not know that any person had any claim on the land, and did not even know of whom or how she acquired the title to the property.

Miss Newcomb testifies the trade was made in January, 1869, and $300 paid, and the deed was executed and delivered on the fourth of the following March, when the remaining seventeen hundred dollars was paid. Mrs. Greves testified the deed was delivered in her presence at her house on the 4th day of March, 1869, and the $1,700 paid. Carpenter, the scrivener who prepared the deed, says Miss Newcomb called upon him on the 3rd day of March, 1869, and left the deed made by Rockafellow to her, and directed him to make out a deed to Grant; that on the day following, the deed was executed and acknowledged before him.

Here is the evidence of grantor and grantee and the officer who prepared the deed and took the acknowledgment, and Mrs. Greves, who has no interest in the suit, all concurring in the fact that the sale was made and consummated at a particular date, and delivered, and the consideration for which the land sold was actually paid. This proof on the part of the appellants is not overcome by the evidence introduced by appellees.

If it be true that the object of Miss Newcomb in making the sale to Grant was to deprive Rockafellow from obtaining a reconveyance of the property, such would not defeat the title Grant acquired, if he purchased in good faith without notice of the equities of Rockafellow. Nor can the conduct of Miss Newcomb in defending the suit instituted by Rockafellow against her in her own name and not disclosing the fact she had sold, affect Grant so long as he had no knowledge of the impending litigation.

It is said the fact that Grant failed to place upon the record the quit-claim deed and the anti dating the warranty deed subsequently obtained, are facts which show bad faith on his part. It is not unusual for a person to retain a deed and not record it.

As to the other matter it was in proof when the quit claim deed was delivered, Miss Newcomb agreed to make a warranty deed at any time Grant might desire it, and when the warranty deed was subsequently made, it was anti-dated to correspond with the time the purchase was made by Grant. The date the par-

ties might insert in the deed was of no consequence. Nothing could be gained by making a second deed, except Miss Newcomb would be responsible to Grant on the covenants, in case the title should fail.

The quit-claim deed would as effectually pass the title, as a warranty with full covenants. The law upon this point is well settled. Butterfield *v.* Smith, 11 Ill., 485; Brady *v.* Spruck, 27 Ill., 478; Meyen *v.* Clayton, 61 Ill., 35.

Various other matters of a similar character have been urged by appellees for the purpose of showing that Grant did not purchase in good faith.

But unless we presume without sufficient proof that the four witnesses, Grant, Carpenter, Miss Newcomb and Mrs. Greves, have deliberately testified falsely, we are aware of nothing upon which the sale and conveyance of the property consummated on the 4th day of March, 1869, so far as Grant is concerned, can be impeached.

After a careful examination of the whole record, we are satisfied the decree cannot be sustained. It will, therefore, be reversed, and the cause remanded.

BREESE, J., dissents, and holds when the bill in chancery was filed a suit was pending. He further believes there are facts in the record strongly tending to mark the transaction as fraudulent.

WALKER, J. I dissent from the decision in this.

SCHOLFIELD, J. I dissent from the opinion of the majority of the court.

SUPREME COURT OF TENNESSEE.

KNOXVILLE, MAY 20, 1876.

W. G. NEWMAN et al. *v.* P. W. ASHE et al.

While it is the better rule to construe strictly the power of corporations, still it was within the corporate powers of the city of Knoxville to purchase and own land outside the city limits, for water reservoir purposes.

Land being purchased for such a purpose, the title vested in the city, and was not divested by a change of purpose.

Land conveyed for a fair consideration does not revert to the bargainer because some outside consideration has not been performed, when there is nothing in the deed to show that such failure was, by the contract, to forfeit the title.

The right to re-enter is reserved to the bargainer and his heirs, and not to his grantees.—[ED. *Commercial and Legal Reporter.*

Opinion of the court by MCFARLAND, J.

This is an action of ejectment, brought to recover a lot of land two hundred feet square, lying within the present corporate limits of the city of Knoxville. The plaintiffs having failed in the action, bring the cause to this court for revision.

It is conceded that the land was formerly owned by Calvin Morgan, and both parties claim title through him. On the 6th of December, 1838, said Morgan conveyed the lot in dispute to the mayor and aldermen of Knoxville, for the purpose of erecting a reservoir thereon. This deed was duly registered. No reservoir was ever erected, however, and the city authorities afterwards subdived the lot and sold and conveyed it to various parties—the several defendants to this action and others through whom they claim.

Calvin Morgan died between the years, 1850 and 1852, and on the 12th of February, 1853, the executor of his will conveyed to John Fouche twenty-five acres of land, including the land in dispute. On the 22d of April, 1853, Fouche conveyed to Jacob Newman, Tazwell W., and W. G. Newman, a lot, the boundaries of which also include the disputed land.

This deed, after giving the boundaries, uses this language: "Containing, after deducting two hundred feet square, heretofore sold by Calvin Morgan, Sr., to the corporation of Knoxville for a reservoir lot, 6 acres 99-100 poles." In another part of the deed the bargainer quit claims to the bargainees of his title to said two hundred feet square, but without warranting the title. The action is brought by W. G. Newman, and the heirs of Jacob and Tazwell W. Newman.

It is manifest upon this statement that if the deed of Calvin Morgan to the mayor and aldermen, of the 6th of December, 1838, be valid, and nothing else appearing, the title of the defendants is superior.

The plaintiffs therefore maintain:

First, That this deed was inoperative and void, because the land at the time was without the corporate limits of the city of Knoxville, and the corporate authorities had no power under the charter and laws to purchase and take the title to such land; and

Second, If this be not so, that the title of the city was lost by reason of its failure to perform the conditions contained in the deed, and the title thereby reverted to the grantor, and passed to them under their deeds.

These questions were determined against the plaintiffs by the Circuit Judge.

Upon the first question, a strict construction of the powers of municipal corporations may be conceded as the safer rule, and that such corporations must act within the powers of their charters, and to carry out the legitimate purposes of their creation; and the power to purchase real estate for the purposes of speculation could certainly not be inferred from the general powers contained in city charters. But the act of the 19th of January, 1830, while it does not in express terms give the power to purchase and hold real estate outside the corporate limits for the purpose of constructing water works, yet it does so by necessary implication. The power to construct water works, a legitimate corporate purpose, is expressly given, and the authority is given to the mayor and aldermen "to protect from injury by adequate penalties * * * the pipes, hydrants or fixtures, buildings or improvements, belonging to, or in any wise appertaining to said water works, *whether within or without the limits of said corporation.*"

We think it requires no latitude of construction to hold that the corporate authorities had at the time the power to purchase and take the title to the lot for the purpose indicated; and this being so, the deed is not on this account void, although no water works were ever constructed upon the lot in question. The purchase having been made in accordance with the power and authority then existing, the title passed, and was not defeated by reason of a change of purpose on the part of the corporate authorities, as to constructing waterworks upon the land.

To determine the next question, it is necessary to notice the material parts of the deed in question, as follows: "The said Calvin Morgan, for and in consideration of the sum of $1,000, to him in hand, the receipt of which is hereby acknowledged, and for and in consideration that the said mayor and aldermen hereby agree, as soon as conveniently practicable, to erect for said Morgan's use, a hydrant within ten feet of the descending pipe from the reservoir contemplated, furnishing water sufficient for the domestic consumption of one family, hath granted, etc., etc., to the mayor and aldermen of Knoxville, for the use and benefit of said town, and for the purpose of erecting a reservoir thereon, a certain tract of land, etc., etc., with the privilege of ingress and egress." It is argued that the failure of the corporation to erect the reservoir and the hydrant, within the time indicated, was a breach of the condition upon which the land was conveyed, and gave to Morgan the right to avoid the conveyance by a re-entry.

We hold that this is not a proper construction of the deed; that the conveyance was absolute and unconditional; that the undertaking of the mayor and aldermen to erect a hydrant was a part of the consideration of the conveyance, and Morgan might or might not have had his remedy for the non-performance of this undertaking; but there is nothing in the deed to show that a failure to perform this undertaking was to forfeit the title to the land, or cause it to revert to the grantor—where a fair consideration, as in this case, has been paid outside of the undertaking in question. Courts would certainly not imply a condition that the title is to be forfeited by a non-compliance of the further undertaking of the bargainees.

Such conditions would have to be clearly expressed. The language of the deed, showing that the conveyance was for the purpose of erecting a reservoir thereon, as standing alone, has no other significance than to show that the purchase by the corporate authorities was within their power, and for a legitimate purpose.

We think this holding will be found to be in accordance with the authorities upon the subject. Shepherd Touchstone, p. 127. If it were conceded that the deed is subject to the construction contended for, the authorities hold that the right to enter or avoid the deed is reserved only to the bargainer or his heirs, and does not pass to his grantee. 4 Kent, p. 127; Washouse on Real Property, 1st Vol., pp. 450, 451.

We think there is nothing to show any attempt upon the part of Morgan or his heirs or representatives to assert the right of re-entry, though he remained in possession for some years after the conveyance.

We think there is no error in the record, and the judgment will be affirmed.

WE are under obligations to C. C. BONNEY, of the Chicago bar, for the following opinion:

SUPREME COURT OF ILLINOIS.

OPINION FILED JUNE 30, 1876.

HARTFORD LIFE AND ANNUITY ASSURANCE CO. *v.* HARTWELL GRAY et al.

Appeal from Cook.

APPLICATION FOR INSURANCE—EVIDENCE TO CONTRADICT.

1. GENUINENESS OF SIGNATURE.—That when the genuineness of a signature to an instrument is established, it affords *prima facie* evidence that the contents of the instrument were known to the subscriber, and that it is his act, and that the burden is upon those who assert the contrary, to make such proofs as shall overcome this *prima facie* evidence.

2. DISREGARDING TESTIMONY.—That a jury cannot willfully disregard the testimony of an unimpeached witness; that while they may judge of the credibility of a witness, they must exercise judgment, and not will merely, in doing so.—[ED. LEGAL NEWS.

Opinion by SCHOLFIELD, J.

The question first to be considered is, was secondary evidence of the application for the policy properly received? for if it was not, the ground of defense entirely fails.

It was witnessed by "Capt. B. Wheeler," and it is insisted by appellees that its execution must be proved by him. It has been held by this court that it is not necessary to produce the subscribing witness to testify to the execution of the instrument, when he is beyond the reach of the process of the court. Wiley et al. *v.* Beem et al., 1st Gilm., 302; Newsom *v.* Suster, 13th Ill., 175; Miller *v.* Metsger, 16th Id., 390, and the same rule obtains if the witness cannot be found on dilligent enquiry. Clark *v.* Sanderson, 3rd Beimey, 192; Jackson ex dem *v.* Gager, 5th Cowen, 383; Jackson ex dem *v.* Cody, 9th Cowen, 140; Ingram *v.* Hall, 1st Haywood, 207; Jackson ex dem *v.* Root, 18th Johns, 60; Whitteman *v.* Brooks, 1st Greenleaf, 59; Baker *v.* Blount *ynd* Haywood, 404; Lansing *v.* Chamberlan, 8th Wend, 620; Note to Jones *v.* Coopriders, 1st Blackfield, 49; Spring *v.* South Can. Ins. Co., 8th Wheaton, 269.

The evidence shows that the witness left Belvidere, the place where the instrument was subscribed, and was last heard of in Wisconsin. An agent of the company at Belvidere testifies to this, and also, that he has made enquiries as to his whereabouts and endeavored to find him, but has been unable to do so. We think this was sufficient to authorize the introduction of other evidence of the execution of the instrument.

We are also of opinion that the evidence of the genuineness of the signature of Morey, to the application, was sufficient for the purposes of the case, standing, as it does, uncontradicted.

The next question is, was it incumbent on the company to prove that Morey filled up the blank application, or that he was acquainted with the contents of the application when he signed it; or is it incumbent on the plaintiffs to show that he was ignorant of the contents of the application when he signed it, in order that they shall be relieved from its representations?

It has been several times laid down, in previous decisions, as the rule recognized by this court, in such cases, that it may be shown the applicant for the policy in fact did not make the representations as shown by the application; but that the application was filled out by the agent of the company, he inserting the statement claimed to be false, of his own accord. It has, however, never been ruled that the court will, in the absence of all evidence, presume the application was thus made out, and we have been referred to no decision elsewhere announcing such doctrine. Numerous cases are referred to by counsel for appellees, holding that insurance companies, establishing local agencies, must be held responsible to the parties with whom they transact business, for the acts and declarations of the agents, within the scope of their apparent employment, as if they proceeded from the principal; and that policies will not be avoided for errors by the agents acting within the apparent general scope of their powers, on the artificial and unwarranted assumption that they are agents of the applicants for policies.

But, so far as our own observation has gone in all the cases, the onus was on the party denying that the application was the act of the person by whom it was signed, to prove the circumstances which justified the denial.

We are of opinion, when the genuineness of a signature to an instrument is established, it affords *prima facie* evidence that the contents of the instrument were known to the subscriber, and that it is his act, and hence that the burden is upon those who assert the contrary, to make such proofs as shall overcome this *prima facie* evidence.

There was no evidence introduced, on the trial below, tending to prove Morey was ignorant of the contents of the application; that it was filled up contrary to his direction, or without his knowledge; or that any representations were made to him by the agents of the company.

The court, at the instance of the plaintiffs, instructed the jury "that they are the judges of the credibility of witnesses, and of the weight of evidence. They may believe and accept, or disbelieve any testimony which, under all the circumstances of the case, is not creditable and entitled to weight in deciding the issue in this case."

This is entirely too comprehensive in its terms. The jury are at liberty to disbelieve the evidence of a witness who has been impeached, in any of the modes recognized by the law for impeaching witnesses, which may include not only direct contradictions and evidence of bad character, but also the inherent improbabilities of his statement, and his manner and appearance while testifying, but they cannot be allowed to go beyond this, and determine for themselves that other circumstances not within legal contemplation tending to impeach the witness, show that his evidence is impeached, and therefore entirely disregard it. The effect to be given to evidence, it is true, may depend, in some degree, on circumstances other than those which are regarded as directly tending to impeach a witness, such as his opportunity for knowing that to which he testifies, the strength or weakness of his memory—his interest in the question, and even his temperament—but, here also, the jury are limited and can only consider those circumstances which, in human experience, are known to affect perception, memory and judgment. The form of the instruction is calculated to mislead. What circumstances in the case tend to discredit any particular part of the evidence, or what is necessary for that purpose, is not indicated.

The jury might well understand from the instruction that it was left to them to determine, without restriction, whom to believe or to disbelieve.

In Robertson *v.* Dodge, 28 Ill., 161, it was held a jury cannot willfully disregard the testimony of an unimpeached witness; that while they may judge of the credibility of a witness, they must exercise judgment, and not will, merely, in doing so.

In Evans *v.* George, at the present term, this precise form of instruction was condemned.

For the reasons given, the judgment is reversed and the cause remanded.

Reversed and remanded.

HITCHCOCK & DUPEE, counsel for appellants.

C. C. BONNEY and C. W. GRIGGS, counsel for appellees.

THERE are forty thousand lawyers in the United States, of whom 198 are in Congress.

THE chief of police of Little Rock, Ark., was sent to jail lately for whipping a boot-black.

CHICAGO LEGAL NEWS.

Lex vincit.

MYRA BRADWELL, Editor.

CHICAGO, AUGUST 19, 1876.

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We call attention to the following opinions, reported at length in this issue.

R. R. Liability—Injuries to Express Messengers.—The opinion of the New York Court of Appeals as to the liability of railroad companies for injuries to express messengers.

Consolidation of Railroads—Taxation.—The opinion of the Supreme Court of the United States, by Bradley, J., as to the effect of the consolidation of railroads upon the taxation of their property.

Postal Money Orders—Indictment for Embezzeling.—The opinion of the Supreme Court of the United States, by Swayne, J., construing the act of Congress creating the postal money order system, and providing for the punishment of those who should be found guilty of embezzlement, and holding that such act was not to be regarded as a revenue law.

Refusing to Furnish Refreshments to a Colored Man—Trial by Jury.—The opinion by the Supreme Court of the United States, by Waite, C. J., in a suit brought against a coffee-house keeper, in New Orleans for refusing to furnish refreshments to the appellee, on the ground that he was a colored man, and holding that the trial by jury in suits of common law, pending in the State courts is not a privilege or immunity of national citizenship, which the States are forbidden by the fourteenth amendment to abridge.

Insurance Case.—The opinion of the Supreme Court of the United States, by Hunt, J., in an insurance case.

Lis Pendens—Notice on Appeal—Purchaser in Good Faith.—The opinion of the Supreme Court of Illinois by Craig, J., holding that the filing of a bill in chancery is not to be regarded as *lis pendens* before the service of summons upon the defendant, and that in the case before the court, the purchase of the premises was in good faith and for a valuable consideration, and the purchaser was not to be regarded as having constructive notice of the decision of the Supreme Court rendered in the case on appeal. We regard this as an extremely important opinion, the question as to what shall be regarded in such a case as *lis pendens* never before having been passed upon by our Supreme Court. It is to be regretted, however, that the opinion is only by a majority of one. Breese, Walker and Scholfield, JJ., dissent from the opinion of the majority of the judges. Breese, J., being of the opinion that when the bill in chancery was filed a suit was pending, and that there were facts in the record strongly tending to mark the transaction as fraudulent.

Covenant not to Carry on Business, etc.—The opinion of the English Divisional Court for Appeals holding that it is no breach of a covenant not to carry on the business of a wholesale or retail confectioner for a grocer and tea-dealer to sell a particular kind of sweet-meat, in which a confectioner may happen to deal.

Authority of City Council to Commit for Contempt.—The opinion of the Supreme Judicial Court of Massachusetts, by Gray, C. J., holding that the Massachusetts statute, conferring authority upon the presiding officer of the City Council to commit for contempt, is unconstitutional.

Divorce—Expenses—Attorneys' Fees—Appeal.—The opinion of the Supreme Court of this State, by Scott, J., holding that an appeal will lie from a decree entered in a divorce suit ordering the husband to pay a sum of money to the wife for the expenses accrued and to accrue in defending against the husband's appeal to the Supreme Court, and to pay the wife's attorneys' fees. The main question in this case has never before been decided in this State.

Power of City to Purchase Land beyond Limits.—The opinion of the Supreme Court of Tennessee by McFarland, J., holding that while it is the better rule to construe strictly the power of corporations, still it was within the corporate powers of the city of Knoxville to purchase and own land outside the city limits; that land being purchased for such a purpose. The title vested in the city, and was not divested by a change of purpose.

Insurable Interest—Wager Policy on Life—Suicide.—The opinion of the Supreme Court of this State, by Sheldon, J., holding, in the case before the court, that the relation of father and son did not create an insurable interest in the son in the life of the father, unless the son had a well-founded or reasonable expectation of some pecuniary advantage to be received from the continuance of the life of the father, and passing upon several interesting questions of pleading upon a life insurance policy, and stating, where the death of the insured occurs, the presumptions as to whether he met his death by his own hands, or died from natural causes.

When a Person may be Imprisoned for Neglect or Refusal to Perform a Money Decree.—The opinion of the Supreme Court of this State, by Scott, C. J., holding that when the neglect or refusal to perform the decree is not from mere contumacy, but from the want of means, the result of misfortune, not induced by the fraudulent conduct on the part of the defendant, the party will be compelled to adopt some mode other than imprisonment, to enforce the decree consistent with the practice in the courts, either by execution, or by other final process, or by sequestration of real or personal estate, or by the exercise of such other powers as pertain to courts of chancery, and which may be necessary to the attainment of justice; that decrees for the payment of alimony are not different from other decrees for the payment of money; that imprisonment for non-compliance therewith unless wilful, or unless upon a refusal of the defendant upon proper demand made to deliver up his estate in satisfaction of the decree, is within the inhibition of the constitution as against imprisonment for debt.

Application for Insurance—Evidence to Contradict—Genuineness of Signature.—The opinion of the Supreme Court of this State by Scholfield, J., as to whether secondary evidence of the application for the policy could properly be received, and holding, that when the genuineness of a signature to an instrument is established, it affords *prima facie* evidence that the contents of the instrument were known to the subscriber, and that the burden of proof is upon those who assert the contrary.

Recent Publications.

Chitty's Treatise on Pleading and Parties to Actions, with a second volume containing Modern Precedents of Pleadings, and Practical Notes. In two volumes. Vol. II. The Seventh English Edition, corrected and enlarged by Henry Greening, Esq., of Lincoin's Inn. Sixteenth American Edition, with Notes, and References to the English and American Decisions, by J. C. Perkins, LL. D. Springfield, Mass. Published by G. & C. Merriam. 1876. Sold by W. B. Keen, Cooke & Co., Booksellers, Chicago.

It would be a waste of words to speak to any lawyer of the value of Chitty's Pleadings. It is one of the most remarkable law works of this or any other age. It has been the leading text book upon the complicated subject of pleading for more than two generations in England and America, and stands to-day without a successful rival. It is still acknowledged as the best authority in all courts where the common law prevails. A new and exhaustive edition of such a work as this, containing references to all the recent important opinions of England and America, involving questions of common law pleading, is an enterprise in which lawyers must take a deep interest. The edition before us contains about twenty-two hundred pages, is beautifully printed, and bound in a dress worthy of such a work. In this edition the American notes have been very much enlarged, and many editions of new notes have been made; and they have all been blended and made homogeneous with the English notes. The rules adopted and the cases decided under the new systems of pleading and procedure in the several States, have been referred to so far as it has been supposed it would be useful. In consequence of the great changes which in modern times, made in abridging, compressing and simplifying the forms of precedents in pleading, the second and third volumes, which are composed of forms founded on antiquated precedents, and which have heretofore been connected with and published as a part of Mr. Chitty's Treatise on Pleading, have become for the most part practically obsolete, and have not, therefore, been republished with this edition of the Treatise, but in the place of those volumes, and as a substitute for them, a single volume of precedents, carefully adapted to modern practice, has been prepared, and is now published as a companion of the Treatise. This volume is founded on Chitty's Precedents in Pleading, and contains a copious and diversified collection of forms which are clear, concise, and, so far as we are able to judge, well suited to the practice of the present time.

Digest of the Michigan Reports, including nearly Twelve Volumes of the Regular Series, embracing one by Clarke (22 Mich.) and Ten by Post, together with the Cases contained in the 11th of Post (33 Mich.) to the April Term of 1876. A Supplement to Cooley's Digest of 1872. By Henry A. Chaney. Detroit: Published by the Editor. 1876.

We have received a copy of the above volume. Its author, Mr. Chaney, is no stranger to the readers of the Legal News. We have frequently been favored by him with abstracts of recent important Michigan opinions, and have, upon several occasions, spoken in these columns of his ability as a digester. This digest is arranged with taste and skill, so as to enable the lawyer to find just what has been decided by the Supreme Court of Michigan in the least possible time. While the points of law decided are given briefly, they still contain sufficient to enable the reader to form a correct idea of the cases. Every Michigan lawyer should lose no time in adding this digest to his library. We are sure no person who has a set of Michigan reports can afford to be without it.

A Valid, but Not Literary, Contract.—Josiah H. Bissell, of the Cincinnati Abstract Company, sends the following copy of an agreement, found on the files in one of the old suits in the Common Pleas Court of that city, with the remark that, although the agreement is hardly in strict legal phraseology, the "level-headed" Dutchman who got it up, seems to have had a better idea of what he wanted than some lawyers of considerable pretentions. The agreement is as follows:

Cincinnati Nov. 10, 69.

The undersiend are satisfeit with this contract & under the Firme Sibley, Murray & Co, Frame Besenes 481 Plum St. betw. 15 & Wade St.

Each Patner hase to work to the profet to the Besenes, if he dount work to the profet to the Besenes he kan expeckt no watches.

Sicknes or Familie Besenes are not entcluded, if he dount tant to his Besenes at al, then he pusht out by majoryta out the Besenes, the oder Partners god the first rith to bay him out, or he has to put a oder man in his place were them oder Patners are satisfeit with.

Each Patner can drow $15 00-100 watches, if the Besenes erlaw it, each Patner can drow so moutsh then the oder.

If a Patner git sick he is teitled to his fool watshes the first week, the oder time only half watshes if the Besenes erlaw it.

If a Patner die his Familie can expeckt only the Profit from the Besenes or the Familie can sell the stock to the oder Patners or to a oder man were them oder Partners are satisfeit wich.

No Patner kan borow Money for his own person on the Besenes, the Besenes is not responsible for that money.

If a Patner gos Secourte for am body, the Besenes got nothing to do with it.

If a Patner do outside Besenes, the Besenes has to pay it.

Each half Jahr the first of January am the first of July the Stock has to be count up an the books am be settled.

Each Patner is inteitled to 7 Per cent. each Jahr on the stock wat hie got more in Besenes then the oder.

C. Sibley
P. J. Murray
W. Steffes
H. Fricke
Ch. Westerkamp.

XXVIII. OHIO STATE REPORTS.

We have received advance sheets of the 28th Ohio State Reports, from which we take the following head notes:

Jones *v.* The State.

CRIMINAL CASE.—INSTRUCTING JURY IN ABSENCE OF PRISONER.

1. Where the jury on the trial of a felony have retired to consider of their verdict, it is error for the court, on the return of the jury into court, to again instruct them as to the law of the case in the absence of the accused, who is then in jail under the order of the court.

2. Such irregularity is not cured by the presence of defendant's counsel at the giving of such additional instructions.

3. Nor will a reviewing court inquire into the correctness of such additional instructions.

LIABILITIES OF BANKERS PAYING STOLEN ORDERS FOR PAYMENT OF MONEY.

ARNOLD *v.* THE CHEQUE BANK, LIMITED
(34 L. T. REP. N. S. 729.)

The plaintiffs in this case, who were merchants in New York, being desirous of transmitting £1000 in payment to their correspondents, Messrs. Williams and Co., of Bradford, inclosed in a letter to England a draft for that amount, specially indorsed to them. The draft was stolen out of the letter by a clerk in the plaintiff's office, and was afterwards presented at the defendants' bank with a forged indorsement, by Messrs. Williams and Co.; and the defendants having cashed the draft at the bank on which it was drawn, placed the proceeds to the credit at their bank of the person who had presented the draft, who subsequently drew out the whole amount, with the exception of £106. The plaintiffs sued for the proceeds of the draft as money reserved to their use. On the trial evidence was tendered by the defendants of a usual or almost invariable practice of sending, besides the letter containing the draft, a letter of advice by the same or another ship, for the purpose of showing that the plaintiffs had by negligence afforded facilities for the fraud that had been practiced; but this evidence was rejected by Lord Coleridge, who, in the result, directed a verdict for the plaintiffs for the amount of the draft and interest. A rule *nisi* having been obtained to set aside this verdict and for a new trial, on cause being shown, the questions raised were: First, whether, under the circumstances, the money received by the defendants for the draft was received to the use of the plaintiffs; and, secondly, whether there was any evidence of negligence by which the plaintiffs were estopped from setting up against the defendants their title to the draft, and whether the rejected evidence was admissible for the purpose of showing such negligence. Lord Coleridge, delivering the judgment of the Common Pleas Division, consisting of himself and Archibald and Lindley, JJ., decided both these points in favor of the plaintiffs, who will, accordingly, keep the verdict they had obtained at Nisi Prius.

About the first question there could be very little doubt, after the clear enunciation of the law on the subject by Lord Chelmsford, in Hollins *v.* Fowler (33 L. T. Rep. N. S. 73, 81). It was there laid down that, "Any person who, however innocently, obtains possession of the goods of a person who has been fraudulently deprived of them, and disposes of them whether for his own benefit or that of any other person, is guilty of a conversion." In fact, in Hollins *v.* Fowler, and Arnold *v.* The Cheque Bank, the same question substantially arose, namely, Where one of two innocent parties must suffer, who is to be that party? And in both cases the answer was very properly returned: The party who directly (though perhaps innocently) caused the loss. Accordingly, in Arnold *v.* The Cheque Bank, it was held that the defendants who had converted the money were *prima facie* bound to recoup the plaintiffs for the loss sustained by them by reason of such conversion. But then came the second question, whether there was any evidence of negligence by which the plaintiffs were estopped from setting up against the defendants their title to the draft? This question, we should have thought, might have been summarily disposed of by applying the old maxim, "A stranger shall neither take advantage of, nor be bound by, an estoppel" (Co. Litt. 352a), for we do not see how the objection that the plaintiffs had omitted to send a letter of advice with the draft could lie in the mouth of the Cheque Bank, though circumstances may be imagined in which Messrs. Williams and Co. would have been entitled to complain of such omission. This view of the point, however, was not presented to the court by the plaintiff's counsel, nor noticed in the judgment delivered; the decision in favor of Messrs. Arnold on the second question proceeding upon the ground that even if they had been guilty of negligence in not sending a letter of advice, yet that such negligence was "entirely collateral to the transmission of the draft," and an omission which "could in no sense be considered as the proximate cause of the larceny and forgery" that had occurred. The Common Pleas Division was, no doubt, perfectly right here, both as to the law and the facts to which they had applied it, but as some of the cases on this subject have been apparently more often commented upon than clearly understood, we will take this opportunity of endeavoring to explain and reconcile them.

The counsel for the bank, after having quoted the *dictum* of Ashurst, J. in Lickbarrow *v.* Mason, (2 T. R. 63, 70), to the effect that it may be laid down "as a broad general principle that wherever one of two innocent persons must suffer by the acts of a third, he who has enabled such third person to occasion the loss must sustain it" (see Hollins *v.* Fowler, *sup.*), proceeded by a curious mischance to quote—in support of his contention that the defendants were entitled to rely upon this rule of law—two cases, which, if properly understood, the court held to be clear authorities for the plaintiffs: (Young *v.* Grote, 4 Bi, 253; and Ingham *v.* Primrose, 7 C. B. N. S. 82). In the former often-criticised case, the plaintiff's wife, acting as his agent in that behalf, had filled up a cheque with such extreme negligence, that one of his clerks was enabled with the greatest ease to change the amount for which it was drawn from 50*l.* 2*s.* to 350*l.* 2*s.*, and it was held that under the circumstances the loss must fall upon the plaintiff. "The blame," said Burrough, J. (4 Bi. 260), "is all on one side," and Best. C. J., pointed out that Pothier in his Traite du Contrat du Change (pa. 1. ch. 4 sect. 100), had considered the very question, and decided it in the same way as he was about to decide it. In Ingham *v.* Primrose the defendant had torn an acceptance of his own in half, and one Murgatroyd having picked up the two pieces in his presence, without any remark from him, pasted them together again, and put the bill in circulation. It was held that the defendant was liable to the holder of the bill. "The defendant here," said Williams, J., delivering the judgment of the court (7 C. B N. S., 87), "by abstaining from an effectual cancellation or destruction of the bill has led to the plaintiff's becoming the holder of it for value, and without any just cause for supposing that it had been cancelled or annulled." Now, it is clear that the negligence in both these cases was in the transaction itself—in the drawing of the cheque, or the cancellation of the bill—and not in something collateral to it; and Lord Coleridge, after having pointed out how Arnold *v.* The Cheque Bank, differed from the above authorities in this respect, gave his entire approval to the following statement of the law by Mr. Justice Blackburn in Swan *v.* The North British Australasian Co. (2 H. & N., 175, 182). That learned judge there said, "What I consider the fallacy of my brother Wilde's judgment (in the court below, 7 H. & N., 633), is this, he lays down the rule in general terms 'that if one has led others into the belief of a certain state of facts by conduct of culpable neglect calculated to have that result, and they have acted on that belief to their prejudice, he shall not be heard afterwards as against such persons to show that state of facts did not exist.' This is very nearly right, but in my opinion not quite, as he omits to qualify it by saying that the neglect must be in the transaction itself, and be the proximate cause of leading the party into that mistake, and also, as I think, that it must be the neglect of some duty that is owing to the person led into that belief, or what comes to the same thing, to the general public, of whom the person is one, and not merely neglect of what would be prudent in respect to the party himself, or even of some duty owing to third parties with whom those seeking to set up the estoppel are not privy." Every case of this kind, in fact, must stand upon its own peculiar circumstances, and in the great majority of cases we should say that common sense would point out with tolerable clearness upon whom the loss ought to fall. "If such negligence" (*i. e.*, merely collateral negligence), said Lord Coleridge, in conclusion, quoting The Bank of Ireland *v.* Evan's Charities (5 H. of L. Cas. 389, 410), "could disentitle the plaintiffs, to what extent is it to go? If a man should lose his cheque book, or neglect to lock the desk in which it is kept, and a servant or a stranger should take it up, it up, it is impossible to contend that a banker paying his forged cheque would be entitled to charge his customer with that payment."—*The London Law Times.*

THROUGH the kindness of the law firm of SLEEPER & WHITON, we have received the following opinion:

SUPREME COURT OF ILLINOIS.

OPINION FILED JUNE 30, 1876.

THE GUARDIAN M. LIFE INS. CO. *v.* PATRICK HOGAN.

Error to Winnebago.

INSURABLE INTEREST—WAGER POLICY—AUTHORITY OF AGENT—PLEADING—DECLARATION ON POLICY—WHAT ARE NECESSARY AVERMENTS—SUICIDE.

1. INSURABLE INTEREST.—What constitutes an insurable interest in the life of another, stated.
2. SUICIDE—NATURAL DEATH.—The instructions of the court below, where death had occurred, as to the presumption whether it was from natural causes, or a case of suicide, discussed, and the law stated.
3. NECESSARY AVERMENTS.—The court states what are necessary averments in a declaration upon a life insurance company.
4. AUTHORITY OF AGENT.—The authority of an agent to bind an insurance company in receiving an application for a life policy, and the effect of changing the policy for that of another kind, and the proper mode of declaring on such new policy, considered.
5. INSURABLE INTEREST.—*Held*, in this case, that the mere relation of father and son, did not create an insurable interest in the son in the life of the father, unless the son had a well-founded or reasonable expectation of some pecuniary advantage to be derived from the continuance of the life of the father.
6. WAGER POLICY.—The court cites approvingly, a case wherein a policy of insurance to a creditor, on the life of a debtor, the sum insured was so largely disproportionate to the amount of the creditor's claim that the policy was held void as being a mere wager policy.—[ED. LEGAL NEWS.

Opinion by SHELDON, J.

On December 31, 1868, the plaintiff in error, a corporation of New York, granted to John Hogan, of Rockford, Illinois, a policy of insurance, No. 16,870, on his life, for $10,000, to be paid to his son Patrick Hogan, who resided some seventeen miles from Rockford, in Ogle county, on the death of the father, subject to the conditions of the policy. The circumstances under which the policy was issued were: That J. C. Mayberry was the general agent of the company in 1868 and 1872, residing at Rockford. L E. Herrick was a solicitor of insurance under Mayberry, and went out in company with one Parkison, another insurance solicitor, from Rockford to Ogle county, to solicit Patrick Hogan to take insurance on his own life. He declined to take any, but originated a suggestion for a policy on his father's life, John Hogan, an old man, living at Rockford, if it was practicable. There were doubts of its practicability, but after an interview of some hours an application was made out by Herrick, to be delivered to Mayberry. Herrick knew nothing of John Hogan, except from Patrick's statements, neither he nor Mayberry ever having seen John Hogan till long after the policy was issued. The application was taken away by Herrick, and soon after delivered by him to Mayberry. The signature of John Hogan appeared to the application, and, as may be inferred from the evidence, was in the handwriting of Herrick. Mayberry forwarded the application to New York, to the company, and received therefrom the policy, and mailed it to Patrick Hogan, Mayberry never having seen or had any communication with Patrick up to that time. He never collected any premium from John Hogan, or had any communication with him. At a subsequent time Mayberry requested Patrick Hogan to change the policy into a Tontine policy, stating to him that the company were changing all their policies to Tontine policies, and having gone to his house to see him for the purpose. There was an arrangement that Patrick Hogan would call and see about it. Some days or weeks afterward, he came into Mayberry's office, and at the latter's request signed the following letter, the signature "John Hogan" being written by Patrick Hogan, viz:

ROCKFORD, ILL., Oct. 28, 1872.

J. C. MAYBERRY, ESQ., State Agent, Rockford,

Dear Sir:—Please obtain for me a Tontine Policy for ten thousand dollars in the Guardian Mutual Life Insurance Company of New York, as I wish to surrender policy No. 16,870, and accept its return value to apply on the premium on the new policy, reference being had to my application for policy No. 16,870.

Yours truly, JOHN HOGAN.

Thereupon Mayberry himself filled out and forwarded to New York what is called a "dummy application" for the new policy, Patrick Hogan doing nothing more than to sign the letter as above. The company thereupon issued a new policy on the Tontine plan, called a "Tontine Saving Policy," No. 33,754, dated Nov. 7, 1872. This policy, like the first, purports to insure the life of John Hogan in the amount of $10,000, for the sole use of his son Patrick Hogan, and contains the recital that it is granted "in consideration of the representations made in the application for policy No. 16,870, which is hereby made a part of this contract."

John Hogan died from the effects of taking arsenic, August 26, 1873. This suit was thereafter brought by Patrick Hogan against the insurance company, upon this second policy, the "Tontine Saving Policy," wherein he recovered, in the court below, a verdict of judgment for $10,500, and the defendant appealed to this court.

SHELDON, J.

It is first insisted as a ground for reversing the judgment, that the averments in the declaration are not sufficient to sustain the judgment upon the evidence. The declaration was framed precisely as if John Hogan had, as the policy purported in fact, procured the insurance himself for the benefit of Patrick Hogan, and so it is not averred, as it need not be in such case, that Patrick Hogan had any interest in the life of John Hogan. But a different rule prevails where one procures insurance on the life of another. In such case the plaintiff must aver in his declaration on the policy that he had an insurable interest in the life insured, and prove the same affirmatively as a part of his case. And as the fact here is, that Patrick Hogan procured the insurance in question upon the life of John Hogan without the latter's knowledge or consent, and that Patrick Hogan alone, without the knowledge of John Hogan, paid whatever premiums were advanced upon the policy, it is insisted the declaration is not sufficient to sustain the judgment upon the evidence, for want of the averment that Patrick Hogan had an insurable interest in the life of John Hogan.

Although it may be otherwise upon the proof, upon any question as to the validity of the policy as respects the form of the declaration, we regard the company as *concluded* from making any such objection. With knowledge of the facts the agents of the company allowed and were instrumental in causing the transaction of the insurance to assume the form which it did, and in framing the declaration upon the policy the plaintiff was justified in treating it according to its purport, and upon a mere question of pleading, the company should not be heard to make the objection, that the transaction was different in fact from what it purported to be by the policy.

And in this connection may be answered another point made, that the application was a fraud on the company in not disclosing that it was really Patrick Hogan's application when it purported to come from John Hogan. The whole conduct and dealing of the agents with Patrick Hogan throughout the entire affair, in all its different stages, show too much of privity and knowledge on the part of the agents of the company, in respect of the actual facts, to expose the transaction to this imputation. It is further objected on this subject of pleading, that inasmuch as, according to the recital of the policy sued on, it was issued "in consideration of the representations in the application for policy No. 16,870, which is hereby made a part of this contract," the declaration should have set out the whole transaction, beginning with the original insurance, and have counted upon both policies. A good cause of action was shown by declaring upon the policy sued on alone, and we regard it as unnecessary to have noticed in the declaration the former policy or application. If the representations in the former application furnished any matter in defeat of the right of action, it was open to the defendant to avail of it in defense.

It is said if this position taken is not correct, then the court below erred in permitting the original policy and the payments made under it to be given in evidence on the trial. But this was done,

ot in support of the action, but to meetn the matter of defence set up of suicide. Had such defence been established, the limit of recovery by the provisions of the policy would have been the amount of premiums paid. In view of this defence, the proof, we think, was properly made of the whole amount of the premiums which had been paid under both the policies.

The policy in suit, as also the original one, contained the provision that "should the death of the assured be caused by any act of self-destruction, whatever, sane or insane, then the said company shall pay to the assured the full amount of the premiums that shall have been paid hereon, but no further sum whatever, and then in that case the policy shall cease and determine. It clearly appeared that John Hogan died from the effects of arsenic, either purposely or inadvertently taken by himself. It was a main ground of defence that the poison was taken designedly and the death caused by suicide. Evidence was adduced tending to its proof.

The court below gave to the jury, for the plaintiff, this instruction. And the court further instructs the jury that in case of death and the evidence leaves the matter in doubt whether the deceased came to his death by an act of self-destruction or by accident, the law presumes the death to have occurred from accident. The giving of this instruction is assigned as error. This instruction required even more than full proof of the fact of suicide—the amount of proof required in a criminal case to constitute full proof of the fact in dispute, only requires evidence which satisfies the minds of the jury of the truth of the fact to the exclusion of every *reasonable doubt*. This instruction in effect tells the jury that if there is under the evidence, *any doubt* of the fact that the deceased destroyed himself, the law presumes the death to have occurred from accident.

Under the instruction, no matter how strong the preponderance of evidence might have been of the commission of suicide, yet, if the jury had a doubt upon the subject, it is not seen how they could have done otherwise than to find against the fact of suicide.

Where there is the occurrence of death merely and no evidence upon the subject, the presumption is that it was from natural causes, and not an act of self-destruction. The presumption prevails in the absence of proof or in the case where the evidence on the point is equally balanced. This is the extent. The jury we think were not under this instruction, left at liberty as they should have been, to determine from all the evidence whether there was here an act of self-destruction or not. The defendant was entitled to have the issue it made on this question fairly submitted and decided upon a preponderance of the evidence adduced. An instruction to a jury what the "presumption of law" was upon a question of disputed fact, was commented upon in Garritson *v.* Pegg, 64 Ill., 111, and condemned as being extremely likely to mislead the jury. The instruction was erroneous. Objection is also taken to this instruction which was given for the plaintiff.

If the jury believe from the evidence that the plaintiff, Patrick Hogan, was the son of John Hogan, and that the relations between the father and son were amicable and affectionate, and that John Hogan was a prosperous and well-to-do man; and if the jury further believe from the evidence that Patrick Hogan had remained at home and worked for his father several years after he became of age, for which he had received no compensation from his father, and if they also believe from the evidence that Patrick Hogan had made valuable improvements after he became of age, upon an eighty acres of land of his father's, under a promise, or a well grounded expectation that his father would give him the land upon which the improvements had been made, and that his father, John Hogan, had subsequently disposed of the land and had made said Patrick Hogan no compensation for the improvements made by him, said Patrick Hogan thereon, and that he, Patrick Hogan had a just, legal and moral claim upon his father, for such labor and improvements upon said piece of land, at the time of making said application for insurance upon the life of his father and the issuing the policy thereon, then the court instructs the jury that such facts would constitute an insurable interest in Patrick Hogan, in the life of his father, John Hogan.

As also to the refusal to give the following instructions which were asked on behalf of the defendant.

If you shall find from the evidence that the applications for insurance, bearing date December 29, 1868, and October 28, 1872, offered in evidence, and purporting to have been made by John Hogan, were really in substance the application of Patrick Hogan, for insurance on the life of his father, then you will enquire whether Patrick had an insurable interest in the life of his father which would support a policy for $10,000.

In determining this question, you will enquire whether, from the evidence, it appears that at the time of making such applications, said Patrick had any pecuniary interest, as creditor or otherwise, in the life of his father, or any reasonable expectation of profit or advantage which might be thwarted by his father's death, for the law will not enforce policies of insurance procured for mere gambling or wager purposes, upon lives, on the continuance of which the assured cannot be deemed to have an insurable interest, and the mere relation of father and son, where both parties are of mature years, and live apart, in independent pecuniary circumstances, and mutually entirely independent of each other, and having no business relations with each other, does not create an insurable interest in the son on the life of the father; and in deciding whether, in this case, Patrick Hogan had such an interest in his father's life as will support the insurance procured, you will take into account all the evidence as to the respective ages and situations in life of the father and son, and their business and social relations, and all other facts which tend to show whether, as above defined, the son had an insurable interest in his father's life, at the date of his application aforesaid.

You are further instructed that though a party may have *some* insurable interest in the life of another as creditor or otherwise, yet if the amount of insurance procured upon such life appears palpably to be very largely in excess of any possible loss the assured can suffer from the death of the insured, then the presumption of a gambling or wager insurance arises, which calls upon the assured to show that such insurance was not procured as a mere cover for gambling, or a wager upon the life of the insured; and in this case, if you believe from the evidence that the plaintiff had some interest of an insurable character, as already defined, in his father's life, at the date of his several applications for insurance, yet if you find from the evidence that the amount procured was vastly disproportionate in its excess to any probable loss which Patrick might suffer from his father's death, such circumstance has a tendency to prove that the insurance was procured for mere purposes of speculation, and as a cover for gambling, and if from the evidence you shall find that such was the fact, then the plaintiff cannot recover in this action.

Under the facts, we consider that Patrick Hogan had no just or legal claim upon his father for labor or improvements, and that should not have been submitted to the jury as a question for them to find upon. A moral claim would not constitute an insurable interest in behalf of one as a creditor. The facts, as we regard them, were no more than evidence tending to show an insurable interest, and should not have been declared by the court to constitute an insurable interest. As said by the court, in the case of Ruse *v.* The Mutual Benefit Life Insurance Company, 23 N. Y., 516: "A policy obtained by a party who had no interest in the subject of insurance, is a mere wager policy." "But policies, without interest, upon lives, are more pernicious and dangerous than any other class of wager policies, because temptations to tamper with life are more mischievous than incitements to mere pecuniary frauds. And see 3 Kent Comm., 11th ed., 462-3. It is said that every man has an interest in his own life to any amount he chooses to value it, and may insure it accordingly. But what is such an interest in the life of another as will support a contract of insurance upon the life, is confessedly not as yet very well defined under the authorities.

Some of them tend in the direction that the mere relationship, as between father and son reciprocally, is a sufficient foundation upon which to rest an insurable interest. Mr. May, in his late treatise on the Law of Insurance, § 107, says, that that precise question yet remains to be decided; and he states as the result of his review of the authorities, his conclusion to be, that the relationship seems to be of little importance, except as tending to give rise to the circumstances which justify a well-founded expectation of pecuniary advantage from the continuance of the life insured, or risk of loss from its termination. Mr. Bliss, in his work on Life Insurance, section 31, seems to arrive at essentially the same conclusion. We are disposed, from an examination of the authorities and our own sense of the requirement of sound public policy, to concur in such conclusion, and hold that the mere relation here of father and son did not constitute an insurable interest in the son in the life of the father, unless the son had a well-founded or reasonable expectation of some pecuniary advantage to be derived from the continuance of the life of the father. We do not regard, as really holding anything different, the case cited as a contrary authority by appellee's counsel, of Insurance Company *v.* Bailey, 13 Wall., 619, where the court, in discussing this question, say, as the better opinion, "that it is sufficient to show that the policy is not invalid as a wager policy if it appear that the relation, whether of consanguinity or of affinity, was such between the person whose life was insured and the beneficiary named in the policy, as warrants the conclusion that the beneficiary had an interest—whether pecuniary or arising from dependence or natural affection—in the life of the person insured." We think this may consist with the idea that it is the well-founded expectation of advantage to be derived from the continuance of the life insured, which makes the insurable interest in it, and not the mere relationship as between father and son, under any and all circumstances.

The circumstances of the situation of the parties as bearing this connection, were, that at the time of the application for the original policy, John Hogan was an infirm man, having but a partial use of his right arm and leg, unable to labor, engaged in no business, and sixty years of age, as the application states, though his age was a point in dispute, there being evidence tending to show he was at least five years older. He had four children; had been married to a second wife about four years before, by whom he had a young child. He left an estate of some $13,000, and a legacy by his will of $1,000, to Patrick Hogan. The latter was forty years of age, living away in another county, some seventeen miles distant, with a family of children, upon a farm of his own of 300 or 400 acres.

As respects the second refused instruction, appellee's counsel saying nothing in just ification of its refusal, asserts that it was given, and files with his brief a certificate of the clerk to that effect. But we, of course, cannot notice it. The bill of exceptions states that the instruction was refused. We can only look to and act upon that. Cammack *v.* Lewis, 15 Wall., 643, was a case where, in a policy of insurance to a creditor, on the life of a debtor, the sum insured was so largely disproportionate to the amount of the creditor's claim that the policy was held void, as being a mere wager policy. This would seem to have entitled the defendant to the instruction. According to the views which have been expressed, the first refused instruction was substantially correct, and we think should have been given; as also that the above one given for the plaintiff, should have been refused.

Other questions have been raised and discussed, which, in order to the disposition of the case, it is unnecessary to notice, and we pass them by without considering them. The judgment is reversed and the cause remanded.

We are under obligations to the law firm of HERVEY, ANTHONY & GALT, of this city, for the following opinions:

SUPREME COURT OF ILLINOIS.

OPINION FILED JUNE 30, 1876.

BARNUM BLAKE *v.* CHRISTINE BLAKE.

Appeal from Cook.

DIVORCE—APPEAL FROM DECREE ORDERING MONEY TO BE PAID FOR EXPENSES AND ATTORNEY'S FEES.

1. APPEAL.—That an appeal will lie from a decree ordering a husband, in a divorce case, to pay money to the wife for expenses already accrued, and to accrue, and for attorney's fees.
2. FINAL ORDER.—That such a decree is not to be regarded as interlocutory, merely; it is more in the nature of a final decree, and if no appeal lies, it would furnish an instance of a money decree against a party for which no relief can be had.
3. APPEALS.—It is apprehended, says the court, there can be no decree against a party that will work a deprivation of his property or liberty, from which no appeal or writ of error will lie.
4. ATTORNEY'S FEES.—That the attorney's fees allowed in this case were excessive.—[ED. LEGAL NEWS.

Opinion by SCOTT, J.—A motion was made in this court to dismiss the appeal in this case, on the ground the decree appealed from is interlocutory and not final. The appeal taken is from a decree of the Circuit Court awarding attorneys' fees, and money to defray the expenses attending the defense of an appeal which defendant had prayed from an order of the Circuit Court committing him to prison as for contempt, for non-compliance with a previous decree for alimony and solicitors' fees in complainant's suit against defendant for divorce.

The question raised is one that has never been passed upon by this court; but upon first impression we are of opinion the appeal will lie. It is a money decree, is for a specific sum, and is payable absolutely. No execution has been as yet awarded, but the court has the undoubted authority to award an execution, or, if payment was willfully and contumaciously refused, the decree might be enforced by attachment as for contempt, or payment might be coerced by sequestration of real or personal estate. Blake *v.* The People, Sept. T., 1875, (reported 8 CHICAGO LEGAL NEWS, page —.)

By one mode or the other the decree could be enforced, and if defendant has property it could be in some way consistently with the practice in courts of chancery be subjected to its payment. Such a decree does not seem to us to be merely interlocutory. It is more in the nature of a final decree, and if no appeal lies, this case affords an instance of a money decree against a party for which no relief can be had, no matter how unjust or oppressive. This ought not to be.

It is no answer to this position to say defendant can have this decree against him reviewed on appeal or error after a final decree in the original cause. Of what avail would that privilege be to him then? The litigation might be protracted and years elapse before any final decision could be reached. In the meantime he has been imprisoned for disobedience to the decree, or his property under process of law been subjected to the payment of the sum decreed.

Nor does the fact an appeal is allowed impose any hardship not incident to other money decrees from which appeals may be prosecuted.

On the theory alimony is for the immediate benefit of the wife to enable her to prosecute or defend her suit against her husband on terms of equality. The only serious result would be to delay the litigation until the propriety of the decree for temporary alimony and solicitor's fees could be determined in the appellate court. On the contrary if an appeal should be denied it might subject defendant to very great hardships in many cases, as the sequel will show. It is apprehended there can be no decree against a party that will work a deprivation of his property or liberty, from which no appeal or writ of error will lie. Such is the decree against defendant. Under it he may be deprived of his liberty or his property subjected to levy and sale.

Entertaining jurisdiction of the cause, but one other question arises, and that has relation to the amount ordered to be paid, whether it is justified by the facts in the case.

Undoubtedly the court under our statute has power to award attorney fees and other expenses in divorce causes

and the matter is largely in the discretion of the court. But this court has always assumed jurisdiction to review the action of the court below in the allowance either as to alimony or solicitor's fees and its right to do so has not been questioned. Blake *v.* Blake, 70 Ill., 618.

Such allowances must always be reasonable, having in view the wealth and social standing of the parties. What would be suitable alimony for the wife or reasonable counsel fees, is a matter of evidence.

We have examined with care the evidence in this cause, and we cannot avoid the conclusion, the sum allowed for attorney's fees and expenses of the suit is unreasonable and oppressive in the extreme, in view of the services rendered and to be rendered. The record has been incumbered with a vast amount of useless matter, wholly irrelevant to this application, and if counsel choose to perform this valueless labor, he will not be permitted to charge defendant for his services.

The decree will be reversed and the cause remanded.

Decree reversed.

HERVEY, ANTHONY & GALT, for appellant.

S. K. DOW, for appellee.

SUPREME COURT OF ILLINOIS.

OPINION FILED JUNE 30, 1876.

NO. 460.—BARNUM BLAKE *v.* THE PEOPLE.

Appeal from Cook.

WHEN A PERSON MAY BE IMPRISONED FOR NOT COMPLYING WITH A DECREE TO PAY MONEY.

1. IMPRISONMENT FOR NEGLECT OR REFUSAL TO PERFORM DECREE.—That when the neglect or refusal to perform the decree is not from mere contumacy, but from the want of means, the result of misfortune, not induced by any fraudulent conduct on the part of the defendant, the party will be compelled to adopt some mode other than imprisonment to enforce the decree, consistent with the practice in the courts, either by execution or by other final process, or by sequestration of real or personal estate, or by the exercise of such other powers as pertain to courts of chancery, and which may be necessary to the attainment of justice.

2. DECREES FOR THE PAYMENT OF ALIMONY.—That decrees for the payment of alimony are not different from other decrees for the payment of money; that imprisonment for non-compliance therewith, unless willful, or unless upon a refusal of the defendant, upon proper demand made, to deliver up his estate in satisfaction of the decree, is within the inhibition of the Constitution against imprisonment for debt.—[ED. LEGAL NEWS.

Opinion by SCOTT, C. J. Shortly stated, the case made by this record is, that on the eighth day of February, 1875, the court entered an order in the case of Christine Blake *v.* Barnum Blake, then pending for divorce, that defendant should pay the complainant $75 forthwith, and the sum of $65 on the first day of every month next following during the pendency of the suit, for temporary alimony, also pay the further sum of $150 to her solicitor's within ten days from that date, as a reasonable retainer and counsel fee, and that defendant refund to her the sum of $6, costs advanced, and that in case of default in the payment of such sums of money, or any part thereof, the same should be collected in accordance with the usual practice in courts of chancery in such cases.

An affidavit having been filed showing defendant had not complied with the decree of the court in that particular, and that there was then due, under the decree, the sum of $426, and that another monthly instalment would mature on the next day, thereupon on the first day of June, 1875, on motion of complainant's solicitors, the court entered an order that defendant be arrested and brought into court for a failure to make payments of the several instalments of alimony and solicitor's fees as he had been directed to do by the original decree.

On being brought into court, defendant first entered a motion that he might be discharged from arrest for the reason he was then, and had been, pecuniarily unable to comply with the decree of the court for the payment of the several sums of money specified, and secondly, for a modification of the decree allowing alimony, that the installments to be paid might be so reduced that he could thereafter pay them. Both motions were based upon affidavits in which were given in detail the facts relied upon in support of the motions. Counter affidavits having been presented and considered, the court overruled both motions, and ordered defendant to pay instanter the amount due under the original decree, and in default of such payment he be remanded to the custody of the sheriff, to be safely kept until he should comply with the order, or be otherwise discharged.

Under our statutes there are several modes in which decrees in chancery may be executed or enforced. When there shall be no direction that a master in chancery or commissioner execute a decree, the same may be carried into effect by execution, or other final process, according to the nature of the case, or the court may, if necessary, direct an attachment to be issued against the party disobeying such decree, and may fine or imprison him, or both, in the discretion of the court, and may also direct a sequestration for disobedience to any decree. R. S. 1874, p. 203, sec. 47.

In divorce cases the court is authorized to require the husband to pay the wife such sums of money as may enable her to prosecute or defend the suit, and when it is just and equitable, may allow her alimony pending the litigation, and may enforce the payment in any "manner consistent with the rules and practice of the court." R. S. 1874, p. 421, secs. 15, 18.

It is apprehended that decrees for alimony may be enforced by execution or other final process, as other decrees in chancery, or in any other mode consistent with the practice in the courts of chancery. But as cumulative remedies, no doubt the court may enforce decrees for alimony, either by sequestration of real or personal estate, by attachment against the person by fine or imprisonment, or both, in the discretion of the court," as other decrees in chancery may be enforced.

That courts possess power to commit as for contempt, to compel obedience to decrees for the payment of alimony, has been recognized by this court in a number of cases. Buck *v.* Buck, 60 Ills., 105; O'Callaghan *v.* O'Callaghan, 69 Ills., 552; Dinet *v.* The People, (Sept. T., 1873). In Buck *v.* Buck, the court committed defendant for disobedience to a decree for alimony and maintenance, and its action was affirmed on appeal.

While this extraordinary power is conceded to rest in the courts, it is nevetheless subject to this limitation imposed by the constitution, that a party may not be imprisoned except in cases where it shall appear he has the pecuniary ability to enable him to comply with the decree, and his disobedience is willful. In O'Callaghan *v.* O'Callaghan, it was said: "The court is empowered to punish willful obstinacy in such cases by imprisonment, but we think the spirit of our constitution forbids that the pecuniary inability of the party not resulting from his fraudulent conduct to produce that condition, cannot be punished as a contempt by imprisonment."

Where the neglect or the refusal to perform the decree is not from mere contumacy, but from the want of means the result of misfortune, not induced by any fraudulent conduct on the part of defendant, the party will be compelled to adopt some mode other than imprisonment to enforce the decree consistent with the practice in the courts, either by execution or by other final process, or by sequestration of real or personal estate, or by the exercise of such other powers as pertain to courts of chancery, and which may be necessary to the attainment of justice. It is not perceived in what respect decrees for alimony are different from other decrees for the payment of money. Imprisonment for non-compliance therewith, unless willful, or unless upon a refusal of defendant upon proper demands made to deliver up his estate in satisfaction of the decree, is within the inhibition of the constitution against imprisonment for debt.

The case at bar comes within the rule declared. It appears from the affidavit in the record, defendants refusal to comply with the decree of the court was not wilful, but resulted solely from his pecuniary inability, and that, under our former decisions was sufficient to entitle him to be discharged from arrest. Detailed statements of defendant's financial condition were given, from which it appears he had no means and no income from which he could discharge the decree. This condition was not the result of any fraudulent conduct on his part, but was produced by misfortunes in commercial transactions. There is nothing in the record that disproves or even contradicts defendant's account of his financial condition. It must therefore be regarded as a fair and candid exposition of his monetary affairs. Defendant discloses that he has real estate and perhaps personal property, but it is all heavily incumbered. A full exhibit of all his property, real and personal is made, that it may be subjected to the payment of alimony under the decree, in any manner known to the law or consistent with the practice in the court. This is all he can do and having offered to surrender his property, such as he has, he is entitled to be discharged from arrest.

The judgment will be reversed and the cause remanded, with direction to the court to enter an order discharging defendant.

ENGLISH DIVISIONAL COURT FOR APPEALS.

Thursday, June 1.

(Before BRAMWELL, B. and GROVE, J.)

LUMLEY *v.* THE METROPOLITAN RAILWAY COMPANY.

LEASE—COVENANT NOT TO CARRY ON THE BUSINESS OF A CONFECTIONER—GROCER SELLING SWEETMEATS.

It is no breach of covenant not to carry on the business of a wholesale or retail confectioner for a grocer and teadealer to sell a particular kind of sweetmeats in which a confectioner may happen to deal.

This was a rule to set aside a non-suit by the Judge of the Clerkenwell County Court, and to recover £10, 10*s*., the agreed damages, and the question raised was, whether there had been a breach of the covenant contained in a deed dated the 3rd June, 1868, and made between the Metropolitan Railway Company of the one part, and Robert Lumley of the other part. Mr. Lumley was a wholesale confectioner, and the company took his premises, and contracted with him that he should have certain rights of preemption; these were afterwards given up, in consideration that the company entered into a covenant that no tenant should carry on at the premises mentioned in the deed, the business of a pastry-cook or wholesale or retail confectioner. The company afterwards let the premises on lease to Day, and inserted in his lease a similar covenant to that contained in their deed with Lumley.

Mr. Day carried on the business of a grocer and teadealer, and it appeared he was in the habit of selling a particular kind of sweetmeat to the extent of 28lb or so a week.

The question raised was, whether the sale of the sweetmeat was a breach of covenant hereinbefore referred to.

A rule *nisi* was granted to set aside the non-suit, against which

Waddy showed cause.—The only question here, is as to what carrying on the business of a confectioner includes. According to Johnson, a confectioner is a man whose trade it is to make confections or sweetmeats. [BRAMWELL, B.—A man sells coals and potatoes, is he therefore a green-grocer?] The real test is, whether or no he substantially carries on the trade of a confectioner.

Arthur Charles supported the rule.—Day is a confectioner *quoad* this particular sweetmeat. The other side say this covenant should be read as a covenant prohibiting retail confectionery only. The evidence here is, that as much as 28 lb. of this sweetmeat is sold every week. In Doe *dem.* Gaskell *v.* Spry (1 B. & Ald. 617), the defendants covenanted in a lease not to carry on certain trades in the premises demised, amongst others, that of a butcher. From the evidence, it appeared that the defendant was a carpenter and joiner, and had taken the house in question to fit up a chandler's shop, in which various provisions were sold. He was also in the habit of selling meat in a raw state to his customers, though the animals were not killed there. Lord Ellenborough, C. J., says: "It is not necessary that a man should carry on every branch of a trade on the premises in order to come within the proviso of the lease. It will be quite sufficient if he partially carries on these; and here he does exercise a material part of it in exposing the meat for sale."

BRAMWELL, B.—Were it not that a rule *nisi* had been granted, I should have thought this case perfectly clear. Mr. Charles reads this covenant as if it meant the tenant shall neither carry on the business of a confectioner, nor sell articles usually sold by a confectioner. Here the defendant carries on the business of a grocer, and it appears that grocers and confectioners alike deal in the same things; why, then, is this a breach of covenant? It is merely a case of two different tradesmen selling the same article. I think the County Court Judge came to a right conclusion.

GROVE, J.—I am of the same opinion. Had it rested with me whether this rule should have been granted, I certainly should have refused it. The real question is, does the defendant substantially carry on the business of a confectioner? If, under pretense of carrying on a grocer's business, he was really trading as a confectioner, the case would have been altogether different. The case cited is distinguishable; the point there was whether there must be a killing and slaying on the premises in order to make a man a butcher.

Rule discharged.

—*The London Law Times.*

SUPREME JUDICIAL COURT OF MASSACHUSETTS.

WHITCOMB'S CASE—MARCH 30, 1876.

Habeas Corpus.

AUTHORITY OF CITY COUNCIL TO COMMIT FOR CONTEMPT—CONSTITUTIONAL LAW.

The Massachusetts statute conferring authority upon the presiding officer of the city council to commit for contempt, is unconstitutional.

Petition for *habeas corpus*. It appeared that Ephraim D. Whitcomb was summoned to testify before a special committee of the Common Council of the city of Boston. He appeared, but refused to answer a question propounded to him, stating that he did not refuse because the answer would criminate him, but did refuse for business reasons. Whitcomb was ordered to be committed for contempt. Ch. 128 of the acts of 1863, under which these proceedings were to be had, provides that "in case any witness summoned and paid to attend and testify before any City Council shall fail to attend in pursuance of such summons, the presiding officer of such City Council, or either branch thereof, may issue a warrant to bring such witness before them to answer for the contempt, and also to testify as a witness in the cause in which he is summoned."

The question in the case was whether this statute was constitutional.

Held, That the Common Council has not the power to commit and punish for contempt without right of appeal or trial by jury. To confer such a power upon municipal boards or officers, which are not courts of justice, and whose proceedings are not an exercise of judicial power, is repugnant to the constitution of the commonwealth, and a violation of the twelfth article of the Declaration of Rights, which declares that no subject shall be arrested, imprisoned, or deprived of his liberty, but by the judgment of his peers, or the law of the land. So much of the Stat. of 1863, c. 158, as undertakes to confer such authority upon the presiding officer of each branch of a City Council, or the chairman of a board of selectmen, was inoperative and void.

Opinion by GRAY, C. J. Prisoner discharged.—*Law and Equity Reporter.*

SUPREME COURT OF OHIO.

IN THE MATTER OF ALBERT BEALL.

Motion for a writ of *habeas corpus* from Gallia county.

SIMEON NASH, for Beall.

JOHN LITTLE, attorney-general, for the respondent.

BY THE COURT. The applicant was convicted of assault and battery in the Court of Common Pleas, and was sentenced to imprisonment and the payment of a fine. After serving out his term of imprisonment, he was arrested on a writ of execution, no property being found, and again imprisoned. He now applies for a writ of *habeas corpus*, on the ground that the provision of the act of April 7, 1863, (S. & S., 610, sec. 2), authorizing such arrest and imprisonment, does not apply to a case like his, where it was no part of the judgment that he should stand imprisoned till the fine and costs should be paid, or if the provision does so apply, then that it is unconstitutional. We think neither of these positions is maintainable. The statute plainly authorizes the proceeding in all cases where a party has been adjudged to pay a fine; and we are aware of no provision of the constitution which it violates.

Motion overruled.

CHICAGO LEGAL NEWS.

CHICAGO, AUGUST 26, 1876.

The Courts.

SUPREME COURT OF THE UNITED STATES.

No. 213.—OCTOBER TERM, 1875.

THE NEW YORK LIFE INSURANCE COMPANY, Plaintiff in Error.
v.
HENRIETTA HENDREN.

In Error to the Supreme Court of Appeals of the State of Virginia.

FEDERAL QUESTION—LAW OF WAR—JURISDICTION.

1. FEDERAL QUESTION.—That the record does not show that any Federal question was decided, or necessarily involved in the judgment rendered by the court below.
2. JURISDICTION.—That the jurisdiction of the Supreme Court of the United States, over the decisions of the State courts, is limited.
3. NO JURISDICTION.—That this case having been presented to the court below for decision, upon principles of general law alone, and it nowhere appearing that the Constitution, laws, treatise or executive proclamations of the United States were necessarily involved in the decision, the court has no jurisdiction.—[ED. LEGAL NEWS.

Mr. Chief Justice WAITE delivered the opinion of the court.

This record does not show that any federal question was decided or necessarily involved in the judgment rendered by the court below. The pleadings, as well as the instructions asked and refused, present questions of general law alone. The court was asked to decide as to the effect, under the general public law, of a state of sectional civil war upon the contract of life insurance, which was the subject of the action. It was not contended, so far as we can discover, that the general laws of war, as recognized by the law of nations, applicable to this case, were in any respect modified or suspended by the Constitution, laws, treaties, or executive proclamations of the United States. This distinguishes the present case from that of Matthews *v.* McStea, of which we took jurisdiction, (20 Wall., 640,) and decided at the present term. In that case the question was presented whether the President's proclamation of April 19, 1861, did not suspend, for the time being, the operation of that principle in the law of war which prohibited commercial intercourse in time of war between the adherents of the two contending powers. Here there is nothing of the kind.

Our jurisdiction over the decisions of the State courts is limited. It is not derived from the citizenship of the parties, but the questions involved and decided. It must appear in the record or we cannot proceed. We act upon questions actually presented to the court below, not upon such as might have been presented or brought into the case, but were not.

The case, therefore, having been presented to the court below for decision upon principles of general law alone, and it no where appearing that the Constitution, laws, treaties, or executive proclamations of the United States were necessarily involved in the decision, we have no jurisdiction. We have often so decided. (Bethel *v.* Demaret, 10 Wall., 537: Delmas *v.* Insurance Co., 14 Wall., 666; Tarver & Keach, 15 Wall., 67; Rockhold *v.* Rockhold, decided at the present term.) The motion to dismiss the writ for want of jurisdiction is granted.

Mr. Justice BRADLEY dissenting.

I dissent from the judgment of the court in this case. When a citizen of the United States claims exemption from the ordinary obligations of a contract by reason of the existence of a war between his government and that of the other parties to it, the claim is made under the laws of the United States, by which trade and intercourse with the enemy are forbidden. It is not by virtue of the State law that such intercourse is forbidden, for a separate State cannot wage war. That is the prerogative of the general government. It is in accordance with international law, it is true; but international law has the force of law in our courts because it is adopted and used by the United States. It could have no force but for that, and may be modified as the government sees fit. Of course, the government would not attempt to modify it, in matters affecting other nations, except by treaty stipulations with them. If it did, it would prepare itself to carry out its resolutions by military force. But in many things that *prima facie* belong to international law, the government will adopt its own regulations; such as the extent to which intercourse shall be prohibited; how far property of enemies shall be confiscated; what shall be deemed contraband, etc. All this only shows that the laws which the citizens of the United States are to obey in regard to intercourse with a nation or people with which they are at war, are laws of the United States. These laws will be the unwritten international law, if nothing be adopted or announced to the contrary; or the express regulations of the government, when it sees fit to make them. But in both cases it is the law of the United States for the time being, whether written or unwritten.

The case, then, of claiming dissolution or extinction of a contract on the ground of the existence of a war, is precisely a case within the meaning of the law which gives a writ of error to this court from the judgment of a State court where a right or immunity is claimed under the Constitution of the United States, or under an authority exercised under the United States. The power given by the Constitution to Congress to declare war, and the authority of the general government in carrying on the same, are the grounds on which the exemption or immunity is claimed. It is under the authority of the government of the United States that the party is not only shielded but prevented from the execution of his contracts. If he performed them it would be a violation of his obligations to his government.

And it is highly expedient that obligations and immunities of this sort, arising from public law and the public relations of the government, should be subject to uniform rules, and to the final adjudication of the judicial department of the general government.

UNITED STATES SUPREME COURT.

No. 205.—OCTOBER TERM, 1875.

ANDREW H. HAMMOND and ARTHUR A. GOODELL, Appellants.
v.
THE MASON AND HAMLIN ORGAN COMPANY.

Appeal from the Circuit Court of the United States for the District of Massachusetts.

PATENT—ASSIGNMENT—RIGHT TO USE—RE-ISSUE.

1. *Held*, That the defendant corporation is entitled to the benefit of the contract between Mason and Hamlin, covered by Exhibit A.; and that this gives them the right to use the attachment under the extension of the original patent, now assigned to the plaintiffs.
2. That, Louis having sold this invention, and doubt existing whether the purchasers would obtain a patent for it, intended by this contract, and by Exhibit D., to secure to them the benefit of the exclusive use of that invention, in connection with his first mechanism, so long as the latter was protected by any patent founded on his right as inventor.—[ED. LEGAL NEWS.

Mr. Justice MILLER delivered the opinion of the court.

On the 18th day of November, 1856, a patent issued to Lafayette Louis for an invention which produced a tremolo in the musical notes of melodeons or reed instruments, and which has since become known as the tremolo attachment. Mr. Louis surrendered and obtained reissues of this patent on the 26th day of February, 1867, and again on the 26th day of May, 1868, and after his death, his wife, who was his administratrix, obtained, in July, 1871, what appears to have been both a reissue and a renewal for seven years of the same patent, the whole right in which she assigned to plaintiffs, May 30, 1872.

Whereupon the present suit, which is a bill in chancery, is brought against the defendants, as infringers, for an injunction and for an account of profits, and other relief.

The defendants, not denying the allegation of the use of the invention, interpose a plea, and on this plea the case was heard, and a decree rendered dismissing the bill.

The plea sets up the right to use the invention described in the reissued patent of 1872, in defendants, as shown by five several written instruments, signed by Louis in his life-time, which were made parts of the plea as exhibits A, B, C, D, and E.

The first of these is a contract between said Louis and Henry Mason and Emmons Hamlin, for the use by the latter in their melodeons, of the original invention of Louis, and is dated April 10, 1861. Exhibit B is a copy of an application by Louis for a patent for an improvement in his tremolo attachment, with the accompanying specifications, and is dated September 25, 1868. Exhibits C, D, and E are all dated the same day as this application, and are contracts between said Louis and the Mason & Hamlin Organ Company for the sale of this improvement and its use in connection with the invention already patented in 1856 and reissued in 1867 and 1868.

Exhibit A is a contract by which Louis agrees to furnish to Mason and Hamlin his patent tremolo attachment in such numbers and as they may order them, at one dollar for each attachment, and if he fails to furnish them as ordered, Mason and Hamlin are licensed to make, use and sell the same in connection with all musical instruments manufactured by them, anywhere in the United States. The closing paragraph of this contract declares that "the said parties mutually bind themselves and their legal representatives to the covenants and agreements herein contained, to continue in force until the full expiration of the term for which said letters-patent have been granted, and during such period as the same may be hereafter *renewed or extended*.

It is not alleged that any of the subsequent contracts abrogated this one. It cannot be denied that this contract extends to the renewal of the patent which was assigned to plaintiffs. The only question on this branch of the plea is whether the Mason and Hamlin Organ Company are entitled to the rights of Mason and Hamlin.

As the case was decided on the sufficiency of the plea, its allegations must be taken as true, and all that can be reasonably inferred from those allegations, and from the various exhibits which it makes, must also be held to be true. The plea does allege that the defendants are "the legal representatives, and successors, and assignees in business and interest of said Mason and Hamlin." This allegation seems to be full and specific, and the only doubt of its sufficiency arises as to whether the legal representatives spoken of in the agreement are or can be others than executors, administrators, or heirs. Whatever doubt might be entertained on this point, we think is solved by the fact that Louis, in the subsequent contracts of 1868, seems throughout to treat with the corporation as successors of Mason and Hamlin in the contract of 1861. For in exhibit E he sells and assigns to the company the exclusive right to use his supposed improvement under the patent of 1856 and all the subsequent reissues, and as this new improvement required the use of the old, he seems here to recognize the right of the company to control the license he had previously granted to Mason and Hamlin.

We are of opinion, therefore, that the defendant corporation is entitled to the benefit of the contract between Mason and Hamlin, covered by exhibit A, and that this gives them the right to use the attachment under the extension of the original patent now assigned to plaintiffs.

It is said that defendants never demanded these attachments, and, therefore, they had no right to make them.

But the allegation is full that Louis at all times *refused* to manufacture and furnish the attachment to defendants, and we think under the contract this authorized them to make them for themselves

The court below, however, rested its decision on another ground, which we think equally conclusive.

As we have already said, Louis signed these contracts with the defendant company on the same day that he made his application for a patent for his improvement in the tremolo. The supposed improvement consisted in a different construction of the parts already patented by him. By the first contract (Exhibit C) he *sold* to the defendant *this* invention wholly, and authorized the patent to issue to the company. By the second (Exhibit D) he licensed them to use this new invention or improvement in connection with his former patents, and in connection with a patent of his of 1862, for an improvement in pianos with melodeon attachments, and the company agreed to pay him a royalty of one dollar each for his new tremolo attachment, at an average of forty attachments per month. The third contract (Exhibit E) provides that if the company fail in securing a patent for the improvement sold to them, referring to his original patent and re-issues, and to his sale of the later invention, and his claim to use it in connection with the old patents, he grants to the defendants the exclusive right, under the letters patent already granted, and under *any* and all re-issues thereof, to make, use and sell the specific mechanism described and set forth in the application for the new patent.

Without elaborating this matter, we concur in the opinion of the Circuit Court that Louis, having *sold* this *invention*, and doubt existing whether the purchasers would obtain a patent for it, intended by this contract and by exhibit D to secure to them the benefit of the exclusive *use* of that invention, in connection with his first mechanism, so long as the latter was protected by any patent founded on his right as inventor. It was this use for which defendants are sued in this case.

While it is, perhaps, not necessary to decide whether in any case a sale of an invention which is never patented carries with it anything of value, we are of opinion that the rights growing out of an *invention* may be sold, and that in the present case the sale, with the right to use it in connection with the existing patent and its reissues or renewals, protects defendants from liability as infringers.

The decree of the Circuit Court is affirmed.

U. S. CIRCUIT COURT, DISTRICT OF OREGON.

OPINION FILED JULY 31, 1876.

No. 320.—W. W. PAGE *v.* JOSEPH W. TRUTCH.

Action to Recover Money.

LIABILITY OF ATTORNEY FOR NOT GIVING A CORRECT CERTIFICATE OF TITLE.

An attorney who is employed by the lender to examine the title of property offered as a security for a contemplated loan by the borrower, is responsible to the lender for the correctness of his opinion, although the expense of the examination is paid by the borrower.

If the attorney certifies that the security is a good one, he thereby warrants that the title shall not only be found good at the end of a contested litigation, but that it is free from any palpable, grave doubt or serious question of its validity.

An attorney who conducts a suit to foreclose a mortgage taken upon his certificate that the title was good, is not entitled to extra compensation because of labor and time consumed in such suit, in contesting the validity of such mortgage, upon a question within the scope of his certificate.

Whatever extra labor or time is bestowed in conducting the suit on account of such question being raised, is bestowed for the benefit of the attorney himself in maintaining his certificate, and he is only entitled to charge his client as for an uncontested case.

DEADY, J.—This action is brought to recover the sum of $1,800 gold coin, with interest from April 20, 1876, for professional services rendered by the plaintiff to the defendant between November, 1874, and said date, in conducting a suit to foreclose a mortgage upon the north half of block 8 in the city of Portland.

The answer of the defendant admits the services, but denies that they are worth more than $500 in coin, and alleges that the plaintiff, in the conduct of said suit, received sundry sums of money from the defendant for which he has failed to account; and also that the loan for which said mortgage was given as security was made upon the certificate of the plaintiff acting as attorney for defendant to the effect that the property was "a good and valid security" for such loan, but that in fact there was a grave question as to the validity of said mortgage, and that the same was "a perilous and doubtful one," whereby the defendant was put to great costs, trouble and delay in collecting his money, and suffered great loss on account of the uncertainty of the title to said property, and the consequent depreciation in its market value.

The reply admits the receipt of $86.50 in currency for the plaintiff on defendant's account, but denies that plaintiff was employed by defendant to examine the validity of the mortgage, and that the security was doubtful or perilous.

In pursuance of the stipulation of the parties, the cause was heard by the court on July 21st, without the intervention of a jury.

From the evidence the facts of the case appear to be as follows:

In December, 1873, Mr. Edwin Russell, then manager of the Bank of British Columbia, in this city, and the agent of

the defendant, then and now a resident of Victoria, V. I., loaned to D. D. Bunnell, guardian of the five minor children of Emsley R. Scott, deceased, the sum of $12,000 in gold coin, at one per centum per month interest, and took as security therefore a mortgage executed by said Bunnell, as guardian aforesaid, upon the north half of block 8 in the city of Portland, the same being the property of said minor children. That said Bunnell, before executing said mortgage, procured the order of the County Court of Multnomah county, authorizing him, as guardian aforesaid, so to do; that said Russell, before making said loan and accepting said security, employed the plaintiff to examine the title to said property and the authority of said Bunnell to execute said mortgage, and that said plaintiff, in pursuance of said employment, gave said Russell a certificate to the effect that the title to said property was in said minor children, and said Bunnell was duly authorized to make the loan and execute the mortgage as security therefore; and that said money was borrowed for the purpose of improving said property by building a market house thereon, which was done.

That afterwards, in November, 1874, the interest being in arrears upon said mortgage, the plaintiff was employed by said Russell acting as the agent of the defendant to foreclose the same; that in pursuance of said employment he brought suit in the Circuit Court for the county aforesaid, where there was a decree dismissing the same upon the ground that the mortgage was invalid for want of power in the County Court to license the guardian to mortgage his wards' property; that thereupon said plaintiff took an appeal to the Supreme Court of the State, which court upon consideration of the cause, gave a decree foreclosing said mortgage and directing a sale of the premises for the amount due thereon; and that afterwards in the spring of 1876, the plaintiff caused said property to be offered at sale upon an execution to satisfy said decree, at which sale there being no bidders, the defendant by his agent, Mr. Lloyd Brooke, bid in the same at $15,500, that being substantially the amount then due thereon. That the defendant has only received in satisfaction of the decree in said suit of Trutch *v.* Bunnell, the property aforesaid, and that assuming the title to be good, it is not now and was not at the time of said sale worth more than $12,000 in gold coin. That it was worth to foreclose said mortgage, provided there had been no material objection to the validity of the same, not more than 5 per centum of the amount recovered, but there being good cause to question the validity of the same for the alleged want of power in the County Court to authorize the guardian to execute the same, and the suit to foreclose being contested by the guardian *ad litem* on that ground, it was worth not more than $1,000.

That the plaintiff, while acting as attorney for the defendant in said foreclosure suit, received from the clerk of said Circuit Court, out of the moneys paid to said clerk by the defendant as costs and expenses of said suit, the sum of $160 in currency, for which he has not accounted to the defendant.

On the argument, several questions of law and fact were discussed by counsel. The plaintiff insisted that in making the examination of the title of the mortgaged premises he was not acting as the attorney for the defendant, but for Bunnell. But upon the evidence it is clear that the facts and law are to the contrary.

In his own testimony, the plaintiff, while he states that Russell was not to pay him for the examination and that Bunnell was, also admits that Russell would not make the loan except upon his certificate that the title was good and that the County Court had power to authorize the loan, and that he gave him such a certificate; while Mr. Russell testifies explicitly that he employed the plaintiff, who was then attorney for the bank, to make the examination, and that upon his certificate he made the loan, but that it was understood that Bunnell was to pay all the expenses of the examination of the title, as it was the custom for the borrower to do. Add to this the frequent declarations of the plaintiff to the agent of the defendant, when doubts were expressed as to the essuec of the foreclosure suit, that he was responsible for the validity of the mortgage and would pay the defendant himself if he failed to make it out of the mortgaged premises, and there can be no doubt but that he was acting as the attorney of the defendant in making the examination of the title, and is responsible to him accordingly. The fact that the borrower, Bunnell, was to pay the expense of the examination does not affect the question a particle. If the plaintiff agreed to look to him for the compensation for his services, that did not make him any the less the defendant's attorney.

Practically, it is admitted that the compensation claimed by the plaintiff is an extraordinary fee, and his right to recover it is placed upon the ground of the serious character of the litigation involved in the foreclosure suit and the extra time, labor and risk incurred by him in conducting it. In reply to this it is argued for the defendant that as the loan was made by him on the plaintiff's certificate that the security was good, and he being responsible for that opinion, if any serious question arose in the course of the litigation concerning the validity of the mortgage, just so far the correctness of the certificate was impugned or brought in question, and whatever extra labor, time or risk the plaintiff incurred on this account, was in fact incurred for himself, and therefore the defendant ought not to be required to compensate him for it.

The certificate is not to be considered a warranty against every frivolous and speculative question which the dishonesty of the debtor or the ingenuity of counsel may interpose against the enforcement of the security, but I think it ought to be held as a warranty or representation, not only that the mortgage would be found or held to be valid at the end of a protracted and expensive litigation, but that there was no palpable, grave doubt, or serious question concerning its validity.

Ordinarily, when a party loans money upon the certificate of an attorney that the title to the proposed security is good, he does not expect that in the enforcement of such security he may encounter a question which gives the debtor or other persons interested in the property a reasonable ground to contest his claim and put him to the risk and expense of a contested litigation. Upon this branch of the case my conclusion is, that the defendant having taken the security in question upon the opinion of the plaintiff that it was valid, whatever extra labor or risk the latter incurred in enforcing it on account of its alleged invalidity, was incurred in contemplation of law and good morals for himself and not the defendant, and therefore he is only entitled to compensation as for an uncontested suit to foreclose.

In disposing of this question I have not considered it necessary or proper to express an opinion upon the validity of the mortgage. Most of the gentlemen of the bar who were examined as witnesses in the case, expressed the opinion that it was invalid, and leaving out of consideration the effect of the certificate, fixed the compensation of the plaintiff proportionately high—one of them, Judge Strong, even going so far as to say that he ought to have 25 per centum of the value recovered; upon the principle, I suppose, that he considered the debt in such extreme peril that the attorney who recovered it, ought to be considered as a salvor and allowed salvage.

But even supposing the plaintiff had not given the certificate, and that he is entitled to compensation accordingly, he could not recover the fee claimed. Whatever risk there might be in the litigation, there could not be any extraordinary labor or time attending it. There were no witnesses to examine or evidence to sift and marshal. The contest, so far as there was one, turned upon a single narrow question of statute law, upon which the arguments on either side are apparent and limited. The opinion of Mr. Justice Shattuck, before whom the case was heard in the court below, was that $1,000 was a reasonable compensation for the services, and such was the opinion of other leading attorneys at this bar. In a country where the justices of the Supreme Court only get a salary of $3,000 per annum, a fee of $1,000 for conducting a foreclosure suit involving $14,000 and one such question of law and two or three weeks work, at the outside, ought to be considered a liberal compensation. But the conclusion having been reached that the plaintiff is only entitled to recover as for an uncontested suit, it is not necessary to consider the matter in this light any further. Upon this point there is no conflict in the evidence. All the witnesses agree that for an uncontested foreclosure suit, five per centum upon the amount recovered is a reasonable compensation for the services of the attorney. To ascertain what this amounts to, as there was no money collected on the decree, it became necessary to inquire into the value of the mortgaged property bid in by the defendant.

Upon this question the evidence is quite conflicting. It is given upon the assumption that the defendant acquired a good title to the property by the purchase at the sheriff's sale, and so it will be considered. The figures range from $25,000 to $10,000. From all the circumstances of the case, and the relation of the witnesses to the transaction and the subject of real property in this city, I am very certain that the minimum valuation is much nearer the mark than the maximum one. The property consists of 4 lots between Front and First and Jefferson and Madison streets. The improvement upon it is a one-story brick building about 40 feet wide and 200 feet long. It was built for a market house where there appears to be no demand for one. No one offered to bid upon the property at the sale and it only brings in $50 per month rent. I have found the value of it to be $12,000, and my impression is that that sum is rather above than below its real worth. Five per centum upon this sum is $600, which is the amount the plaintiff is entitled to recover, less the amount received by him from the defendant. The evidence upon the latter point is not satisfactory. But it appears from two receipts given by the plaintiff to the clerk of the Circuit Court, that he received from the latter out of the costs and expenses paid by the defendant in the foreclosure suit the sum of $224.50 in currency. But the plaintiff shows by the receipt of the clerk of the Supreme Court that he had advanced $35.50 of this amount and was entitled to receive it back. Besides this, I deduct $29 from these receipts because I am not satisfied but that it was advanced by the plaintiff. This leaves $160 of the amount received by the plaintiff unaccounted for, which must be deducted from the sum due plaintiff for his services. Converting the $600 into currency gives $660, which sum, less the $160, is the amount for which the plaintiff is entitled to judgment—$500.

G. W. YOCUM and HUGH T. BINGHAM for plaintiff.

JOHN CATLIN for defendant.

UNITED STATES DISTRICT COURT, W. D. WISCONSIN.

OPINION, AUGUST 1, 1876.

In re LAMMER, Bankrupt.

SETTING OFF HOMESTEAD UNDER THE BANKRUPT LAW—OCCUPYING PREMISES FRAUDULENTLY.

In this case, the bankrupt owned a lot upon which was an old house, in which he lived with his family; he built a business block on the front of the lot, and moved the old house back, and repaired it. A short time before filing his petition in bankruptcy, he moved into the business block with his family, and claimed it as his homestead. The court disregarded his claim, and *held*, That it was intended as a fraud on the rights of creditors, and not a *bona fide* change.—[ED. LEGAL NEWS.

Opinion by HOPKINS, J.

The bankrupt, when he filed his petition to be declared such, was the owner of lot 5, block 118, in the village of Menominee, 44x132 feet in size, upon which was a new brick block just finished and an old house (which had formerly stood on the site of the new block), which had been used as a dwelling house. When the block was built, it was moved on to the back part of the lot, and placed on blocks fronting on a side street, the new block being on the front. It was repaired sometime after it was moved, and the family of the bankrupt moved into it and occupied it as a dwelling house up to a short time before the filing of the petition in bankruptcy.

The new block was finished for business purposes, and not as a dwelling house. There was a saloon and billiard-room in the basement; two stores on the first floor, and a public hall in the second story. The entrance to the basement and hall was on the corner outside. The bankrupt occupied one of the stores for his business as a merchant, and had offered the other store for rent up to the time he moved into it with a part of his family. The new block cost about $9,000, and was mostly paid for out of the store.

The creditors, about the time it was finished, commenced pressing for their pay, and some sued him, and when he filed his petition in this court his personal property was in the custody of the sheriff on execution.

After his creditors commenced suing him, he placed some board partitions in one of the stores, not extending to the ceiling, and moved in there with his wife and child, leaving his father and mother, who lived with him and constituted a part of his family, in the old house. After he moved in he claimed it as his homestead. In about a month after that time he filed his petition to be declared a bankrupt.

The assignee, however, refused to set off the new block as a part of his homestead, but set off the balance of the lot, including the old dwelling house and all of the lot except 44x56 feet on the front end. The bankrupt, feeling himself aggrieved by the action of the assignee, now moves the court to set aside the assignee's report, and for an order that he set off the whole lot as exempt on the ground that it is his homestead.

The statute of this State exempts not to exceed one-quarter of an acre of land in a village or city and "the dwelling house thereon," owned and occupied by the debtor as a homestead. In order to constitute a homestead under the statute, it will be seen that it must be the *dwelling house* of the debtor, not a store, saloon or shop, so it becomes necessary to first determine whether this block can be considered a "dwelling house" within the meaning of the statute. This is a question of fact to be ascertained from the evidence.

It is conceded, that it was not built for, or intended as, a dwelling house, which is apparent by the construction of the building itself. It has none of the conveniences or comforts of such a house, and the bankrupt himself testified that he intended to build his dwelling house on some other lots in another part of the village which he had commenced to improve with that view. So I must find that it was not built or intended for a dwelling house, and was not suitable in its then condition for such use, and was not in any reasonable sense a dwelling house, unless a debtor arbitrarily has the right to call anything he pleases a dwelling house, and, by moving into such building, estop a court from all further enquiry into its character.

This is, substantially, the bankrupt's claim in this case. If occupation is alone to determine the question, then a grist mill, or cotton or woolen factory, or saloon, or church, may be a dwelling house and exempt as a homestead, for a party could move his family into either and live there as the bankrupt did in this store.

But I do not think the statute will allow of such a construction. It uses the word "dwelling house" in its common and ordinary sense, and to distinguish it from other kinds of buildings. Those words are used as a limitation upon the right of the debtor and restrict his claim to that character of building.

I do not mean by this to go so far as to hold that it must be *exclusively* used for that purpose, but in some reasonable sense it should be susceptible of being a dwelling house.

A building may be constructed for a store and dwelling house, saloon and dwelling house, but its construction should in some manner and to some extent manifest its character of dwelling house so as to give some appearance of good faith, in calling or claiming it as such.

If this is the true meaning and construction of the statute, could this party after he had built this block for business purposes with no appearance or claim that it was to be used as his dwelling, on the eve of bankruptcy move into it, and thereby change its character, and thus withdraw from the reach of his creditors that amount of his property? If he can, he had within his power the right to commit a great fraud upon his creditors, and if the law upholds such a trans-

action, it may be said to sanction what honesty would denounce as a great moral wrong.

But I do not believe the act admits of such a construction.

This block was built mostly by goods out of the store—his creditors' property—and does any one believe that if he had told his creditors that it was to be claimed as his homestead, they would have stood by and seen him put the property to such a use? Most certainly not. He was not worth anything, he had no means to put into a homestead, he was owing more than he could pay, and having built the block under such representations to his creditors, he should be estopped from interposing a homestead claim to it just as soon as he had finished it.

They rested easy when he was building a business block with their means, for that was not placing the avails beyond their reach. Their remedy was not at all impaired by that change. But to allow him by a simple act of his will to withdraw all that property by moving his family into it and claiming it as his homestead, is too unconscionable to be sanctioned if within the power of courts to prevent it.

In this case he says this building cost him $9,000, a larger sum by a good deal than the value of his other property liable to the payment of his debts. The assignee, acting upon what he supposed the better construction of the act, refused to set off the block as a dwelling house or as a part of the homestead exemption.

The bankrupt claims that the old wooden dwelling house is in bad condition, and is located amid unpleasant surroundings. The evidence shows this complaint is not wholly groundless, but he did use it as a dwelling house as long as he meant to pay his debts, it would seem, and did not discover its defects until he conceived the idea of not paying his creditors. Then he seemed to discover that it was too poor to live in. This discovery was coeval with his intention to defraud his creditors. In his insolvency he became ambitious for a better dwelling house than when he deemed himself able to pay his debts, and hence moved into this block. It was conceded on the argument that he moved in under advice of counsel to be able to hold it as his homestead. But the wooden building was a dwelling house and the block was not, and the occupancy being commenced under such circumstances and such motives, cannot be held to accomplish the purpose designed. The fraud of the party vitiated its effect and rendered the act nugatory.

Indeed, I cannot believe from the evidence that the occupancy for residence of his family was intended to be permanent. It was a mere experiment to frighten his creditors—not *bona fide*, so that all the claims based upon the pretended occupancy fail for want of reality and good faith.

All such devices are plain violations of the true spirit and meaning of the homestead law. It was intended to secure a "*home*" for the family, and therefore exempted the "dwelling house." It was not intended as a refuge for dishonest debtors to retire to, when overtaken by bankruptcy, and thereby keep their property away from their creditors.

In view of the frequent complaints that I hear against the law, I will venture to suggest that they all have their origin in the *omission* to prescribe a limit upon the *value* of the homestead to be exempted.

Bankrupts too often occupy the most elegant and costly residences under claim of homestead. Those of weak moral perceptions very frequently are distinguished in that direction, and do not seem either to be disturbed by the fact that they are built out of the property of their creditors. Such fraudulent use of their creditors' money often provokes severe comments upon our homestead law.

The Supreme Court of the State has often given expression to sound views on the subject, and in Casselman *v.* Packard, 16 Wis., 119, they decided that all the buildings on the quantity of land that might be exempted, were not exempt. That only the "dwelling house" was exempt, and stores and shops or other buildings on such land were not.

The assignee recognizing this as the law, set off only the *dwelling house*. He held that the block was not a dwelling house, in which opinion I fully concur.

The bankrupt's counsel argued that the room in the block occupied by the bankrupt could be set off, if not the whole block. That the court could divide the building horizontally and perpendicularly and give him that part, and cited Phelps *v.* Rooney, 9 Wis., 70, on that point. Something of that kind is said by the Chief Justice in his *dissenting* opinion, but the idea was too chimerical to find favor with that court, and until it is sanctioned by the State Courts I shall not attempt its adoption here.

I place my decision on the broader ground that this new block was not a "dwelling house" in fact, and the pretended occupancy of it, as such, was not in good faith, or intended to be, nor was it intended to be permanent, and therefore no change in the real character of the building was effected by that attempt at occupation by the bankrupt.

This doctrine is not new in the Federal Courts in this State. In re Wright, 3 Bisbell, 359, the bankrupt, a few days before going into bankruptcy, sold his dwelling house and moved into his store and claimed that as a homestead, but the court disallowed the claim and held that it was intended as a fraud on the creditors, not a *bona fide* change. Such, I think, is the case here, and therefore deny the motion to set aside the report of the assignee.

E. B. BUNDY, for Bankrupt.
F. J. & W. C. MCLEAN, for Assignee.

WE ARE under obligations to WM. W. BERRY, of the Quincy bar, for the following opinion:

SUPREME COURT OF ILLINOIS.

OPINION FILED JUNE 30, 1876.

M. A. BRUCE *v.* MARY J. DOOLITTLE et al.

Appeal from Scott.

CITATION AGAINST GUARDIAN—WHEN ACTION ON BOND BARRED BY STATUTE OF LIMITATION—ACCOUNTING—JUDGMENT IN VACATION.

1. That when an action on a guardian's bond is barred by the statute of limitations, it does not prevent the County Court from citing such guardian to account.
2. That when there is an error in the previous accounting of a guardian, it may be re-stated, and the guardian charged with the omitted item.
3. That it was error for the county court to enter the judgment in vacation.—[ED. LEGAL NEWS.

Opinion of the court by Mr. Justice DICKEY.

This was a proceeding instituted in the County Court to compel Manning A. Bruce, who had been appointed guardian in 1848 of Maria J., Elvira L. and James W. Campbell, to render an account and make final report of his guardianship. The guardian, who was appellant here, was brought in by citation issued and served under the statute enacted for that purpose.

In the County Court an order was entered requiring appellant to account, as guardian, for certain moneys in his hands belonging to his wards, from which he appealed to the Circuit Court, where a trial was had before the court, and the court found from the evidence that appellant had in his hands $3 735.09 belonging to his wards.

The court thereupon entered an order requiring appellant to pay over to Maria J. Doolittle $1,395.04, to Elvira L. Cackley $1,395.04, and to the heirs of James W. Campbell $945.00. To reverse the order of the Circuit Court this appeal has been taken.

It is first urged that an action is barred upon the guardian's bond by the statute of limitations, and appellant could not therefore be required to render an account on citation issued by the County Court.

So far as appears from the record, the statute of limitations was not set up or relied upon by appellant in the County Court, where the proceedings were commenced, or in the Circuit Court, where the order appealed from was entered. But even if the statute had been set up, it would be no bar to this proceeding by citation, to require a guardian to account, for it is not an action either at law or equity, within the meaning of the statute, in bar of which the statute of limitations can be pleaded. Gilbert *v.* Guplice, 34 Ill., 112. The main object of the proceeding is to determine the amount of money in the hands of the guardian, due the wards, and require an account. The statute confers express power on county courts to compel guardians to render their accounts upon oath touching their guardianship, and also authority to require guardians to give additional security when necessary, and in default thereof, power of removal. At the time the citation was issued in 1872, the bond executed by the guardian and his sureties, was in force. The guardian had rendered no final report of his doings as such, and the County Court not only had the power to require an account, but it was a duty resting upon it to take action in the matter. It appears from the record that the appellant rendered an account to the County Court in 1851, which showed a balance in his hands belonging to his wards, and although efforts were made by the County Court after that time to compel a further account and settlement by citation, they proved unavailing, and appellant was not brought before the court until 1872. It is claimed by appellant that the account rendered in 1851 is final, between the guardian and his wards, and that the Circuit Court in stating the account, could not go behind that account, or in any manner reopen it for further adjudication.

While the approval of the guardian's account by the court, in 1851, was a judicial act, yet, if the guardian had secured money which he had failed to account for, or charged himself with too small an amount, no reason is perceived why the wards may not require the account to be correctly stated, and the guardian properly charged. Bird *v.* Lockwood, 35 Ill., 215. Prior to the rendition of the account in 1851, the guardian had sold real estate belonging to the wards, under a decree of the Circuit Court, for the purpose of raising money for their education and support. In 1850, he filed a report of the sale to the court, from which it appears the land sold for $2,200. Notwithstanding this fact, a short time afterwards he rendered an account in the probate court in which he charged himself with $2,002, as the amount for which the real estate sold. But not satisfied with this fraudulent concealment of money that belonged to his wards, he also reported that $667.33⅓ of the proceeds of the sale of real estate belonged to his wife during her lifetime as widow of the father of the wards. This, too, was done when the records of the Circuit Court showed that the widow's dower had been assigned in the lands previous to the time he had made sale of the ward's interest. The effect of this would be to deprive the wards, whose interest he had sworn to protect, of the interest which would accrue from year to year on a large portion of the estate, and placed it in his own pocket.

The Circuit Court however did not reopen the account which had been approved, but merely on the evidence required the guardian to charge himself with that portion of the proceeds of the sale of the lands which he had fraudulently concealed from the Probate Court in his report, and also required him to account for interest on $667.33⅓, which he had attempted, in defiance of his duty and requirement of law, to appropriate to his wife.

There was one other item—the rent of the farm from 1846 to 1848. The guardian had charged himself with but one hundred dollars, while the proof showed the rent to be worth a much larger sum. The court, from the evidence, required the guardian to account for $160 rent he had never accounted for or charged to himself. The account of the guardian rendered in 1851, which was the last report made, was not disturbed, but left in full force, but in addition to the account then rendered, a guardian was required to charge himself with the items alluded to, which he had received as guardian and had never accounted for. We are satisfied from the evidence the court was fully justified in the conclusion reached; indeed, from the evidence, the court would have been warranted in requiring the guardian to account for a much larger sum. James G. Campbell, the father of these wards, died seized of a good farm and quite a large amount of property. The appellant married his widow and became guardian of his children. Under his management the property has been squandered and the children have secured little or no education, and while the law required the appellant, as guardian, to render an account to the Probate Court each year, and when the wards came of age, pay over to them the amount in his hands, this duty was ignored, no report made after 1851, and the money belonging to the wards has been squandered or used by the appellant in his own business. This conduct of the guardian has no sanction in the law, and had the Probate Court properly discharged its duty, he would have been removed years ago for disregard of duty and his securities sued on his official bond.

It is, however, claimed by appellant that he has settled with the wards and nothing was due them at the time the court made the order. It appears from the evidence that in 1853, Maria J. Campbell was married to Mr. Doolittle. No formal settlement was made with her. She resided with appellant some years after she was of age and received her board and clothes. But it is fair inference from the evidence, that her labor was worth all she received. James W. Campbell died in 1861. Prior to this, appellant claims to have settled with him. But all he secured was a horse-bridle and saddle, valued at $2.00, and the settlement was based upon the erroneous report of 1851. The court allowed appellant what he had paid to this ward and charged him with the balance due, which under the evidence was proper. Elvira L. Campbell married Cackley in 1863. In 1871, appellant obtained a receipt of her. But the evidence shows that the receipt was obtained on the representation that there was but $60 going to her, and that was on a settlement appellant was then making in answer to a citation in Mason county. If it turned out any further sum was due, the receipt should not stand in the way. Under the circumstances the receipt given by Mrs. Cackley cannot be regarded as conclusive upon her. Upon a careful examination of the evidence, we are satisfied that the facts found by the court were fully authorized by the testimony, and that the order entered was proper. But after the court had heard the evidence, the court adjourned for the term and the judgment of the court was entered in vacation. Appellant was not present nor did he consent. The rendition of the judgment in vacation was error for which the judgment must be reversed and the cause remanded. The court is however directed to enter the judgment when court again convenes.

Reversed and remanded.

WM. W. BERRY, JAS. M. EPLER, for Appellee.

THROUGH the kindness of FREDERIC ULLMANN, of the Chicago bar, we have received the following opinion:

SUPREME COURT OF ILLINOIS.

OPINION FILED JUNE 30, 1876.

ANDREW WARREN *v.* JAMES E. TAYLOR et al.

Appeal from Superior Court.

RESCINDING CONTRACT—FALSE REPRESENTATIONS—INTEREST ON RESCISSION.

1. Where a party is induced to enter into a contract by false representations, the court discuss the question as to the length of time within which the party must rescind the contract and bring his action for damages, after discovering such representations to be false.
2. INTEREST. The court states from what time in such action, and the rate per cent. of interest may be recovered.—[ED. LEGAL NEWS.

Opinion by WALKER, J.

The principal question presented in this case is one of fact, exceptions having been taken on the rulings of the court to only two or three legal propositions.

But it is urged, that the court below should have granted a new trial because the finding of the jury was manifestly against the weight of evidence. When examined, it is found, that if all of the evidence were taken alone, on either side, it would be amply sufficient to sustain a verdict for that side. Withdraw all of appellant's evidence, and no one would question the correctness of the finding. Or, on the other hand, if all of appellee's evidence was struck out, then the defence would be established beyond question. But the evidence is highly conflicting, and portions of it is irreconcilable. And it was for the jury, under proper instructions, to find and determine what was proved under the issues of fact in the case. Such instructions were given, and the jury found in favor of the plaintiff, and we are not prepared to say that it is decidedly and clearly against the preponderance of the evidence. In the conflict, it was for the jury to find the facts, and unless the evidence failed to warrant the verdict,

the court could not rightfully set it aside. We are therefore of the opinion that the court below did not err in refusing to grant a new trial. It is urged that the finding of the jury is excessive. That, according to the evidence of Sheldon, the Wisconsin lands were worth, at the lowest estimate, from $3,500 to $5,000, and that appellees had no right to recover more than the difference between that sum and the amount of the debt.

The answer to this is, that if the contract to take the lands on the debt was procured by false representations, known to have been such by appellant, and they were relied upon by appellees, and they were thereby induced to enter into the agreement, it was void, and appellees, on discovering the fraud, had the right to repudiate it, and sue for and recover the debt. The jury, on the evidence and under proper instructions, have found that appellees were so induced to enter into the contract, and we are not disposed to disturb the finding. Had the contract been fairly entered into by the parties, and the only fraud had consisted in fraudulent representations by appellant, when the price was fixed on the lands by Sheldon, then a different question would have arisen, which is unim portant now to determine.

It is said that the delay of eighteen months after the fraud was discovered, was too great before bringing suit, to be permitted to recover. And the case of Cox *v.* Montgomery, 36 Ill., 396, is referred to in support of the proposition. That case, in limiting the period within which the party defrauded must bring suit, is perhaps one of the most extreme cases. But there the party had full knowledge of the fraud, and all of the facts constituting it for the period of eighteen months before suit brought. Here, on the other hands, appellees only had their suspicions aroused, and commenced their investigations that length of time before this action was commenced.

Appellant's property was scattered, and the record of titles in Cook county had been destroyed by fire, and we may reasonably suppose that some considerable time expired before they could learn all of the facts necessary to establish their case, and to hold appellees precluded from rescinding the sale would be to materially shorten the period laid down in Cox's case, which we are not inclined to do.

It is next urged that the verdict was excessive, inasmuch as it allowed appellees seven per cent. interest on the account from the time it was stated until the finding of the verdict. On the statement of an account and the ascertainment of the balance due, the present statute only allows six per cent. interest. But the statute then in force authorized the parties by written or verbal agreement to stipulate for any rate of interest not exceeding ten per cent. per annum. Pub. Law, 1857, sec. 2, 45.

Tyler in his testimony states that his firm had been charging appellants seven per cent. in their dealings with him, and he had been paying it. This, in the absence of proof to the contrary, was evidence from which an agreement to pay that rate might be inferred, but had it been rebutted by evidence that no such agreement had in fact been made, then the presumption would have been rebutted, as we apprehend that a rate higher than that fixed by the statute could only be collected when there was an express stipulation or agreement therefor.

There was no evidence in this case rebutting the presumption, and there was no error in its allowance. It is also urged that interest could only be allowed from the time of the rescission of the contract, and the case of Harding *v.* Larkin, 41 Ill., 414, is cited in support of the proposition. That was an action of covenant for the breach of warranty of title. That grew out of a valid and binding contract. But here, the contract was fraudulent and void, and the rescission of the contract and tender of a re-conveyance of the lands, placed the parties in their former position, as though the conveyances had never been made. Hence, there is no presumption of rents and profits received by appellees; and the proof shows that the lands were vacant and unoccupied. Had the evidence shown that appellees had received rents and profits, whatever amount they had received, could have been set off or recouped against the recovery. But the record is barren of any such evidence, and interest was properly allowed from the date of the settlement, and the striking of the balance. After a careful examination of the entire record, we perceive no error for which the judgment should be reversed, although we should have been quite as well, if not better satisfied, had the jury found the other way, and the judgment of the court below must be affirmed.

LAWRENCE, CAMPBELL & LAWRENCE, for appellant.

FREDERIC ULLMANN for appellees.

U. S. CIRCUIT COURT, N. DIST. OF ILLINOIS.

OPINION, JULY, 1876.

MILLER BROTHERS *v.* THE PROCEEDS OF THE KATE HINCHMAN, and GILBERT HUBBARD et al. *v.* THE SAME.

Appeal in Admiralty from the District Court.

LIENS AGAINST VESSEL — SUPPLIES FURNISHED IN HOME PORT — MORTGAGE — STATE LAWS — THE 12TH RULE.

That the mortgage, in this case, is to be paid in preference to the supplies and materials furnished in the home port.

12TH RULE.—That, as the twelfth rule now stands, and is construed by the Supreme Court, a claim for materials, supplies, repairs or other necessaries, where a lien exists by the law of a State, though not by the maritime law, may be enforced in the admiralty, in a proper case of admiralty jurisdiction; but it by no means follows that because the law of the State gives a lien, it is superior to that of a mortgage; that, as between the different liens existing in this case, that of the mortgage is paramount.—[ED. LEGAL NEWS.

DRUMMOND, J.—The original libel in this case, under which the schooner was sold, was filed by Seamen, and the sale took place December 16, 1874. On that day these parties filed intervening claims for a portion of the proceeds of the vessel arising from the sale. These cases have been submitted to the court under a stipulation of the following facts:

A mortgage was executed upon the schooner, dated March 1, 1871, which was duly recorded in the office of the collector, at Chicago. The claim of Miller Bros. was for labor and materials furnished the vessel from January 1st, 1873, to December, 1874. Gilbert, Hubbard & Co.'s claim is for supplies furnished, partly prior to 1871, and also during that year and up to October, 1874. Chicago was the home port of the vessel, and the supplies and materials were there furnished at the request of the master and owners. The parties had a lien upon the schooner under the laws of the State of Illinois. There is not a sufficient fund in court, arising from the sale, to pay the mortgage, as well as Miller Bros., and Gilbert, Hubbard & Co., and the question is, whether the mortgage is to be paid in preference to the supplies and materials furnished in the home port.

I am of opinion it is, and that it constitutes a prior lien upon the vessel and should be first paid out of the proceeds. It may be admitted that if these supplies and materials constituted a maritime lien upon the vessel, that this priority would not exist, but the case of the Lottawana, 21st Wallace, 558, decides that these claims did not constitute a maritime lien, and although that case was decided under a strong dissent, still, whatever may be our personal views, we must assume it to be the law in the Federal courts upon the subject; thus reaffirming the rule laid down by the Supreme Court of the United States in the case of the Gen. Smith, 4 Wheaton, 443.

In the case of the Lottawana, the Supreme Court held that the claims which were made under the State law of Louisiana were not valid because that law had not been complied with, and there was no obstacle arising in that way to prevent the payment of the mortgage which was there set up. In this case it is admitted that there was a valid lien for supplies and materials furnished to the schooner, under the law of this State, and we are therefore met directly by the question whether the mortgage supersedes the State lien. The law of the State required that in order to make the lien available as against other creditors or subsequent encumbrances, or *bona fide* purchasers, proceedings must be instituted within nine months after the indebtedness accrued. This would exclude a large portion of the claims of the libellants.

The 27th section of the act of 1850, (contained in section 4,192 of the Revised Statutes of the U. S.,) required, in order that mortgages on vessels should be valid as against certain persons, that they should be recorded in the office of the collector of customs, where the vessel was registered or enrolled. That section provided that the lien by bottomry on any vessel created during her voyage, by a loan of money or materials necessary to repair or enable her to prosecute the voyage, should not lose its priority or be in any way effected by the mortgage. This undoubtedly means a maritime lien, and not a lien created solely by a law of one of the States. It was intended that in all such cases as are referred to in the proviso, the vessel should be bound independent of the mortgage, but as the lien in this case was not a maritime lien, it is not within the terms of the proviso.

As the twelfth rule in admiralty now stands, and as construed by the Supreme Court, a claim for materials, supplies, repairs, or other necessaries, where a lien exists by the law of a State, though not by the maritime law, may be enforced in the admiralty, in a proper case of admiralty jurisdiction, but it by no means follows that because the law of the State gives a lien, it is superior to that of a mortgage. The case of Aldrich *v.* Ætna Co., 8 Wall., 491, is a strong illustration of this principle. There it was sought to make an attachment against the vessel, issued and served subsequent to the recording of the mortgage, supersede it, because the law of the State, *as* to the mortgage, had not been complied with, which the Supreme Court decided could not be done. White's Bank *v.* Smith, 7 Wall., 646; The Belfast, 7 Wall., 624.

In the case of the Emily Souder, 17 Wall., 666, the supplies and advances were made in a foreign port and constituted a maritime lien, and were properly held to be paramount to the claims of the mortgagees, and, indeed, were within the terms of the proviso of the act of Congress as to the recording of mortgages on vessels.

The Supreme Court of this State, in construing the law of the State in relation to the lien of boats and vessels in the case of the Barque Great West, No. 2, *v.* Obenndorf, 57 Ill., 168, and in the case of the Propeller Hilton *v.* Miller, 62 Ill., 231, held that the lien created by the statute for supplies or materials furnished was subordinate to that of a mortgage given and recorded under the act of Congress; and it is held in the case of the Grace Greenwood, 2 Bissell, 131, that a mortgage properly recorded under the act of Congress, took precedence of the lien under the State law for supplies and materials furnished subsequent to the mortgage.

To the principles announced in that case, and which I believe has been followed in this circuit since, I still adhere. It seems to me, as between these different liens existing in this case, that of the mortgage is paramount. The Sky Lark, 2 Bissell, 251; The Lady Franklin, 2 Bissell, 121. The legislation of Congress was upon a subject confessedly within its legitimate authority, and it must therefore override all State legislation upon the subject, even if any existed. As the decision of the District Court was in accordance with the views here stated, the decree is affirmed.

We are under obligations to the law firm of MOORE & WARNER, of Clinton, for the following opinion:

SUPREME COURT OF ILLINOIS.

OPINION FILED JUNE 30, 1876.

LOUIS FREDENSTEIN *v.* CALVIN D. MCNIER et al.

Appeal from Dewitt.

LIABILITY OF CONSTABLE AND HIS SURETIES FOR NOT LEVYING AN EXECUTION — SICKNESS NO EXCUSE.

1. WHAT STATUTE GOVERNS.—That, in determining the liability of a constable and his sureties for the official acts of the constable, the bond and the statute in force at the time, must be regarded as the contract between the defendants and the public.

2. SICKNESS NO EXCUSE.—That the sickness of a constable is no defense to an action brought on his official bond, for failing to levy an execution; that illness cannot excuse the non-performance of an official act enjoined.—[ED. LEGAL NEWS.

CRAIG, J. This action was brought by Louis Fredenstein, before a justice of the peace against Calvin D. McNier, as constable, and S. P. Waldo and D. M. Gavender, his sureties, on the official bond of the constable.

The condition of the bond read in evidence, declared that the principal and his sureties jointly and severally agree to pay to such and every person who may be entitled thereto, all such sums of money as the said constable may become liable to pay on account of any executions which shall be delivered to him for correction, by virtue of his office, and all such damages as each and every person may sustain by reason of any malfeasance, misfeasance or non-performance of duty on the part of said constable.

It has been provided by statute, if a constable shall fail or neglect to return an execution written ten days after return day, or if the demand, debt or claim be wholly or in part lost, or if any special damage shall arise to any party on account of the neglect to act, or the misfeasance or non-feasance of any constable in the discharge of any official duty, the party aggrieved may have his action against such constable, and his sureties on the official bond, and shall recover thereon the amount of the execution and costs with interest from the date of the judgment upon which the execution issued.

In determining the liability of the constable and his sureties for the official acts of the constable, the bond and the statute in force at the time must be regarded as the contract between the defendants and the public. It appears from the evidence that in July, 1872, appellant recovered a judgment before a justice of the peace of DeWitt county against Isaac J. Shinnaman; on the third day of August thereafter an execution was issued on the judgment and delivered to the constable McNier. Shinnaman at the time lived a short distance across the line in Piatt county, but the constable was notified that on the 23d day of August, the defendant in the execution would have property at a Mr. Brown's, in DeWitt county, subject to be levied upon, and he was requested to make the levy.

When the time arrived that the constable was notified the defendant in execution would have property in the county subject to the execution, he came into the county with a threshing machine and three span of horses and remained there from three to four days. The constable however, although he resided only a short distance from the place where the property was, made no attempt whatever to levy upon it. The execution was returned, no property found, and the defendant in the execution has since died and his estate is insolvent. The only excuse offered by the constable for his failure to discharge his duty and make a levy as required by law, was, that at the time the property was in his county, he was sick with chills and fever, and in consequence thereof, made no effort to levy upon the property. The appellant on the trial objected to the introduction of all evidence tending to prove sickness of the constable as a defense to the action, but the objection was overruled and the evidence admitted. At the request of appellees the court gave this instruction to the jury:

2nd. The court instructs the jury for the defendant, that if they believe from the evidence, that an execution came into the hands of McNier, as constable, in the case of Frebenstein *v.* Shoenamann for $54.50 and costs, dated August 3rd, 1872, and that McNier was notified by the justice that Shoenamann would have property in the county on the 23rd and 24th days of August, 1872, following, and if they further believe from the evidence that on the 23rd and 24th days of August, 1872, when the property of Shoenamann was in the county, that the constable McNier, was confined to his bed from sickness, at the time the property was in the county, in such manner that he was incapable of attending to his official duties, then they will find for the defendant, but if after the defendant recovered, if he recovered so that he could perform his official duty, and the property still remained in the county of DeWitt, the defendant failed to make all reasonable efforts in his power to find such property and make the levy, the defendant would be liable.

The court refused to instruct the jury in behalf of appellant that the sickness of the officer could not be relied upon as a defense to the action.

(*Continued to page* 392.)

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Lex vincit.

MYRA BRADWELL, Editor.

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We call attention to the following opinions, reported at length in this issue.

FEDERAL QUESTION — JURISDICTION. — The opinion of the Supreme Court of the United States by WAITE, C. J., stating what will be regarded as a Federal question so as to give the Supreme Court of the United States jurisdiction to review the judgment of a State court.

PATENT CASE.— The opinion of the Supreme Court of the United States by MILLER, J., in a patent case.

ATTORNEY — LIABILITY OF TO LENDER WHEN PAID BY BORROWER.—The opinion of the United States Circuit Court for the district of Oregon by DEADY, J., holding that an attorney who is employed by the lender to examine the title of property offered as a security for a contemplated loan by the borrower, is responsible to the lender for the correctness of his opinion, although the expense of the examination is paid by the borrower; that if the attorney certifies that the security is a good one, he thereby warrants that the title shall not only be found good at the end of a contested litigation, but that it is free from any palpable grave doubts or serious question as to its validity; that an attorney who conducts a suit to foreclose a mortgage taken upon his certificate that the title was good, is not entitled to extra compensation because of labor and time consumed in such suit in contesting the validity of such mortgage upon a question within the scope of his certificate.

This opinion will be of general interest to attorneys throughout the United States. The learned judge is of the opinion that the legal profession should be held to the same liability as the members of other professions.

BANKRUPTCY—HOMESTEAD.—The opinion of the United States District Court for the western district of Wisconsin, by HOPKINS, J., refusing to allow the claim of a bankrupt to have his homestead set off to him in a business block in which he and his family were residing, on the ground that his occupancy of it was a fraud upon the rights of creditors, and was not intended to be in good faith.

GUARDIAN'S ACCOUNT—CITATION—STATUTE OF LIMITATIONS—JUDGMENT IN VACATION.—The opinion of the Supreme Court of this State, by DICKEY, J., holding that a guardian may be cited to account by the County Court, even after an action upon his bond is barred by the statute of limitations; that judgment in the case should not have been entered by the County Court in vacation.

FALSE REPRESENTATIONS.—The opinion of the Supreme Court of this State, by WALKER, J., as to within what time a party, who has been induced to enter into a contract by false representations, must rescind the contract and bring his action, after discovering such representations to be false.

LIENS IN ADMIRALTY— SUPPLIES FURNISHED IN HOME PORT.—The opinion of the United States Circuit Court for the northern district of Illinois, by DRUMMOND, J., holding that in the case before the court, the mortgage is to be paid in preference to the supplies and materials furnished in the home port. That as the 12th rule now stands, and as construed by the Supreme Court, a claim for materials, supplies, repairs, or other necessaries, where a lien exists by the law of a State, though not by the maritime law, may be enforced in the admiralty, in a proper case of admiralty jurisdiction, but it by no means follows, that because the law of the State gives a lien, it is superior to that of a mortgage. The court refers to its former decisions upon this question, and still adheres to them.

SICKNESS NO EXCUSE FOR NOT LEVYING AN EXECUTION.—The opinion of the Supreme Court of Illinois, by CRAIG, J., holding that sickness is no defense to an action brought on the official bond of a constable, for failing to levy an execution; that sickness cannot excuse the non-performance of an official act enjoined by statute. Judge DICKEY concurs in the judgment, but is of the opinion that the rule, that illness cannot excuse the performance of an official act enjoined, is laid down too broadly in the opinion, and needs qualification. SCOTT, C. J., concurs with DICKEY, J. The question upon which the judges failed to agree in this case, is one of the greatest importance to sheriffs and constables.

NOTES TO RECENT CASES.

CONSTRUCTIVE TRUST—LACHES.

The Supreme Court of Penn. in Evans' et al. Appeal, 33 *Leg. Intel.*, 280, held that where a party claims to hold another as trustee under a constructive trust, he must assert his claim with diligence, and that even less than six years will bar him on account of his laches.

MECHANICS' LIEN—MARRIED WOMAN.

The Supreme Court of Pa. in Schreiffer *v.* Saum et al., 33 *Leg. Intel.*, 280, held that a mechanics' lien to bind a married woman's separate estate must be filed against her and her husband, and indicate that the person joined with her is her husband, and that the work and material were done and furnished for and about the improvement of her separate estate.

ACT OF GOD—CARRIER BY WATER—ACCIDENT CAUSED PARTLY BY STORM, PARTLY BY TERROR OF ANIMAL.

The English Court of Appeal in Nugent *v.* Smith, 34 L. T. Rep. N. S., held that a loss occasioned by the act of God is a loss arising from and occasioned by the agency of Nature which cannot be guarded against by the ordinary exertions of human skill and prudence so as to prevent its effect. The plaintiff delivered to the defendant in London, a mare to be carried by the defendant by steamer from London to Aberdeen, between which places the defendant run steamers as a common carrier. A storm arising during the voyage, the mare was so injured that she died. The jury found that the injury was caused partly by excessive bad weather, and partly by the struggling of the mare, and they negatived all negligence on the part of the defendant. The court held, reversing the judgment of the Common Pleas, that upon these findings of the jury, the defendant was not liable. COCKBURNE, C. J. said there is no authority for the proposition, nor is there any trace of a special custom of the Realm, i. e., common law, that all carriers by sea are subject to the liability of a common carrier, whether by sea or land.

SLANDER — PRIVILEGE — STATEMENT BY WITNESS.

The English High Court of Justice, Common Pleas Division, in Seaman *v.* Nethercliff, 34 L. T. Rep., N. S., 878, *held*, that no action lies for defamatory words, spoken by a witness in a judicial proceeding, even if spoken for the witness' own purpose, and maliciously. The defendant, an expert in handwriting, was in cross-examination at a police court, whether he had heard of some severe comments made on his evidence, by the Judge, in a recent case, in which he had given evidence against the genuineness of a will. He said he had, and desired to make a further statement. The magistrate refused to hear him, but he persisted, and said he believed the will to be forged. An attesting witness to the will, brought an action for slander, and the jury found that the words were not spoken in good faith as a witness, but as a volunteer for defendant's own purposes, and maliciously, and found a verdict for plaintiff. The court, on a motion for judgment, held that the words were privileged, and that the defendant was entitled to judgment.

TRADE MARK—TRADE NAME—IMPROPER USE—INJUNCTION.—The opinion of the English Supreme Court of Judicature in the case of the Singer Manufacturing Co. *v.* Wilson, occupies twelve pages of the London *Law Times Reports*. We regret that its length prevents us from publishing it entire. The Singer Manufacturing Company had acquired a great reputation as manufacturers of sewing machines, which were commonly known as "Singer" machines, and had largely advertised these machines, describing themselves in the advertisements as the makers of the "Singer" machine. The defendant manufactured and sold machines in imitation of the Singer machines, but differing from them in some important particulars, and describing them in his advertisements and price lists as "Singer" machines of his manufacture, but the word "Singer" did not appear on the machine, which bore the defendant's own trade mark and his own name as manufacturer. The plaintiff's machine also bore a trade mark, which the defendant's trade mark in no way resembled. The court *held*, affirming the decision of Jessel, M. R., that the defendant could not be restrained from using the word "Singer" in this way, as he stated clearly in his advertisements and price lists that machines described as "Singer" machines were manufactured by himself. 34 L. T. R. N. S., 858.

ILLINOIS SUPREME COURT.—The next term of this court will commence at Ottowa, on Tuesday, September, 12th. Already attorneys are engaged in preparing abstracts, briefs and arguments, and in reading proof. We have printed for this term, some of the most beautiful briefs and arguments ever presented to the court. We have facilities for doing this class of work unequalled in the west. Having large fonts of type, and employing a large number of experienced workmen, we are enabled to print attorneys' briefs and abstracts for them with accuracy and without delay. All orders from the country will be promptly filled and proofs carefully read.

THE USE OF EXTRINSIC EVIDENCE TO SUPPLEMENT OR CONTROL DOCUMENTS OF TITLE.

(*Continued from p.* 334.)

VIII.—EQUITABLE PRESUMPTIONS.

Before we discuss the rules and cases appertaining to the use of parol evidence to rebut or fortify an equitable presumption, it will be wise to call attention to the different systems of classifying these equitable presumptions which writers of repute and authority adopt in their treatises. Before the Statute of Uses the word "use" in chancery contemplation stood in the place occupied now by the word trust, and Sir William Blackstone, Lord St. Leonards, and Mr. Hayes, with different degrees of success have applied the rules settled as to the one to the parvenu successor. The Statute of Frauds speaks of a trust or confidence which shall or may arise or result by the complication or construction of law on a conveyance, or be transferred or extinguished by an act or operation of law. Mr. Lewin remarks that the terms implied trusts, trusts by operation of law and constructive trusts, appear from the books to be almost synonymous expressions, and then distinguishes: 1. Implied trusts; 2. Trusts by operation of law; 3. Constructive trusts. At the same time he observes that constructive trusts form one branch of trusts by operation of law, while resulting trusts constitute the other. This form of definition is scarcely logical. We think Mr. Griffith is more correct in distributing the different species into implied trusts and constructive trusts, ranging a resulting trust under the former (inasmuch as it is the intention of the party therein to which operation is given by law), and defining a constructive trust as an equitable presumption, not only *juris* but *de jure*, to be displaced, indeed, by evidence of another equity, but not to be rebutted. However this may be, as far as the discussion of the use of parol evidence is concerned, the nomenclature of Mr. Taylor and Mr. Griffith seems the most serviceable. We shall commence with a concise statement as to the admissibility of parol evidence in proving an ordinary use or trust, and then proceed to the more complicated trusts or equitable presumptions in which such evidence plays so important a part. Our titles we propose to arrange in the following order:

1. The simple or express trust.
2. Executor the trustee of his surplus for the next of kin.
3. Revocation of will by marriage and other circumstances.
4. The nominal purchaser of an estate a trustee for the person who pays the money.
5. Purchase by a husband or parent in the name or names of a wife and child.
6. Joint purchases.
7. Vendor's lien.
8. Purchases by persons making undue use of information.
9. Purchases by persons having undue influence.
10. Repetition of legacies.
11. Performance of a covenant to leave money.
12. Performance of a covenant to settle land.
13. Election.
14. Satisfaction of debts, legacies, and portions.

A glance at the list will show that some of the presumptions operate in cases of wills exclusively, others exclusively in cases of deeds, while the remainder are more or less common to both.

1. THE SIMPLE OR EXPRESS TRUST.

In Fordyce *v.* Willis, 3 B. C. C., 587, Lord Chancellor Thurlow said, "I have been accustomed to consider uses as averrable, but perhaps, when looked into, the cases may relate to feoffment, not to conveyances by bargain and sale, or lease and release." That is to say, on a conveyance operating by livery of possession, a use or trust might at common law be averred or declared by word of mouth, but in deeds of bargain and sale, or lease and release and covenant to stand seized, the consideration expressed in the deed alone raised the use on trust. If it had been otherwise, Tyrrell's case, which decided that a use cannot be upon a use, would not have been law, and the most important section of the statute of

user would have had the operation the legislature intended, instead of being narrowed to a rule, which, as Lord Chancellor Hardwick observed, "though made upon great consideration, and introduced in a solemn and pompous manner, had no other effect than to add two or three words to a conveyance of the legal estate." Dyer, in his report, of the case, which was decided by the judges of the Common Pleas, in the Court of Wards 4 & 5, Phil. & Mary, thus quaintly states the judgment. (The case was a bargain and sale by A. to her son B., with a further limitation of the use to herself.) "Mes semble a toutes les Justices et a Saunders, Chief Justice, que le limitation des uses supra est void. Car admit que la statutes d'enrolments ne ust estre faits mes tantum le Statute de Uses in 27 Hen. 8, donques te cas supra ne poit estre es que use ne port estre ingendre de use." Dyer 155*a*, 20.

29 Car. 2, c. 3. An act for the Prevention of Frauds and Perjuries, better known as the Statute of Frauds, contains the following important rules:—Sec. 7. "And be it further enacted by the authority aforesaid, that from and after the said 24th June, all declarations or creations of trusts or confidences of any lands, tenements, or hereditaments shall be manifested and proved by some writing signed by the party who is by law enabled to declare such trust, or by his last will in writing, or else they shall be utterly void and of none effect. Sect. 8. Provided always that where any conveyance shall be made of any lands or tenements by which a trust or confidence shall or may arise or result by the implication or construction of law, or be transferred or extinguished by any act or operation of law, then and in every such case such trust or confidence shall be of the like force or effect as the same would have been if this statute had not been made. Anything hereinbefore contained to the contrary notwithstanding. Sect. 9. And be it further enacted, that all grants and assignments of any trust or confidence shall likewise be in writing, signed by the party granting or assigning the same, or by such last will or devise, or else shall likewise be utterly void and of none effect."

In Ireland, the Right Hon. J. E. Walsh, the learned Master of the Rolls, in Nicholson *v.* Mulligar, 3 Ir. Rep. Eq. 322, compared the weight of evidence necessary to rebut a resulting trust in the case of a purchase in another's name with that requisite to prove or establish an ordinary parol trust. He gave it as his opinion that much weaker, or at least much less definite evidence, was sufficient in the first case; that all that was necessary was to show that the person who paid the prices was not intended to take the benefit of the purchase, and that the law would then leave it where the conveyance purported to give it.

The reported cases substantiate the opinion expressed in Nicholson *v.* Mulligar. The notion that any expression of confidence and its reciprocation by the person trusted is sufficient to constitute a trust, though frequently entertained, is not the doctrine of the courts, except where there is fraud. As in contracts at common law, so in trusts in equity, something definite and final is required. Not only must the subject-matter, but the objects also must be ascertained or definitely ascertainable. Inchoate attempts to form a trust, whether shown by parol or parchment, are not enforceable; and yet parol evidence of completed intention is sufficient to superadd a trust to important legal documents.

In Beeden *v.* Major, 12 L. T. Rep. N. S. 562; 11 Jur. N. S. 537, a *feme sole* purchased £1000 Consols in the name of her niece, informed her of the fact, and that she intended the sum should be for her benefit, and procured her to execute a power of attorney enabling the aunt to transfer the stock and to receive the dividends. Vice Chancellor Kindersley was of opinion that this power to sell the stock did not amount to a retention of the ownership, that it was only the retaining a power to destroy the niece's right, and stood on the same footing as if there had been a declaration of trust subject to a power of revocation. He accordingly held that a trust was well created for the benefit of the niece after her aunt's death. He also held that the aunt, having also by will bequeathed an annuity, and the facts not establishing a parental or quasi-parental relationship, there was no ademption, but that the niece was entitled both to the £1000 and the annuity. On appeal, the Chancellor affirmed the decision, 13 L. T. Rep. N. S. 554.

In Down *v.* Ellis, 35 Bea., 578, money was standing in the name of a married woman, which, after her decease and that of her husband, was claimed by her mother on the ground that it had been invested for her while separated from her husband in her daughter's name. The affidavit of the mother was corroborated by the fact that the dividends had been received by her with the assent of the daughter and her husband, who was a Welsh clergyman, and not wealthy. Lord Romilly held the evidence sufficient to establish the resulting trust.

In Milroy *v.* Lloyd, 31 L. J., 798, Ch; 7 L. T. Rep. N. S. 178; M., in consideration of natural love and affection to his niece, by deed transferred to L. fifty bank shares, then belonging to him, with the certificates or scrip of the same, and the dividends upon trust during his life or until the niece's marriage, to apply the dividends for her use and benefit; and in the event of his death before her marriage, to transfer the share to her with trusts for her issue, in the event of her marrying in the settlor's lifetime. At this time L. held a general power of attorney from the settlor to transfer the stock of any incorporated company which might be standing in his name; and soon after the date of the deed the settlor gave him the certificates of a large number of shares he held in the same bank, including the shares mentioned in the deed; and he executed a special power to him to receive the dividends on all the shares in the bank then in his name. This was the only transfer ever made to L. of the fifty shares. The said power of attorney was never left with the bank, as was needed by their rules; but under another special power L. received the dividends, and sometimes paid them to the niece and sometimes to the settlor, who handed them over to her. Lord Justice Bruce and Lord Justice Turner held that M. continued up to his death both legal and beneficial owner of the shares, and had not by the deed conferred the ownership on any other person, and had not constituted himself a trustee for his niece or made any contract enforceable against him or his estate.

In Arthur *v.* Clarkson, 35 Beav., 458, a person voluntarily gave his promissory note to two friends for his natural child, and deposited with them title deeds to secure the amount. In his will he alluded to the provision. After the testator's death Lord Romilly held that a valid trust had been created.

In Gee *v.* Liddell, 35 Beav., 621; L. Rep. 2 Eq Ca., 341; a testator bequeathed £2,000 on certain trusts, and he empowered his executor, who was also his residuary legatee, to retain the amount, in his hands uninvested, he paying interest thereon. After the testator's death, the executor, being satisfied that the testator intended to bequeath £3,000, and not £2,000, promised to make it up to £3,000. He made no investment, but continued to pay interest on £3,000 till his death. Lord Romilly held that as to the additional £1,000, there was a complete voluntary trust which the court would enforce.

In Morgan *v.* Mallison, L. Rep. 10 Eq. Ca., 475, one Saunders signed a memorandum in this form, "I hereby give and make over to M. an India bond, value £1,000," and give it to his medical attendant, Dr. Morris, but did not hand over the bond. He died, and the residuary legatee under his will claiming, Lord Romilly held that the memorandum was a good declaration of trust, and that Dr. Morris was entitled to the bond. —*The London Law Times.*

SUPREME COURT OF ILLINOIS.

ABSTRACTS OF OPINIONS FILED AT OTTAWA, JUNE 30, 1876.

25–1874.—John M. Reynolds *v.* Joseph M. Greenebaum. — Error to Cook.—Opinion by SCOTT, C. J., affirming.

DELIVERY OF LEASE—POSSESSION A QUESTION OF FACT—CHARGE AS TO EVIDENCE.

Held, 1. Where a written lease is left in the hands of the scrivener for the benefit of both parties, this is a sufficient delivery thereof.

2. Whether one was really in possession of the premises, under such lease, is a question of fact for the jury.

3. It is erroneous to charge a jury that they *should* disregard the testimony of a witness who has sworn falsely in any material point; for the credibility of witnesses is a matter exclusively for the jury.

4. Nevertheless, where such a charge is merely abstract, and could not have prejudiced the rights of parties, a cause will not be reversed therefor.

382–1874.—James H. Bowen et al. *v.* Mary Bond et al.—Appeal from Ogle.—Opinion by SHELDON, J., reversing and remanding.

RECITALS OF COURT RECORDS.

Recitals of court records—how construed—and what their effect is—as to jurisdiction—direct and collateral proceedings—distinctions thereon—power of sale to an administrator—how construed—where no debts at the time of making the sale—validity of sale.

STATEMENT.—Bill to enjoin suit in ejectment, and to clear title, dismissed. Appellants claimed title to the premises, under an administrator's sale, which was impeached—the files being lost, and no evidence of the validity of the sale except the records. Objection being made thereon to the jurisdiction, it was *Held*,

1. That recitals of a record are competent evidence to sustain jurisdiction when this is impeached in a collateral proceeding.

2. A recital that proof was made in a cause "of the service of notice according to the provisions of the statute, in such case made and provided," meant that notice had been given by service instead of publication, and that this service had been in accordance with the requirements of the statute, as to the first mode of notice required, namely, by service of a written notice, together with a copy of the account and petition by the administrator; and it should not be construed to mean that there was service of notice only, without a copy of the account or petition, served on the heirs, etc

3. A recital in a decree "that it appeared to the court that notice according to law was given of the pendency of this cause," will cure a minor defect in a certificate of publication of notice, so as to make the certificate sufficient to give jurisdiction [in argument].

4. While, in a direct proceeding, on writ of error to reverse the proceedings of the court below, in such a case, an entitling of an order of court will not be held to show the proper filing of a petition containing the statutory allegations, namely, what lands the intestate died seized of, etc., and requesting the aid of the court, without a direct recital, yet the rule is different in a mere collateral proceeding.

5. The general rule is, that a party who has purchased land under the judgment of a court of competent jurisdiction, *bona fide*, and with no notice of any such defects as the absence of a summons, or notice, should not be put in jeopardy of his title, or be required to take the risk of the loss or abstracting of a loose paper from the files, when the decree or judgment of the court recites the fact that process was duly served, or the required notice duly given. And the rule applies in case of the absence of a petition.

6. In a collateral proceeding, the stating of facts in a record is, at least, *prima facie* evidence of the existence of those facts, to be rebutted only by the clearest proof. And where it appears that there was a petition for the sale of real estate, the findings in an order of sale may fully show that the court had jurisdiction over the subject-matter.

7. Where an order of sale directs an administrator to report at the "next term of the court," this is not to be construed as limiting the power of selling within that period of time. The grant of power to sell is general, without restriction as to time, and the provision as to making report at the next term does not have the effect of imposing any restriction as to time upon the power of sale. Nor does the fact that the court subsequently continues the cause, and thus extends the time for reporting, or gives an extension of time to the administrator to make the sale, limit it by express words to a time certain—the next term. The order, as well as the subsequent orders of continuance for report, is to be regarded as but formal orders made on the call of the docket, and no significance is to be attached to them as, in any way, changing the order of sale, or limiting the time of making the sale.

8. If, meantime, the debts were paid so that there were no debts at the time of the sale remaining unpaid, the sale will not, for that reason, be held void; because the fact would not retroact so as to annul a valid decree of sale by a court having competent jurisdiction. A purchaser at such sale cannot be held to be under obligation to go and examine first whether there are really any debts owing by the estate, sufficient to require the sale of that particular land, at the peril of getting nothing by his purchase. In all such cases, a purchaser must be held to be a *bona fide* purchaser without notice, who must, therefore, be protected. He is only required to look to the order of sale as his warrant to buy.

9. Nor does it charge a purchaser with notice that the cause was continued from term to term after the first order of sale.

436–1874.—Illinois Cent. R. R. Co. *v.* William R. Green.—Appeal from Cook.—Opinion by SHELDON, J., reversing.

NEGLIGENCE OF PASSENGER CARRIED PAST A STATION—NOTIFYING PASSENGERS.

Held, 1. That a passenger being carried past a station and then jumping from the car cannot hold the railroad company liable for the injury he may have received from thus leaping from the car; because this has no necessary connection with the being carried past the station.

2. And where a train at night stops at a watering place, and not a station for passengers, there is no obligation to notify passengers of danger; and if one is injured by getting off at such a place, it must be regarded as a result of his own negligence, and not that of the company.

453–1874.—Peter J. Claassen *v.* Benj. Shoenamann.—Appeal from Superior Court of Cook.—Opinion by CRAIG, J., affirming.

TRIAL WITHOUT A JURY—WHAT REVIEWED ON APPEAL—FRAUD UNDER BANKRUPT LAW IN THE CREATION OF A DEBT—NEW PROMISE AFTER DISCHARGE.

Held, 1. That where a court tries a cause without a jury, and no error of law is complained of, the Supreme Court will not disturb the finding of the court, unless the judgment is clearly and manifestly against the evidence.

2. Under the bankrupt law, if property is sold, and the buyer obtains possession of it, under an agreement to pay cash on delivery, then ships the goods beyond the reach of the seller, and refuses to pay the cash, such act is regarded as fraud in the creation of the debt, in the meaning of the 33rd section.

3. Where, after a discharge in bankruptcy, the bankrupt makes a new promise to pay a debt, the discharge will not preclude a recovery.

487–1874.—John H. Donlin *v.* Louis J. Daegling.—Appeal from Superior Court of Cook.—Opinion by BREESE, J., affirming.

PAROL EVIDENCE IN CONNECTION WITH A WRITTEN AGREEMENT.

STATEMENT.—Court house of Kankakee destroyed by fire; except the walls—the insurance company having a risk thereon, employed Donlin to rebuild. Donlin employed Daegling—a brick-mason—to rebuild the walls, under a written agreement, for $4,500 to be paid in installments, as the work progressed. The work was to be done in a manner acceptable to the county authorities. Work was begun, the standing walls partly torn down; and bricks being laid thereon, the county authorities threatened to enjoin the work, unless more of the walls were taken down before the re-building should commence. This further tearing down the brick-layers regarded as extra work; and asked $1,000 more for it. Donlin, thinking this charge excessive, offered to pay for it by the day. They refused; and then he told them to go on and he would pay them what it was worth. The work was done, and $1,000 claimed for it as *quantum meruit*, which Donlin refused to pay. *Held*,

That notwithstanding the written contract, it was competent for the parties to supply any supposed defect in it, as to the quantity of work to be done; for such testimony does not vary the terms of the contract in any of its obligatory

parts, when the contract does not specify exactly what work was to be done in taking down and rebuilding; and there are no written plans or specifications showing this as to quantity, and the only particular specification in the contract is as to quality.

500–1874.—Nancy B. Walker *v.* Sarah A. Carrington.—Appeal from Superior Court of Cook.—Opinion by SCHOLFIELD, J., reversing and dismissing; BREESE, J., dissenting.

FRAUDULENT REPRESENTATIONS IN THE SALE OF LANDS—EVIDENCE THEREOF—TRUSTEE AFTERWARDS BECOMING INTERESTED IN LANDS—LACHES IN EQUITY.

STATEMENT.—Bill in chancery by appellee, charging that appellant holds certain lands in trust for appellee, and praying a conveyance of the title. Charles Walker (now deceased), in his lifetime, together with appellant, his wife, conveyed the land in controversy to Eliphalet Terry, of Connecticut (now deceased), who, by his last will and testament, bequeathed to certain trustees $5,000, the income to be paid to the appellee for life; and, after her death, the principal to be equally divided among her children. Also, the residue of his estate to be divided into four parts, and one part held by the trustees for the use of appellee, on the like trust as the $1,500; and he gave the trustees full authority to sell and convey the real estate.

After Walker conveyed the land to Terry, he continued to look after it as Terry's agent; and he was authorized to ascertain if he could make sale of it. This agency was subsequently withdrawn.

After Terry's death, the trustees again appointed Walker as agent to look after the land and assist them in making sale of it. The appellee's husband (Edward Covington), residing in Connecticut, also, to some extent, assisted the trustees and had some correspondence with Walker in regard to the sale of the land. Walker sent on a proposition of purchase, from one Bentley, a brother-in-law, and advised the trustees, if they wished to sell, to close with the offer, as it was a fair one—especially considering that some of the land was quite wet, and not tillable, and there being no communication with Chicago, seven miles distant, except by wagon. The offer was, thereupon, accepted, and conveyance made—notes and mortgage being given on deferred payments. Bentley afterwards sold the land to appellant, who, afterwards, was left as the widow of Walker. The trustees had resigned after the conveyance to Bentley, but before the conveyance to appellant.

The bill charges fraud in Walker's representations to the trustees, and that the trustees placed entire confidence therein, and believed them to be true; and that appellee but recently discovered the falsity thereof; that the sale was made really to and for Walker's wife, through Bentley, etc., and asking a reconveyance to appellee.

In defense, the limitation statute of 1835 was set up among other answers. *Held*,

1. That the legal presumption is always in favor of innocence, and against all imputations of fraud; and that it would be unreasonable, after a great lapse of time, to require exact proof of all minute circumstances of any transaction, or to expect a satisfactory explanation of every difficulty, real or apparent, with which it may be incumbered. In such cases, the most that can fairly be expected, if the parties are living, from the frailty of human infirmity, is, that the material facts can be given with certainty to a common intent; and, if the parties are dead, and the case rests in confidence and in parol agreements, the most that can be hoped for is to arrive at probable conjectures, and to substitute general presumptions of law for exact knowledge. Fraud, or breach of trust, ought not lightly to be imputed to the living; the legal presumption is the other way. And, as to the dead, who are not here to answer for themselves, it would be the height of injustice and cruelty to disturb their ashes, and violate the sanctity of the grave, unless the evidence of fraud is clear beyond all reasonable doubt.

2. Fraudulent representations must not only be wilful, but the conduct of the opposite party must have been influenced thereby to vitiate a transaction in the sale of land.

3. Where fraud is charged in regard to representations merely advisory, the burden necessarily rests upon those charging the fraud, to establish, by clear and satisfactory proof, (1), That the representations made and the advice given, were in bad faith; (2), that they were material; and (3), influenced the sale of the land.

4. Where values rest in the estimate of witnesses, the question of the knowledge of such value by the representor is not conclusively settled by a preponderance of evidence in such estimates; since so many circumstances affect the value of land, which different minds may look at in different ways, that it would be grossly unjust to condemn an estimate as fraudulent because more persons should be found to say it was too low than that it was fair and reasonable. The experience and competence of the witnesses to judge must be taken into account, and also the experience and competence of the representor. Even if inaccurate, representations are not, therefore, fraudulent.

5. Where an agent or trustee has fully discharged his duty and ended his trust, the fact that he subsequently becomes interested in the land sold through his agency, does not vitiate the sale.

6. Laches in an equity suit will destroy the right of relief, because, by long delay, circumstances susceptible of proof, when they are of recent occurrence, become unsusceptible of proof, and thus work injury to a defendant.

531–1874.—David Dreyer *v.* Henry C. Durand.—Appeal from Cook.—Opinion by BREESE, J., reversing.

FRAUDULENT CONCEALMENT—WHAT CIRCUMSTANCES DO NOT SHOW THIS.

STATEMENT.—Creditor's Bill, on the ground that appellant is fraudulently concealing his property by transfer to his co-defendant, in this cause. Answer that this co-defendant was the owner of the goods claimed by the bill, and that appellant was only an agent to sell them for him. Dreyer was burnt out in 1871; and applied to his uncle to help him, who did so, by putting him into the store. He acted as "agent," and kept his bank account as "agent for" this uncle, and so drew his checks, and the same notification was also in the bill heads, and on the wagons. *Held*,

That there was no fraudulent concealment in any way, and the public were sufficiently notified of the existence of the agency.

532–1874.—M. E. Hanandez *v.* J. B. Drake.—Appeal from Cook.—Opinion by WALKER, J., affirming. (SCOTT, Ch. J., dissenting.)

ATTACHMENT—NOTICE IN NEWSPAPER—DEFECTIVE EXECUTION—SUBSEQUENT ERRORS—ISSUING AFTER A YEAR FROM RENDITION OF JUDGMENT—EFFECT ON LIEN—NOTICE ON SETTING ASIDE SALE—EQUITY JURISDICTION.

STATEMENT.—In a foreign attachment suit, notice of publication was made in a weekly newspaper, and was therefore objected to as insufficient. *Held*,

That what was said in Kerr *v.* Hitt, 75 Ill., 51, namely, on the point that the LEGAL NEWS, a weekly law publication, was such a newspaper as the statute requires, is fully applicable to this case.

The first execution issued after payment lacked the signature of the clerk, and sale being made thereon, it was set aside at the instance of the purchaser (plaintiff), and the land was resold under an execution in due form. *Held*,

1. That as the court had acquired jurisdiction to adjudicate upon the matter, it could not lose that jurisdiction by any error that subsequently occurred; and its judgment became absolutely conclusive, and binding in all collateral proceedings, whether in a court of law or equity.

2. Where an invalid execution is issued, a sale thereunder may be set aside without notice to the defendant—since the execution, levy and sale are thus without vitality. However, had the purchaser been a stranger, the plaintiff in execution might have been required to give notice to the purchaser on moving to set aside the sale.

3. But where the second execution is issued more than one year after the rendition of the judgment, without reviving the judgment by *scire facias*, the execution is voidable, though not void, as at common law; our statute having made no change in the common law rule in this respect. When thus issued, therefore, without reviving—the first execution being null as though none had ever been issued—and the defendant takes no steps to have it quashed, or proceedings under it set aside before they are consummated, this neglect creates a counter presumption strong enough to overcome the presumption of a satisfaction of the judgment; and the court will not set aside sales or other consummated proceedings under the execution.

4. Were such sale void, or voidable, it must be set aside by ejectment at law, and not in equity. An unsupported charge of fraud does not give equity jurisdiction in such cases.

630–1874.—James Pratt *v.* H. O. Stone.—Appeal from Cook.—Opinion by WALKER, J., affirming.

LACHES AS TO SECRET TRUSTS IN LANDS—ESTOPPEL.

Held, That where a claim for a secret trust in lands has existed, without assertion, for many years, and the claimants have stood by and seen valuable improvements made upon the lands, and various persons become interested therein, under apparently absolute titles of record, they are estopped from asserting their claim.

26.—Leland Moody *v.* Harriet C. Thomas.—Error to Cook.—Opinion by SCHOLFIELD, J, reversing and remanding.

RULES TO PLEAD WHEN NECESSARY TO JUDGMENT BY DEFAULT.

STATEMENT.—Suit commenced April 8, 1873, to the April term, 1873; summons served on appellant at that date. No declaration was filed until May 30, 1873—the terms of the court, by law, commencing on the 3d Monday of each month. The cause remained on the docket, no plea being filed, and no rule being taken, until April 23, 1874, when the plaintiff called up the case, and took judgment by default, against appellants, who afterwards made a motion to set aside the default, which was overruled. *Held*,

That under these circumstances it was error to take a judgment by default, without a rule to plead, and service of it on the defendant. A party who is not required to plead is not in default, although, ordinarily, a party who, without any rule, fails to plead according to the practice of the court, is in default. Nor does it make any difference in principle that other parties were made defendants with appellants, who were not served; and against whom *alias* summons was issued.

29.—Peru Coal Co. *v.* George G. Merrick. Error to Kendall.—Opinion by CRAIG, J., affirming.

CHANCERY BUSINESS—HEARING MOTIONS—SECOND APPLICATIONS FOR CONTINUANCE—WHEN DEFENDANT CAN ADDUCE EVIDENCE.

Held, 1. That the mere fact that a court is in session for the purpose of disposing of chancery business, does not deprive it of jurisdiction to hear and determine an application for change of venue, in an action at law. This may, indeed, by the terms of the statute, be done even in vacation, and an application may be made when the court is in session for any purpose.

2. A second application for a continuance will not be allowed at the same term, unless based upon facts which had arisen since the overruling of the first motion.

3. A defendant cannot, while a plaintiff is under cross-examination, offer account books in evidence, as a part of the cross-examination. There is no rule of practice which permits a defendant to introduce evidence until the plaintiff has closed his case.

[DICKEY, J., having been of counsel, took no part.]

40.—Sophia A. Bostwick *v.* Mark Skinner.—Appeal from Superior Court of Cook.—Opinion by SCHOLFIELD, J., affirming.

VALIDITY OF ORDERS OF COURT—DOMICIL—RECITALS IN RECORDS OF COURT—NATURE OF PROBATE JURISDICTION IN COUNTY COURTS—SALES—PETITION.

STATEMENT.—Petition to be allowed to redeem from a sale, made by an administrator, under order of court, for want of jurisdiction in the court ordering the sale. *Held*,

1. That, to allow, after the lapse of years, an issue to be raised collaterally to test the verity of orders by courts, as to the sale of lands; which, upon their face, show the jurisdiction in the court, would be fraught with great evil, in view of the commercial character which custom, in this country, has affixed to lands, and the frequent and great fluctuations in value to which they are subject.

2. In many cases, the domicil of an intestate can hardly be determined by reason of his having had more than one residence, occupied alternately, as pleasure or convenience dictated, or by reason of a change of domicil being in process of consummation at the time of his death. And so, if this question, however deliberately passed upon by a county court, is to be considered always open to proof, whenever any one may choose to raise it in a collateral proceeding, it is fair to presume that different results might be reached by different tribunals, or even by the same tribunal, at different times, varying, in each case, to conform to the preponderance of proof then produced.

3. A fact which may, when a decree for the sale of lands is rendered, be demonstrably proved, may become, by the lapse of time, unsusceptible of satisfactory proof, by reason of the death or absence of witnesses; and, if titles derived from administrator's sales should be held subject to this element of insecurity, few men would be found to invest in them except at prices ruinous to the estates.

4. When a decree is made for the sale of lands, a court therein acts judicially, and therefore determines the question of its jurisdiction, both over the subject-matter and the person; and this is conclusive, if questioned collaterally. Property rights acquired under such decree cannot be disturbed, without gross injustice; even if the decree appears to have originated in a total misapprehension of principle.

5. For, as to county courts, although they are of limited, they are not, strictly speaking, of inferior jurisdiction; and when they adjudicate upon the class of questions over which they have general jurisdiction, as liberal intendments will be granted in their favor as would be extended to proceedings of a Circuit Court; and therefore their records are conclusive when questioned in a collateral proceeding, as, for example, in administrations the jurisdiction is general, and their records are conclusive therein; and as to granting letters, etc., or the domicile of the deceased, all that is requisite is that the record do not show the want of jurisdiction.

6. In a petition to sell lands, it is not requisite that the names of the heirs should be given.

56.—Harriet King *v.* Eugene B. Mix.—Error to Kane.—Opinion by SCOTT, J., affirming.

ASSIGNING A HOMESTEAD UNDER INSTRUCTIONS FROM THE SUPREME COURT—AGREEMENT OF PARTIES.

Held, That when, on remanding a cause, the Supreme Court instructs the court below as to two alternative modes of assigning a homestead, or its equivalent, to a widow, namely, setting apart the homestead, or else giving her in lieu of it, $1,000 and interest, if the land is indivisible, the court below is at liberty, in its judicial discretion, to adopt either mode, according to the facts in evidence, and where a settlement is made by an agreement of the solicitor of the petitioner and the opposite party, and a decree made accordingly, it is no objection that the solicitor had no authority to make such agreement, provided the facts, independently of the agreement, would justify the decree of the court under the instructions of the Supreme Court.

58.—Marshal Stone *v.* Hannah Carr.—Appeal from Peoria.—Opinion by SCHOLFIELD, J., affirming.

CONSTRUCTION OF THE EVIDENCE ACT AS TO EXCEPTIONS TO THE RIGHT OF PARTIES TO TESTIFY IN THEIR OWN BEHALF—EXCUSE AS TO FALSE AFFIDAVIT.

Held, 1. That, under the evidence act of 1867, where heirs, etc., are interested, each of the enumerated disqualifying causes as to a party testifying, stands by itself; and the exceptions apply to such as they are at all applicable to, separately, in the order in which they are stated, and, therefore, the intent is, that no

person directly interested, etc., shall be allowed to testify when the adverse party sues, or defends, as the executor, administrator, heir, legatee, or devisee, of any deceased person; except as to facts occurring subsequent to the death of the deceased; but, if the adverse party sues or defends, as guardian, or trustee for such heir, legatee, or devisee, then the additional restriction is imposed that such facts shall not only have occurred subsequent to the death of the deceased, but also after such heir, legatee or devisee shall have attained majority. The manifest purpose of the act is, that parties in interest shall be allowed to testify only where they are on terms of comparative equality.

2. It is not a sufficient excuse for a false affidavit that a party legally responsible had been advised by counsel to make the affidavit.

THE GENERAL JURY SYSTEM.

Among the so called improvements in criminal procedure made in some of the Western States is the abolition of the grand jury, and some of the reformers in other States are crying out against this institution as an unnecessary and expensive part of our method of administering penal justice. There is no doubt that in certain cases the investigation before the grand inquest adds somewhat to the cost of the proceeding, and may, perhaps, delay somewhat the events known as conviction and sentence. Probably where the evidence on the part of the prosecution is conclusive and easily gotten at, the necessity of having the witnesses give in their testimony two or three times operates oppressively, and there would be much time and trouble saved if one appearance only of witnesses was necessary. Yet, in those instances where there is much doubt, an impartial examination by a jury of the prosecutor's evidence is of benefit both to the public and to the accused individual; to the public by enabling it to dispose promptly of uncertain cases, so that they do not clog up the criminal calendar, and to the individual by saving him from the humiliation of a public trial where there is no *prima facie* case against him. The grand jury is an inherent part of the common-law system, and it has for centuries answered a good purpose. It may occasionally prove an obstacle to the speedy punishment of crime, but we think it more often proves one to malicious prosecution. The penal system of the common law has many defects which it is the duty of legislation to remove, but we cannot think the grand jury is one of them. In the prosecution of those accused of crime, too much care cannot be taken that an unjust conviction be not had, and a public trial for a felony ought not to be undertaken unless there is *prima facie* evidence enough to satisfy twelve men that the charge is probably true.

It would seem by the above, which we take from the *Albany Law Journal*, that that able publication is not in favor of abolishing the Grand Jury. We are among those who believe that the Grand Jury may be abolished, without any injury to the prompt and efficient administration of criminal law. All that should be accomplished by the grand jury in the way of indicting persons charged to have committed crime, can as readily be done on a preliminary examination before a committing magistrate or judge. It is probably true that there would not be as many persons held to answer for crime, but it is undoubtedly true that there would be a larger proportion of the persons held, finally convicted. We do believe that before a person is committed to prison, there to remain for weeks and sometimes months, he should have an opportunity, at least, to show that he is not guilty of the crime with which he is charged. Under the Grand Jury system, how many men who were entirely innocent of the crime with which they were charged, because they were unable to get bail, have remained in jail months, and sometimes years, awaiting trial, who, if they could have met their accusers face to face, on a preliminary examination, would have been able to have removed all suspicion, and shown that the charges were made through malice, and without foundation.

(*Continued from page* 388.)

It is apparent that appellant lost his debt on account of the failure of the constable to perform a duty the law casts upon him, and it is not denied that the constable had due and ample notice when the property would be in his county, which was liable to be taken on the execution, and that the property remained in the county of DeWitt a sufficient length of time, so that by the exercise of reasonable exertion on the part of the constable, it could have been secured upon the executions.

The only excuse the constable has to offer to relieve him and his sureties from the liability imposed by statute, and his official bond, is that he was sick and not able to perform a duty voluntarily assumed.

If sickness could be relied upon as defense to an action in any case brought upon an official bond of a constable for a failure to discharge a duty resulting in loss, the constable in this case has, in our judgment, entirely failed to establish a state of facts which can shield him and his sureties from an action.

If he was sick and unable to serve the execution, why did he not notify appellant or the justice who issued it, so that it could be placed in the hands of some other constable, and thus save the debt? The property remained in DeWitt county from three to four days; if the constable was sick, when the defendant in the execution first came in the county with the property, there was ample time for him to have sent the execution to a constable in good health, and had it levied, but the constable did nothing but quietly remained at his home for three or four days, when the property was within two miles of his residence, and permitted the defendant in execution to come and go with the property as he saw fit. Such conduct on the part of an officer entrusted with the business of the public cannot be sanctioned or sustained.

But we cannot hold that sickness of a constable will relieve him and his sureties from duties implied by law.

In the case of the People et. al. *v.* Palmer, 46 Ill., 398, which was an action brought against a sheriff and his sureties upon the official bond of the sheriff for the failure to levy an execution upon property of defendant, it was said:

"It is a safe rule to hold that a sheriff failing to levy on personal property in the possession of the defendant, can only discharge himself from liability by showing the property was not subject to levy."

The *onus* is upon the officer. While, it is true, the defense relied upon in that case was not sickness, yet the reasoning will apply with as much force and effect if the excuse relied upon there had been the same as set up to defeat this action.

If a sheriff cannot on account of sickness discharge the duties imposed upon him by law, he must provide a sufficient number of deputies, so that the business will not be neglected or left undone; so, too, with a constable, should he be overtaken with sickness and unable to discharge the duties of his office, he should resign or pass the business into the hands of other like officers who can properly attend to the business so that loss will not follow.

Public policy requires that an officer elected or chosen to fill official position, should be held to a strict performance of every duty enjoined upon him by law; in no other manner can the laws be properly enforced, and the rights of the people preserved. As the sickness of the constable was no defense to the action brought upon the official bond, the evidence of sickness was improperly admitted, and the instructions of the court upon this question given for appellees, were erroneous, for which the judgment will be reversed and the cause remanded.

Reversed and remanded.

DICKEY, J.—While I concur in the judgment, it is my opinion that the rule, that illness cannot excuse the non-performance of an official act enjoined, is laid down too broadly in this opinion, and needs qualification. In my view of the law it will not do to hold that *no illness*, however extreme, can excuse an officer for any such omission. The law does not require the performance of impossible acts.

SCOTT, C. J.—I concur with Mr. Justice Dickey.

MOORE & WARNER, for appellant.

DONAHUE & KEELY, for appellees.

THE RECENT AMENDMENT TO THE BANKRUPT LAW.

Under the recent amendments to the bankrupt law the making of a voluntary assignment of all his property by an insolvent is no bar to his discharge in bankruptcy. A voluntary bankrupt may file his petition for discharge although more than a year has elapsed since he filed his petition.

The following is the amendment:

AN ACT to amend the act entitled "An act to amend and supplement an act entitled 'An act to establish a uniform system of bankruptcy throughout the United States,' approved March second, eighteen hundred and sixty-seven, and for other purposes," approved June twenty-second, eighteen hundred and seventy-four.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section twelve of said act be, and the same is, hereby, amended, as follows: After the word "committed" in line forty-four, insert: Provided also, That no voluntary assignment by a debtor or debtors of all his or their property, heretofore or hereafter made in good faith for the benefit of all his or their creditors, ratably and without creating any preference, and valid according to the law of the State where made, shall of itself, in the event of his or their being subsequently adjudicated bankrupts in a proceeding of involuntary bankruptcy, be a bar to the discharge of such debtor or debtors. That section fifty-one hundred and eight of the Revised Statutes is hereby amended so as to read as follows: At any time after the expiration of six months from the adjudication of bankruptcy, or if no debts had been proved against the bankrupt, or if no assets have come to the hands of the assignee, at any time after the expiration of sixty days and before the final diposition of the cause, the bankrupt may apply to the court for a discharge from his debts. This section shall apply in all cases heretofore or hereafter commenced.

Approved, July 26, 1876. Department of State, Aug. 5, 1876. A true copy.

S. A. BROWN.

The London *Law Times* says: Infants are a troublesome class in the community, and a fruitful source of litigation. The law relating to them will probably have another illustration from a case tried on the 21st instant, on the Western Circuit, before Baron Amphlett and a common jury. We refer to the case of Mitchell *v.* France, which was an action on a bill of exchange given by the defendant, when an infant, for the value of a horse. For the last fifteen months of his minority, the defendant, who came of age in January last, had been in receipt of £1,500 a year. Whilst staying at Penzance, in Jan., 1875, he bought a hunter for 100 guineas, and paid for it by the bill in question. The jury found that the hunter was a necessary for a person in the position of the defendant. Under the term "necessaries" are included many things that would be excluded by a strict application of the word. At law the expression is a relative one, and must be construed with reference to the infant's age and position. Thus, livery for a servant has been held to be necessary in the case of an infant captain, and an infant volunteer has been held liable for his uniform (Coates *v.* Wilson, 5 Esp., 152); and in a recent case (Hill *v.* Arbon, 34 L. T. Rep. N. S., 125), a pair of spurs, a suit of horse clothing, a breastplate, and set of best plated harness, supplied to a man nearly twenty-one, who managed a farm for his father, were considered necessaries. In all these cases the question is, as stated by Willes, J. in Ryder *v.* Wombwell, whether it is so necessary, for the purpose of maintaining himself in his station, that he should have these articles, as to bring them within the exception under which an infant may pledge his credit for them as necessaries.

THE COLLEGE OF LAW.

The Union College of Law announces for the coming year, several new features of interest. James L. High, Esq., who is now one of the most successful and widely read of American writers on equity topics, will assume the Professorship of Equity. The selection is a particularly admirable one. Mr. High is a very unpretentious but a most judicious and sound lawyer, whose abilities have tended to exalt the reputation of the Bar of our city and State throughout the country. His acquisition by the College of Law is a most fortunate and timely one. Prof. Cumnock of the Evanston University, who is announced as the Instructor in Elocution, is a gentleman of thorough culture, and has few superiors as a teacher of this most important branch. So many lawyers are deficient in this part of their education, that we can only regret that instruction in the use of the voice, is not made an imperative instead of a voluntary feature of the Law Course. Prof. Elias Colbert, the renowned Statistician, Commercial Editor of the *Tribune*, Scientist, Author and Astronomer, Director of the Dearborn Observatory, is not only one of the most versatile men in this country, but one whose thoroughness in each of the branches to which his versatility extends, is unquestioned. He has consented to teach Short-hand or Phonography, of which he is the oldest and probably most perfect master connected with journalism. Every student at law in this age, should learn short-hand. It adds to the value of his services while a student, and furnishes him with an art of immeasurable importance to his future as a lawyer.

Perhaps the feature which will attract as much attention as any other is the extended course of lectures by members of the bar, so extended as to indicate that the college is backed by a very unanimous approval on the part of the bar. The course will comprise one lecture each day, for five days in the week, during the first two terms of the college year, amounting in all to 130 lectures, of which an average of five will be given by each of the following 25 lawyers, among others, viz.: Atty.-Gen. James K. Edsall, of Dixon; Hon. Lyman Trumbull, Leonard Swett, John Van Arman, John M. Jewett, Obadiah Jackson, John Borden, George Gardner, Joseph M. Bailey, of Freeport: Wm. Barge, late of Dixon, now of Chicago; Emory A. Storrs, Elliott Anthony, Judge John A. Jameson, I. N. Stiles, Thos. Dent, Chas. H. Reed, James L. High, C. C. Bonney, M. F. Tuley, Marshall D. Ewell, Edward Roby, R. H. Forrester, James P. Root, and Geo. W. Kretzinger. The course of upward of 70 lectures given last year by members of the bar not only indicated the lively interest felt by the bar in the success of this institution, but pointed out certain advantages in such a course of lectures over any that could be given by a single lecturer however experienced in the art. The course renders the students personally acquainted with many leading members of the bar, and with their mode of speaking, thinking, and acting. The lectures are often full of personal reminiscences, from the experience at the bar, of the lecturers, and as often relate to a class of topics not dwelt upon in the elementary treatises. Instead of consisting of mere definitions and elementary outlines, which the student has already found in better form in his text books, they are diversified, pungent, practical and pointed, and full of a kind of instruction which the student could not obtain elsewhere except by experience. This course of lectures will be opened by Hon. Leonard Swett, on Monday, Sept. 18. The examination of students from law offices for admission to the senior class will occur on the 15th and 16th of September.

CHICAGO LEGAL NEWS.

CHICAGO, SEPTEMBER 2, 1876.

The Courts.

SUPREME COURT OF THE UNITED STATES.

No. 207.—OCTOBER TERM, 1875.

HIRAM BARNEY, Collector of the Port of New York, Plaintiff in Error,
v.
WILLIAM WATSON and WILLIAM G. TOWNLEY.

In Error to the Circuit Court of the United States for the Southern District of New York.

PAYING DUTIES UNDER PROTEST—WITHIN WHAT TIME NOTICE OF DISSATISFACTION TO BE GIVEN—WITHIN WHAT TIME APPEAL MAY BE TAKEN FROM DECISION OF COLLECTOR.

Mr. Justice BRADLEY delivered the opinion of the court.

This was a suit brought by the defendants in error against the collector of customs, at New York, to recover certain duties alleged to have been overcharged upon certain goods imported in December, 1863. The plaintiffs claimed that they were "flannels," dutiable at only 35 per cent. *ad valorem;* the collector held them to belong to a particular class of goods which were subject to an additional specific duty of 18 cents per pound. As the quantity of goods was 7,984 pounds, the difference was $1,437.12. For this amount, with interest, the plaintiffs brought the suit.

The goods in question were part of a large invoice entered on the 24th of December. 1863, on which day the sum of $8,840.93 was paid on account. The entry was not liquidated until the early part of March, 1864, when an additional sum of $1,182.71 was demanded. To this the plaintiffs demurred as it was based on the aforesaid charge of 18 cents per pound in addition to the *ad valorem* duty on the goods in question.

The questions arising at the trial, as to the character and dutiability of the goods referred to, and the evidence proper to decide the same, are not of sufficient importance to demand special consideration. The principle question below, and that which has been most discussed in this court, is, whether the plaintiffs gave timely and sufficient notice of protest and dissatisfaction with the decision of the collector.

No objection was made until the additional amount was demanded in March, 1864. The import entry was endorsed with the following memorandum: "Liquidated and notified importer, Mar. 11, 1864." The additional duty was paid and a formal protest in writing was served by the plaintiffs on the 24th of March, 1864. In the meantime the importers had appealed to the Secretary of the Treasury, and had obtained his decision, dated the 21st of March, affirming that of the collector.

The defendant insisted that this protest was too late; that it should have been made within ten days from the entry of the liquidation on the import entry. But the court allowed the plaintiffs to prove that the liquidation was really completed before the 11th of March, and that within ten days after its completion a written notice of dissatisfaction, different from the formal protest, was given to the collector. To this the defendant excepted. The jury rendered a verdict for $2,235.72, being the whole amount demanded with interest.

It is assumed in the argument and seems to have been assumed at the trial, that the case was governed by the act of March 3rd, 1857, (11 Stat., 195,) by the 5th section of which it was provided, "That on the entry of any goods, wares, and merchandise imported on and after the 1st day of July aforesaid, the decision of the collector of the customs at the port of importation and entry, as to their liability to duty or exemption therefrom, shall be final and conclusive against the owner, importer, consignee, or agent of any such goods, wares, and merchandise, unless the owner, importer, consignee, or agent shall within *ten days* after such entry, give notice to the collector, in writing, of his dissatisfaction with such decision, setting forth therein, distinctly and specifically, his grounds of objection thereto, and shall within *thirty days* after the date of such decision, appeal therefrom to the Secretary of the Treasury, whose decision on such appeal shall be final and conclusive; and the said goods, wares, and merchandise shall be liable to duty or exempted therefrom accordingly, any act of Congress to the contrary notwithstanding, unless suit shall be brought within thirty days after such decision for any duties that may have been paid, or may thereafter be paid on said goods, or within thirty days after the duties shall have been paid in cases where such goods shall be in bond."—11 Stats. at Large, 195.

On examination of the various acts of Congress relating to claims for overcharge of duties on imported goods, we are satisfied that the act of 1857 above quoted had no application to this case; but that the case was governed by an act passed on the 26th of February, 1845. 5 Stat., 727.

To make this more apparent it will be necessary briefly to advert to the history of the laws on this subject.

The case of Elliott *v.* Swartwout, 10 Pet., 137, decided in 1836, affirmed the principle which had been established by previous authorities, that money paid to a collector for duties illegally demanded, if paid under compulsion in order to get possession of the party's goods, or to prevent their being seized for the duties, may be recovered against the officer in an action at common law, provided the payment be made under protest and with full notice of the intent to sue, so that the officer may protect himself by retaining the money in his possession; but that a payment voluntarily made without such protest cannot be recovered back. The embarrassments which ensued in consequence of the large amount of duties withheld from the public treasury by Mr. Swartwout, the defendant in that case, induced the passage of an act in 1839 (5 Stat, 348, sect. 2), which required all duties collected to be paid into the treasury without regard to claims for overcharge, and deprived the party of an action at law, by giving him the specific remedy of an appeal to the Secretary of the Treasury. This was held to be the effect of the act, although not its express terms, as may be seen by a reference to the case of Cary *v.* Curtis, reported in 3rd Howard, 236. In 1845 the right of action was restored by an act passed to explain the act of 1839. It declared that nothing contained in this act should be construed to take away the right of any person who should pay money for duties under protest in order to obtain goods imported by him, which duties were not authorized or payable, in part or in whole, by law, to maintain an action at law to ascertain and try the validity of such demand and payment, and to have a right to a trial by jury according to the due course of law; but it required the protest to be made in writing, and signed by the claimant, at or before the payment of the duties, setting forth distinctly and specifically the grounds of objection to the payment thereof. Act of Feb. 26, 1845; 5 Stat., 727. This act was never repealed until the passage of the act to increase duties on imports, approved June 30th, 1864, by the 14th section of which (13 Stat., 214) it was enacted that on the entry of any vessel, or of any goods, the decision of the collector as to the rate and amount of the duties, both on the tonnage of the vessel, and on the goods, should be final and conclusive, unless the owner or consignee should, within ten days after the ascertainment and liquidation of the duties, give notice in writing to the collector, on each entry, if dissatisfied with his decision, setting forth distinctly and specifically the grounds of objection, and should appeal to the Secretary of the Treasury within thirty days after such ascertainment and liquidation; and unless suit should be brought within ninety days after the secretary's decision. This act supplied the act of 1845, and repealed it by implication. But it was not in force when the goods in question in this case were imported. Therefore, the proceedings in this case were subject to the regulations of the act of 1845, which required the protest to be made at or before the payment of the duties alleged to be illegal.

The act of 1857, which was erroneously supposed to govern the case, did not relate to a decision upon the rate and amount of the duties to be charged; but to the decision of the collector whether the goods were on the free list or not. This act was passed for the purpose of reducing duties on imports still lower than the rates imposed by the tariff act of 1846, and it made a large addition to the list of articles entirely exempt from duty. The list of additional articles exempted is extended at large in the act, and occupies the greater part of it. The last section then enacts, that on the entry of any goods imported after the first of July then next, the decision of the collector *as to their liability to duty or exemption therefrom* shall be final and conclusive, etc., unless the importer or consignee, etc., shall, within ten days after such entry, give notice to the collector in writing, of his dissatisfaction, etc. See Act, 11 Stat., 195. Now, the question whether goods imported were or were not on the free list, and exempt from any duty at all, could and necessarily would be decided on their entry, and need not await any ascertainment or liquidation of the amount. Hence it was required that the notice of dissatisfaction should be made within ten days after such entry, and the requirement, on this view of the act, was a reasonable one. The act does not in terms, nor by implication, repeal the act of 1845. That act still furnished the rule to be observed if the importer, admitting that the goods were dutiable, questioned the rate and amount of duties to be paid. In most cases the amount, and in many cases the rate, could not be ascertained, until after examination and appraisement; and hence, a limitation to ten days from the time of entry would often, perhaps generally, deprive the party of any remedy at all.

The question in the case, therefore, really was, whether the importers made their protest in accordance with the act of 1845, namely, at or before paying the duties complained of. It is not denied that they did this so far as relates to the additional charge of $1,182.72. But they claim a return of more than this, and, under the charge of the court, they obtained a verdict for nearly double this amount, which would include some portion of the money paid by them without protest when the goods were first entered. This was erroneous.

The judgment must be reversed and the cause remanded with directions to award a *venire de novo.*

SUPREME COURT OF THE UNITED STATES.

No. 190.—OCTOBER TERM, 1875.

SELAH CHAMBERLAIN
v.
THE ST. PAUL AND SIOUX CITY RAILROAD COMPANY, THE SOUTHERN MINNESOTA RAILROAD COMPANY, A. P. MANN, S. B. RUGGLES, W. R. MARSHALL, C. SHEFFER, T. A. SCOTT, H. D. HALL, G. I. SENEY, and J. A. STEWART.

Appeal from the Circuit Court of the United States for the District of Minnesota.

1. The act of Congress of March 3d, 1857, granting certain lands to the territory of Minnesota, for the purpose of aiding in the construction of several lines of railroad between different points in the territory, only authorized for each road, in advance of its construction, a sale of one hundred and twenty sections; no further disposition of the land along either road was allowed, except as the road was completed in divisions of twenty miles.

2. Where land is conveyed to the State by a corporation as indemnity against losses on her bonds loaned to it, the bondholders have no equity for the application of the land to the payment of the bonds which can be enforced against the State, and her grantees take the property discharged of any claim of the bondholders.

Mr. Justice FIELD delivered the opinion of the court.

The plaintiff is the holder of bonds of the State of Minnesota, amounting to half a million of dollars, and seeks to charge certain lands in the possession of the defendant railroad companies with their payment. The bonds were issued in 1859, to the Southern Minnesota Railroad Company, under the authority of the constitutional amendment of April, 1858. That company was one of the four companies to which the Territory of Minnesota, on the 22d of May, 1857, granted the lands obtained by the act of Congress of March 3d of that year. The grant of the State was made in express terms, subject to the provisions of the act of Congress, and would have been thus subject without any declaration to that effect. The act of Congress only authorized a sale of one hundred and twenty sections for each road in advance of its construction. Any further disposition of the land along either road, was allowed only as the road was completed in divisions of twenty miles.

The Southern Minnesota Railroad Company was authorized to construct two of the lines mentioned in the act of Congress, and took, therefore, under the grant of the state, a title to two hundred and forty sections. No title to any greater quantity passed from the State. In allowing one hundred and twenty sections for each line to be disposed of before the construction of any part of the road, Congress intended to furnish aid for such preliminary work as is required in all similar undertakings. We do not understand that the complainant contends that the company acquired an interest in any other lands than the one hundred and twenty sections for each of its roads.

In July of that year, the lines of the two roads were definitely surveyed and located to the extent of the grading subsequently made, and maps of the surveys were filed in the General Land Office at Washington. But it does not appear that any other work for the construction of either of the roads was done during the year.

The Territory of Minnesota became a State in October, 1857, and was admitted into the Union in May, 1858. Its Constitution prohibited the loan of the State credit in aid of any corporation; but the first legislature assembled under it, being desirous of expediting the construction of the lines of road, in aid of which the congressional grant was made, proposed in March, 1858, an amendment to the Constitution, removing this prohibition so far as the four companies named in the act of May 22d, 1857, were concerned. The amendment was submitted to the people, and on the 15th of April, of the same year, was adopted. It provided, *first*, for the issue of bonds of the State to the railroad companies; *second*, for taking from them security for the payment of the interest, and against loss on the bonds thus issued; and, *third*, for a forfeiture of the lands and franchises of the companies in case certain portions of their respective roads were not completed within prescribed periods.

1st. The bonds were issued to each of the four companies, bearing interest at the rate of seven per cent. per annum, payable semi annually in the city of New York, to an amount not exceeding twelve hundred and fifty thousand dollars, in installments of one hundred thousand dollars, as often as any ten miles of its road was ready for placing the superstructure thereon, and an additional installment of the same amount as often as that number of miles of the road was fully completed and the cars were running thereon, until the whole amount authorized was issued. The bonds were to be denominated Minnesota State railroad bonds; they were to be signed by the governor, countersigned and registered by the treasurer, and sealed with the seal of the State; they were to be issued in denominations not exceeding one thousand dollars, payable to the order of the company to whom issued, transferable by endorsement of the president of the company, and redeemable at any time after ten and before the expiration of twenty-five years from their date; and for the payment of their interest and the redemption of their principal the faith and credit of the State were pledged.

2d. The security to be taken for the payment of the interest on the bonds received by each company, was to consist of an instrument pledging the net profits of its road, and the security against loss on the bonds was to consist of a conveyance to the State of the first two hundred and forty sections of land, free from prior incumbrances, which the company was or might be authorized to sell; and a transfer to the treasurer of the State of an amount of first mortgage bonds on the roads, lands, and franchises of the company corresponding in amount to the State bonds issued to it. The delivery of the first mortgage bonds necessarily implied the execution of a mortgage or deed of trust for their payment. In case either company made default in the payment of the interest or principal of the bonds issued to it by the governor, no more State bonds were to be thereafter issued to that company, and the governor was to proceed to sell, in such manner as might be prescribed by law, its bonds, or the lands held in trust, or require a foreclosure of the mortgage executed by the company to secure its bonds.

3d. Each company which accepted the bonds of the State was required, as a condition thereof, to complete not less than fifty miles of its road on or before

the expiration of the year 1861, and not less than one hundred miles before the year 1864, and four-fifths of the entire length of its road before the year 1866; and the amendment declared that any failure on the part of the company to complete the number of miles of its road in the manner and within the several times thus prescribed, should forfeit to the State all the rights, title and interest of any kind whatsoever, in and to any lands granted by the act of May 22d, 1857, together with the franchises connected with the same, not pertaining to the portion of the road then constructed.

The Southern Minnesota Railroad Company accepted the amendment and executed the pledge of net profits and the conveyance of the two hundred and forty sections required. It also executed a deed of trust upon its roads and all its lands and franchises to secure its first mortgage bonds, to be transferred to the treasurer when State bonds were received. It then entered upon the construction of its roads and contracted with the plaintiff to grade and prepare the road-beds for the superstructure. During that and the following year, 1859, thirty-seven and a half miles of one of the roads and twenty miles of the other road, were thus graded by the plaintiff. As often as any ten miles of either of the roads were ready for the superstructure, the governor issued to the company bonds of the State to the amount of one hundred thousand dollars. Nearly all of these bonds, amounting to half a million of dollars, were transferred to the plaintiff for his work in grading the roads, and are still held by him. They were indorsed by the president of the company with a waiver of presentment, demand, and notice.

An act of the legislature passed on the 12th of August, 1858, required the first mortgage bonds of the company to be transferred to the treasurer, to be drawn so that the interest and principal should mature sixty days before the maturity of the interest and principal of the State bonds, and as the bonds of the company offered were accepted, we assume that they were so drawn. The act also provided for the foreclosure of the mortgage or deed of trust whenever default was made in the payment of either interest or principal.

The company never completed any part of either of its roads, and did nothing more than the grading mentioned, and it made default in the payment of the interest maturing upon the State bonds, and also in the payment of the interest accruing on its first mortgage bonds. The governor thereupon proceeded under the above act, and an act passed on the 6th of March, 1860, and procured a foreclosure of the mortgage of the company, and the roads, lands, and franchises which it covered were sold pursuant to its provisions, and at the sale were purchased by the State. This purchase took place in October. 1860, and the necessary conveyances were made to the State. From that time until the 4th of March, 1864, the State held the property, lands and franchises thus acquired. During this period, it made repeated efforts to induce other parties to undertake the enterprises and carry them to completion, but without success.

On the 4th of March, 1864, the legislature passed an act by which two new companies were organized: one, with the same name as the original company, The Southern Minnesota Railroad Company; and the other, by the name of the Minnesota Valley Railroad Company. The name of this latter company was afterwards changed to that of St. Paul and Sioux City Railroad Company.

To the companies thus organized the legislature granted, subject to certain conditions, all the property, rights, and franchises of the original company, which the State had acquired, "free from all claims and liens;" those which appertained to one of the lines were granted to the new Southern Minnesota Railroad Company; those which appertained to the other line were granted to the Minnesota Valley Railroad Company, now the St. Paul and Sioux City Railroad Company. The conditions annexed to the grants were complied with and the grants accepted. These new companies soon afterwards commenced the construction of their respective roads, and had, at the commencement of this suit, nearly completed them. The Southern Minnesota Railroad Company had constructed and equipped one hundred and sixty-seven miles of its road, at an expenditure of five millions of dollars; and the St. Paul and Sioux City Railroad Company had constructed and equipped one hundred and seventy miles of its road, at an expenditure of three millions of dollars.

Upon the completion of ten miles of its road each company received from the governor, pursuant to the provisions of the act, a deed in fee simple of one hundred and twenty sections of land appertaining to its road, to which the State was entitled under the congressional grant, and the bonds of the original Minnesota company transferred to the treasurer of the State were cancelled.

Pending these proceedings the bonds of the State in the hands of the complainant remained unpaid, and they are still unpaid. The faith of the State, solemnly pledged for the payment of both principal and interest, has never been kept. So far from keeping it, the State as early as November, 1860, adopted an amendment to its constitution prohibiting any law, which levied a tax or made other provision for such payment, from taking effect until the same had been submitted to a vote of the people and been adopted by them. This prohibition, if not a violation of the State's pledge, conflicts with its spirit. The bonds issued are legal obligations; the State is bound by every consideration of honor and good faith to pay them. Were she amenable to the tribunals of the country, as private individuals are, no court of justice would withhold its judgment against her in an action for their enforcement.

The complainant, under these circumstances, finding no relief from the pledged faith of the State, and unable to pursue any remedies at law against her on the bonds, seeks to charge with their payment the two hundred and forty sections mortgaged by the company under the amendment of 1858 and purchased by the State under the foreclosure of the mortgage, and now held by the defendant railroad companies.

The position of the complainant is, that notwithstanding the form of the contract, the original company was in fact the principal debtor, and the State its surety, and that as the creditor to be paid, he is entitled to have the securities taken by the State applied to the payment of the bonds held by him; that the one hundred and twenty sections for each road, which the company was authorized to construct, became its property by the act of May 22d, 1857; that the subsequent interest of the State under the trust deed and mortgage was only the right to hold them as security against loss upon its bonds; that this interest was not changed by the foreclosure of the mortgage and purchase of the State at the sale; and that the lands passed to the defendant railroad companies with notice that they were thus held by the State.

The general doctrine, that a creditor has a right to claim the benefit of a security given by his debtor to a surety for the latter's indemnity, and which may be used if necessary for the payment of the debt, is not questioned. The security in such case is in the nature of trust property, and the right of the creditor arises from the natural justice of allowing him to have applied to the discharge of his demand the property deposited with the surety for that purpose if required by the default of the principal. In this case the deed and mortgage to the State were not intended to create a trust in favor of the holders of her own bonds. The State was primarily liable to the bondholders; and it was only as between her and the company that the relation of principal and surety existed. It may be doubted whether the bondholders could call upon the company in any event. The indorsement made by the president simply transferred the bonds; it was not the act of the company. Be that as it may, whatever right the plaintiff had to compel the application of the lands received by the State to the payment of the bonds held by him, it was one resting in equity only. It was not a legal right arising out of any positive law or any agreement of the parties. It did not create any lien which attached to and followed the property. It was a right to be enforced, if at all, only by a court of chancery against the surety. But the State being the surety here, it could not be enforced at all, and not being a specific lien upon the property, cannot be enforced against the State's grantees.

Where property passes to the State, subject to a specific lien or trust created by law or contract, such lien or trust may be enforced by the courts, whenever the property comes under their jurisdiction and control. Thus, if property held by the government, covered by a mortgage of the original owner, should be transferred to an individual, the jurisdiction of the court to enforce the mortgage would attach, as it existed previous to the acquisition of the government. (The Siren, 7 Wallace, 158, 159.) But where the property is not affected by any specific lien or trust in the hands of the State, her transfer will pass an unencumbered estate.

But aside from this consideration, which of itself is a sufficient answer to the present suit, the long delay of the complainant in asserting any claim to the lands in controversy, whilst the defendants were constructing, at a vast expenditure of labor and money, their railroads, deprives his suit of favorable consideration. It does not appear that for twelve years after the abandonment of work by the original Minnesota company on the roads, the grading of which it commenced, he set up any claim such as is advanced in this suit. On the contrary, it is abundantly established that in various ways he urged upon members of the legislature the adoption of measures for the construction of the roads, which involved an appropriation by the State for that purpose of the lands in controversy; and that after the new companies were organized, and the lands were granted to them, he urged them to proceed with the enterprises, knowing that upon those lands they relied to carry on the works. Under these circumstances, it would be manifestly inequitable and unjust to grant his prayer.

The conclusion we have reached, renders it unnecessary to consider the effect of the alleged forfeiture, declared by the State, upon the interest of the company in the lands.

Decree affirmed.

THROUGH the courtesy of L. S. DIXON, late Chief Justice of the Supreme Court of Wisconsin, and now of the law firm of Dixon, Hooker, Weggs & Noyes, of Milwaukee, we have received the following opinion:

SUPREME COURT OF WISCONSIN.

THE STATE ex rel A. J. DRAKE *v.* PETER DOYLE, Secretary of State.

THE JURISDICTION AND CONTROL OF THE FEDERAL COURTS OVER THE STATES BY ACTION AGAINST THEIR OFFICERS—THE POWER OF THE SUPREME COURT TO COMPEL THE SECRETARY OF STATE TO REVOKE A LICENSE ISSUED TO A FOREIGN INSURANCE COMPANY.

1. FOREIGN INSURANCE COMPANY.—Save by the voluntary license of the State, a foreign insurance company has no right to carry on its business within the State. The State sees fit to grant a license to it on the condition, instantly revocable upon condition broken. The insurance company breaks the condition, but claims the right, notwithstanding, to act under the license throughout the State. Here is a direct and approximate interest of the State, and raising a contingency requiring the interposition of the court to preserve the prerogatives of the State in its sovereign character.

2. THE STATUTE—DUTY OF SECRETARY.—The statute of the State devolves upon the Secretary of State the imperative duty of revoking the license of the insurance company, upon condition broken, and prohibits a renewal of the license for three years; that the statute is not void, and the license may be revoked without notice.

3. JUDICIAL POWERS.—That the duty of revocation does not impose judicial powers upon the Secretary of State.

4. THE CONDITION—THE FEDERAL CONSTITUTION.—That the statute of the State prescribing the condition upon which licenses shall be granted, is not a violation of the Federal Constitution.

5. UNCONSTITUTIONAL STATUTE.—That it is the settled doctrine of the Wisconsin Supreme court, that if it be unconstitutional, the whole statute authorizing licenses to foreign insurance companies is unconstitutional.

6. INJUNCTION BY FEDERAL COURT.—The court considers the effect of an injunction issued by a Federal Court, to restrain the Secretary of State from revoking a license.

7. SUIT IN FEDERAL COURT AGAINST STATE OFFICER.—The court examines the various opinions of the Supreme Court of the United States, and holds that where a suit is prosecuted in a Federal Court, by a private party, against a State officer, in which the State has a direct interest, but cannot be made a party, the officer himself must have an interest or liability in the subject matter, upon which the jurisdiction of the court can attach.

8. WHEN STATE THE REAL PARTY.—That when such a suit is prosecuted against a State officer, having no such interest or liability in his official capacity only, to affect a right of the State, the State is the real defendant within the prohibition of the amendment to the Constitution.

9. THE FEDERAL COURT NO POWER TO BIND THE STATE AS TO ITS OWN OFFICERS.—The court reviews the various decisions upon the subject, and holds that the State is not bound in the exercise of its authority by the proceedings of a Federal Court against its officer.—[ED. LEGAL NEWS.

RYAN, C. J.—The facts of this case were discussed at the Bar, on the motion to quash the alternative writ. But as some of them did not then appear of record, we refrained from any expression of opinion in overruling the motion. All the material facts are now before us for final adjudication.

It appears by the return that the license of the Insurance Company in force when these proceedings were commenced, expired by limitation pending the alternative writ; and that some three days after the motion to quash the alternative writ was denied, the respondent renewed the license for another year. His doing so, under the circumstances, may have been an act of questionable propriety. But the fact itself is immaterial here, because it was agreed by counsel, if it were otherwise doubtful, that if a peremptory writ should be granted, it should cover any subsisting license issued by the respondent to the Insurance Company.

The motion to quash the alternative writ was argued for the respondent by the Attorney-General. The demurrer to the return was argued for the respondent by the learned counsel who represented the Insurance Company in the Federal Court, and a brief was afterward submitted on his behalf by the Attorney-General. Different questions were raised for the respondent by the different counsel, which will be considered in proper order.

I. It was stated by the Attorney General that the suit of the relator against the Insurance Company had been settled; that the relator has no further interest in the question, and therefore no further right to the writ. The fact does not appear of record, but it is immaterial.

So far as the private right of the relator is concerned, it is now well settled that this court would not assume original jurisdiction to enforce it. Attorney-General *v.* R. R. Cos, 35 Wis., 425; Attorney-General *v.* Eau Claire, 37 Wis., 340; State *v.* Baker, 38 Wis., 71; State *v.* Supervisors, Ib., 554. But, as it is said in Attorney-General *v.* Railroad Cos, "In a government like ours, public rights of the State and private rights of citizens often meet, and may well be involved in a single litigation. So it may be in the exercise of the original jurisdiction of the court. The prerogative writs can issue only at the suit of the State, or the Attorney General in the right of the State. They may go on the relation of a private person, and may involve private right." And the question before us is not upon the private right of the relator, and is independent of the accident that there is a relator in the case. The question on which the exercise of jurisdiction here must turn is, whether the subject matter of the writ is one "*quod a statum reipublicæ pertinet*; one affecting the sovereignty of the State, its franchises or prerogatives." Atty.-Genl. *v.* Eau Claire. And on this question there appears to us to be no room for doubt.

Save by the voluntary license of the State, the Insurance Company has no right to carry on its business within the State. The State sees fit to grant a license to it, upon condition, instantly revocable upon condition broken. The Insurance Company breaks the condition, but claims the right, notwithstanding, to act under the license throughout the State; claims that the condition is void, and that the license is therefore independent of the condition on which it was granted. And it assumes to carry on its business throughout the State, under the license, in defiance of the condition. Here is very plainly a direct and proximate interest of the State, affecting the State at large, in some of its prerogatives, and raising a contingency requiring the interposition of this court to preserve the prerogatives of the State in its sovereign character. Atty.-Genl. *v.* Eau Claire.

The statute of the State devolves upon the respondent the imperative duty of revoking the license of the Insurance Company, upon condition broken, and prohibits a renewal of the license for three years. The respondent claims that the statute so far is void, and wholly disregards it. Upon condition broken, he refuses to revoke the subsisting license of the Insurance Company, and upon its

expiration, renews it. Whether the respondent be right or wrong in his view, and that is for this court and not for him to determine, it is very certain that it concerns the State at large, that one of its principal officers executes his office in positive and deliberate disregard of a public statute defining its duties.

Such a case, when presented, is one eminently calling for the exercise of our original jurisdiction; one, with or without a relator, eminently fit to be presented to the court for adjudication. The writ of *mandamus*, in such a case, eminently serves its function as a prerogative writ.

II. It was objected to the statute, by the learned counsel who argued the demurrer, that it provides for no notice to the Insurance Company, gives it no opportunity of being heard on the question of revocation for condition broken. It might have been more provident to have required such notice; but that rested entirely in legislative discretion. It was for the legislature alone to say whether or not the Insurance Company should have license to act within the State; and if so, on what conditions, and how revocable, such license should be granted. Authorizing such a license, out of its mere discretion, it was competent for the legislature to impose any conditions, reasonable or unreasonable, and to provide for revocation, upon any cause or no cause, in any manner it might see fit.

It was for the Insurance Company to elect whether it would seek or accept the license authorized, on the very terms on which it was offered, at its own peril of the very power of revocation reserved. And, having elected to accept the license, it cannot now set up a vested right in the license, inconsistent with the license and in defiance of the terms and conditions on which it was granted. It voluntarily ran the very risk of summary revocation, *ex parte*, to which it now objects. It took the license *cum onere*, and has no just ground of complaint that the license is not more favorable to its interests.

We have carefully examined the numerous authorities cited on this point, and are unable to discover the application of any of them to the revocation of a voluntary license, in the precise manner reserved in the license itself.

III. It was likewise urged that the duty of revocation imposed upon the Secretary of State, operates to confer judicial power upon that officer.

We cannot think that either the power to grant a license or the power to revoke it, involves the exercise of a judicial function. Both appear to us to be plainly and equally ministerial functions. The Secretary, upon certain facts appearing to him, is authorized to issue a license; upon certain other facts appearing to him, is required to revoke it. This is a common condition of ministerial duty. In such a case, the ministerial officer must exercise his personal intelligence in ascertaining the fact upon which his authority is founded; but he acts upon his peril of the fact, and can in no sense be said to exercise a judicial function. If the use of personal judgment in such cases should be held to be judicial, the distinction between ministerial and judicial functions would be very much removed.

The Secretary of State is a ministerial officer, authorized by law to perform different duties, upon different contingencies. If he make mistakes of fact in the performance of his functions, his action may be void or voidable, only, in different circumstances. But he cannot judicially determine the facts on which he acts or refuses to act. This can only be done by the courts, whose duty it is, in proper cases, to review his action and determine the facts and his official duty upon them.

IV. It is contended, not that the statute of the State prescribing the condition upon which license shall be granted, is a violation of the Federal constitution, but that it has been so adjudged by the Supreme Court of the United States, and that thereupon and thereby the statute has ceased to have any force.

For the purpose, as Waite, C. J., remarks, (20 Wall., 459) of putting foreign insurance companies, licensed to do business in this State, upon equal footing with its own companies, sec. 22 of chap. 56, of 1870, requires foreign companies, before license, to file an agreement in the secretary's office, not to remove causes against them from the State to the Federal courts.

In Morse *v.* Ins. Co., 30 Wis., 496, the Insurance Company had, in violation of its agreement, petitioned the State court to remove the cause from the State to the Federal Court, under the Act of Congress. This court held the agreement to be a valid relinquishment of the right of such removal, obligatory upon the Insurance Company, and gave judgment against it. The judgment of this court was taken by writ of error to the Supreme Court of the United States. And that court in Ins. Co. *v.* Morse, 20 Wall., 445, reversed the judgment of this court, upon the ground that such an agreement did not deprive the Insurance Company of the right of removal to the Federal Court, under the constitution and laws of the United States.

The question was certainly not free from difficulty; and while we think, with all due deference, that the weight of authority and sound principle sustain the views of this court, it is our duty and pleasure to submit to the decision of the Federal Court, on a point unquestionably within its final jurisdiction.

Under that decision, it follows that the jurisdiction of the State Court in that case was ousted, upon the presentation of the petition to remove the cause to the Federal Court, and that all subsequent proceedings in the State Courts were *coram non judice*. Gordon *v.* Longest, 16 Peters, 97; Kanonse *v.* Martin, 15 How., 198; Ins. Co. *v.* Dunn, 19 Wall., 214.

The sole question, therefore, before the Federal Court, upon the writ of error in Ins. Co. *v.* Morse, was whether the right of the Insurance Company to remove the cause to the Federal Court remained, notwithstanding the agreement. Upon that point only, is the judgment in that case conclusive on this court; upon that point only, is the opinion of that court authoritative with this.

"This court, and other courts organized under the common law, has never held itself bound by any part of an opinion, in any case, which was not needful to the ascertainment of the right or title in question between the parties. In Cohens *v.* The State of Virginia, 6 Wheat., 399, this court was much pressed with some portion of its opinion in the case of Marbury *v.* Madison. And Mr. Chief Justice Marshall said, 'It is a maxim not to be disregarded that general expressions in every opinion are to be taken in connection with the case in which those expressions are used. If they go beyond the case they may be respected, but ought not to control the judgment in a subsequent suit, when the very point is presented. The reason of this maxim is obvious. The question actually before the court is investigated with care, and considered in its full extent; other principles which may serve to illustrate it are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated.' The cases of *Ex parte* Christy, 3 How., 292, and Jenness et al. *v.* Peck, 7 How., 612, are an illustration of the rule that any opinion given here or elsewhere cannot be relied on as a binding authority, unless the case called for its expression. Its weight of reason must depend on what it contains." Carroll *v.* Carroll, 16 How., 275. The rule is elementary, but we choose to give in the words of the court to whose opinion we consider it presently applicable.

Ins. Co. *v.* Morse, was decided by a divided court. The opinion of the majority, delivered by Mr. Justice Hunt, applies to the agreement of the Insurance Company, not to remove the cause to a Federal court, the general and familiar rule, that parties cannot, by contract, oust the ordinary courts of their jurisdiction; citing to that effect several cases, English and American; and quoting the rule from Story's Eq., sec. 670, in these words: "And where the stipulation, though not against the policy of the law, yet is an effort to divest the ordinary jurisdiction of the common tribunals of justice, such as an agreement in case of any disputes, to refer the same to arbitrators, courts of equity will not, any more than courts of law, interfere to enforce that agreement; but they will leave the parties to their own good pleasure in regard to such agreements. The regular administration of justice might be greatly impeded or interfered with by such stipulations, if they were specifically enforced."

Having held the rule to be otherwise applicable to the agreement of the Insurance Company, the opinion proceeds to inquire, whether the agreement gains validity from the statute of the State requiring it; and holds that it does not, because the right of removal is given by the Constitution and laws of the United States, and therefore the majority of that court reversed the judgment of this court, on the ground that the petition to remove the cause to the Federal Court had ousted the jurisdiction of the State court.

So far, the opinion deals with the question involved in the case. Having so held, the opinion had exhausted the question before the court; had exhausted its appellate jurisdiction to this court; had exhausted its concern with the statute of the State. In its own view of the question before it, the only concern of that court with the statute of the State, was, whether it could operate to take the agreement out of the general rule held to be applicable to it. The agreement was directly before the court; the statute at best was only before the court collaterally. And we may be pardoned for suggesting that, the validity of the statute not being directly involved in the decision, the declaration that it is unconstitutional, overlooked the universal rule of all American courts, sanctioned by that court (Cooper *v.* Telfair, 4 Dallas, 14; Parsons *v.* Bedford, 3 Pet., 433; United States *v* Coombs, 12 Pet., 72), that courts will avoid an interpretation or application of a statute rendering it unconstitutional; and will hold one so, only in plain and peremptory cases, and with the domestic policy of the statute, with the right of the State to refuse license to insurance companies refusing to make the agreement, that court had no concern.

"This court has no authority to revise the act of (Wisconsin), upon any grounds of justice, policy or consistency to its own Constitution. These are concluded by the decision of the public authorities of the State. The only inquiry for this court is, does the act violate the Constitution of the United States, or the treaties and laws made under it?" Carpenter *v.* Pennsylvania, 17 How., 456.

The statute of the State does not assume to prohibit insurance companies taking license under it, from removing actions on its policies from State to Federal courts. It only provides that no insurance company shall be licensed under it, which shall not file an agreement not to remove them. So that the question in Ins. Co. *v.* Morse was not whether the statute was in violation of the right of removal, but whether the voluntary agreement of the Insurance Company was obligatory upon it. The only question upon the statute before the court was, whether it could operate to give validity to the agreement, held to be otherwise invalid. And it is sufficiently plain that the validity of the agreement, and the validity of the statute requiring the agreement, are entirely distinct questions. The invalidity of the agreement has been determined by the court of last resort on the subject, but the statute remains. And we take it that no provision in the Constitution, laws or treaties of the United States is violated by a statute of the State prohibiting the license of the State to foreign corporations to do business within it, upon any condition whatever. The right of the State to refuse such license is absolute; and, being absolute, it may be exercised at absolute discretion, not to be questioned or abridged, anywhere, under any pretense. It was within the appellate jurisdiction of the Federal Court to refuse effect to the agreement, as ousting the jurisdiction of the Federal courts; but it is not within its jurisdiction to hold foreign insurance companies entitled to license without the agreement. It can hold an insurance company not bound by the agreement when made, as repugnant to the Constitution and laws of the United States; but it cannot excuse the agreement, as a condition precedent to license under the State statute. So far, the statute stands outside of its appellate jurisdiction; raising a pure question of State policy and economy, in a matter within the absolute pleasure of the State. Conceding the invalidity of the agreement, the statute still prohibits license, within the mere discretion of the State, without the agreement; and the statutory license cannot issue without it. In authorizing voluntary licenses, with absolute right to annex any condition to them, the State may exact agreements morally although not legally binding on the licenses. It may be presumed there is some sense of decency even among corporations. It may be presumed that not every insurance company will voluntarily make such an agreement, as a condition of a voluntary and advantageous license, and then deliberately violate it, even with the sanction of the Supreme Court of the United States. In any view, such a violation is a scandalous breach of good faith, indicating a disposition to bad faith in all the dealings of the company. And, though the agreement be not obligatory in law, yet has the State a right to trust to it, as obligatory in conscience; and to refuse licenses to all insurance companies refusing to execute it. In that view of it, the Federal Court has no appellate jurisdiction over the statute; and the declaration that it is unconstitutional was *brutum fulmen*. To that extent, at least, the State retains power over foreign corporations seeking to do business within it. The statute is indeed inoperative to give validity to the agreement, ousting the urisdiction of the Federal courts. So the Supreme Court of the United States has decided. But it is operative to prescribe the conditions on which the State, in the exercise of its sovereign authority, sees fit to license foreign corporations within it. That is for this court, not that, to determine. No foreign insurance company need come here under the agreement; coming, every foreign insurance company violating the agreement is guilty of a moral fraud upon the State. And, in upholding the statute to this extent, against the extra judicial *dictum* of the Supreme Court of the United States, we may quote in our own behalf the language of one of the great chief justices of that court: "A sanction is claimed to a breach of trust, and a violation of moral principle. In such a case, the mind submits reluctantly to the rule of law, and laboriously searches for something which shall reconcile that rule with what would seem to be the dictate of abstract justice." Hannay *v.* Eve., 3 Cranch, 242.

The provision in sec. 22 of chap 56 of 1870, requiring the agreement as a condition of license, was alone before the court in Ins. Co. *v.* Morse. And so far we have considered it by itself. But this writ is applied for, not under that section, but under chap. 64 of 1872. And the two statutes, taken together, put the whole subject in a view, which was not before the court in that case, and could not properly be in any case of its appellate jurisdiction. The former statute requires the agreement; the latter statute provides for the revocation of any license issued, upon violation of the agreement. And, the agreement being invalid to oust the jurisdiction of the Federal courts, the two provisions together are equivalent to one, requiring the revocation of a license issued to a foreign insurance company, upon its application to remove an action on its policy, from a State to a Federal Court.

The statute extended to these foreign insurance companies the privilege of doing business in this State, on equal footing with domestic companies. Experience showed their power to harass the citizens of the State doing business with them, by removing actions on their policies from courts of the vicinage, to distant and expensive tribunals. Hence the provisions of both statutes. And, conceding to the fullest extent the right of removal of actions commenced, we can see no pretense for questioning the power of the State, in the exercise of its absolute discretion on the subject, to revoke the license of a company exercising the right. The State has power to make its voluntary license subject to forbearance of a right, and revocable upon its exercise. The right may survive the license, but the license cannot survive its exercise. So, grants are sometimes made upon condition to forbear a right. It was for the authorities of the State alone to judge that the exercise of the right is an abuse of the privilege of the license. With that question, the Federal courts have no concern. They can hold, as they have, that the right exists impending actions; but they have no jurisdiction over the question whether foreign corporations, exercising the right, shall be permitted by the State to do business within it. That is matter of State policy, State law, State jurisdiction.

The distinction between the validity of the agreement, and the validity of the statute, is readily illustrated. It is quite clear that the Secretary of State takes no authority under the statute, to license a foreign insurance company not executing the agreement. That is a condition precedent to his authority. This court would assuredly refuse to compel him to act in disregard of the statute which confers his authority. And we take it that the Supreme Court of the United States would hardly claim appellate jurisdiction to review our decision, or to compel a State officer to act officially for the State, in disregard of the letter of his authority, on the ground that the agreement, when executed, is inoperative to oust the jurisdiction of the Federal Court.

It appears to us to be very plain that the statute of 1870 is valid enactment; that its validity was not involved in the decision of Ins. Co. *v.* Morse; that its validity, as a limitation upon the issue of licenses under State authority, was not within the appellate jurisdiction of the court; and that the declaration in the opinion that it is repugnant to the Constitution and laws of the United States and therefore void, is but an improvident and erroneous expression of the learned judge who delivered the opinion. With all due deference, we may be permitted to say of it what Lord Mansfield said of a *dictum* of Chief Justice Holt: "That is *obiter* saying only; and not a resolution or determination of the court, or a direct solemn opinion of the great judge, from whom it dropped." Saunderson *v.* Rowles, 4 Burr, 2064.

The opinion proceeds to discuss the relations of foreign corporations to the State in a scope wholly foreign to the judgment in the case, and in a tone inconsistent with decided cases in that court, and therefore, so far, of no authority there or here. It is sufficient for this case that that great tribunal has frequently and uniformly held that the corporations of one State have no right to migrate to another, there to exercise their franchises, except upon the assent of such other State; and that such assent may be granted upon such terms and conditions as the State granting it may think proper to impose. Ins. Co. *v.* French, 18 How., 404; Paul *v.* Virginia, 8 Wall., 168; Ducat *v.* Chicago, 18 Wall., 410; Ins. Co. *v.* Massachusetts, Ib. 566; Osborn *v.* Mobile, 16 Wall., 479.

Paul *v.* Virginia was the case of an insurance company of New York, doing business in Virginia, under a statute of the latter State, prohibiting foreign insurance companies from doing business there, without license to be granted upon conditions precedent. It was decided as late as 1868, and the court uses this language:

"The corporation being the mere creation of local law, can have no legal existence beyond the limits of the sovereignty where created. As said by this court in Bank of Augusta *v.* Earle; 'It must dwell in the place of its creation, and cannot migrate to another sovereignty.' The recognition of its existence even by other States, and the enforcement of its contracts made therein, depend purely upon the comity of those States—a comity which is never extended where the existence of the corporation or the exercise of its powers are prejudicial to their interests or repugnant to their policy. Having no absolute right of recognition in other States, but depending for such recognition and the enforcement of its contracts upon their assent, it follows, as a matter of course, that such assent may be granted upon such terms and conditions as those States may think proper to impose. They may exclude the foreign corporation entirely; they may restrict its business to particular localities, or they may exact such security for the performance of its contracts with their citizens, as, in their judgment, will best promote the public interest. The whole matter rests in their discretion." And this doctrine is expressly affirmed in Ducat *v.* Chicago, a like case in 1870.

The doctrine is so sound in itself, and so many of the decisions of that court on other subjects would be disturbed or subverted by a departure from it, that we feel safe in holding it to be the settled law of the Federal Supreme Court, notwithstanding intimations to the contrary in the opinion in Ins. Co. *v.* Morse; another reason for regarding these as not sufficiently considered, as is apt to be the case with all *obiter dicta*.

V. But if we should be mistaken in all this, if the provision of the statute of 1870 requiring the agreement, be unconstitutional, there is another view of the case, in our judgment, conclusive of it.

Morse *v.* Ins. Co. was decided in 1874, and reported in 1875. The legislature of the State has since been in session, and there is no doubt that their attention was called to the decision. Yet, though they have since enacted at least one statute, chap. 300 of 1876, amending the general insurance laws, they have not repealed or modified the provision requiring the agreement. This is a strong confirmation of our view, derived from the statute itself and its history, that the legislature would not have adopted or retained the statute authorizing licenses to foreign insurance companies, without the provision for the agreement. It is not an independent provision, to fall by itself.

The other provisions of the statute in regard to license, cannot be executed independently of it. It was evidently designed as a compensation for the provisions authorizing licenses—an inducement to them. And it is the settled doctrine of this court that, if it be unconstitutional, the whole statute authorizing licenses to foreign insurance companies is unconstitutional. Slauson *v.* Racine, 13 Wis., 398; Lynch *v.* The "Economy," 27 Wis., 69; State *v.* Dousman, 28 Wis., 541.

In that view of the statute, no license to foreign insurance companies would be authorized by law; the Secretary of State would have acted without color of authority in issuing the license in question; the license would give no color of right to the Insurance Company to do business within the State; and it would be our undoubted duty to compel the secretary to undo an official act, done without authority, an infringement upon the prerogatives of the State, and a usurpation of its sovereign authority.

VI. The return pleads in bar of the peremptory writ, an injunction of the Circuit Court of the United States for the Western District of Wisconsin, issued upon a bill filed in that court, by the Insurance Company against the Secretary of State; restraining that officer from revoking the license of the State to the Insurance Company, and the brief of the Attorney-General takes the position that the Federal Court had jurisdiction of the bill; and that jurisdiction of the subject-matter having first attached in that court, the jurisdiction of that court is exclusive of the jurisdiction of this.

Upon the application to us for the alternative writ, the learned counsel for the relator made a statement, repeated on both arguments without contradiction, which has left a very painful impression on our minds. He stated that as early as July, 1875, the petition for the alternative writ was filed, and the writ issued, and we think served, in one of the Circuit Courts of this State; that upon the suggestion of the Attorney-General, in September, that the petition should, for convenience, be withdrawn from that court and immediately filed in this; the relator's counsel assented, withdrew the petition from the Circuit Court and sent it to the Attorney General to be at once filed in this court, according to the suggestion; that the relator's counsel understood it to be so filed here, and the alternative writ issued; that it was not so filed; but that in the meantime the proceeding was taken, and the injunction issued in the Federal Court, of which the relator's counsel had no notice. It does not appear by the record of the proceeding annexed to the return, that the Secretary of State or the Attorney-General appeared in the Federal Court, or made any objection to the injunction. Indeed, the record implies that there was no such appearance or objection. As the facts, except, perhaps, the last, do not appear of record, we are without power to act upon them; but, if they are correctly stated, the present objection to our jurisdiction to issue the writ, appears to us to come with an ill grace from the chief law-officer of the State. For it would be a grave encroachment upon the sovereign authority of the State, if State officers could so transfer judicial control over their official action for the State, and the prerogative jurisdiction of this court, to an inferior Federal Court. But it is quite certain that the Federal Court has not jurisdiction to bind the State, or to foreclose the authority of the State courts, on behalf of the State, over its own officers, in their duty to it under its own law.

(To be Continued.)

OUR thanks are due JAMES K. EDSALL, Attorney-General, for the following opinion:

SUPREME COURT OF ILLINOIS.

OPINION FILED JUNE 30, 1875.

THE PACIFIC HOTEL COMPANY *v.* JOSEPH POLLACK et al.

Appeal from Cook.

POWERS OF THE BOARD OF EQUALIZATION TO ASSESS CAPITAL STOCK OF CORPORATIONS—RULES FOR SO DOING.

1. THE LOCAL ASSESSOR.—That the local assessor is not required to fix any valuation upon the capital stock; the return to be made by him is merely of certain facts which may be important in enabling the State Board of Equalization to fix its value; that this return is not necessary to give the State Board jurisdiction to assess the capital stock of a particular corporation.
2. NOT A BOARD OF REVIEW.—That, so far as this class is concerned, the board does not act as a board of review, but as an original assessor.
3. THE EVIDENCE.—That the schedule is but one form of presumptive evidence of that which admits other forms of proof equally satisfactory, for the purpose of ascertaining the data for the application of the rule adopted by the board.
4. THE RULE.—The court states the rule and manner of assessing the capital stock of corporations.—[ED. LEGAL NEWS.

Opinion by SCHOLFIELD, J.,

The bill in this case prays that the collection of all taxes levied upon the capital stock of the Pacific Hotel Company, as assessed by the Board of Equalization for the taxes of the year 1873, be enjoined. Demurrer was sustained to the bill by the court below, and the correctness of that ruling is questioned upon grounds, the sufficiency of which, we shall now attempt to consider.

By section thirty-two of the revenue act in force July 1st, 1872, it is required that companies and associations incorporated under the laws of this State (other than banks organized under the general banking laws of this State) shall, in addition to the other property required by this act to be listed, make out and deliver to the assessor a sworn statement of the amount of its capital stock, setting forth particularly "1. The name and location of the company or association; 2d. The amount of capital stock authorized, and the number of shares into which such capital stock is divided; 3d. The amount of capital stock paid up; 4th. The market value, or if no market value, then the actual value of the shares of stock; 5th. The total amount of all indebtedness, except the indebtedness for current expenses, excluding from such expenses the amount paid for the purchase or improvement of property; 6th. The assessed valuation of all its tangible property." Such schedule shall be made in conformity to such instruction and forms as may be prescribed by the auditor of public accounts. "In all cases of failure or refusal of any person, officer, company or association to make such return or statement, it shall be the duty of the assessor to make such return or statement from the best information which he can obtain."

Section thirty-three requires that "such statements shall be scheduled by the assessor and such schedule with the statements so scheduled shall be returned by the assessor to the county clerk, said clerk shall at the time he makes his report of assessments forward to the auditor all such schedules and statements so returned to him. The auditor shall annually, on the meeting of the State Board of Equalization, lay before said board the schedules and statements herein required to be returned to him; and said board shall value and assess the capital stock of such companies or associations in the manner provided in this act." Which is as prescribed by section three "to ascertain and determine respectively the fair cash value of such capital stock including the franchise, over and above the assessed value of the tangible property of such company or association." It is alleged in the bill that the valuation or assessment of appellant's capital stock is grossly unequal, unfair and oppressive, and was made in fraud of its right; and it shows that in listing its property, appellant omitted to list its capital stock or indebtedness in addition to its tangible property, for the reason that neither the auditor of public accounts nor the duly authorized assessor furnished it with the instructions or forms, in conformity with which such return is required to be made, or made demand for such return."

The position is taken and discussed with much ability by the counsel for appellant, that this renders the tax levied upon its capital stock absolutely void, and among other cases cited in its support are, Graves *v.* Bruen et al., 11th Ill., 439; Tibbetts *v.* Job et al., Id., 460; Schuymler et al *v.* Hull, Id., 463; Marsh *v.* Chestnut, 14th Id., 223; Billings *v.* Dutton, 15th Id., 218.

In our opinion, there is an important distinction between the returns required by the statutes in those cases, and that required by the section under consideration and the principle controlling there, has no necessary application here. In the cases in the 11th of Illinois, the listing included the valuation of the property upon which the rate per cent. of taxation levied had to be computed and extended for collection. Without a return, therefore, there was nothing upon which to compute the amount the tax-payer should pay, there being no authority to determine it otherwise than upon computation, based upon the assessed valuation of his property. In the last two cases cited, the listing also included the valuation of the property upon which the rate per cent. of taxation levied had to be computed and extended for collection, and it was essential the return should be made within the time prescribed by the statute, to allow the tax payer an opportunity to inspect the return and prepare for the hearing of his objections to the assessment. Here, however, the local assessor is not required to fix any valuation upon the capital stock; the return to be made by him is merely of certain facts which may be important in enabling the State Board of Equalization to fix its value. Nor do we understand this return is essential to give the State Board of Equalization jurisdiction to assess the capital stock of a particular corporation. So far as this class of property is concerned, it does not act as a board of review, but as an original assessor. The law enjoins upon it as a duty, not to assess the capital stock of such corporation as shall be returned or reported to it by the auditor, but to assess the capital stock of each company or association respectively, now or hereafter incorporated under the laws of this State. (Revenue Law of 1872, § 108.) This is to be done, not from the evidence of the schedule alone, for there is nothing in the language of the section, or of the act, that makes it conclusive for any purpose, but necessarily from such sources of information as shall be satisfactory to the minds of the members of the board. They, as well as local assessors, act in making assessments, under the solemnity of an oath, and in discharging every enjoined duty in the absence of specific statutory limitations, must resort to such appropriate means as they shall deem necessary to enlighten their understandings and satisfy their consciences. That this is so in regard to local assessors in fixing valuations, has never, so far as we are aware, been seriously questioned. The only difference between an assessment by a board and an individual, is manifestly but the difference between ascertaining the judgment of a single mind and the aggregate judgment of a number of minds. The same evidence operates equally on the mind whether the individual acts alone or in conjunction with others, although in the latter case concession or compromise may become indispensable to reach a result by reason of the differences in mental organization. To the extent, therefore, that it is feasible for the State Board of Equalization, in assessing capital stock, to act as a local assessor does in ascertaining the value of property which he assesses, we are unable to comprehend why it may not do so. If in this we are not in error, it then follows it was competent for the members of the State Board of Equalization to resort to such sources of information, in this respect, as shall be most satisfactory to themselves, and it can admit of no contsoversy that they might become enlightened as to the value of capital stock by information, although it should not be communicated in the *precise form* prescribed by the schedule.

It is true, when the board adopts a rule by which to be governed, it should be adhered to until it shall be repealed and a new one adopted in its stead, but the data essential to the application of the rule adopted by the board in the present instance, and the reasonableness

(Continued on page 400.)

CHICAGO LEGAL NEWS.

Lex vincit.

MYRA BRADWELL, Editor.

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We call attention to the following opinions, reported at length in this issue.

PAYING DUTIES UNDER PROTEST.—The opinion of the United States Supreme Court, by BRADLEY, J., as to the practice of paying duties under protest, and stating within what time notice of dissatisfaction must be given, and within what time an appeal may be taken from the decision of the collector.

LAND GRANT CONSTRUED.—The opinion of the Supreme Court of the United States, by FIELD, J., holding that the act of Congress of March 3d, 1857, granting certain lands to the Territory of Minnesota, for the purpose of aiding in the construction of several lines of railroad between different points in the same territory, only authorized for each road, in advance of its construction, a sale of one hundred and twenty sections; no further disposition of the land along either road was allowed, except as the road was completed in divisions of twenty miles; that where land is conveyed to the State by a corporation, as indemnity against loss on her bonds loaned to it, the bondholders have no equity for the application of the land to the payment of the bonds, which can be enforced against the State, and her grantees take the property discharged of any claim of the bondholders.

THE JURISDICTION AND CONTROL OF THE FEDERAL COURTS OVER THE STATES BY ACTION AGAINST THEIR OFFICERS.—The opinion of the Supreme Court of Wisconsin, by RYAN, C. J., holding that where a suit is prosecuted in a Federal Court, by a private party, against a State officer, in which the State has a direct interest, but cannot be made a party, the officer himself must have an interest or liability in the subject-matter upon which the jurisdiction of the court can attach; that when such a suit is prosecuted against a State officer having no such interest or liability in his official capacity only to affect a right of the State, the State is the real defendant within the meaning of the prohibition of the amendment to the Constitution; that a State is not bound, in the exercise of its authority by the proceedings of a Federal Court against its officer. In this case the court held that it had the power to enter an order requiring the Secretary of State to revoke a license, which he had improperly issued to a foreign insurance company. This opinion, delivered by the learned chief justice, will attract universal attention in legal circles throughout the Union. It is bold and aggressive, and goes further than any opinion of the Supreme Court of South Carolina in sustaining the doctrine of State rights.

WHEN MARRIAGE REVOKES A WILL—THE STATUTE PROSPECTIVE—THE SEPARATE ESTATE OF A MARRIED WOMAN.—The opinion of the Supreme Court of this State by SHELDON, J., holding that under the act of 1845, a married woman might dispose of her *separate* estate by will; that under the act of 1861, all a married woman's property is made her sole and separate property; that the enactment which went into force July, 1, 1872, that "a marriage shall be deemed a revocation of a prior will," was prospective in effect and had reference only to marriages which should take place thereafter, and did not apply to marriages which had taken place prior to the passage of the act. We regard this as an exceedingly important opinion in several particulars. One of the most important being the defining what is to be regarded as a married woman's separate estate. We know quite a number of good common-law lawyers, who have been of the opinion that a married woman could only devise by will what was known under the old English law as "her separate estate." The court is evidently correct in holding that a married woman may now devise all her property.

ASSESSING CAPITAL STOCK.—The opinion of the Supreme Court of Illinois by SCHOLFIELD, J., defining the powers of the State Board of Equalization to assess the capital stock of corporations, and stating the manner of making the assessment.

ILLINOIS REPORTS FOR SALE.—We call attention to the advertisement of nearly a full set of Illinois Reports for sale, on the first page of this issue.

SUPREME COURT OF TENNESSEE.

KNOXVILLE, MAY 15, 1876.

ALLEN HOLLAND *v.* L. LOCKE et al.

MATERIAL ALTERATION.—Striking out all the names except one of several payees, to a bill single, is a material alteration.

BURDEN OF PROOF.—It rests upon the holder of the paper to show that the alteration was not made by him, before he can recover on the note.

STATUTE OF LIMITATIONS.—The note being out of the way, the claim is barred by the statute of limitations.—[ED. *Commercial and Legal Reporter.*

MCFARLAND, J.—The note or bill single in controversy was originally made payable to the several persons who sold the slave, the consideration of the note; but when the note is produced upon the beginning of this litigation, it appears that all the names of the payees have been stricken out, by drawing lines across them, except one, James W. Gillespie, and on this ground the maker of the note (Locke) pleaded *non est factum* to the action at law. This was a material change of the obligation, and if made by the obligees or owners of the note, or any of them, without the knowledge or consent of the obligor, it would amount, in law, to an *alteration*, and would be fatal to a recovery. If the names were stricken out by a stranger, it would be termed a "*spoliation*," and a recovery might be had upon it, if enough remained to determine its identity and its terms; otherwise, secondary evidence might be resorted to. Crocket *v.* Thomason, 5 Sneed, 342.

It does not appear in the present case who made the change in the writing, but it appears that the obligor, Locke, did not know of or consent to the change, and it was incumbent upon the parties claiming under the note, and who produced it, to explain the alteration, which they have failed to do, and there can be no recovery upon it.

The complainant, who claims to be the equitable owner of the note, can stand upon no higher ground, and claim no greater right than the payees of the note.

The complainant can have no recovery against Locke upon the footing of the original consideration, because the slave was not sold to the defendant Locke, but to his sister, and Locke only became bound by his note, if at all; and, secondly, the note or bill single being out of the way, any indebtedness arising upon the original sale of the slave is clearly barred by the statute of limitation, which was pleaded and relied upon.

The decree of the Chancellor dismissing the bill will be affirmed. The complainant will pay the costs of this court; the costs of the court below as decreed by the Chancellor.

SUPREME COURT OF ILLINOIS.

ABSTRACTS OF OPINIONS FILED AT OTTAWA, JUNE 30, 1876.

61.—John Wilson *v.* Henry Kruse.—Appeal from Peoria.—Opinion by BREESE, J., reversing and remanding.

AMENDMENTS OF ATTACHMENT AFFIDAVIT—DEED—COLOR OF TITLE.

Amendments of affidavits in attachment—legal presumptions as to affidavits and issuing writs—proceedings—executions—limitations—color of title—payment of taxes—transfer by appeal—description of land—second sheriff's deed—effect thereof.

STATEMENT.—Suit in ejectment—pleas; outstanding title in another party; and statute of limitations. The title claimed was under proceedings in attachment. This was claimed to be void, on the ground that there was no affidavit filed; and this being a jurisdictional fact, the court acquired no jurisdiction in the attachment suit—the paper purporting to be an affidavit not being properly sworn to, as it was alleged. The writ of attachment recited that the plaintiff had complained on oath, etc. *Held*,

1. That it is not to be presumed that a clerk makes a false recital in a writ; or that he would issue a writ of attachment without the oath required.

2. If an affidavit was not, in fact, sworn to, it could have been amended under section 8 of the statute; and, if amendable on objection, it cannot be held void. It would be error to refuse an amendment to the affidavit, however defective it might be, and even if it were sworn to before an improper officer.

3. Even, where an affidavit for attachment had written on it by a judge, the words "subscribed and sworn to before me," but the signature of the judge was omitted—the order, however, of the judge being inscribed below these words, that the writ should issue—this was held to show, by strong implication, that the affidavit was sworn to. (English *v.* Wall 12 Rob., 132.)

4. Attachment proceedings cannot be attacked on the ground that the jurat of the affidavit was not signed by the officer, if, in fact, it be shown that the oath was administered by him.

5. A defective affidavit in attachment is not void; and can be attacked only in a direct proceeding.

6. Where it is alleged that it does not appear that the sheriff attached the property of the defendant, this objection does not go to the jurisdiction of the court, but only to the regularity of the proceedings under the writ.

7. Where an attachment was pending in the County Court at the time of the repeal of the statute conferring such jurisdiction upon it, the cause was transferred by the repealing statute to the Circuit Court, which had then the same jurisdiction as if the cause had originated therein.

8. Objections to the regularity of attachment proceedings after jurisdiction attaches, are of no consequence collaterally.

9. In attachment, only a special execution can issue, but this may issue although a general execution was awarded in the judgment.

10. As to the description of land in a sheriff's deed, the rule is, when there are two descriptions—the one complete of itself, and the other indeterminate—the incorrect description may be rejected as surplusage, and the complete description be allowed to stand alone.

11. If a sheriff's deed be defective—as for want of a seal—and he afterwards makes a good deed to the grantee, the latter deed relates back to the time of execution of the defective deed. And a sheriff can be required and compelled to make a correct deed. The law is well settled that for the advancement of a right, and for the furtherance of justice, and when the rights of third parties will not be injuriously affected, a deed will have relation to, and take effect from, the time the parties were entitled to receive it.

12. Color of title requires that an instrument professes to convey the title, but not that the title, when traced to its source, should prove to be an apparently legal title.

13. Payment of taxes thereunder may be by a tenant.

69.—Herman B. Goodrich *v.* David C. Cook.—Error to Superior Court of Cook.—Opinion by SCHOLFIELD, J., affirming at appellant's costs.

PROCEEDINGS AFTER JUDGMENT—PRESUMPTION—COSTS.

Orders in a cause—proceedings after judgment—presumption as to certificate of evidence, etc.—supplemental record—costs on successful party in the Supreme Court, when. *Held*,

1. That while a court cannot make an order in a cause after it has been finally decided and passed beyond its control, yet this does not militate against the right of a court before whom an action at law, or in chancery, has been tried, to give time to prepare a bill of exceptions, or certificate of evidence, for the judge's signature; nor prohibit the filing of a bill of exceptions, or certificate of evidence, properly signed in apt time by the judge, after the decree has been entered up.

2. As to a certificate of evidence, the presumption is that it was presented and signed at the right time, and that, otherwise, the judge would not have signed it; and the mere fact that it was not filed until a later day, does not rebut that presumption.

3. When a supplemental record is filed, it becomes a part of the record, in a case appealed, as if it had been incorporated in the original record.

4. Where an appellee is at fault in not having had a certificate of evidence filed in the office of the clerk of the court below, before appellant sued out his writ of error, he will be taxed with all the costs made in the Supreme Court.

70.—Anson Sperry, guardian, etc. *v.* Patrick Fanning.—Error to Superior Court of Cook.—Opinion by CRAIG, J., affirming.

PERSONAL LIABILITY OF GUARDIAN ON CONTRACTS FOR HIS WARD—GENERAL PRINCIPLES.

STATEMENT.—A minor ward owned lots in Chicago. Appellant (guardian) executed a contract for erecting buildings thereon, signing his name as guardian, and having no order from court. *Held*,

1. There is a marked distinction between the agreement of an agent, who describes himself as contracting for a principal, and the covenant of a principal, who contracts by and through an agent. The former may be regarded as the personal contract of the agent; while the latter may be held to be the undertaking of the principal.

2. The mere use, by a promissor, of the name of trustee, or of any other name of office, will not discharge him. Some one must be bound by the contract, and if he does not bind some other, he binds himself; and the official name is then only regarded as one of description.

3. Accordingly, a guardian cannot, by his own contract, bind the person or estate of his ward; but if he promise, on a sufficient consideration, to pay the debt of his ward, he is personally bound by his promise, although he expressly promised as guardian. And it is a sufficient consideration if that promise discharges the debt of his ward; and he may thus discharge the debt of his ward, and then lawfully indemnify himself out of the ward's estate; or, if he be discharged from his guardianship, he may have an action against the ward for money paid to his use.

78.—Peter Stubher *v.* Christian Belsey.—Error to Woodford.—Opinion by SCOTT, J., partly reversing.

EQUITY JURISDICTION—WHEN AND WHERE CONSTRUCTION OF LEGAL RIGHTS MUST BE SOUGHT—REVIEW OF DECREE BY AGREEMENT NOT ENTERTAINED.

STATEMENT.—Bill contesting the will of Joseph Belsey, previously admitted to probate, on the ground that it was not, in fact, his will; and praying that, if the will was his, the court would construe it. As to the first ground the bill was dismissed, and as to the second, retained. *Held*,

1. That, where no trust is created, neither the executor, nor the heir, nor the devisee, who claims only a legal title in the estate, can come into a court of equity for the purpose of obtaining a judicial construction of the provisions of a will. Equity will not entertain jurisdiction merely to declare legal rights.

2. The Supreme Court will not review a decree rendered by agreement of parties.

85.—Richard C. Craft *v.* J. O. McConoughy.—Error to Ogle.—Opinion by CRAIG, J., reversing and remanding.

COMBINATIONS IN RESTRAINT OF TRADE.

STATEMENT.—Four grain-dealing firms entered into a secret combination to control prices of grain, etc., their copartnership being entirely concealed from the public, to whom they were held out as competing houses, although they met, from time to time, in secret conclave, to make arrangements, etc., and bound themselves to abide the result of the deliberations. *Held*,

1. That such an agreement, controlling the general grain trade in that locality, was in general restraint of trade, and therefore void. The rule is, that a partial or particular restraint upon trade is good, where the consideration is adequate, and the restriction reasonable; but an agreement in general restraint of trade, is contrary to public policy, illegal and void.

2. The test of this reasonableness is, whether the restraint is such only as to afford a fair protection to the interest of the parties in whose favor it is given, and not so large as to interfere with the interest of the public. Whatever is injurious to the public interest, is void, on the ground of public policy.

3. So long as competition is free, the interest of the public is safe, but where a secret combination destroys all competition, it creates a monopoly against which the public interest has no protection.

4. And a court ef equity will not lend its aid to enforce a division of profits among conspirators of this kind.

107.—John McNab *v.* Hezekiah Young.—Appeal from Superior Court of Cook. Opinion by BREESE, J., affirming.

OMISSION OF A WORD IN A RETURN DOES NOT NECESSARILY VITIATE PROCEEDINGS OR DEPRIVE OF JURISDICTION—SERVICE ON UNNECESSARY PARTY.

STATEMENT.—Bill to set aside conveyances under a sale on execution to satisfy a judgment in the U. S. Circuit Court. It was claimed that the court had not jurisdiction of parties, because of an omission of the word "copy" in the return of the officer serving the writ, namely, "served this writ by leaving a true — in the hands," etc. *Held*,

1. That, by every fair and reasonable intendment, the service was good, as to the defendant mentioned in the return in that connection; since it is impossible to doubt that a copy was left, although the word "copy" is omitted in the return.

2. As to a co-defendant—although service was not according to the statute—yet as he was not a necessary party, but a mere naked trustee with no real interest, a defective service could not vitiate.

120.—Amos S. Gilbert *v* Wallace G. Bone.—Appeal from Warren.—Opinion by SCHOLFIELD, J., affirming.

WHEN VERDICT SET ASIDE—EVIDENCE UNDER PENAL STATUTE—AFFIRMATIVE OF THE ISSUE A QUESTION OF LAW—AND PREPONDERANCE.

STATEMENT.—Action of debt by appellant against appellee for issuing marriage license to a minor without consent. *Held*,

1. While it is true that this, being a civil action, needs not be established with the same degree of certainty requisite in a criminal prosecution, yet it is brought under a penal statute; and before a party can recover, in such a case, he must bring himself clearly within the provisions of the statute.

2. The Supreme Court will not disturb a verdict merely because, if the question of fact had been submitted to it, in the first instance, instead of to the jury, it would have come to a different conclusion. In order to justify the interference of the court, a verdict must be clearly and palpably against the evidence. The evidence must be considered with reference to the issues, and if then it is apparent, at first blush, that the conclusion of the jury is unauthorized, it is the duty of the court to set the verdict aside.

3. Whether a plaintiff or defendant has the affirmative on the particular issue, is a question of law for the court, and not, in any degree, a question of fact for the jury. Also, to what extent it is incumbent on either to have a preponderance of evidence, is also a matter of law.

113.—George F. Work *v.* William E. Hall.—Appeal from Cook.—Opinion by SCHOLFIELD, J., reversing in part.

COMMENCEMENT OF SUIT—MECHANICS' LIEN—DECREE—DIFFERENT CLAIMANTS—ENFORCEMENT OF LIEN.

STATEMENT.—Mechanics' lien for materials, etc. Answer to petition that petitioners, beforehand, accepted a note of a third party, in satisfaction, and thereby waived all right to a lien. Also, that the bank (made co-defendant) purchased bonds, etc., without notice of any such lien, on the certificate of the architect, that there was no such lien. The limitation of six months was also pleaded. *Held*,

1. That where one firm commences a suit in mechanics' lien proceedings, and afterwards an amendment is made, admitting as parties to the petition, another firm, the *commencement* of the suit is not to be dated at the amendment, but at the original filing of the petition, however improperly or irregularly the first firm may have filed the petition. Other parties can be admitted at any time before final judgment.

2. Where there are different claimants the rights of all should be settled in the same decree.

3. The lien attaches to the property, but it cannot be enforced against subsequent purchasers, who are not otherwise liable for the payment of the debt, beyond the sale of the property.

137.—John A. Huck *v.* Henry Flentye.—Appeal from Superior Court of Cook.—Opinion by SCHOLFIELD, J., reversing and remanding.

PARTY WALLS—LIABILITY THEREFOR.

Held, That, while a party who builds a party wall, partly on his own land, and over the line partly on his neighbor's land, without any agreement or knowledge thereof on the part of the latter, he cannot afterwards recover a portion of the cost of erection, even if his neighbor erects a building adjoining the wall; yet where there is knowledge, even if no express agreement, and if, at the time of the erection, it is beneficial or necessary to the neighboring lot-owner, and the latter accordingly uses the wall, there is a liability incurred thereby for contribution toward the building of the wall.

155.—Reason C. Kill *v.* Town of Yellowhead.—Appeal from Kankakee.—Opinion by SCHOLFIELD, J.

PROSECUTION FOR OBSTRUCTING HIGHWAY—INITIALS IN DESCRIBING ROAD—ESTOPPEL.

Held, 1. That, in a prosecution for obstructing a public highway, initials may properly be used to describe the highway; for where a custom is so universal and of such antiquity that all men must be presumed to know it, courts will not pretend to be more ignorant than the rest of mankind, but will recognize and act upon it.

2. An objection that a record of a highway is void, because it shows the petition was not acted on in the time prescribed by the statute, is not tenable, if not made in the court below; and more particularly where the record shows that after the road was ordered, the objector accepted the payment of damages awarded him in laying it out.

160.—Gould's Adm'r *v.* Mason's Ex'r.—Appeal from Warren. — Opinion by BREESE, J., reversing and remanding.

PARTY CANNOT MAKE EVIDENCE FOR HIMSELF—ADMISSIONS—INTERESTED PARTIES AS WITNESSES.

Held, 1. That a party cannot be allowed to make testimony for himself and claim its benefit in an issue on trial, and where it appears that a jury must have, or may have, based their verdict, in whole, or in part, on such evidence, or upon testimony as to what one party said in the absence of the other, a cause will be thereon reversed.

2. Where it is objected that the husband of the daughter of a testator is not a competent witness for the executor, the objection must be overruled where it appears that the daughter had been provided for by her father's will, and has no interest, therefore, in the controversy pending—as she herself would then be a competent witness.

180.—W. Lowell *v.* N. F. Wren.—Appeal from Cook.—Opinion by SCHOLFIELD, J., affirming.

CONSPIRACY TO OBTAIN A MARRIED WOMAN'S SIGNATURE.

STATEMENT.—Bill to enjoin sale under a deed of trust, filed by appellee, on the ground that appellant and another, with her husband, conspired to defraud her by procuring the notes and deed of trust to be executed as if by her, but that she never signed them, nor authorized any one to do so for her, and never acknowledged the deed. The notes purported to be signed by appellee, "per John Wren." The acknowledgment of the deed was written out and attested by one Albin, as notary public, whom, appellee testified she did not know, and she was never introduced to him as a notary public. Further, however, she said, on one occasion, her husband brought her a paper to sign, she asked him what it was, as she could not read or write. He replied, "It's only a matter of form," and, thereupon, she made her mark, not knowing what the paper was; her husband then gave the paper to appellant. She was not asked whether she acknowledged her signature, etc. *Held*,

That these circumstances in testimony, together with the further facts that the husband appears to have been entirely worthless, and that appellant was present when the signature was obtained, participating in what then occurred, etc., proved sufficiently that they had conspired with the husband to obtain the execution of the notes and deed fraudulently.

196.—Stephen Hanford *v.* Isaac Blessing.—Appeal from Kankakee. — Opinion by SCHOLFIELD, J., affirming.

EVIDENCE AS TO WHETHER A CONVEYANCE IS A DEED OR A MORTGAGE—INTERLOCUTORY ORDER NOT APPEALABLE.

STATEMENT.—The controversy herein was as to whether a certain conveyance was absolute, or only intended as a mortgage. The direct testimony was about evenly balanced. *Held*,

1. That where the grantee subsequently executes a mortgage on the premises to secure indebtedness to the grantor, and where it is shown by disinterested witnesses that the grantee frequently claimed to own the property, and denied any right of the grantor in it, and exercised continued acts of ownership, such as renting the property to other parties, these circumstances being inconsistent with the position of a mere mortgagee, raise a legal presumption that the first conveyance (in controversy) was absolute, and not intended to be a mortgage.

2. Where a judge imposes terms on granting a preliminary injunction, this cannotbe reviewed in the Supreme Court, because it is interlocutory, and not final.

203.—George A. Moore *v.* John Mauck.—Appeal from Mercer.—Opinion by SCHOLFIELD, J., affirming.

AFFIDAVITS IN ATTACHMENT AMENDABLE—DEFECTIVE AFFIDAVITS—EFFECT OF DEFICIENCY — WHEN NOT AMENDABLE — VIOLENT EJECTION A QUESTION OF FACT.

STATEMENT.—Suit for "wrongfully taking goods and chattels from plaintiff," and for "wrongfully and forcibly taking possession of certain premises occupied by the plaintiff and his family." Plea, not guilty; with notice of special matters, namely: That the goods and chattels were taken in attachment, in due course of law; that appellant's wife, as his agent, sued out a replevin for the property, and on the trial the replevin suit was decided in favor of appellee; and that the land belonged to appellee, and had been occupied by appellant as his tenant, and appellant and his son having gone to California, whereon appellee caused a notice to be left at the house; upon service of that notice, appellant's wife and family left the premises, and appellee took possession.

The attachment proceedings were claimed to be void by reason of a defective affidavit. *Held*,

1. That where a statute provides that affidavits in attachment proceedings may be amended, although informal, and not in accordance with the requirements of the statute, a sufficient amount of vitality is imparted by such amendable defective affidavits to render them voidable only, and not absolutely void; although, if it is so defective as not to be amendable, as by omitting the names of the parties, the amount of indebtedness, or all grounds of issuing the attachment, the affidavit is void.

2. As to whether improper means were used to eject the family of the appellant from the land, this is a matter of fact for the jury.

209.—John A. Brown *v.* Frederick H. Luehrs.—Appeal from Superior Court of Cook.—Opinion by SHELDON, J., affirming.

NEW TRIAL.

New trial on newly-discovered evidence — requisites — interlocutory proceedings—transcript of evidence taken by a stenographer—depositions—commissioner.

STATEMENT.—Bill to enjoin the collection of a judgment, and to vacate the judgment, on the ground of newly discovered evidence, since the term of court at which the judgment was rendered. *Held*,

1. That the rule governing such cases is, that a bill for a new trial is watched by equity with extreme jealousy, and that the court must see that injustice has been done, not merely through the inattention of parties; that a party is not entitled to relief after verdict, upon testimony which, with ordinary care and diligence, he might have procured and used upon the trial at law. But where there is no lack of diligence imputable, and evidence is afterwards discovered which would be likely to have a controlling influence and produce a different result, a judgment will be re-opened.

2. Where it is objected that a preliminary injunction was granted without notice, the objection can avail nothing in the way of reversing a decree on final hearing, making the injunction perpetual.

3. A transcript of evidence taken by a stenographer at the common law trial, in such a case as this, is properly admissible in evidence, when sworn to by him as true and correct.

4. Where it is objected that an officer taking a deposition was not the same as the one to whom the commission was directed—as where the commission was sent to "the Clerk of the District Court, of the ninth judicial district, in Dubuque, county of Dubuque, Iowa," and the certificate shows the officer to have been "clerk of the District Court of the State of Iowa, in and for Dubuque county," it is held there is no variance. A person acting as commissioner, may be designated by the name of an office he holds, as well as by his proper name. And where a certificate to a deposition is to the effect that the person taking it did so pursuant to the commission, this is proof of his identity.

243.—Samuel H. Melvin *v.* Lamar Ins. Co.—Error to Superior Court of Cook.—Opinion by SHELDON, J., reversing and remanding.

BONA FIDE SUBSCRIPTIONS FOR SHARES OF STOCK—SURRENDERS WHEN FRAUDULENT—LACHES.

STATEMENT.—Bill by stockholders, in behalf of themselves and others, against the company, on the ground that the officers were guilty of collusion and fraudulent conduct prejudicial to the rights and interests of the other stockholders; more especially in this, that they, having in 1869, subscribed for and taken a large number of shares (5500), and paid for them in the usual way, were afterwards permitted to surrender all said shares, and withdraw from the company all the money and assets that they had paid therefor, and also to withdraw other funds or assets of the company, and appropriate them to their own use—that afterwards a receiver was appointed for the company, etc. The answer was that the defendants only held the 5500 shares as a loan for money advanced as security for the loan. Bill dismissed.

It appeared that the 5500 shares were held out to other stockholders as on the same footing as other *bona fide* subscriptions; and were counted in as assets of the company; and an auditor's certificate obtained on a showing so representing these shares as subscribed for in the usual way. *Held*,

That the presumption is that all subscriptions stand on the same basis, and all shares are entitled to the same benefits, and subject to the same burdens, and in the subscription of each person, every other subscriber has a direct interest. And where there purports to be an amount of stock taken, when in fact it has not been taken, but issued to individuals under a private agreement that they may at pleasure surrender the shares and take back their money, such

an arrangement is a fraud in law, even though it may not have been intended as a fraud, and it will be disregarded, and the parties be held bound to all the responsibilities of *bona fide* subscribers. (Numerous authorities cited to fortify this point.)

It was contended that a party has a right to make any condition he pleases to a subscription, provided the condition is expressed in the contract; that what he is forbidden to do, is, to make an unconditional subscription, accompanied by a secret stipulation written or parol. *Held*,

1. That the present case does not come within that rule, because here certificates of stock were issued in the usual form, and the issue appears on the books of the company, as a regular issue, unaccompanied by any sign of a condition. They showed the stock taken to be real, *bona fide*, absolute issues of shares. And other stockholders were entitled to rely upon the certificates and book entries, and are not to be held bound to go back and take notice of any antecedent individual contract existing between the directors and the takers of the shares—and so the transaction stands as an unconditional subscription controlled by a secret agreement embodying conditions.

2. Nor are shareholders bound to look into the management of the affairs of the company, and will not be held to have notice of every thing which has been done by directors; who may be assumed by the stockholders to have done their duty.

3. Nor need other stockholders to show that such a subscription deceived them, and influenced them to subscribe for shares. The transaction being, in itself, fraudulent, will be disregarded, whether any one was influenced by it, or not.

4. Nor will the stockholders be estopped by the fact that they met and approved the course of management while the particular facts of the secret transaction was unknown to them.

5. And if a committee is appointed to collect the assets of the company, to ascertain whether business should be suspended, this committee is confined to the purpose of the appointment. They have authority to collect the assets, but not to give them away, or release them without payment.

6. Nor will a delay of two years be regarded as laches in such case.

245.—Gravel Road Co. *v.* Philip Daun.—Appeal from Superior Court of Cook.—Opinion by SCHOLFIELD, J., affirming.

COLLECTION OF TOLLS ON A GRAVEL ROAD.

STATEMENT.—The question presented herein was whether a person, traveling some distance on a toll road between gates, and turning into another road, in good faith, and not for the purpose of passing around a gate, is liable to pay toll for the distance he thus travels on the road. *Held*,

That a company can collect its tolls only at the gates or places legally established; and, therefore, those only can be compelled to pay who pass through the gates, etc., when traveling in good faith on their proper course. And this principle is not changed by the fact that at the gates the charges are proportioned to distance, or made by the mile under the requirements of a statute.

251.—Protection Life Ins. Co. *v.* Ann E. Foote.—Appeal from Knox.—Opinion by SCHOLFIELD, J., affirming.

MUTUAL LIFE INSURANCE CO,—POWER OF OFFICERS AND AGENTS—DUTY OF MEMBERS—PAYMENT OF ASSESSMENTS—WAIVER AND FORFEITURE.

Held, 1. That in a mutual life insurance company, which must, as well as others, necessarily transact its business through officers and agents, it is to be held, that, in the absence of express provisions in their charters, limiting the powers or appointment of these, every person, becoming a member by taking out a policy, impliedly consents that the company shall be represented by such officers and agents, as are reasonably necessary for the transaction of its business; and that they shall possess the powers and perform the duties ordinarily possessed and performed by such officers and agents.

2. And a member must be held to know that no officer or agent of the company can, for his benefit, do any act, or waive the performance of any act required of him to be performed, in contravention of the charter of the company, or of its by-laws, unless, indeed, it may be in the case of a by-law adopted without his knowledge, and under circumstances where the law will not charge him with knowledge.

3. From the very nature of such a company, it is indispensable that an assessment shall be promptly paid, since in no other way are policy-holders to receive their insurance; and it may well be doubted, therefore, whether it is competent for those representing the company to accept anything less than the amount actually due from each stockholder, in discharge of an assessment; for if it could be done with one it could be done with all, and thus the whole purpose of the corporation be defeated.

4. But forfeitures are not indispensable to secure the payment of assessments. They are simply convenient, and, perhaps, more effective than any other mode. Nor is a temporary delay in the payment of an assessment necessarily subversive of the purposes of the incorporation. And forfeitures, in the view of the law, are always odious. When declared for accidental or merely technical grounds, which produce no substantial or permanent injury, forfeitures are unjust and oppressive, and may, in many instances, be relieved against in a court of equity. Therefore, while it is not competent for officers and agents to relieve an assured from the payment of any assessment, they may mitigate terms on which a policy would be otherwise declared forfeited, and waive causes of forfeiture, where the waiver does not substantially impair the rights of creditors and policy-holders. The principle is the same with mutual insurance companies as with others. It would be otherwise if the charter or by-laws expressly prohibited such waiver.

5. Where a notice of an assessment is sent to an assured, and the mode of remitting prescribed—as by post office order, or draft, he is not to be held liable to a forfeiture if he promptly remits, although the remittance may not reach the officers within the time prescribed. He has a right to rely upon the post office as a medium of conveyance, and if a delay therein occurs, without his fault, he is not to be held chargeable.

258.—James D. Lehmer v. The People ex rel.—Appeal from County Court of Cook.—Opinion by BREESE, J., affirming.

JUDGMENT IN TAX CASE—CLERICAL ERRORS IN ASSESSMENT ROLLS—RES ADJUDICATA.

Held, 1. That a judgment is sufficient in a tax case, which substantially complies with the statute, even though not technically exact in all respects.

2. Where there are merely clerical errors and omissions in an assessment-roll, they may be amended, where they do not affect any person's rights or interests.

3. It is too late, on appeal, to inquire whether a street for which a special assessment has been made, is public or private. If no objection was made below at the time application was made for a confirmation of the assessment, the question is *res adjudicata*, and will not be examined.

259.—Baptist Theological Union *v.* People ex rel.—Appeal from County Court of Cook.—Opinion by SCHOLFIELD, J., affirming.

EXEMPTION OF CORPORATIONS FROM TAXATION.

Held, That where a charter, granted in 1865, under the Constitution of 1848, exempted, perpetually, the property, real and personal, belonging to the corporation, from all taxation and assessments, the property on which tax was levied being obtained for the purpose of leasing, and being let on long leases, and the income therefrom being used to maintain the institution—the charter is unconstitutional and void, in this respect.

OUR thanks are due to the law firm of COOPER & BASSETT, of Peoria, for the following opinion:

SUPREME COURT OF ILLINOIS.

OPINION FILED JUNE 30, 1876.

IN THE MATTER OF THE WILL OF ESTHER R. TULLER, Deceased.

Appeal from Peoria.

REVOCATION OF A WILL BY MARRIAGE—UNDER THE COMMON LAW—UNDER THE STATUTE OF ILLINOIS—EFFECT OF MARRIAGE ON THE WILL OF A FEME SOLE—WHAT IS A MARRIED WOMAN'S SEPARATE ESTATE.

1. UNDER THE COMMON LAW.—That, under the common law, the will of a *feme sole* is revoked by her subsequent marriage.

2. UNDER THE STATUTE.—That, under the statute of 1872, which gives to every female of the age of eighteen years, the power to devise her property by will or testament, the same reason does not exist as at common law.

3. MARRIED WOMEN'S SEPARATE ESTATE.—That, under the act of 1861, all a married woman's property is made her sole and separate property; but this statute gives no power of disposing of her estate. The act of 1845 gave a married woman power to dispose of her separate estate. The reason, then, for holding the will of a *feme sole* to be revoked by marriage, no longer exists, as the marriage would not destroy the ambulatory nature of the will, but still leave it subject to the wife's control.

4. THE STATUTE MAKING MARRIAGE A REVOCATION OF A WILL, PROSPECTIVE.—That the enactment which went into force July 1, 1872, that "a marriage shall be deemed a revocation of a prior will," was prospective in effect, and had reference only to marriages which should take place thereafter, and did not apply to marriages which had been had prior to the passage of the act, and that it is without effect upon the will of Mrs. Tuller. —[ED. LEGAL NEWS.

Opinion by SHELDON, J.

This is an appeal by Lydia A. Cole, residuary devisee and legatee under the will of Esther R. Tuller, deceased, from the order and judgment of the Circuit Court of Peoria county, refusing to admit said will to probate. Such order and judgment have been made on appeal in reversal of an order of the County Court admitting the will to probate.

The facts are, that Esther R. Tuller, on the 20th day of May, 1869, made and published her will, she being then a widow and having at that time living, three children by a former marriage, all of whom are still in full life; afterwards on the 2d of September, 1869, the testatrix was married to one Marcus Hosmer, from whom she was, on the 16th day of December, 1873, divorced by decree of the Circuit Court of Peoria county, upon bill filed by her for that purpose.

The testatrix died on the 6th of March, 1874, having made no other will, and having had no child by said Hosmer. The question presented is, whether there was a revocation of the will by the marriage with Hosmer. It is the old and well settled rule of the common law that the will of a *feme sole* is revoked by her subsequent marriage, and it is contended that under this rule the will was revoked. The reason of the rule was, that a will is, in its nature, ambulatory during the testator's life, and can be revoked at his pleasure; that the marriage destroys the ambulatory nature of the will, and leaves it no longer subject to the wife's control, and that it is against the nature of a will to be absolute during the testator's life. It is, therefore, revoked in judgment of law by such marriage. 4 Kent. Comm., 527; 2 Greenlf. Ev. § 684. That reason does not exist under our present statute of 1872, which gives to every female of the age of 18 years, the power to devise her property by will or testament.

Did it exist under the Statute of Wills of 1845, in force up to 1872? The first section of the Statute of Wills of 1845, provides as follows: Every person aged 21 years, if a male, or 18 years, if a female, or upwards, and not married, being of sound mind and memory, shall have power to devise all the estate * * which he or she hath, or at the time of his or her death shall have in and to any lands, etc.; all persons of the age of 17 years, and of sound mind and memory, married women excepted, shall have power to dispose of their personal estate by will or testament, and married women shall have power to dispose of their separate estate, both real and personal, by will or testament, in the same manner as other persons. The statute draws a manifest distinction between the property generally, of married women, and their separate property, giving power to dispose of the latter by will, but not of the former. The strict rules of the old common law, as is well known, would not permit the wife to take or enjoy any real or personal estate, separate from, or independent of, her husband.

But courts of equity have admitted the doctrine that a married woman is capable of taking real and personal estate to her own separate and exclusive use; and whenever real or personal property is given, or devised, or settled, upon a married woman for her separate and exclusive use, her interest will be protected in equity against the marital rights and claims of her husband and of his creditors. The separate estate of a married woman was a creature of equity at the time of the passage of the statute of 1845. By the statute of 1861, entitled, "An act to protect married women in their separate property," all the property of a married woman is made her sole and separate property, and is thereby made as fully her separate estate as any separate estate which she could in any way have had at the date of the passage of the act of 1845 and after, except that the statute of 1861 gives no power of disposing of her estate. Such being the case, then, that under the statute of 1861 all of the property of a married woman is made her separate estate, we know no sufficient reason why, since the act of 1861, the statute of 1845, giving to married women the power to dispose of their separate estate by will, should not have operative effect in respect to all of a married woman's property, and be construed as enabling her to dispose of all her property by will, in the same manner as other persons. The reason, then, for holding the will of a *feme sole* to be revoked by marriage would no longer exist, as the marriage would not destroy the ambulatory nature of the will, but still leave it subject to the wife's control.

The further reason given that the marriage of a *feme sole* is such an entire change in her condition and relations that it is generally held to work a revocation of her will, (1 Redfield on Wills, 292,) equally fails, as since the act of 1861 her marriage works no essential change in her conditions and relations as respects her property. We are of opinion, then, that since the act of 1861, the will of a *feme sole* is not revoked by marriage, the reason of the rule no longer existing. Her will, then, in this respect must be regarded as standing upon the same footing with the will of a man. As respects his will, marriage is not a revocation of it; but marriage and the birth of a child are an implied revocation of a will previously made. Such was recognized by this court to be the rule in Tyler *v.* Tyler, 19 Ill., 151, and the authorities referred to. But it was there held, that under our statute, making the wife heir to the husband, and the husband heir to the wife, when there is no child nor descendant of a child, marriage is, in the absence of facts showing an intention to die testate, arising subsequent to the marriage, a revocation of the will of the husband made prior to the marriage, disposing of his entire estate, without making provision in contemplation of the relations arising out of the marriage. It is insisted that the present case falls within that decision, and is controlled thereby. The facts of that case were, that Stephen H. Tyler and the complainant in the suit intermarried in this State in 1842, and here lived as husband and wife until his death in 1855; that he died never having had a child, and leaving a considerable estate in this State, and that the defendants claimed his estate under a will executed in the State of Connecticut, where Tyler then lived in 1834, which will devised his entire estate to his blood relations.

Under such circumstances, in view of our statute of descents, providing that when there should be a widow and no child or descendant of a child of the intestate, then the one half of the real estate and the whole of the personal estate, shall go to such widow, it was held that the marriage was a revocation of the will. The reason of the rule of the English courts that marriage and the birth of a child were, but that marriage alone was not, a revocation of a will, was recognized to be, that by the law of descents there, the child may inherit the parent's estate, but that the wife and husband could not inherit from each other. But that, as under our law the wife and husband may inherit from each other the one-half of each other's lands, in case there be no child or lineal descendant, the *reason* of the common law rule would require that marriage alone would revoke a will, and the rule was made to conform to the reason of it; and

it was held that marriage alone worked a revocation of the will. In that case there was no child of the marriage, and from the instant of the marriage, upon the death of the husband without a will, one-half of his real estate and all his personal estate would have gone to the widow. In the present case, the testatrix at the time of the making of her will and up to the time of her death, and since, had three children living.

Had she died at any time during the existence of her marriage all her property, in the absence of a will, would have gone to these children, and none of it to her husband. Where is the reason, then, to require in such a case as this, that marriage alone should revoke the will? Under the laws of this State in force when the will was made and since, Hosmer, the husband, could have taken nothing, if there had been no will. The property disposed of by the will was the separate estate of the testatrix. No estate by the courtesy ever became initiate.

The marriage did not vest in the husband the personal property of the wife, nor any right to the rents and profits of the real estate; and as his wife had children of her own by her first husband, to inherit, he, Hosmer, could take nothing as her heir, at her death.

The sole effect of the revocation would be, to let others inherit her property, whom the testratrix had in her mind when she made her will and purposed should not take her estate.

To set aside the will would be to thwart the solemnly declared intention of the testatrix, and that without benefit to the object of the marriage relation, on whose account, as a new object of duty to be provided for, the revocation of the will would be brought about. The revocation of a will which arises from subsequent marriage and birth of a child, is an implied or presumptive revocation.

It is founded upon the reasonable presumption of an alteration of the testator's mind, arising from circumstances since the making of the will, producing a change in his previous obligations and duties. 4 Kent Comm., 521. Under the general rule, the circumstance of marriage alone did not lay the foundation of a presumed alteration of the testator's intention; but it was marriage and the birth of a child; and both must have concurred, in order to raise an implied revocation of the will. Brush *v.* Wilkins, 4 Johnson, ch. 506. There was a qualification of the general rule upon this subject, made in the case of Sheath *v.* York, 1 Vesey & Bea., 390, which bears strongly upon the present case. A widower, having a son and two daughters, devised his estate, real and personal, and then married and had a daughter. The Ecclesiastical court held the will to be revoked as to the personal estate, but Sir William Grant thought that there was no ground to presume the will revoked as to the real estate, upon any implied condition annexed to it, or upon any presumed change of intention when the testator had already an heir apparent, and the revocation would be of no use to the subsequent child, who could not take the land. It might be revoked as to the personal estate, for that lets in the subsequent child, but he held that it was not, in such case, revoked as to the land. The principle of that decision seems to meet precisely the question now under consideration, and to require a qualification to the general rule laid down in Tyler *v.* Tyler, that under our statute of descents, a subsequent marriage is a revocation of a will, and to exclude the application of the rule to the facts of the present case, for the reason that there is no ground to presume the will revoked upon any presumed change of intention, inasmuch as the testatrix had, at the time of the making of the will, and ever after, three children, and, as was said in Sheath *v.* York, the revocation would be of no use to the subsequent husband, as he could not take the property.

But it is said that it does not matter whether the husband or wife do actually become heir to the other or not, that it is enough that the marriage creates the possibility of such a result.

But that is not the principle which governs. If it were, then under the common law rule upon the subject, marriage alone would work a revocation, as upon a marriage, there would exist the possibility of the birth of a child, and in the case cited of Sheath *v.* York, there was a possibility of the daughter of the subsequent marriage becoming an heir by the death of the son of the former marriage, * * * not matter whether it survives the parent or not, and it is said that there the birth of the issue, and the mere possibility of its becoming an heir by surviving its parents, at once revokes the will.

It is the occurrence of new social relations and moral duties arising by marriage and the birth of issue raising a presumption of a change of intention in the testator, which impliedly revokes a previous will, and the revocation so made by the occurrence of those events is once for all, and the will is not restored on the subsequent death of the issue contributing to produce the revocation during the life of the testator. But under the state of facts in this case, there has been no actual occurrence of the circumstances to afford ground of a presumed intention to revoke the will, but only a possibility of such occurrence taking place. It is finally insisted that there is here, a statutory revocation of the will, by force of the statute of 1872, Laws 1871-72, p. 355 in force July 1, 1872, that "a marriage shall be deemed a revocation of a prior will." That as the will did not take effect nor were any rights acquired under it, until the testatrix's death, its validity depends upon the law as it then stood at the time of her death, that the statute, though passed after the making of the will, takes effect upon it precisely as though the law had been passed before its execution.

The question is not so much whether the statute affects rights vested before its passage, as what was the intention of the legislature. A law is a rule of civil conduct, and the principle is, that it is a rule for the regulation of future conduct. It is, in the general, true, that no statute is to have a retrospect beyond the time of its commencement, for the rule and law of parliament is, that *nova constitutio futuris formam debit imponere, non præteritis*, 4 Bac. Abr., 636, Statute C.

It is the doctrine applicable to all laws that, generally, they are to be considered as prospective, and not to prejudice or affect the past transactions of the citizens. Not that the legislature cannot, in some cases, make laws with a retrospective operation, but that it is not to be supposed they so intended, unless that intention has been manifested by the most clear and unequivocal expressions. Garret *v.* Wiggins, 1 Scam., 335; Bruce *v.* Schuyler, 4 Gilm., 221; Thompson *v.* Alexander, 11 Ill., 54; Marsh *v.* Chestnut, 14 Id., 223; Hatcher *v.* T. W. & W. R. R. Co., 62 Id., 477; Whitman *v.* Hapgood et al., 10 Mass., 447; Somerset *v.* Dighton, 12 Mass., 383; Dash *v.* Van-Kleek, 7 Johns, 477; Sedgwick on Stat. and Const. Law.

The law of 1872 is not retrospective in terms; there is no indication of the legislative intention that it should be retroactive, and we must regard the intention to have been that it should have only a prospective and not a retrospective operation. We are of the opinion, then, that the enactment which went in force July 1, 1872, that "a marriage shall be deemed a revocation of a prior will" was prospective in effect, and had reference only to marriages which should take place thereafter, and did not apply to marriages which had been had prior to the passage of the act, and that it is without effect upon this will of Mrs. Tuller.

Our conclusion, is that the court below erred in reversing the order of the County Court instead of affirming the same, and that the judgment of the Circuit Court should be reversed and the cause remanded.

Judgment reversed.

COOPER & BASSETT, Attys. for appellant.

MCCULLOCH, STEVENS & WILSON, STARR & CONGER, Attys. for appellee.

(*Continued from page* 396.)

of which has been pressed upon our attention in previous cases, may obviously be obtained by reference to appellant's charter, and by communications from those familiar with its affairs and those acquainted with the value of its stocks and the amount and value of its debts, and by reference to the assessed valuation of its tangible property, although no schedule on the prescribed form shall have been made. In other words, the schedule is but one form of presumptive evidence of that which admits of other forms of proof equally satisfactory for the purpose of ascertaining the data for the application of the rule.

But has appellant by the omission to make and return the schedule, been denied the right to be heard in regard to this assessment?

Appellant's officers knew when its tangible property was assessed. They are charged with knowing what the law required, and therefrom that appellant's capital stock would be assessed by the State Board of Equalization, and that they were directed to make the schedule. Of what consequence is it, if the form of the schedule and the instructions from the auditor were not tendered them, or that no demand was made upon them for the schedule? Their duty in that regard is not thus limited. They now claim it was to appellant's interest, was of vital consequence to it, that it should be heard through this schedule, and yet they do not pretend they made any effort, although the opportunity to do so indirectly admitted, is to be thus heard. Why did they not apply for the blank forms and the instructions of the auditor, themselves, that the schedule might have been completed in time to deliver to the local assessor, with their return of the list of appellant's tangible property? It was no less their duty to have done so, than it was the duty of the auditor and assessor to have prepared and furnished the blank forms and the instructions. But again, appellant's officers had notice, by the law, of the time and place of the meeting of the Board of Equalization, and that among other duties incumbent on it, was to assess for taxation appellant's capital stock.

We cannot suppose that the board would have been unwilling to receive information respecting the value of property to be affected by its action, in such form as might have been consistent with a reasonable degree of convenience and facility in the transaction of the business before it, for such, as we conceive, was unquestionably its duty. Nor can we suppose that information thus communicated would not have received all the consideration to which it was entitled.

But it does not appear that appellant communicated, or offered to communicate, any information whatever, respecting the value of this capital stock, to the board. It has, then, had an opportunity to be heard, both by making the schedule and presenting it to the local assessor, and by communication to the Board of Equalization while it was in session, both of which it voluntarily waived. Is it consistent with the principles of equity, however, to say, true, appellant might have been thus heard, had it pleased its officers to have availed of the opportunity, still it was imperative that it should be heard, and not having been, the tax is unauthorized. This is not claimed, nor can it be claimed to be sanctioned by law. The utmost that is required in any case, is to afford parties what the law deems, under the circumstances, a reasonable opportunity to be heard, and if they do not choose to avail of it, the consequences must rest with themselves. The claim is also made that appellant was entitled, when it was in default in making the schedule, to have it made by the assessor, that it might prefer that he should make it, to having it made by its own proper officers. This could hardly be true in any case where it was not supposed that more was to be gained by concealing than by disclosing the facts affecting the value of the capital stock.

But, in our opinion, a conclusive answer to the claim, is the requirement that the local assessor shall make and return a schedule, in default of the corporation doing so, is a matter in which it has no concern. Having waived whatever of privilege it had in this respect, and by so doing, made it probably more difficult to ascertain the value of its capital stock than it would have been had it made the schedule, it took its chances of letting the Board of Equalization ascertain the value in the best way it could. As before observed, the schedule would be but prima facie evidence of that which is susceptible of proof otherwise, and is simply designed to aid the Board of Equalization in its labors. The assessor was not the agent of the corporation, nor could a schedule made by him be regarded in any sense, as a representation of facts made by it, but it would rather be evidence obtained by him affecting its property, in spite of its neglect or refusal to make disclosures.

The remaining allegation in the bill to be noticed is in substance, that while appellant's capital stock was assessed professedly in conformity with the rule which the board had adopted for assessing capital stock, it was in truth assessed without any evidence of the fact essential to the application of the rule. It has been held in many cases by this court, that in no event will the collection of a tax be enjoined unless it clearly appears injustice will otherwise result to the complainant; and we have held that the mere application of the rule adopted by the Board of Equalization and applied in the present instance in ascertaining the value of the capital stock of corporations is of itself not sufficient evidence of injustice to authorize the interposition of a court of equity to enjoin the collection of the tax computed upon such valuation. In view of the facts that assessors, in ascertaining values, may act on their own personal knowledge as well as on information derived from other sources, it is not enough to say the evidence before them at the time of making the assessment was insufficient, for it might be that no evidence was necessary, they might of their own personal knowledge have had all the information that could have been imparted by evidence. Or, if they acted on the hypothesis that a state of facts different from the true state of facts existed, it should be shown either expressly that it was known the facts assumed were not true, or that the facts assumed were in themselves so unreasonable that an honest mind of ordinary intelligence could not believe them to be true. The rule of the Board required that there should be ascertained "the market or fair cash value of the shares of capital stock, and the market or fair cash value of the debt (excluding from such debt the indebtedness for current expenses)," which were to be added together, and from their sum was to be deducted the equalized valuation of the tangible property, leaving the balance as the value of the capital stock, over and above the assessed value of the tangible property. It is alleged in the bill that the shares of stock were worthless, but it is also alleged appellant was largely indebted, and what was the value of that debt is not stated. It is shown that the entire property is not equal in value to the amount of the bonded debt, but this signifies nothing, since the bonded debt neither destroys the value of the property nor exempts it from taxation. Whether appellant is indebted or free of debt, the same property is there, and it is the property, disconnected from all questions of the owner's indebtedness, whether in the form of liens upon the property or otherwise, that is the basis of the taxation. If the value of the debt is greater than the equalized valuation of the tangible property, the difference theoretically represents the value of the intangible property, which is as much a part of the capital stock as it is the tangible property.

It does not appear otherwise than from the general assertion of the worthlessness of appellant's capital stock and its franchise (which cannot, from the other allegations in the bill, be true in the sense the words "capital stock" are used in the revenue act), but that the result reached by the Board of Equalization may be correct so far, at least, as a valuation can be correctly ascertained by the application of the rule applied by the Board.

We think the allegations fail to show such injustice to appellant in this assessment as authorizes a court of Chancery to interfere, and the decree of the court below will therefore be affirmed.

Affirmed.

CHICAGO LEGAL NEWS.

CHICAGO, SEPTEMBER 9, 1876.

The Courts.

UNITED STATES DISTRICT COURT, E. D. MICHIGAN.

THE DOLPHIN.—*In Admiralty.*

LIEN OF UNDERWRITER—AVERMENTS IN LIBEL.

The underwriter of a ship has a lien for the premiums due upon marine policies, and is entitled to payment from the proceeds of sale.

The libel or petition should aver not only the dates and amounts of the policies, but the names of the parties insured, and the character and extent of their several interests in the vessel.

On exceptions to the libel of the Orient Mutual Insurance Company. The libellant set forth that it was a New York corporation, that the Dolphin was a vessel of more than 20 tons burden, used in navigating the great lakes and waters connecting the same, and the waters of the State of Michigan; that, on the 6th of March, 1875, the master and owners represented to the libellant that the vessel stood in need of insurance, and that, in pursuance of their representations and request, it furnished insurance in the amount of $4,000; and that there was due to libellant for premiums the sum of $277.38, for which libellant claimed a lien upon the vessel. To this libel, Stephen B. Grummond, who also filed a libel against the schooner for salvage, excepted; for the reason, that the matters set up therein were not within the admiralty jurisdiction of this court; that a claim for premiums was not a lien upon the schooner, such as this court ought to enforce by proceedings in rem. The Dolphin had been sold upon other claims, and the proceeds were in court awaiting distribution. Mr. James J. Atkinson for libellant; Mr. F. H. Canfield for claimant..

BROWN, J.—The question presented by the exceptions to the libel is one of great novelty and importance; and it is believed that no direct adjudication upon the point can be found either in this country or in England. After years of doubt in the minds of the profession, and some conflict of opinion in the courts, it was finally settled by the Supreme Court, in the case of the Insurance Company *v.* Dunham, 11 Wall., 1, that the contract of marine insurance is maritime in its character, and that in case of loss a libel may be sustained by the insured against the underwriter. It seems to me to follow as a necessary corollary that the underwriter may maintain a suit in admiralty for the premium, as it would be at war with established principles to say that the maritime character of a contract could be invoked by one party and not by the other.

The more serious question, however, remains to be decided, namely, whether the underwriter has a lien upon the vessel for the payment of his premium. The question is not discussed in this case nor in any other where actions have been sustained in the admiralty, upon contracts of insurance. If the analogies of the contract of affreightment are to govern, as indicated by the Supreme Court in the opinion above cited, page 30, the lien would follow as a necessary consequence. It is described in the opinion as "a contract or guaranty, on the part of the insurer, that the ship or goods shall pass safely over the sea, and through its storms and its many casualties to the port of its destination, and if they do not pass safely, but meet with disaster from any of the misadventures insured against, the insurer will pay the loss sustained. So, in the contract of affreightment, the master guarantees that the goods shall be safely transported (dangers of the sea excepted), from the port of shipment to the port of delivery and there delivered. The contract of the one guarantees against loss from the dangers of the sea, the contract of the other against loss from all other dangers. * * * The object of the two contracts is in the one case maritime service and in the other maritime casualties." If in the one case the shipper has a lien upon the vessel for a breach of the contract of affreightment, and the ship has a lien upon the cargo for the payment of the freight (though for reasons applicable to the character of this property this lien is dependent upon possession), it is difficult to see why upon principle the underwriter should not have a lien upon the ship for the payment of his premium.

It is true the general sentiment of the profession is adverse to the existence of such a lien, but no more so, perhaps, than it was to the jurisdiction of the admiralty in actions upon policies of insurance.

In the case of the Williams, Brown's Admiralty Reports, page 208, perhaps the most exhaustive disquisition upon maritime liens to be found in the books, the judge remarked, page 215: "Without any very thorough examination at the time, but drawing mainly upon what we had ever assumed to be the law, we ruled that all maritime contracts, made within the scope of the master's usual authority, did *per se*, hypothecate the ship; and that those of affreightment, *insurance*, towage, the fitting out and discharge of vessels, and for aiding them in distress, were instances only of the application of the rule." I should have no hesitation in adopting the general principle there announced, that all contracts within the scope of the master's authority are binding upon the vessel, but in its application to the contract of insurance, I think the learned judge overlooked the fact that such contracts are not within the scope of the master's authority. General Interest Insurance Company *v.* Ruggles, 12 Wheat., 408; Foster *v.* United States Insurance Company, 11 Pick., 85.

Even a ship's husband, whose powers with regard to the fitting and equipment of a vessel are much more extensive than the master's, has no authority to bind the other part owners by a contract of insurance. Bell *v.* Humphries, 2 Starkie, 345; Finney *v.* The Warren Insurance Company, 1 Metcalf, 16.

The case of the Williams was that of a contract for services in the nature of salvage, made by a master whose power was unquestioned, and is a direct authority only for the proposition that all contracts, whether executed or executory, which he makes within the scope of his authority are binding upon the vessel. Obviously, however, the learned judge based his opinion upon a much broader principle. On page 217, referring to the case of the Pigs of Copper, 1 Story, 314, he observes, "This judgment is referred to in this connection more particularly to illustrate the position that a denial of salvage is not a rejection of a proceeding *in rem;* but it quite as fully sustains the broader proposition, soon to be considered, that all authorized maritime contracts pledge the vessel for their performance." Again, on page 222, he says: "The wider principle, that every maritime agreement binds the ship as well as the owner, is that upon which we rest our decision."

Although the authorities cited in support of this proposition refer to cases of salvage, or of contracts within the scope of the master's authority, and therefore do not sustain it to its fullest extent, yet I apprehend the principle is a safe one, and subject to two or three exceptions, which at an an early day were imported into the maritime law of this country by the Supreme Court, following too closely the English authorities, one which may be acted upon without trenching upon the proper domain of the common law. So far as a dictum can be an authority it is certainly an authority for the lien of the underwriters.

The doctrine that the admiralty courts of this country are restricted to the jurisdiction exercised by the High Court of Admiralty in England at the time of the adoption of our Constitution is now so completely overthrown that no argument can be properly deduced from it. The only exceptions believed to exist to the jurisdiction *in rem* of the admiralty over maritime contracts is that of supplies furnished domestic vessels, established in the case of the Gen. Smith, and recently recognized in the case of the Lottawanna, 21 Wall., and that of masters' wages, held not to be the subject of a lien in the case of the Steamboat New Orleans *v.* Phœbus, 11 Peters, 175. Contracts for the construction of vessels which are recognized as maritime by the Continental codes and a lien given thereby, were also held by the Supreme Court in the case of Roach *v.* Chapman, 22 How., 129, not to be subject to the admiralty jurisdiction in any form.

In determining whether a maritime lien exists in favor of the underwriter, it is well to consider the source of the doctrine that courts of admiralty have jurisdiction over policies of insurance. The subject is fully discussed in the case of the Insurance Company *v.* Dunham, pages 31-38, and the court remarks: "Perhaps the best criterion of the maritime character of a contract is the system of law from which it arises, and by which it is governed. And it is well known that the contract of insurance sprang from the law maritime, and derives all its material, rules and incidents therefrom. * * * These facts go to show, demonstrably, that the contract of marine insurance is an exotic in the common law. And we know the fact historically that its first appearance in any code or system of laws was in the law maritime as promulgated by the various maritime States and cities of Europe." Mention is here made of the maritime laws of the ancient Rhodians, of the ordinances of Barcelona, Venice, Florence and of Antwerp, and the court further observes: "But an additional argument is founded on the fact that in all other countries, except England, even in Scotland, suits and controversies arising upon the contract of maritime insurance are within the jurisdiction of the admiralty or other marine courts. * * * It is also clear that, originally, the English Admiralty had jurisdiction of these as well as of other maritime contracts." * * This last remark is corroborated not so much by positive adjudications to that effect as from the language of the commissions issued to the early Vice Admiralty courts which authorize them to take cognizance of marine policies. This would hardly have been done had such jurisdiction never been exercised by the High Court of Admiralty in England.

Tracing, then, the jurisdiction of the Admiralty over contracts of insurance to the continental law, it is pertinent in this connection to inquire whether that law gives to the underwriter a lien upon the vessel for the payment of his premiums.

Art. 16 of the marine ordinance of Louis XIV., title "Of Seizure of Vessels," in enumerating the persons entitled to liens upon ships, makes no mention of underwriters, but Valin, in commenting upon this ordinance, book 1, lib. 14, sec. 16, says: "If this article has not mentioned them (the underwriters), it is probably because the ordinance takes it for granted in many articles under the title of 'insurance,' that the premium is paid in cash at the time the policy is signed, while, by the custom of this place, and of many others, it is paid after the arrival of the ship at a port of safety. However this may be, the insurer of a vessel has doubtless a lien (privilege) upon her for the payment of his premium as the insurer of a cargo has a lien upon it. This lien ranks with that of the lender upon bottomry and with material men."

A privilege is defined by Art. 2095, of the Civil Code as "a right which the character of the credit gives to a creditor to be preferred to other creditors even mortgagees (*hypothecaires*)." If not analogous in all respects to our "lien," it authorizes the like preference in payment to claims within its scope from the proceeds in court.

Emerigou treats the contracts of insurance as analogous to that of maritime loan or bottomry, and observes (Emer. on maritime loans, chap. 1, sec. 4): "In the one contract the lender bears the sea risks; in the other, the underwriter. In the one, the maritime interest is the price of the peril, and this term corresponds with the premium which is paid in the other. In either case it is incumbent upon the plaintiff to prove that the condition has been fulfilled. In case of a suit it lies upon the lender, in order to render the contract of maritime loan *executory*, to show that the ship has arrived at her port of destination in safety; and in an action on a policy of insurance it lies upon the assured to prove the loss, capture or shipwreck of the vessel." * * *

"The policies of insurance made on loose sheets of paper create a lien on the property of the parties, provided they are executed before sworn brokers or notaries; but the other contracts do not create such a lien unless they are recorded by a notary in his public register, in the sworn form as ordinary contracts."

Again, in his work upon the contract of Insurance, ch. 3, sec. 9, Emerigou says: "The ordinance having regarded the premium as paid in cash upon signing the policy, the insurer, who had not been paid, was not placed among creditors whose ranks and preferences are determined by articles 16 and 17. Title "Seizure of Vessels." From this silence it has been often concluded that the insurer had no privilege, because it is said the matter of privilege is *stricti juris* (droit etroit) it is necessary they be expressly bestowed (deferes) by law, and it is never permitted to extend them from one case to another, because of equal or superior equities. But it should be considered that the premium of insurance is comprised in the expense of the equipment or building; it becomes, then, in some measure, part of the thing insured, which by this means is presumed to have an increased value (valoir davantage). Consequently, the privilege which the ordinance accords to the seller or material man ought to be common to the insurer, a creditor to the amount of his premium."

In support of this doctrine the learned author cites several decrees of the tribunals of commerce.

So, also, Alauzet des Assurances, Pt. 2, Sec. 2, Ch. 15: "It is rare that maritime premiums are paid in cash; they are settled generally in notes called premium notes (*billets de prime*) the maturity of which varies with the length of the voyage and the usage of the place; the lien of the insurer is preserved for the payment of the notes; they are not considered as working a novation, provided always the discharge (*quittance*) be not absolute, and the origin of the notes not doubtful."

See also Cleisac, P. 237, 318, 323, and 363. Pothier des Assurances, Ch. 3, Art. 3, Sec. 2. Boulay Paty, Vol. 1, Tit. 1, Sec. 2.

If any doubts, however, ever existed in the law of France, with regard to this lien, they are put to rest by Article 191 of the commercial code, which reads as follows: "Privileged debts are the following, and in the order in which they are classed:

1. Judicial costs and other charges incurred in obtaining a sale of the vessel and a distribution of the price.
2. The charge for pilotage, tonnage, hold fees, mooring and dockage.
3. The wages of the keeper, and the expenses of guarding the vessel from the time of her entrance to port to the sale.
4. The storage of her rigging, tackle and apparel.
5. The expenses of repairing the vessel, rigging and apparel since her entrance into port from her last voyage.
6. Wages and pay of the captain and crew employed in the last voyage.
7. The sums loaned to the captain for the necessary expenses of the vessel during the last voyage, and the re-imbursements of the price of goods sold by him for the same purpose.
8. The sums due to the vendor, material men and workmen employed in her construction, if she has not yet made a voyage, and those due to creditors for furnishing work, labor and for refitting, victualing, outfits and equipments before the departure of the vessel, if she has already made a voyage.
9. The sums loaned on bottomry on the rigging and apparel for repairs, victualing, outfit, equipment before the departure of the vessel.
10. The amounts of the premiums of insurance effected on the hull, rigging, apparel, outfit and equipment of the vessel for her last voyage.
11. The indemnity due to the freighters for not delivering goods laden on board or for the losses which the goods may have sustained from the default of the captain or crew.

The creditors comprised in each of the numbers of the present article shall have a concurrent lien on the vessel for the amount of their demand, and in case of insufficiency, the price of the vessel shall be divided equally among them (i. e., those of the same class) in proportion to the amount due each."

In a recent work upon the commercial code of France, by Edmund Dufour, (Paris, 1859,) in speaking of this article, section 215, the author observes, "We

see that if the code has admitted this opinion (of Valin) as to the principle of the lien, it has largely modified the combinations. The underwriters are still paid before the shippers, but that is all. They are ranked by the material men, who are placed two degrees above them in the scale of liens. They are also distanced by lenders upon bottomry, who immediately precede them. This classification appears to me more rational than that of Valin. For, the truth is, insurance is only a private affair of the insured; it is a very proper act of prudence, it certainly merits and it possesses all the sympathies of the law; but it is, after all, only a passive element of navigation. It rather repairs disasters than comes directly in aid of them of its efforts. It is otherwise with the material men, as well as with lenders upon bottomry. It is the labor of the one, and the goods or the money of the other, which permit the vessel to undertake its voyage. There is then in their favor a reason for preference, which is not wholly arbitrary, and the code has done well in recognizing it." The nature of this lien is discussed at length, and is applied as well to time policies as well as to policies or for a single voyage.

In a recent admirable dictionary of the maritime law of France, by Aldrick Caumont, Paris, 1867, under the head of marine insurance, section 141, the author observes: "A lien is attached to the premium for the last voyage, if it be that made during the life of the policy upon the hull. This lien for the last voyage, resulting from articles 191 and 192, exists whenever there is a policy executed. The insured, who, asserting his right to suit, has attached the proceeds of the ship for the amount of his premium, is not permitted to claim a lien for the increase of premium for the time during which navigation is closed.

Any number of voyages made during the time fixed for the duration of the insurance, are considered as one and the same voyage. The broker has a lien upon the sum assured for the premium which he has paid. The liens for premiums of insurance upon property, rank only after that accorded to contracts of bottomry. They constitute an expense made for the preservation of the res. In case where an insurance upon the hull has been made for a limited time, the underwriters have a lien upon the ship, not only for the premiums of the last voyage, but also for the entire premium due under the policy." In support of these various constructions of article 191, the author cites opinions of the Court of Cassation, of the Imperial Court of Bordeaux, and Rouen, and Aix, and of the Tribunal of Commerce of Marseilles.

From these authorities I gather the following summary of French law upon this subject:

(1) That the Marine Ordinance of Louis XIV. did not expressly recognize the lien of the underwriter, but in this regard it was held not to be exclusive, and the premium was generally (perhaps not universally) held by the courts as a privileged debt.

(2) That the privilege of the underwriter for payment of the premium due upon the policy for the last voyage, is expressly recognized by Art. 191 of the Code of Commerce, and that such privilege is also extended to time policies.

(3) That this privilege is not waived by taking premium notes, unless it is thereby intended to be discharged.

Now, if the Supreme Court has adopted the Continental law in respect to jurisdiction over contracts of insurance, must it not be presumed logically to have adopted it as an entirety, and not by piecemeal? It certainly seems so to me, and it goes very far to justify the language used by the circuit judge in the case of the Williams.

It is claimed, however, that these contracts are made exclusively upon the credit of the owner. If this were so, it might be presumed in a particular case that the lien was thereby waived, but with the exception of supplies, repairs and materials furnished in the home port, the mere fact that the contract is made by the owner does not import a waiver or lien. There is no doubt of the existence of such lien in favor of seamen, although hired by the owner in person; nor in favor of shippers, where the contract of affreightment is made with the owner. Nor is it, I believe, any objection to the lien of a lender upon bottomry, that the bond was made by the owner.

In the nature of the contract itself, I see no reason forbidding such lien to the underwriter which does not apply with equal force to the salvor, or material man. Their contracts differ mainly in the fact that the services of the underwriter are rendered only upon a contingency which may never happen. That the question has never before arisen is due, as before observed, solely to the fact that the contract of marine insurance was not generally recognized as maritime until the opinion was pronounced in the Insurance Co. *v.* Dunham.

Under the ruling in this case, I feel constrained to hold that the contract of insurance being maritime in its character, the underwriter is entitled to a lien upon the ship for the payment of his premium: although, for the reason given by Dufour, I think it should rank in the lowest class of strictly maritime liens.

I think, however, the libel is defective in this case, in failing to aver the names of the parties insured, and the character extent of their interests in the vessel. I think it should also appear that the policy was a marine policy, or at least that it covered the vessel during the season of navigation. I regard it as very doubtful whether an ordinary fire policy covering a vessel while lying at the wharf during the winter would be the subject of admiralty jurisdiction. The above quotation from Caumont, citing a judgment of the Tribunal of Commerce at Marseilles, apparently supports this opinion. The schedule annexed to the libel seems to indicate that the policies were issued covering separate moieties of the vessel. This, however, should be made distinctly to appear.

I think I see considerable difficulty in enforcing the lien of an underwriter upon an undivided interest of a part owner, especially if the proceeding were an original one, against the vessel itself, and not against its proceeds of sale. The same difficulty, however, frequently occurs in connection with the mortgages upon undivided interests, and I should not regard it as insuperable, and if it should appear that each moiety of his vessel was covered by a lien of the same amount, the question could be easily solved, as the effect would be practically the same as if the entire vessel was covered by a single policy. The difficulty with the libel in this case is, that it has been attempted to employ the ordinary blank libels for supplies in actions for premiums, for which they are illy adapted.

Upon this ground the exceptions to the libels must be sustained, with leave to amend.

Through the kindness of the law firm of GREGORY & PINNEY, of Madison, Wis., we have received the following opinion:

U. S. CIRCUIT COURT, W. DISTRICT WISCONSIN.

[Before DAVIS and HOPKINS, JJ.]

JOHN F. CURTS et al. *v.* STEPHEN CISNA et al.

LAND TITLE DECISION—TAX TITLE—AGENT PURCHASING AND SELLING TO THIRD PARTY—RIGHTS OF THIRD PARTIES.

1. An agent, to pay taxes on the lands of his principal, cannot acquire a valid tax deed on the same when they have been sold for taxes.

2. Where an agent had acquired a tax deed on the lands of his principal, and contracted to sell the same to a third party, who had no notice of the fraud, but his agent, in making the purchase, had had such knowledge, and such purchaser had received a contract only for a deed, and had paid two-thirds of the purchase money, *Held*, That the fact that the agent of such purchaser had had knowledge of such fraud, was not sufficient to affect his principal, unless the facts and circumstances were such as to show that he had the same in mind at the time of the transaction of the purchase: that the right of such purchaser to call for a conveyance from the fraudulent grantee in the tax deed, was an equitable right merely, and that, as the right of the principal so defrauded to call for a conveyance of the interest vested by the fraudulent tax deed in his agent was the older equity, it must prevail.

3. A purchaser under a contract for a deed, though he may have paid a part or all of the purchase money, if he has not obtained a *conveyance of the legal estate*, cannot maintain as a defense that he is a purchaser *bona fide* and for a valuable consideration and without notice, so as to enable him to insist on the completion of his purchase, or the re-payment of what he has paid on it, as a condition of surrendering his claim under the contract. He must rely on the integrity and solvency of his vendor.

A purchaser without notice will not be protected against the superior equity of an adverse claim, as where a party had purchased what in reality was only a tax title, he must be held as having assumed the burden of maintaining that such tax title had extinguished the patent title, and which, as to him, was an adverse one.

HOPKINS, J. — The bill in this case charges that one, Horatio Curts was, in 1865, the owner of the land in controversy, being 320 acres of heavily timbered land in Clark county, in this State, and that he employed the defendant, Cisna, as his agent to pay the taxes thereon, as well as upon other lands owned by him in that vicinity, as he was a non-resident and furnished him the funds necessary for that purpose. That the general taxes due in the winter of 1865, were paid by defendant for him, but a special war bounty tax was levied in February, 1865, of about $13.00, of which he had no notice, and for which the land was sold in May, 1865, without his knowledge; that the defendant Cisna, continued to pay his taxes up to the time of his death in 1868; that on his death his property descended to John Curts, his father, who thereafter continued to employ Cisna to pay the taxes for him, as he had before done for Horatio, his son, and that he furnished the necessary funds to pay all taxes, and to redeem from tax sales as might be necessary, up to the time of his death in March, 1874; that the defendant Cisna paid the taxes up to the time of his death, either directly or by redemption, and never notified him of the tax deed mentioned in the complaint, or of the existence of the tax for which it was given; that in 1869 Cisna, discovering that the land had been sold for the special tax in 1865, and that the certificates were outstanding, purchased them, and on the 15th of June, 1869, took a deed thereon to himself, which he immediately had recorded; that after the deed to him he paid the taxes thereon with Mr. Curts' money the same as before, and sent receipts to him; that on the death of John Curts the complainants in this case succeeded to his interest and title as his heirs-at-law; that the defendant Cisna, on May 29, 1874, contracted to sell the lands for $1,500 to the defendant Gage, through the agency of one B. F. French, an attorney residing in Clark county, who acted as Gage's agent.

The bill then charges that the land was worth $8,000, and that Mr. Gage or Mr. French, his attorney, had notice of the facts and circumstances under which defendant Cisna obtained the tax deed, and that only a part of the consideration agreed upon had been paid, and no deed had been executed or delivered by Cisna to Gage of the premises. The bill prayed that the defendants might be required to release all claim under the tax deed and that it might be decreed void against them.

The defendants file a joint and several answer, in which they admit the land to be worth $8,000, as charged in the bill, and that Cisna's title was a tax title, as stated in the bill. They deny that he was the agent of either Horatio or John Curts to pay their taxes on the land as alleged, and they allege that John Curts had notice of the tax deed and deny that either Gage or French, his agent, in making the purchase had any knowledge or notice of Cisna's relations with the Curtses, or that he was their agent or owed them in any duty whatever. It does not state when they or either of them first had notice of the plaintiff's claim nor whether it was before or after the second payment of $500 in 1875, nor does it claim that a deed has been executed to Gage or that he has any other right than is derived under the contract set out in the bill.

Upon these issues testimony has been taken, from which it appears most conclusively that Cisna was the agent of both Horatio and John Curts for the payment of their taxes on this land as charged in the bill.

The defendant's letters to them and the tax receipts sent them by him place that question beyond all doubt and convict him of a most deliberate and outrageous fraud in the transaction of obtaining the deed, and also of falsehood in his testimony in denying the agency. It is seldom that parties are enabled to establish the rascality of an adversary so incontrovertibly as the plaintiffs in this case have that of the defendant, Cisna.

It appears that on the day he took this deed, he paid all the general taxes due or unpaid on the land, out of Mr. Curts' money, and sent to him the receipts and his account, including a charge of $5 for his services, and also $5 paid B. F. French for services, and wrote him as follows: "I went to Clark county and paid the taxes; *your land is all clear now*, except some that lies back from the river, there is a tax deed on, which was given in 1864," and again on the 16th of June, 1869, the day after he had taken and recorded this deed, he wrote him again about paying the taxes in Clark county, in which he said "*the land is all clear now*" with the exception of the old tax deed of 1864, and that he would see if that could not be released for the costs.

In view of these letters and receipts it seems preposterous that he should claim the land under that deed or attempt to deny his agency. It must have required some courage coupled with a great degree of moral depravity on his part to deliberately write a falsehood of that character to his employer, who had trusted his interests in his hands. It looks like a carefully contrived scheme to defraud his employer of this valuable property.

He paid the general taxes and sent receipts therefor, and took the deed for the special tax, which was unknown to his principal, and therefore would not likely be discovered, as there would be no occasion for examination in regard to such a tax. He doubtless thought if he could conceal the existence and record of the deed for three years, the principal's right to impeach it would be barred, as the statute of this State limits the right of an original owner to three years to bring an action to defend or set aside a recorded tax deed.

But this is not all of his fraudulent conduct. He continued to pay the subsequent taxes out of Mr. Curts' funds, and to send him the receipts. This became a necessity to avoid inquiry on the part of Mr. Curts, and the consequent investigation, which would necessarily expose him before his scheme had existed three years.

It is true, he swears that he told Mr. Curts of the existence of this deed in 1870, but his testimony on that point, Mr. Curts being dead, was incompetent. But if not incompetent, it is incredible. A careful examination of the letters written by him to Mr. Curts after that time (and they are numerous) shows that no mention was made of any such deed, although reference is made to tax deeds on other portions of his land. From this silence we are constrained to discredit his testimony upon that point, as well as upon the question of his agency. It is also true that a Mr. Bowman swears that he told Mr. Curts of this deed in 1870, and so does Mr. B. F. French testify that he spoke to him about it once. But from the whole evidence and conduct, and transactions of the parties, Curts and Cisna, subsequent to that time, we think these witnesses must be mistaken; that their conversation must have related to some other tax deed, or have been understood by Mr. Curts as relating to some other tax deed.

The position occupied by Mr. French in reference to this matter is not wholly free from suspicion. The evidence may not be sufficient to charge him as a confederate of Cisna, but there are circumstances that require close scrutiny into his conduct, motives and testimony. He swears he had the tax certificates and sold them to Cisna, knowing they were on Curts' land, on condition that Cisna should take a deed and not let Curts have them, and yet charges $5 for services rendered to Mr. Curts on the day of the deed, that Cisna paid, and neither he nor Cisna is able to state what those services were, and very soon after Mr. Curts' death, we find him negotiating for this title with Cisna, for and in the name of Mr. Gage, the other defendant. It is also shown that Cisna paid him $50 out of the first payment for his services in buying the land from him, which, in short, was paying him for buying this land of him for a client of his—a transaction almost as questionable as that of Cisna in taking the tax deed. He probably knew all about it, but as there is no proof that he acquired such knowledge during the time he was acting as agent for Gage, Mr. Gage's rights would not be affected by his former knowledge, unless we presumed that he had the facts of the case in his mind at the time, which his evidence negatives.

But it is not necessary to pursue the examination of Cisna's rights any further. He did not acquire any rights under the deed, and is not entitled to any benefit or advantage therefrom, and whatever he has received he should pay back, either to his co-defendant, from whom he received it, or to the complainants, the victims of his contemptible fraud.

This brings us to the consideration of the rights of the defendant Gage.

In the answer, the rights of a *bona fide* purchaser are claimed for him. The facts to constitute him such are imperfectly stated in the answer, but as the parties have gone to a hearing, we will examine the question upon its merits, not regarding any technical imperfections in the pleadings.

The defendant Gage is not within the authorities a *bona fide* purchaser, for to constitute such, the purchase must be *completed by a deed*, and the consideration be fully paid, before notice of complainant's rights. Hill on Trustees (marginal), 514 *et seq;* Boone *v.* Chiles, 10 Peters, 177, 242; See Leading Cases in Equity, page 93, *et seq;* See also, Hunter *v.* Simrall, 6 Little, 22; Blight's Heirs *v.* Banks, 6 Monroe, 698; Halstead *v.* The Bank of Kentucky, 4 J. J. Marsh, 534; More *v.* Clay, 7 Ala., 142.

In this case the consideration was not fully paid, nor was there a deed to Mr. Gage. The title, while in the vendor Cisna, is considered as held for the benefit of the prior equity in preference to those of later origin, so that the defendant Gage is not entitled to the land. The only question remaining is whether he is entitled to have the amount he had paid toward the purchase, to wit, the $1,000, refunded before the surrender of his claim.

This involves the consideration of a good many questions, and first, not being a *bona fide* purchaser, not having the legal title, can his interest be considered as other than an equitable right, and if so, does he not fall within the rule that when both parties' rights are equitable, the older prevails?

The equitable right of these complainants to this land as against the defendant Cisna, under whom the defendant Gage claims, is clear and unquestionable. His title, the tax title, was obtained without any act or deed on their part, and was obtained by fraud and without consideration to them, so their equity is perfect and the older.

The defendant Gage has a contract for the land upon which he had paid $1,000, before the commencement of this suit. Now, is his interest anything but an equitable one? If not, it must yield to the complainant's. In Peabody *v.* Fenton, 3 Barb. Chy. R., 451, 465, it is held that if a *bona fide* purchaser has not obtained the legal title by a valid conveyance, he cannot protect himself against the prior equity of the original owner, although he has a contract for the purchase and has actually paid for the land, and cites in support of that doctrine, Wiggs *v.* Wiggs, 1 Atk. Rep., 384; Moore *v.* Mayhew, Freemans Chy., 175; Tourville *v.* Nash, 3 Peere Williams, 307; 2 Sug. on V. & P., 274, 9th ed.

In Boone *v.* Chiles, 10 Peters, 177, 210, the court examine the subject to ascertain who are entitled to the rights of a *bona fide* purchaser, and arrive at the conclusion that such rights exist only "when a prior equity can be barred or avoided only by the union of the legal title with an equity arising from the payment of the purchase price without notice and a clear conscience."

If this is a correct statement of the rule, the rights of a *bona fide* purchaser do not attach upon paying the purchase price and taking a contract for a deed, but only on a union of a legal title with the payment, and that until such union the right of the purchaser is equitable, and a prior equity must prevail.

This view is supported by the weight of American and English authorities, and is fatal to the defendant's claim of protection as to the $1,000 paid before surrendering his rights under his contract. He must look to his contract and seek redress of the party with whom he contracted.

But there are some other questions presented in this case that deserve some notice from their importance.

The fact is admitted by the pleadings that the defendants contracted to buy this property for less than one-fifth of its real value. Is he entitled, in view of that fact, to be treated as a *bona fide* purchaser without notice? Under such circumstances, should not a court presume that he had notice of the defective and imperfect character of the plaintiff's title, particularly in the absence of any explanation on the subject? The purchaser of a promissory note at such a discount, would not, by the law merchant, be regarded as a *bona fide* holder for value to cut off the equities of the maker, and should a court of equity look with more favor upon a transaction apparently so unjust and unconscionable?

It would seem to not be consistent with the quality of equity to do so without some satisfactory explanation of such gross inadequacy, especially where the party claiming under such contract is seeking to defeat a prior equity of unquestionable character as that of the plaintiff's in this case is.

This case differs in another important respect from the reported cases when the rights of the *bona fide* purchasers are discussed.

In the most of them the plaintiff had voluntarily parted with the title, had made a sale and delivered a deed and was seeking to avoid it on the ground of fraud on the part of his grantee in obtaining it. In that class of cases courts of equity very properly lean toward the protection of a party who had bought, relying on the record and apparent title.

But in this case, the plaintiffs or the intestate have not conveyed; they had not clothed Cisna with any apparent title. The record shows them to be the original owners and that Cisna's claim was *adverse—only a tax title*, which probably accounts for the inadequate price paid. The record disclosed also that Cisna had obtained this property, worth $8,000, for about $13.

This places the parties in a different attitude before the court. It is the case of the purchaser of an *adverse* title seeking the protection of a *bona fide* purchaser as against the real owners and claimants. No case has been found where the purchaser of an adverse title has been allowed to demand of the real owner what he may have paid for the adverse title as a condition of surrendering his worthless claim.

In Moore *v.* Dodd, 1 A. K. Marsh, 103, it is held that a purchaser without notice will not be protected against a superior equity, deduced under an adverse claim. Mr. Gage knew his vendor's title was a tax title only, and should be held as having assumed the burden of maintaining that it had extinguished the title of the plaintiff, which was the record title, and adverse as to him.

Courts of equity should pause before going to this extent. A party who obtains "acres for cents," as tax title owners are charged with doing, hardly occupies a position which authorizes him to introduce to courts of equity, parties claiming under him as innocent purchasers as against the parties owning the original title. Grantees cannot be transformed so readily into subjects of favor in those courts. The taint of the original transaction will adhere to them until they show, at least, that they have paid full value, which might warrant a court in presuming that they had purchased in the belief that they were getting a good and perfect title. But when, as in this case, the purchaser pays only one-fifth of the real value, he cannot be entitled to claim the protection, or the favorable consideration due to a *bona fide* purchaser, but should rather be looked upon as a speculator in questionable titles.

In view of all the testimony in this case, we have come to the conclusion that the defendant Gage, must be considered as not occupying the position of a *bona fide* purchaser, and therefore his claim is no better than that of Cisna, and that he, as well as Cisna, must surrender and release all claim or title to the land in controversy, and pay the costs of this case to be taxed.

The complainants, upon paying the amount paid by Cisna for special tax certificates and interest thereon, into court, will be entitled to a decree requiring the defendants to release and relinquish all right and title to said land and the whole thereof, and perpetually enjoining them from setting up or claiming any right derived under or through the tax deed mentioned in the bill of complaint.

I concur in this opinion.

D. DAVIS, Circuit Judge.

BLOOMINGTON, Ill., Aug. 12, 1876.

GREGORY & PINNEY, for complainants.

TYLER & DICKINSON, R. J. MCBRIDE & B. F. FRENCH, for defendants.

SUPREME COURT OF WISCONSIN.

THE STATE ex rel. A. J. DRAKE *v.* PETER DOYLE, Secretary of State.

THE JURISDICTION AND CONTROL OF THE FEDERAL COURTS OVER THE STATES BY ACTION AGAINST THEIR OFFICERS—THE POWER OF THE SUPREME COURT TO COMPEL THE SECRETARY OF STATE TO REVOKE A LICENSE ISSUED TO A FOREIGN INSURANCE COMPANY.

(*Continued from page* 396.)

As originally adopted, the Federal Constitution extended the judicial power of the United States to controversies "between a State and citizens of another State;" vesting in the Supreme Court of the United States original jurisdiction in all cases "in which a State shall be a party." This grant of original jurisdiction in such cases to that great court appears to have been considered exclusive. Federalist, No. 80; Story's Const., sec. 1,682; 1 Kent, 298; Georgia *v.* Brailsford, 2 Dallas, 415; Cohens *v.* Virginia, 6 Wheat., 264.

The jurisdiction was probably intended to apply only to cases in which a State should be plaintiff. But it was held to embrace all controversies between States, whether plaintiffs or defendants, and citizens of other States; so far reducing a sovereign State to the condition of a private corporation. Chisholm *v.* Georgia, 2 Dallas, 419. This was probably a surprise, certainly an offense, to most, if not all, of the States. Says Chancellor Kent:

"The judicial power, as it originally stood, extended to suits prosecuted *against* one of the United States by citizens of another State, or by citizens or subjects of any foreign State; but the States were not willing to submit to be arraigned as defendants before the Federal courts, at the instance of private persons, be the cause of action what it might. The decision of the Supreme Court of the United States, in the case of Chisholm *v.* The State of Georgia, decided in 1793, in which it was adjudged that a State was suable by citizens of another State, gave much dissatisfaction, and the legislature of Georgia carried their opposition to open defiance of the judicial authority. The inexpediency of the power appeared so great that Congress, in 1794, proposed to the States an amendment to that part of the Constitution, and it was subsequently amended in this particular, under the provision in the fifth article." 1 Kent, 296.

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

The manifest object of the amendment was to preclude the Federal courts from jurisdiction over a State, in any case, at the suit of private parties. And by all rules of construction, the prohibition should apply to all cases in which the interest of a State is so concerned that it ought otherwise to be a party. But the intent and letter of the amendment have been greatly narrowed by the effect given to it by the decisions of the Supreme Court of the United States.

The Constitution designed that court to be, as it is, a great national tribunal; a court of last resort on all questions of national character; and a court of a dignity and authority unequaled by any tribunal known in modern history, not perhaps excepting the imperial chamber at Wetzlar, to which it has been compared. Federalist, No. 80; Story's Const., sec. 1,679; 1 Kent, 296. And yet that august tribunal has no general jurisdiction, but is essentially a court of defined and limited jurisdiction, original and appellate. We speak with profound deference to that court, in saying that it should be matter of surprise to no jurist, to no student of history, that so august a tribunal, so constituted and limited, should have from the beginning proved impatient of the limited scope of its own authority and that of the inferior Federal courts on which its own jurisdiction chiefly rests; gradually and sometimes almost insensibly extending it, and signally illustrating the maxim, *ampliare jurisdictionem*. Its views of Federal jurisdiction have always been aggressive. It has but illustrated a general human tendency, a common phase of judicial history, in gradually enlarging the letter of its jurisdiction by construction; until its jurisdiction by implication appears to exceed its jurisdiction by express grant; until it appears to be loaded down and impeded, we might almost say overwhelmed, by excess of jurisdiction, presumably never contemplated by the framers of the Constitution.

And it was, perhaps, hardly to be expected that an amendment to the Constitution, abolishing a jurisdiction originally granted by that instrument to Federal courts, would be kindly regarded by so great a court so constituted, or favorably construed for the prohibition and against the jurisdiction. So it has surely proved.

The amendment appears to have been first before the court in Hollingsworth *v.* Virginia, 3 Dallas, 378. The question was the effect of the amendment upon pending suits, and the court "delivered an unanimous opinion, that the amendment being constitutionally adopted, there could not be exercised any jurisdiction, in any case, past or future, in which a State was sued by the citizens of another State, or by citizens or subjects of any foreign State." But a few years later, in a cause in which a State claimed an interest but was not a party, the court used this language:

"The right of a State to assert, as plaintiff, any interest it may have in a subject, which forms the matter of controversy between individuals, in one of the courts of the United States, is not affected by this amendment; nor can it be so construed as to oust the court of its jurisdiction, should such claim be suggested. The amendment simply provides, that no suit shall be commenced or prosecuted against a State. The State cannot be made a defendant in a suit brought by an individual; but it remains the duty of the courts of the United States to decide all cases brought before them by citizens of one State against citizens of a different State, where a State is not necessarily a defendant. In this case, the suit was not instituted against the State or its treasurer, but against the executrixes of David Rittenhouse, for the proceeds of a vessel condemned in the Court of Admiralty, which were admitted to be in their possession. If the proceeds had been the actual property of Pennsylvania, however wrongfully acquired, the disclosure of that fact would have presented a case on which it was unnecessary to give an opinion; but it certainly can never be alleged that a mere suggestion of title in a State to property, in possession of an individual, must arrest the proceedings of the court, and prevent their looking into the suggestion, and examining the validity of the title." United States *v.* Peters, 5 Cranch., 115. It will be presently seen that the suggestion here thrown out is the seed of great growth of jurisdiction, inconsistent with the spirit of the amendment, if not with its letter.

The amendment appears to have next come before the court in Cohens *v.* Virginia, 6 Wheat., 264. The State had prosecuted the plaintiffs in error criminally in one of her courts, and there was judgment of conviction against them. They sued out a writ of error from the Federal Supreme Court to the State court, against the State; the State being defendant in error in that court. Notwithstanding the amendment, the court claimed jurisdiction of the cause, upon the ground that such a proceeding was not a suit within the meaning of the amendment, though it subjected the State to a judgment in that court, at the suit of a private party. And the court has hitherto adhered to that rule in numerous cases.

In Osborn *v.* U. S. Bank, 9 Wheat., 738, the court thus states the question: "The direct interest of the State in the suit, as brought, is admitted; and, had it been in the power of the bank to make it a party, perhaps no decree ought to have been pronounced in the cause, until the State was before the court. But this was not in the power of the bank. The eleventh amendment of the Constitution has exempted a State from the suits of citizens of other States or aliens; and the very difficult question is to be decided, whether, in such a case, the court may act upon the agents employed by

the State, and on the property in their hands." And the court thus states its conclusion: "It may, we think, be laid down as a rule which admits of no exception, that in all cases where jurisdiction depends on the party, it is the party named in the record. Consequently the 11th amendment, which restrains the jurisdiction granted by the Constitution over suits against States, is, of necessity, limited to those suits in which a State is a party on the record. The amendment has its full effect, if the Constitution be construed as it would have been construed, had the jurisdiction of the court never been extended to suits brought against a State by the citizens of another State, or by aliens. The State not being a party on the record, and the court having jurisdiction over those who are parties on the record, the true question is, not one of jurisdiction, but whether in the exercise of its jurisdiction, the court ought to make a decree against the defendants; whether they are to be considered as having a real interest, or as being only nominal parties." The court then proceeds to show that the officers of the State, who were the parties to the record, were personally liable to the bank, and therefore had a real, personal interest, under the State indeed, but distinct from the interest of the State; and upon that ground upheld the decree against them.

This is the leading case upon the subject. And it is very distinguishable from the case before us, in which the Secretary of State has no interest whatever; is a mere nominal party, the State alone having the whole interest in the subject; a mere shadow of the State set up for jurisdiction against the body over which jurisdiction is prohibited by the Constitution.

The next case which we find is Governor of Georgia *v.* Madrazo, 1 Peters, 110. That was a case in admiralty, in which the Governor of the State intervened in behalf of the State, and the court uses this language:

"In the case of Osborn *v.* The Bank of the United States, 9 Wheat., 738, this question was brought more directly before the court. It was argued with equal zeal and talent, and decided on great deliberation. In that case, the auditor and treasurer of the State were defendants, and the title of the State itself to the subject in contest was asserted. In that case, the court said, 'It may, we think, be laid down as a rule, which admits of no exception, that in all cases where jurisdiction depends on the party, it is the party named in the record.' The court added, 'the State not being a party on the record, and the court having jurisdiction over those who are parties on the record, the true question is not one of jurisdiction, but whether, in the exercise of its jurisdiction, the court ought to make a decree against the defendants; whether they are to be considered as having a real interest, or as being only nominal parties.'

"The information of the Governor of Georgia professes to be filed on behalf of the State, and is, in the language of the bill filed by the Governor of Georgia on behalf of the State, against Brailsford.

If, therefore, the State was properly considered as a party in that case, it may be considered as a party in this.

"The bill of Madrazo alleges that the slaves which he claims, 'were delivered over to the government of the State of Georgia, pursuant to an act of the General Assembly of the said State, carrying into effect an act of Congress of the United States, in that case made and provided; a part of the said slaves sold, as permitted by said act of Congress, and as directed by an act of the General Assembly of the said State, and the proceeds paid into the treasury of the said State, amounting to thirty-eight thousand dollars or more.'

"The governor appears, and files a claim on behalf of the State, to the slaves remaining unsold, and to the proceeds of those which are sold. He states the slaves to be in possession of the executive, under the act of the legislature of Georgia, made to give effect to the act of Congress on the subject of negroes, mulattoes or people of color, brought illegally into the United States; and the proceeds of those sold, to have been paid in the treasury, and to be no longer under his control.

"The case made, in both the libel and claim, exhibits a demand for money actually in the treasury of the State, mixed up with its general funds, and for slaves in possession of the government. It is not alleged, nor is it the fact, that this money has been brought into the treasury, or these Africans into the possession of the executive, by any violation of an act of Congress. The possession has been acquired by means which it was lawful to employ.

"The claim upon the governor is as a governor; he is sued, not by his name, but by his title. The demand made upon him is not made personally, but officially. The decree is pronounced, not against the person, but the officer, and appeared to have been pronounced against the successor of the original defendant; as the appeal bond was executed by a different governor from him who filed the information. In such a case, where the chief magistrate of a State is sued, not by his name, but by his style of office, and the claim made upon him is entirely in his official character, we think the State itself may be considered as a party on the record. If the State is not a party, there is no party against whom a decree can be made. No person in his natural capacity, is brought before the court as defendant. This not being a proceeding against the thing, but against the person, a person capable of appearing as defendant, against whom a decree can be pronounced, must be a party to the cause before a decree can be regularly pronounced.

"But were it to be admitted that the governor could be considered as defendant in his personal character, no case is made which justifies a decree against him personally. He has acted in obedience to a law of the State, made for the purpose of giving effect to an act of Congress; and has done nothing in violation of any law of the United States.

"The decree is not to be considered as made in a case in which the governor was a defendant, in his personal character; nor could a decree against him in that character be supported.

"This decree cannot be sustained as against the State, because, if the 11th amendment to the Constitution does not extend to proceedings in admiralty, it was a case for the original jurisdiction of the Supreme Court. It cannot be sustained as a suit, prosecuted, not against the State, but against the thing, because the thing was not in possession of the District Court.

"We are, therefore, of opinion that there is error in so much of the decree of the Circuit Court, as directs that the said slaves libelled by Juan Madrazo, and the issue of the females now in the custody of the government of the State of Georgia, or the agent or agents of the said State, be restored to the said Madrazo, as the legal proprietor thereof, and that the proceeds of those slaves, who were sold by order of the governor or the said State, be paid to the said Juan Madrazo; and that the same ought to be reversed; but that there is no error in so much of the said decree as dismisses the information of the governor of Georgia, and the claim of William Bowen."

Governor of Georgia *v.* Madrazo was followed and affirmed in Kentucky *v.* Dennison, Governor, 24 How., 66. This was an application for *mandamus*, by the governor of Kentucky against the governor of Ohio, within the original jurisdiction of the Supreme Court; to enforce the performance of an executive duty by the defendant governor. Of course the *mandamus* could not go to the State, but to its officer only. And the objection was taken that it was not a case between two States, to give jurisdiction to the court under the Constitution. But the court holds:

"So, also, as to the process in the name of the governor, in his official capacity, in behalf of the State.

"In the case of Madrazo *v.* The Governor of Georgia, 1 Pet., 110, it was decided that in a case where the chief magistrate of a State is sued, not by his name as an individual, but by his style of office, and the claim made upon him is entirely in his official character, the State itself may be considered a party on the record. This was a case where the State was the defendant; the practice, where it is plaintiff, has been frequently adopted of suing in the name of the governor in behalf of the State, and was, indeed, the form originally used, and always recognized as the suit of the State.

"Thus, in the first case to be found in our reports, in which a suit was brought by a State, it was entitled, and set forth in the bill, as the suit of 'the State of Georgia, by Edward Tellfair, governor of the said State, complainant, against Samuel Brailsford and others'; and the second case, which was as early as 1793, was entitled and set forth in the pleadings as the suit of 'His Excellency Edward Tellfair, Esquire, Governor and Commander-in-chief in and over the State of Georgia in behalf of the said State, complainant, against Samuel Brailsford and others, defendants.'

"The cases referred to leave no question open to controversy, as to the jurisdiction of the court. They show that * * * it has also been settled, that where the State is a party, plaintiff or defendant, the governor represents the State, and the suit may be, in form, a suit by him as governor in behalf of the State, where the State is plaintiff, and he must be summoned or notified as the officer representing the State, where the State is defendant.

"We may, therefore, dismiss the question of jurisdiction without further comment, as it is very clear, that if the right claimed by Kentucky can be enforced by judicial process, the proceeding by *mandamus* is the only mode in which the object can be accomplished."

What is said in Governor of Georgia *v.* Madrazo, and in Kentucky *v.* Dennison, of the governor of a State, applies equally to any other State officer, acting for the State, *virtute officii*. The question is not one of the dignity of the office, but of the representation of the State, *pro hac vice*. "In the application of this principle, there is no difference between the governor of a State and officers of a State of lower grades. In this respect they are upon a footing of equality." Davis *v.* Gray, 16 Wall., 203.

The opinion of the court in Osborn *v.* The Bank, and Governor of Georgia *v.* Madrazo, were both delivered by Marshall, C. J.; and the opinion in Kentucky *v.* Dennison, by Taney, C. J.; two of the most illustrious jurists known in the history of jurisprudence among the great English-speaking common-law peoples. Their doctrines were surely well and wisely considered, are entitled to the most profound deference and not lightly to be overruled. And these cases are in entire accord upon two propositions, both conclusive of the question before us.

1st. That where a suit is prosecuted in a Federal court, by a private party, against a State officer, in which the State has a direct interest but cannot be made a party, the officer himself must have an interest or liability in the subject matter, upon which the jurisdiction of the court can attach; and,

2nd. That where such a suit is prosecuted against a State officer having no such interest or liability, in his official capacity only, to affect a right of the State, the State is the real defendant within the prohibition of the amendment of the Constitution.

These rules are vital. Where there is such an interest or liability of the officer personally, the jurisdiction of a Federal court might be held to attach, against him personally, upon such interest or liability, without direct violation of the Constitutional amendment prohibiting jurisdiction against the State. But when there is no such personal interest or liability of the officer, and the suit is against him in his official capacity only, for the purpose of reaching an interest or liability of the State, then jurisdiction attaches on the interest or liability of the State, not of the officer; the State is the real defendant, and the officer only a nominal defendant; and jurisdiction is as much prohibited as if the State itself were defendant. To hold that jurisdiction could, in such a case, be exercised against the State, in the person of its officer, would be a direct and mere evasion of the constitutional prohibition, which the judges of all courts, Federal and State, are sworn to support; which no judicial construction of any court can erase from the paramount law of the land.

The subject matter of Governor of Georgia *v.* Madrazo, came again before the court, *ex parte*, Juan Madrazo, 7 Peters, 627, upon application to file a libel in admiralty against the State. The application was denied; the chief justice saying of it: "It is a mere personal suit against a State to recover proceeds in its possession, and in such a case no private person has a right to commence an original suit in this court against a State."

Osborn *v.* The Bank, Governor of Georgia *v.* Madrazo, and Kentucky *v.* Dennison, are so closely connected in principle that we have considered them together, a little out of the order of the latter case. Between Governor of Georgia *v.* Madrazo and Kentucky *v.* Dennison, another case came before the court and has its place in the reports, in which the jurisdictional question might have properly arisen. This is Dodge *v.* Woolsey, 18 How., 331. It was the case of a bill filed in an inferior Federal court, by a private party, against a tax collector of the State, to restrain the collection of a State tax. Several questions were raised and passed upon by the court in that case, quite foreign to the question which we are considering. The jurisdictional question before us, arising under the amendment of the Constitution, appears not to have been raised at the bar or considered by the court. The jurisdiction of the Federal courts over the subject-matter, in other respects is discussed; but not the jurisdiction over the State officer, acting officially, without interest, within the constitutional prohibition. It appears quite obvious that this question was altogether overlooked. Indeed, the court says of the case of State Bank *v.* Knoop, 16 How., 369: "It rules this in every particular; and to the opinion there given we have nothing to add, nor anything to take away." State Bank *v.* Knoop, did indeed involve the questions passed upon in Dodge *v.* Woolsey, but it was a writ of error to a State court, and could not possibly involve the jurisdiction of a Federal court in an original suit, against a State officer acting officially. The oversight is the more to be regretted, because the assumption of jurisdiction in Dodge *v.* Woolsey, disregards the two conditions before noticed, as solemnly established in Osborn *v.* The Bank, and Governor of Georgia *v.* Madrazo, subsequently confirmed in Kentucky *v.* Dennison. But the rule applies to it, that a case which overlooks a point cannot be held to overrule cases expressly deciding the very points. And the positive rules of Osborn *v.* The Bank, and Governor of Georgia *v.* Madrazo, must be held to survive the silence of Dodge *v.* Woolsey. If this were otherwise, the negative authority of Dodge *v.* Woolsey, on the question of jurisdiction, must be taken to be overruled by the positive authority of the later case of Kentucky *v.* Dennison.

Then comes Davis *v.* Gray, 16 Wall., 203, where a receiver appointed in a cause pending in an inferior Federal court, filed his bill in the same court, against the governor and another officer of a State, to restrain them in executing the law of the State. The question of jurisdiction was raised and discussed by the court. And Mr. Justice Swayne, who delivered the opinion, says of the question:

"A few remarks will be sufficient to dispose of the jurisdictional objections as to the appellants.

"In Osborn *v.* The Bank of the United States, these things, among others, were dicided:

"(1.) A Circuit Court of the United States, in a proper case in equity, may enjoin a State officer from executing a State law in conflict with the Constitution or a statute of the United States, when such execution will violate the rights of the complainant.

"(2.) Where the State is concerned, the State should be made a party, if it could be done. That it cannot be done, is a sufficient reason for the omission to do it, and the court may proceed to decree against the officers of the State in all respects as if the State were a party to the record.

"(3.) In deciding who were parties to the suit, the court will not look beyond the record. Making a State officer a party, does not make the State a party, although her law may have prompted his action, and the State may stand behind him as the real party in interest. A State can be made a party only by shaping the bill expressly with that view, as where individuals or corporations are intended to be put in that relation to the case.

"Dodge *v.* Woolsey, The State Bank of Ohio *v.* Knoop, The Jefferson Branch Bank *v.* Skelly, Ohio Life and Trust

(*Continued on page* 406.)

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Lex vincit.

MYRA BRADWELL, Editor.

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We call attention to the following opinions, reported at length in this issue.

ADMIRALTY—LIEN OF UNDERWRITER—AVERMENTS—LIBEL.—The opinion of the United States District Court for the Eastern District of Michigan, by BROWN, J., holding that the underwriter of a ship has a lien for the premium due upon marine policies of insurance, and is entitled to payment from the proceeds of sale; that the libel should aver not only the dates and amounts of the policies, but the names of the parties insured, and the character and extent of their several interests in the vessel.

TRYING CASES BEFORE MEMBERS OF THE BAR.—The opinion of the Supreme Court of this State, by SCHOLFIELD, J., holding that parties cannot confer jurisdiction upon a court by consent, neither can they by consent empower any individual other than the judge of the court to exercise its powers, and that a judgment entered in a case tried before a lawyer by consent of the parties was a nullity. We should think this opinion would put a stop to the practice of trying cases before members of the bar who have no commissions as judges. What would be thought of the Supreme Court if it should, every time the parties consented or desired it, appoint seven members of the bar to act as a supreme court? If, under our constitution, members of the bar can act as circuit judges without being elected by the people, they may also, under like circumstances, act as supreme judges. It is undoubtedly the proper practice to allow none to act as judges except these who are constitutionally appointed or elected.

TAX TITLE—AGENT PURCHASING AND SELLING TO THIRD PARTY—RIGHTS OF THIRD PARTIES.—The opinion of the United States Circuit Court for the western district of Wisconsin, by DAVIS and HOPKINS, JJ., holding that an agent to pay taxes on the lands of his principal, cannot acquire a valid tax deed on the same; that where an agent had acquired a tax deed on the lands of his principal, and contracted to sell the same to a third party, who had no notice of the fraud, but his agent in making the purchase had had such knowledge, and such purchaser had received a contract only for a deed and had paid two-thirds of the purchase money, that the fact that the agent of such purchaser had had knowledge of such fraud, was not sufficient to affect his principal, unless the facts and circumstances were such as to show that he had the same in mind at the time of the transaction of the purchase; that the right of such purchaser to call for a conveyance from the fraudulent grantee, in the tax deed was an equitable right merely, and that as the right of the principal so defrauded to call for a conveyance of the interest vested by the fraudulent tax deed in his agent was the older equity, it must prevail.

SUPREME COURT OF ILLINOIS.—The Supreme Court of Illinois will commence its September term at Ottawa on Tuesday next. The certified copies of records of decrees or judgments appealed from must be filed in the clerk's office at Ottawa on or before the second day of the term. Provided twenty days intervene between the day of the judgment or decree appealed from and the sitting of the court; but if ten days and not twenty shall so intervene, then the record must be filed on or before the tenth day of the term; see section 73, Revised Statutes 1874, p. 783. The call of the docket, according to rule 32, published in 55 Illinois Reports and in 4 Chicago LEGAL NEWS, 226, will commence with the second week of the term, and twenty cases per day will be subject to call. The abstract and brief of the plaintiff in error or appellant, must be filed in the clerk's office one day before the day when a cause stands subject to call. The defendant in error, or appellee, in case he does not argue orally, can file a brief within ten days after the time fixed for filing the brief of plaintiff in error, or appellant, and the latter has ten days for a reply.

Under rule 58, in all cases where the defendant in error or the appellee desires to plead and not join in error, he must file such plea in the office of the clerk at least five days before the cause stands for trial, and the issue thereon must be made up before the day the cause stands for trial.

Recent Publications.

REPORTS OF CASES AT LAW AND IN CHANCERY, argued and determined in the Supreme Court of Illinois. By Norman L. Freeman, reporter. Volume LXXVII. Containing the remaining Cases submitted at the January Term, 1875, and a portion of the Cases submitted at the June Term, 1875. Printed for the Reporter. Springfield, 1876.

We have received from Mr. Freeman a copy of the above volume just fresh from the press. In style and mechanical execution it is similar to its immediate predecessors. It contains 131 cases; of these 70 are affirmed, and 61 reversed. There are 8 cases in which the judges do not all concur, and 2 in which the opinions are *per curiam*. We give the names of the judges who tried the cases in the courts below, and how they were disposed of in the Supreme Court: Lyman Lacey, 4 affirmed and 8 reversed; Cyrus Epler, 6 affirmed and 7 reversed; John Burns, 2 affirmed, 3 reversed; Thomas F. Tipton, 3 affirmed, 4 reversed; T. B. Tanner, 3 affirmed, 4 reversed; C. L. Higbee, 3 reversed; James C. Allen, 3 affirmed, 4 reversed; C. S. Zane, 4 affirmed, 4 reversed; Joseph Sibly, 1 affirmed, 2 reversed; C. B. Smith, 8 affirmed, 4 reversed; J. C. Thompson, 1 affirmed; J. W. Cochran, 3 affirmed; H. M. Vandeveer, 1 affirmed, 1 reversed; City court of East St. Louis, 1 affirmed; O. L. Davis, 1 affirmed, 2 reversed; S. M. Moore, 1 affirmed; W. H. Snyder, 13 affirmed, 7 reversed; Amos Watts, 10 affirmed, 5 reversed; Monroe C. Crawford, 1 affirmed, 1 reversed; Charles H. Layman, 1 affirmed; S. B. Bryant, 1 reversed; H. B. Decius, 1 affirmed; Johnson county Circuit Court, 1 reversed. Judge Snyder has the largest number of any of the judges affirmed. At the conclusion of the volume is the following table of unreported cases:

Bester *v.* Chapman. Appeal from the Circuit Court of McLean. Opinion *per Curiam*. Decree affirmed. Messrs. Williams, Burr & Capen, and Mr. Hamilton Spencer, for the appellant. Mr. W. M. Hatch, for the appellee.

Bross *v.* Lieb. Appeal from the Circuit Court of Cook. Opinion *per Curiam*. Decree reversed. Mr. Edward Roby, and Mr. Wm. Bross, for the appellant. Mr. Jas. K. Edsall, Attorney General, for the appellee.

Chicago and Alton R. R. Co. *v.* McKnight. Appeal from the Circuit Court of Macoupin. Opinion by McAllister, J. Judgment affirmed. Mr. W. R. Welch, for the appellant. Mr. John I. Rinaker, for the appellee.

Chicago and Alton R. R. Co. *v.* Purvines. Appeal from the Circuit Court of Morgan. Opinion by McAllister, J. Judgment reversed. Mr. Henry E. Dummer, for the appellant. Messrs. Morrison & Whitlock, and Messrs. Brown & Epler, for the appellee.

Cobb, Christy & Co. *v.* Illinois Central R. R. Co. Appeal from the Circuit Court of McLean. Opinion *per Curiam*. Judgment affirmed. Mr. Hamilton Spencer, and Messrs. Weldon & Benjamin, for the appellants. Messrs. Williams, Burr & Capen, for the appellee.

Davis & Moore *v.* Robbins. Appeal from the Circuit Court of DeWitt. Opinion by Breese, J. Decree affirmed. Messrs. Moore & Warner, for the appellants. Messrs. Williams, Burr & Capen, for the appellee.

Davis *v.* The People. Writ of Error to the Circuit Court of Macon. Opinion by Breese, J. Judgment reversed. Messrs. Crea & Ewing, for the plaintiff in error. Mr. Charles C. McComas, State's Attorney, for the People.

Dennison et al *v.* The People, use of McLean county. Appeal from the Circuit Court of McLean. Opinion by Breese, J. Judgment affirmed. Messrs. Bloomfield & Lucas, for the appellants. Mr. J. W. Fifer, for the appellees.

Humphrey *v.* Stamates et al. Appeal from the Circuit Court of DeWitt. Opinion by Sheldon, J. Judgment affirmed. Messrs. Sweeney, Donahue & Kelly, for the appellant. Messrs. Fuller & Graham, for the appellees.

Indianapolis and St. Louis R. R. Co. *v.* Dawson. Appeal from the Circuit Court of Madison. Opinion by McAllister, J. Judgment affirmed. Mr. F. W. Burnett, for the appellant. Messrs. Irwin & Krome, for the appellee.

McLean County Coal Co. *v.* Straight et al. Appeal from the Circuit Court of McLean. Opinion *per Curiam*. Decree reversed. Mr. Hamilton Spencer, and Messrs. Stevenson & Ewing, for the appellant. Mr. J. W. Fifer, for the appellee.

People *ex rel*, Morgan *v.* Lieb. Appeal from the Circuit Court of Cook. Opinion *per Curiam*. Judgment affirmed. Mr. Edward Roby, for the appellant. Mr. Jas. K. Edsall, Attorney General, for the appellee.

Quincy and Alton R. R. Co. *v.* Schaffer. Appeal from the Circuit Court of Adams. Opinion by McAllister, J. Judgment affirmed. Mr. B. T. Scofield, and Messrs. Wheat, Ewing & Hamilton, for the appellant. Messrs. Carter & Govert, for the appellee.

Toledo, Wabash and Western Railway Co. *v.* Donohue. Appeal from the Circuit Court of Morgan. Opinion *per Curiam*. Judgment reversed. Messrs. Dummer & Brown, for the appellant. Mr. J. T. Springer, for the appellee.

Toledo, Wabash and Western R. R. Co. *v.* Hall et al. Appeal from the Circuit Court of McLean. Opinion by Sheldon, J. Judgment affirmed. Mr. O. T. Reeves, for the appellant. Messrs. Weldon, Stevenson & Ewing, for the appellees.

Toledo, Wabash and Western R. R. Co. *v.* Morgan. Appeal from the Circuit Court of Champaign. Opinion *per Curiam*. Judgment affirmed. Mr. A. E. Harmon, for the appellant. Mr. Thos. J. Smith, for the appellee.

Wilday et al *v.* Craig. Appeal from the Circuit Court of Morgan. Opinion *per Curiam*. Judgment reversed. Messrs. Ketcham & Taylor, for the appellants. Mr. J. T. Springer, for the appellee.

Walwrath *v.* Cleary. Appeal from the Circuit Court of Cook. Opinion *per Curiam*. Decree reversed and remanded. Mr. Edward Roby, for the appellant. Messrs. Hay, Greene & Littler, and Messrs. Robinson, Knapp & Shutt, for the appellee.

SUPREME COURT OF ILLINOIS.

ABSTRACT OF OPINIONS FILED AT OTTAWA, JUNE 30, 1876.

309.—John Barker *v.* Int. Bank of Chicago.—Error to Cook.—Opinion by CRAIG, J., reversing and remanding.

ESTOPPEL OF GRANTEES AS TO PRIOR TRUST DEED.

Held, That where one makes an accommodation note, and afterwards conveys the premises in the deed of trust, and in the sale thereof treats the note as a valid indebtedness, and provides that the deed of trust shall stand as a lien thereon, to secure the payment of the debt, his grantees are not in a position to defeat the lien created by the trust deed.

321.—E. Erickson *v.* Margaret Rafferty.—Error to KNOX.—Opinion by BREESE, J., reversing and remanding; DICKEY, J., dissenting.

NOTICE AS TO MORTGAGE WITH WRONG DESCRIPTION.

STATEMENT.—Bill to reform a mortgage deed, and to foreclose it—the mortgage being for a different piece of land than that intended, the mistake being that of the scrivener, as was alleged. *Held*,

That the mortgage with the misdescription, being on record, was sufficient to put any one on inquiry who knew the extent of the means of the mortgagor's limited possessions, etc., and if such a one would buy the property meant to be included in the mortgage, he must be charged with notice, notwithstanding the misdescription.

477.—Charles Peterson *v.* John W. C. Nehf.—Appeal from Superior Court of Cook.—Opinion by SHELDON, J., reversing and remanding.

RES ADJUDICATA—REQUISITES.

Held, That in order to constitute a question *res adjudicata*, it is not essential that the parties in a former suit be precisely identical, if the question in the latter case was made a distinct issue in the former, and a decision rested on it, as for example, whether certain conveyances were fraudulent as to creditors, or not. In such case, if a married woman brings suit to clear titles and a question is made upon a certain conveyance, and it is decided valid, the same question cannot afterwards be raised as to the land, in a creditor's bill against the husband.

A LUCKY VETERAN.—Years ago, Charles M. Lee was a great lawyer in Rochester, N. Y. On one occasion he was defending an old veteran for passing a forged promissory note for thirty dollars. There was scarcely a doubt of the man's guilt, but Lee, getting over the knotty points of the evidence as well as he could, undertook to carry the jury by escalade on the ground of the prisoner's Revolutionary services. He described in graphic terms the bloody attack on Stony Point, by Mad Anthony, at which the prisoner, then a dare-devil of 19, had distinguished himself, and closed his speech as follows:

"Gentlemen of the jury, will you send to the State prison for passing a contemptible thirty-dollar forged note, an old hero of three-score-and-ten, who in his youth, cheered the heart of his country in the darkest hour of the Revolution by storming Stony Point?"

This was a poser for the jury, who, retiring, returned after an absence of about two hours, when the clerk went through the usual formula:

"Gentlemen of the jury, have you agreed upon a verdict?"

"We have."

"Do you find the prisoner at the bar guilty, or not guilty?"

"Not guilty, because he stormed Stony Point!" thundered the foreman.

The audience applauded, the crier rapped for order, the District Attorney objected to the recording of the verdict, and the Judge sent the jury out again, telling the foreman, in a sharp tone, that they must find an unconditional verdict.

After an absence of a few minutes, they returned, when the foreman rendered the simple verdict of not guilty, adding, however, as he dropped into his seat:

"It was a good thing though, for the old revolutionary cuss, that he stormed Stony Point!"

(*Continued from page* 404.)

Company *v.* Debolt, and the Mechanics and Traders Bank *v.* Debolt, proceeded upon the same principles, and were controlled by that authority, with respect to the jurisdictional question arising in each of those cases as to the defendants."

And again, speaking of parties: "We feel no difficulty in disposing of the case as it is presented in the record."

This case professes to follow Osborn *v.* The Bank; but it is extraordinary that it takes no notice of the essential rule cited from that case, that defendant State officers, to give jurisdiction, must themselves have an interest or liability in the subject-matter. And it is more extraordinary still, that, quoting several cases with, at best, a very remote bearing on the question, the opinion makes no reference to Governor of Georgia *v.* Madrazo, or Kentucky *v.* Dennison, with both of which the opinion is directly in conflict, as well as with the rule in Osborn *v.* The Bank. And, with all due respect, we think it may be said of Davis *v.* Gray, that, instead of following the well considered and established rules in Osborn *v.* The Bank, Governor of Georgia *v.* Madrazo and Kentucky *v.* Dennison, it rather follows, presumably by inadvertence, the blind lead of Dodge *v.* Woolsey, itself an incongruity, sandwiched in the reports between inconsistent decisions.

We cannot think the vital principle established in Osborn *v.* The Bank, or the judgments in Governor of Georgia *v.* Madrazo and Kentucky *v.* Dennison, overruled by Davis *v.* Gray. These cases are too solemn and of too high authority to be set aside *sub silentio*. We cannot but think that they were overlooked; the learned judge who delivered the opinion, being misled by the unconsidered and unfortunate departure from those cases of Dodge *v.* Woolsey.

Woodruff *v.* Trapnall, 10 How., 190; Curran *v.* The State of Arkansas, 15 How., 304; State Bank *v.* Knoop, 16 How., 369; Ohio L. & T. Co. *v.* Debolt, 16 How., 416; The Bank *v.* Debolt, 18 How., 380; and The Bank *v.* Skelly, 1 Black., 436, cited in the opinion to support jurisdiction in Davis *v.* Gray, were all writs of error to State courts, to be classed with Cohens *v.* Virginia. And their authority for original jurisdiction in an inferior Federal court, is not perceived. And it may be said in passing, that the learned judge who delivered the opinion was in error in saying that in Woodruff *v.* Trapnall a writ of *mandamus* was issued to the proper representative of the State. The judgment of the Supreme Court of the State was simply reversed in the usual form. So in Curran *v.* Arkansas, the judgment of the State court was reversed; the Federal Supreme Court simply following the State Supreme Court in holding that such a suit would lie against the State, by her own law, in her own courts.

When the decisions of a State court vary in interpreting State law, the Supreme Court of the United States makes its own election which it will follow. Gelpcke *v.* Dubuque, 1 Wall., 175. We may, with profound respect, presume here upon the like right of choice; and we prefer to hold the rules in Osborn *v.* The Bank, Governor of Georgia *v.* Madrazo, and Kentucky *v.* Dennison, as the more authoritative and well considered cases to settle the law of that court, unless expressly overruled. When adjudications so solemn and so well considered are disregarded or forgotten in the court, none of us may presume to say *Indignor*; but surely all of us should recall sounder and safer principles established in that great court, *Quandoque bonus dormitat Homerus*.

And the rules established in Osborn *v.* The Bank, Governor of Georgia *v.* Madrazo, and Kentucky *v.* Dennison, exclude jurisdiction of the Federal court of the bill and injunction pleaded by the secretary of State in this case.

Our conclusion would not be different if we were to accept Davis *v.* Gray as overruling the earlier cases, and establishing a different rule. For that case does not go the length, no case which we have been able to find in that court does, of holding that the State would be bound, in the exercise of its authority, by the proceeding of the Federal court against its officer. Conceding the power of the Federal court to bind the officer, as between him and the plaintiff who sues him, the constitutional amendment absolutely prohibits it from binding the State, as against either the plaintiff or its own officer. In such a case the private party seeking his remedy against the officer, must be content with that, *valeat quantum*. He can have none against the State, or binding the State, or binding the officer against the State. Against the authority of the State over its own officer, against the officer's duty to the State, Federal process in such a case can avail nothing. It is more than the case of one not bound by a judgment, because not a party. It is not the case of one without the jurisdiction of the court, but of one above the jurisdiction. It is the case of a sovereign State, over which the charter creating the Federal courts, for grave political reasons, prohibits jurisdiction in such cases, has abrogated the jurisdiction once improvidently granted. It would be a singular perversion of all judicial rule, to hold that the State could not be bound as a party, but is bound without being a party. And it would be a simple nullification of the constitutional amendment, to hold the State in any way bound by the judgment of a Federal court against its officer, at the suit of a private party. That would be, not judicial construction, not judicial stretch of jurisdiction, but judicial revolution.

And it would involve the singular absurdity that, while the original Constitution which expressly gave jurisdiction at the suit of private parties, against a sovereign State, confined such jurisdiction to the Supreme Court of the United States; a court worthy of such jurisdiction, if any Federal court could be; the amendment prohibiting such jurisdiction in any Federal court, would subject a sovereign State, in the person of its officer, and the administration of the State government, to the process of any petty Federal court which Congress might see fit to establish, at the suit of any vagabond citizen or corporation of another State, doing business in it.

We abide by the letter and spirit of the Constitution. Unfortunately, many things in its administration are tending toward centralization, which the history and temper of the American people give grave warning might be closely followed by disintegration. The fintegrity of the Union has been tried. The integrity of the States is on trial. Much rests upon the moderation and forbearance of the Federal courts; as much perhaps upon the firmness of the State courts, refusing to abdicate State authority in State matters, to assumption of Federal jurisdiction. We will faithfully try to do our part. In refusing, at the last term, to assume a jurisdiction properly belonging to the Federal courts, we had occasion to say, and we now repeat:

"It is perhaps unfortunate that the Federal Constitution left any ground for concurrent jurisdiction of the Federal with the State courts. It has led to some mischievous confusion of adjudication, and some vicious usurpation of jurisdiction, by both Federal and State courts. In this day, this is a great and growing evil, and we propose, in this State, for the sake of judicial order and of the integrity of the Federal and State governments, to do what we may toward confining the courts of the State to State jurisdiction, and the courts of the United States to Federal jurisdiction." Bromley *v.* Goodrich, *ante*.

VI. Had the Federal court had jurisdiction of the bill and injunction pleaded by the Secretary to bind the State, it could not avail him in this case, because the license in force when the bill was filed and the injunction issued, has expired by its own limitation; and it is only to that license that the injunction can relate. The injunction is indeed very loose and general; literally broad enough to restrain the Secretary from revoking any license to the Insurance Company for any cause, for all time. But it must receive a reasonable construction and be confined to the things and the condition of things existing when issued. When the license existing at the time the bill was filed, expired, the injunction was spent. The Secretary might have found ground for refusing a new license, *dehors* all matters pleaded in the bill; or the legislature might have repealed or modified the statute authorizing the license. The new license, therefore, created a new relation with the State, though it may have been but the renewal of an old relation which had expired by limitation, and the Federal court which issued the injunction could hardly have intended, certainly had in any view no authority, to bind the defendant for all time, outside of the actual condition of things pleaded in the record, or in new relations between the parties. Even Federal jurisdiction, where it attaches, is not so comprehensive or prospective.

VII. The writ in this case will issue, in the right of the State, at any hazard to its officer. We apprehend, however, that there will be none. The State officer is bound to obey the State authority. And if any one, to be found within the State, should molest any officer of the State, for obeying the process of this court, in the administration of the State government, and the fact should be properly brought before us, we think we should be able to afford ample and summary remedy.

We regard this matter as a grave attempt to baffle State authority in the administration of State affairs, in a way to be a temptation for the use of a somewhat injudicial adjective. And we are thoroughly in earnest, as is our duty under our oaths, to enforce State authority, in State affairs, over State officers, and on foreign corporations who come here *ex gratia* of State law, and then set the law at defiance. We mean to suffer no trifling here. The writ must be so framed that the Secretary not only shall promptly revoke the existing license, but shall refrain from granting any other license to the Insurance Company for three succeeding years; and that he certify the revocation to this court, within twenty-four hours after service of the writ upon him.

Let the writ issue at once, in accordance with this opinion.

[For the LEGAL NEWS.]

THE "JURIST" UPON CODE PRACTICE.

In the September number of the *Monthly Western Jurist*, is a short article, upon "Code Practice," which contains extraordinary statements, and displays very apparent unfamiliarity with the subject.

The writer commences with citing the opinion of Mr. Justice Grier, as stated by the *Luzerne Legal Register*, in such a manner as to make it appear that the animadversions of Justice Grier expressed the views of the Supreme Court of the United States.

Mr. Justice Grier has for thirty years been upon the bench of the Supreme Court, and has had little or no opportunity to study the practical advantages of a Code of Procedure; and, indeed, has been called upon to consider almost no questions of pleading.

Mr. Justice Grier, however, although more splenetic in expressing his views, has but followed in the path of former greater lights.

Chief Justice Abbott, Chief Justice Eyre, Mr. Justice Wilson and Lord Kenyon, all, among other learned judges in England, opposed any innovation in the forms of common-law practice. Such has been the history of the bench. The judges have ever been conservative and opposed to progress. The battle between the young, active members of the bar, upon the one side, in favor of changing the practice with the advancement of civilization and change in the surroundings of life, and the conservative bench, upon the other side, strongly opposed to disturbing any of the inherited forms, is an old one.

No less a brilliant lawyer than Cicero entered the fight, and, in his *Oratio pro Murena*, discharged his terrible satire upon the verbose forms of action of that day. So far, the spirit of progress has triumphed, and the laws of all countries have at last yielded to the inevitable power.

We borrowed our forms of action from England, but the country of their origin has abolished them for more than twenty years.

Twenty-four States and Territories of the Union have done likewise, and have Codes of Procedure. The State of Illinois has neither code nor common law practice. The *Jurist*, in the article referred to, says:

"The law-makers of Illinois have shown wisdom by retaining the common law rules of pleading."

How have they done so? The beginning and end of all the arguments made during the last half century, by the advocates of the common law practice, have pointed to the system of *special pleading*, as the one great and beautiful science in common law practice.

A learned Judge in New York, who doubted the wisdom of adopting a Code of Procedure, said that under the old system "the pleader was able to reduce the issues to be tried to a very small number, and all the other facts in the case would be disposed of before trial."

In Illinois, however, special pleading is virtually abolished by statute, and the defendant may, in his answer, give notice of any special matters he intends to prove upon trial for a defense.

This is, so far, code practice. The code abolishes all forms of pleadings, for both plaintiff and defendant. The law of Illinois has abolished common law pleading for the defendant, and retained it for the plaintiff!

With strange consistency, the *Jurist* continues:

"The principles of the common law system are as correct as they were a century ago; all that is necessary to adapt them to our times, is to *lop off the forms* and technicalities that adapted them to the institutions of that time, and add such as will adapt them to the present."

No advocate of a code of procedure ever claimed more. Every State in this Union has attempted just that reform: twenty-four of them by codes of procedure, and the rest by miscellaneous legislation. The practice in the States having a code, is more uniform than in those claiming to use common law practice, and the changes adopted by Illinois, Michigan and other States that cling to common law practice—changes which the *Jurist* applauds as forming "the *modern* common law system"—have all been borrowed from the code. The law of Illinois now permits amendments of process and pleadings in form and substance; allows set-offs by defendant against plaintiff; abolishes distinction between trespass and case; permits trover and replevin to be joined; permits a defendant, by notice, to state the facts constituting his defense, in the place of special pleading; allows assumpsit upon sealed instruments—all of which are code "innovations." In Michigan, declarations in trover, in certain cases, need only state the conversion; assignees of shares in action may sue in their own names; all parties to a bill of exchange or promissory note may be sued in one action; pleading and processes may be amended; special pleas are abolished; defendants, by notice, state the facts relied upon for defense; set-offs are allowed for defendants.

It will be seen, Michigan has adopted certain code innovations, and Illinois has adopted certain other code innovations. So every other State, retaining common law forms, has adopted more or less of code innovations, until the practice in those States has grown widely dissimilar. Now, which State has what the *Jurist* calls "the *modern* common law system?"

But the most remarkable argument made by the *Jurist* is *ab inconvenienti*, in these words:

"Practitioners in a State having a code of its own, find it difficult to practice in the United States courts, as the National Supreme Court retains the common law system. The Circuit and District Courts of the United States also follow that system, subject, however, in some things, to the local State laws. But the practitioner, in a State having the common law system, finds himself at all times qualified to practice in his own State courts, and in all the courts of the United States to which a case may be taken."

It is not strange that lawyers, who have experience in none but common law practice, should often show an ignorance of their subject when they attempt to criticise the code system; but it is surprising that a magazine, published for the instruction of a learned profession, should publish such a loose statement.

Every lawyer knows that the "common law system" of the U. S. Supreme Court is confined to civil controversies, where a State, or a consul, or a vice-consul, or an ambassador or public minister be a party, or an ambassador's servant be defendant. Such practice is almost exclusively local to the District of Columbia, and concerns but a very minute portion of the bar. The Supreme Court has no power to prescribe forms of pleading for inferior courts, except in

chancery and admiralty. "The Circuit and District Courts of the United States" *do not* "follow that system, subject, however, in some things, to the local State laws."

Such was the law until Congress, in June 1872, enacted that,

"The practice, pleadings, and forms, and modes of proceeding in civil causes, other than equity and admiralty causes, in the Circuit and District Courts, shall conform, as near as may be, to the practice, pleadings and forms, and modes of proceeding existing at the time in like causes in the courts of record of the State within which such Circuit or District courts are held; *any rule of court to the contrary notwithstanding.*" (R. S. of U. S., Sec. 914.)

Senator Carpenter, of Wisconsin, was instrumental in procuring this statute to be enacted. It aroused the opposition of the U. S. judges in the code States; and Mr. Justice Miller, for forty years a district judge, often upon the bench, referred to it as, "Mr. Carpenter's code." But it became law and remains law; and in States having a code of procedure, the practice in actions at law, in the United States Courts, is code practice, exactly the same as in the State Courts.

It is not the intention of the writer in this article to discuss the merits of the code, but to call attention to the manner of argument sometimes used against it.

In the future, the writer may point out some of the manifest superiorities of code practice to that nameless system we now use.

GEORGE F. WESTOVER.

Chicago, Sept. 5, 1876.

SUPREME COURT OF ILLINOIS.

ABSTRACTS OF OPINIONS FILED AT OTTAWA, JUNE 30, 1876.

264.—Joseph A. Griswold *v.* William H. Shaw.—Appeal from Superior Court of Cook.—Opinion by SCHOLFIELD, J., reversing and remanding.

CASE OUT OF ITS ORDER — AMENDMENTS WHEN ALLOWED.

STATEMENT.—Case taken up out of its order under the "five-day rule;" and judgment rendered against appellant's objections. Also, a material amendment being made, by leave, to the declarations, appellant was denied leave to file an additional plea going to the *bona fides* of the assignment of the notes in suit. *Held*,

That the rulings of the court in both these particulars were erroneous.

271.—George W. Honeyman, ex'rs, etc. *v.* Samuel Jarvis, guardian.—Appeal from Mercer.—Opinion by SCHOLFIELD, J., affirming.

COMPROMISE OF A DOUBTFUL RIGHT—CONSIDERATION—RESPONSIBILITY.

STATEMENT.—In Indiana, the law requires a guardian, when he applies for leave to sell real estate of his wards, to file an additional bond, conditioned for the faithful account of the money to be received for the sale. The sureties on this bond—but not the sureties on his general bond—are liable for his default in this particular matter. John Honeyman (son of the testator) was guardian for the wards, for whom appellee is now guardian, and made such application, under such a bond, with his father as surety; and was thereon appointed by the court as a "special commissioner" to make the sale. He failed to pay over the money arising from the sale, became insolvent, and removed to this State—the appellee being appointed guardian for the wards. Appellee had an interview with the testator afterwards, and claimed that he (the testator) was liable, as surety, on the bond; and the testator gave him his note, (on which suit was brought in this case) in settlement of his supposed liability on the bond.

It was claimed the note was without consideration, on the ground that the testator was not liable on the bond, since, when the guardian, as special commissioner, turned over the proceeds of the sale to himself, as guardian, it discharged the special bond. The court do not decide whether the testator was really liable on the bond, or not; remarking only that if this bond did not secure the faithful performance of duties under the order of sale, there was then no bond. But, on the supposition, that the testator was not, in reality, liable, it was *Held*,

1. It was not essential to sustain the note that it be absolutely certain, the testator was liable on the bond; on the principle that the compromise of a doubtful right, though it afterwards turns out that the right was on the other side, where there is no actual or constructive fraud, and the parties act in good faith, with full knowledge of the facts, is a sufficient consideration to support a promise—the real consideration which a party receives under a compromise being, not the sacrifice of the right, but the settlement of the dispute, and the abandonment of the claim; and it is no objection to the validity of the transaction, that the right was really in one of the parties only, and that the other had no right whatever. The fact that the one may have had no claim is immaterial, if he was honestly mistaken as to his claim.

2. Where one is merely mistaken as to his rights, but knows the facts, in a matter in which he has constituted himself a judge in his own cause, and decided against himself, he cannot afterwards be heard to reverse his own judgment.

3. In this case, it is sufficient that the claim that the testator was liable on the bond, is not so unfounded and absurd, as to raise the presumption that appellee knew he had no claim, and therefore acted in bad faith in taking the note.

292.—Elias Richardson *v.* Theodosia Quinn.—Appeal from Livingston—Opinion *per curiam*, affirming.

MONEY PAID BY MISTAKE.

Held, That in a suit to recover back an excess of payment of 10 cents per bushel (or other amount), on a large quantity of grain, the over payment being claimed as having been made under a mistake of facts, there is only a question of fact involved; and the verdict will not be disturbed where the evidence was conflicting.

No. 294.—John D. Easter & Co. *v.* Joseph H. Boyd.—Appeal from Livingston.—Opinion by CRAIG, J., affirming.

NOTE PROVIDING FOR ATTORNEY FEE—WHEN ENFORCIBLE HEREIN.

Held, That where a promissory note contained the provision that "if not paid when due, and the same is sued, ten dollars, if sued in justice's court, and twenty-five dollars, if sued in District or Circuit court, additional, to defray the expenses of the plaintiff for his suing the same; to be entered up as a part of the judgment," it cannot be enforced; because the attorney fee thereby provided for, is not due until after the institution of the suit; and the court cannot, in an action on the notes, render a judgment for a claim not due at the time the action was commenced. It would be different, however, if the fee was made due and payable at the time of default in the payment of the notes, instead of being made to depend on the contingencies of suing, and in a particular court.

297.—Charles Seilaff *v.* Lorenz Guthrie.—Appeal from Superior Court of Cook.—Opinion *per Curiam*, affirming.

ABSTRACTS, ON APPEAL.

Held, That where, on appeal, an abstract filed in the Supreme Court is little better than an index to the record, the decision below will be affirmed; for the judges of the Supreme Court have not time to look through the record in quest of specific errors which would reverse.

339.—Adam Smith *v.* William B. Bateham.—Error to Superior Court of Cook.—Opinion by SHELDON, J., reversing and remanding.

AFFIDAVIT OF MERITS ON JOINT PLEA.

Held, That in a joint plea requiring an affidavit of merits, the affidavit is sufficient if made by only one of the defendants.

371.—Sterling Bridge Co. *v.* William N. Pearle.—Appeal from Whiteside.—Opinion by SCHOLFIELD, J., reversing and remanding.

SECURITY FOR COSTS—CHALLENGES OF JURORS—DEGREES OF NEGLIGENCE—TESTIFYING TO OPINIONS.

STATEMENT.—Case against appellants for injuries to appellee, received in consequence of a defective approach to appellant's bridge, at Sterling. Verdict of $6,000.

Appellant moved for a rule on appellee for security for costs. Three days afterward, appellee moved for leave to prosecute as a poor person. No disposition of either motion appears of record. But the court, after the making of the latter motion, ordered a jury and trial of the cause. *Held*,

1. That this was, in effect, an allowance of the later motion, and, therefore, a denial of the former. And the granting of this was within the discretion of the court; which discretion will not be interfered with, unless manifestly abused.

2. Under the requirements of the statute, twelve jurors must be called into the box at once, before either party is required to examine them, and kept up, as to number, until the examination is completed; since the statute is not to be construed as only requiring that the jurors shall, before any examination as to their competency, be ordered into the jury-box, to the number of twelve. And it is, therefore, error to compel either party to exercise his right of peremptory challenge until the panel of twelve is filled. Yet the jurors are then to be passed upon in panels of four, and the statute does not require a plaintiff to exercise his peremptory challenges to the entire panel of twelve, before the defendant can be called upon to exercise his right of challenge. Each panel of four must be accepted before calling up another. But there must be twelve in the box all the time, and when one is challenged, another must be called into the box, and then, from those in the box, another must be added to the panel of four under examination.

3. In such a case as this, when a party to the action testifies, it is error to ask him for opinions. He should be required to testify only to facts, and then it should be left to the jury to draw conclusions as to the comparative or absolute negligence.

4. It is not correct to instruct a jury, in such a case, that, where a plaintiff, as well as a defendant, was negligent, the plaintiff can recover, unless his negligence contributed "to a considerable degree" to the injury complained of; the rule being that the degrees of negligence must be measured, and considered, and whenever it shall appear that the plaintiff's negligence is comparatively slight, and that of the defendant gross, he shall not be deprived of his action. And the corollary is, that, where the negligence of the plaintiff is not slight, and that of the defendant gross, in comparison, the plaintiff cannot recover. If a plaintiff has failed to exercise due and ordinary care, and thereby has contributed to bring on himself an injury, unless the negligence of the defendant has been gross in comparison with his, he cannot recover.

386.—T. P. & W. R. R. Co. *v.* Allen M. Eastburn.—Appeal from Iroquois.—Opinion by CRAIG, J., reversing and remanding; DICKEY, J., dissenting.

JUDGMENTS IN VACATION—SECOND FINAL JUDGMENT.

Held, That where, under the statute declaring that when a cause or matter is taken under advisement by the judge of a Circuit Court, or of the Superior Court of Cook county, and the cause or matter is decided in vacation, the judgment, decree, or order therein, may be entered of record in vacation, but such judgment, decree, or order, for good cause shown, may be set aside, or modified, or excepted to, at the next term of the court, upon motion filed on or before the second day of the term on notice, a judgment is thus entered in vacation, which passes by the next term, without action, it is error for the court, at a subsequent term, to enter a remittitur, and render another final judgment in the cause—for then it acts without jurisdiction.

407.—Harriet C. Roberts *v.* Helen M. Beckwith.—Appeal from Will.—Opinion by SHELDON, J., reversing and remanding.

JOINT DECREE—HUSBAND AND WIFE—LIEN ON WIFE'S SEPARATE PROPERTY.

STATEMENT.—Petition for partition, and account for rents and profits; *held*,

1. That a joint decree may be made against husband and wife for rents and profits, in such a case; and be made a lien on the lands, although it is the wife's separate estate.

2. If the land is a homestead the decree needs not be reversed; but should there come to be a taking of the land under the lien, the homestead can be saved in the same way as under the levy of an execution at law.

3. A decree of this kind should not be for the full amount of the rents and profits. All permanent improvements should be deducted.

Zebina Eastman *v.* City of Chicago.—Appeal from Criminal Court of Cook.—Opinion by SCOTT, Ch. J., reversing and remanding.

CONSTRUCTION OF ORDINANCE AS TO SECOND-HAND DEALERS.

STATEMENT.—Prosecution under an ordinance of Chicago declaring that "any person who keeps a store, office, or place of business, for the purchase or sale of second-hand clothes, or garments of any kind, or second-hand goods, wares, or merchandise, is hereby declared to be a dealer in second-hand goods."

Defendants were booksellers dealing in such stock as is usually sold in a retail book-store, and, in connection with their other business, second-hand books; *held*,

That, if such an ordinance applies to books at all, which is very doubtful, yet, it must be construed to apply only to those whose principal business it is to deal in old goods, and not to such as carry on principally a trade in new goods, and only deal in old as a small portion of their regular business—this being a mere adjunct to their real or leading trade.

448.—Edmund Curtis *v.* George Baugh.—Appeal from Ogle.—Opinion by WALKER, J., reversing and remanding.

INDEMNITY TRUST DEED—MEASURE OF DAMAGES.

Held, That where a trust deed is given to indemnify against loss to lands, as by cutting off timber, the measure of damages is merely the actual loss accruing in the way indemnified against; and the deed cannot be extended to cover notes given to another, as collateral security for indebtedness due from a third party, for balance due on the same lands, the whole transaction not being originally intended to create a penalty, but to indemnify against loss.

490.—P. Strubher execu'rs., *v.* J. H. Moler, exr's.—Appeal from Peoria.—Opinion by WALKER, J., reversing and remanding.

PARTY IN INTEREST AS WITNESS—EXCEPTIONS OF STATUTE CONSTRUED—PRESUMPTION FROM SETTLEMENT OF ACCOUNTS—ADMISSIONS AS EVIDENCE.

STATEMENT.—Suit against an estate for services rendered the testator. It was first objected that the plaintiff was allowed to testify in his own behalf, the party being dead to whom he rendered the services. But, *held*,

1. That as he testified in order to rebut the testimony of one as to a settlement between the plaintiffs and the executors after the death of the testator, his testimony was within the first exception of the statute.

2. As a general rule, a strong presumption arises that a settlement of accounts between parties embraces all the items each has against the other, which are due; and this presumption throws the burden of proof upon one asserting the contrary, to prove that the item was not due, or was omitted by consent of the parties, or by accident.

3. Evidence of admissions by parties, is, as a general rule, unsatisfactory; but not always so. Sometimes it is the most satisfactory of all verbal testimony, when the admission was made understandingly and deliberately, and is testified to by an intelligent, truthful witness of good memory. But it is weak otherwise, and especially if testified to by an unintelligent, forgetful or biased witness.

483.—Redmond Prindiville *v.* Obadiah Jackson.—Opinion by SHELDON, J., reversing and remanding.

WATER REGULATIONS—UNIFORMITY—DUTY AND RIGHTS OF CITIZENS.

STATEMENT.—Petition for mandamus to compel the Board of Public Works to allow the petitioners to connect with certain service pipes, attached to water mains, for convenience, when the mains were first laid. The Board had refused, on the ground that the petitioners refused to pay the cost of the service pipes thus laid, on joining them. Mandamus granted. *Held*,

That, as, under the charter, the Board

had full power to make rules and regulations as to the manner of supplying water, etc., to the citizens, and as they had made the regulation that every citizen desiring to connect with the service pipes already laid should pay the cost of laying the same, the condition imposed on the petitioners was but just and reasonable. The claim of the petitioners is the demand of a special privilege; a claim of exemption from their proportionate share of taxation; a claim that the service pipes for their own use shall be furnished at the expense of the city, while other citizens paid for theirs. Rights and privileges should be equal among citizens; and this claim of the petitioners conflicts with the rule of equality and uniformity in taxation.

SUPREME COURT DOCKET.

The following is the list of cases on the docket at Ottawa, for the September term, as forwarded to us by the efficient clerk, Mr. C. D. TRIMBLE:

PEOPLE'S CAUSES.

1. Robbins v. The People, etc.
2. The People ex rel. Hungate v. Cole.
3. Rummell v. Lippencott.
4. Creed v. The People, etc.
5. Quigg, impl'd, v. The People, etc.
6. Cole et al. v. The People, etc.
7. Allen v. The People, etc.
8. Stanley v. The People, etc.
9. Greenwalt v. The People, etc.
10. Johnson v. The People, etc.
11. Compton v. The People, etc.
12. The People ex rel. Evans v. Callaghan.

REHEARING DOCKET.

1. Russell v. Mandell.
2. Keil v. Healey.
3. Dwinnell v. Irvin, trustee.
4. Randles v. Irvin, trustee.
5. Shoemaker v. Irvin, trustee.
6. Melendy v. Keen.
7. Edgerly v. Osgood.
8. The City of Chicago v. The People ex rel.
9. Wheeler et al. v. Pullman et al.
10. Cotes v. Cunningham.
11. Kassing v. Mortimer et al.
12. The M. C. R. R. Co. v. Curtis.
13. Honore, Jr. v. The Home National Bank, etc.
14. Crowley v. Crowley et al.
15. Wadhams v. Hotchkiss.
16. Harris v. Lester et al.
17. The Merchants Despatch Trans. Co. v. Bolles.
18. Ely v. Ely et al.
19. Stinson et al. v. Earnest.
20. Gerard v. Gateau.
21. Lyon et al. v. Culbertson.
22. Cook v. Preble et al.
23. Voigt v. Resor.
24. The Aurora Agricultural and Horticultural Society v. Paddock et al.
25. The People ex rel. v. Brislin et al.
26. Lamb v. The People ex rel.
27. The Commissioners of Highways of Chistnut Township, etc. v. Newell.
28. Shugart, etc. v. Egan.
29. Jordan v. Dodge et al.
30. Wing et al v. Dodge et al.
31. Hart et al. v. Wingate.
32. Hardin v. Osborn.
33. Arnold et al. v. Rhodes et al.
34. Artt v. Osgood.
35. The Pacific Hotel Co. v. Pollock et al.
36. Storey v. Early.
37. The Knickerbocker Insurance Co. v. Gould et al.
38. Goodrich v. Cook.
39. Sperry, Guardian, v. Fanning et al.
40. Guild, Jr., v. The City of Chicago.
41. Dinet v. Eigenmann, Admr., etc.
42. Hernandez v. Drake.
43. Lehmer v. The People ex rel.
44. Herrick v. Gavy.
45. The People ex rel. Miller v. Cooper.
46. Hyman, impleaded, v. Bayne.
47. Roth v. Eppy.
48. McCarty, impld., v. Marlett.
49. Greenleaf et al. v. Beebe et al.
50. Pratt et al. v. Stone et al.
51. Niles et al. v. Harmon et al.
52. Colehour et al. v. Coolbaugh.
53. The Illinois Central Railroad Company v. Green.
54. Eldridge v. Walker et al.
55. Dryer et al. v. Durand et al.
56. Fauntleroy et al. v. Wilcox et al.
57. Morrill v. Colehour et al.
58. Samuel v. Agnew.
59. Reynolds v. Greenebaum.
60. Harvey v. Drew.
61. Warren v. Tyler et al.
62. Bowen et al. v. Bond et al.
63. Claassen, impld., v. Schoenemann et al.
64. King v. Mix et al.
65. Walker v. Carrington et al.
66. Melvin et al. v. The Lamar Insurance Company et al.
67. Grant et al. v. Bennett et al.
68. The Chicago, Burlington & Quincy R. R. Co. et al. v. Chamberlain et al.
69. Berdel v. Berdel.
70. Donlin v. Daegling et al.

CIVIL CAUSES.

1. Chapman v. Kent et al.
2. Wilson v. Robinson.
3. The Town of Crete v. Smith.
4. VanDeventer v. The People ex rel.
5. The Chicago, Rock Island & Pacific Railroad Co. v. Collins.
6. O'Conner etc. v. Netterson et al.
7. Stenquist v. Marvin et al.
8. Quinn et al. v. Berkley.
9. Reid v. Driscoll, etc.
10. Truitt v. Hull.
11. The Garden City Ins. Co. v. Gloyd, executor, etc.
12. West et al. v. Dement.
13. Reid v. Rice et al.
14. Meacham v. Lawver.
15. McAuley et al. v. The C., C. & I. C. R. R. Co.
16. Schofield v. Tompkins.
17. The P. & R. I. R. R. Co. v. Darst.
18. Fargo v. Goodspeed, etc.
19. The Eclectic Life Ins. Co. v. Beck.
20. Spanknebble v. Ludwig.
21. The City of Chicago v. Hessing, etc.
22. Fitzpatrick et al. v. The City of Joliet.
23. The First Univ. Soc. of Joliet v. The City of Joliet.
24. Johnson v. Estabrook.
25. Davidson v. Bushnell et al.
26. The Lake Shore & M. S. R. R. Co. v. McMillen et al.
27. Brazee v. Lawrence.
28. Ottawa, Oswego & F. R. V. R. R. Co. v. Hopkins.
29. Wade v. Bunn.
30. Johnson v. Watson.
31. Nelson v. Watson.
32. Pierce v. Shippee et al.
33. The C., B. & Q. R. R. Co. v. The People, etc.
34. Wright et al. v. Smith.
35. Sheen v. Hogan et al.
36. The T., P. & W. R. R. Co. v. Johnston.
37. Lynch et al. v. Swyne.
38. Wright v. The People ex rel., etc.
39. Allen v. Peterson.
40. Mackay v. Mackay et al.
41. Allen et al. v. Collins.
42. Arnold v. The I. C. R. R. Co.
43. Hinninger v. Hoshor et al.
44. Galt v. The People ex rel., etc.
45. Bowen et al v. The People ex rel., etc.
46. Pierce v. The People ex rel., etc.
47. Fox v. The People ex rel., etc.
48. The Oakwood Cemetery Ass'n v. The People ex rel., etc.
49. Butler v. The People ex rel., etc.
50. Walter et al. v. The People ex rel., etc.
51. Cooke et al. v. The People ex rel., etc.
52. Simon v. The People ex rel., etc.
53. Parker v. The People ex rel., etc.
54. Jackson v. The People ex rel., etc.
55. Maher et al. v. The People ex rel., etc.
56. Holden v. The People ex rel., etc.
57. Tucker v. The People ex rel., etc.
58. Gilbert v. The People ex rel., etc.
59. Jordon et al. v. The People ex rel., etc.
60. Sutherland v. The People ex rel., etc.
61. Jackson v. The People ex rel., etc.
62. Andrews et al. v. The People ex rel., etc.
63. Andrews v. The People ex rel., etc.
64. Forsythe et al. v. The People ex rel., etc.
65. Lancaster et al. v. The People ex rel. Miller.
66. Wood et al. v. The People ex rel. Miller.
67. McKichan v. The People ex rel. Miller.
68. Page v. The People ex rel. Miller.
69. Crawford et al. v. The People ex rel. Rumsey.
70. Hawley v. The People ex rel. Miller.
71. Wing et al. v. The People ex rel. Miller.
72. Brown et al. v. The People ex rel. Miller.
73. Holdon et al. v. The People ex rel. Miller.
74. Mason et al. v. The People ex rel. Miller.
75. The Cook Co. Land Co. v. The People ex rel. Miller.
76. Andrews v. The People ex rel. Miller.
77. Holden et al. v. The People ex rel. etc.
78. Fullerton v. The People ex rel. Miller.
79. Stinson v. The People ex rel. Miller.
80. Hill v. The People ex rel., etc.
81. Galt et al. v. The People ex rel., etc.
82. Jackson v. The People ex rel., etc.
83. Halsey et al. v. The People ex rel., etc.
84. Tabor v. The People ex rel., etc.
85. Pike v. The People ex rel., etc.
86. Forsythe v. The People ex rel., etc.
87. Harding, executor, etc., v. The Town of Hale.
88. Barber v. Chandler, receiver.
89. Rowell v. Chandler, receiver.
90. Walker v. The People ex rel., etc.
91. Potwin et al. v. The People ex rel., etc.
92. Fisher v. The People ex rel., etc.
93. Prout et al. v. The People ex rel., etc.
94. Martin v. The People ex rel., etc.
95. Hamilton et al. v. The People, ex rel., etc.
96. Honore v. The People ex rel., etc.
97. Vail v. The People ex rel., etc.
98. Broad et al. v. The People ex rel., etc.
99. Beers v. The People ex rel., etc.
100. Gaytes v. The People ex rel., etc.
101. Loomis v. The People ex rel., etc.
102. Derby v. The People ex rel., etc.
103. Hansbrough v. The People ex rel., etc.
104. Walker v. The People ex rel., etc.
105. Rankin v. The People, ex rel., etc.
106. Littlewood v. The People, ex rel., etc.
107. Brant v. the People, ex rel., etc.
108. Prout v. The People, ex rel., etc.
109. Walker, et al., v. The People, ex rel., etc.
110. White v. The People, ex rel., etc.
111. Jones v. The People, ex rel., etc.
112. Waite v. The People, ex rel., etc.
113. Hoxie v. The People, ex rel., etc.
114. Race v. The People, ex rel., etc.
115. Brown v. The People, ex rel., etc.
116. Beers, et al., v. The People, ex rel., etc.
117. Walker, et al., v. The People, ex rel., etc.
118. Tyler, et al., v. the People, ex rel., etc.
119. Gaytes v. The People ex rel., etc.
120. Brislin v. The People ex rel., etc.
121. Derby v. The People ex rel., etc.
122. Honore v. The People ex rel., etc.
123. Walker v. The People ex rel., etc.
124. Johnston v. The People ex rel., etc.
125. Walker v. The People ex rel., etc.
126. Brown v. Smith.
127. Seivers et al. v. Peterson.
128. Cassidy v. Cook et al.
129. Wrenn et al. v. Catton, for use, etc.
130. Walker et al. v. The People ex rel., etc.
131. Whitman et al. v. Henebery.
132. Brooks, Jr. v. Kearns.
133. The P., C. & St. L. R. R. Co. v. Weldt.
134. Walker et al. v. The People ex rel., etc.
135. Elder et al. v. Marshall.
136. Waldron et al. v. Marcier.
137. Brown v. Smith.
138. Dinet v. Eigenmann.
139. Cline v. Mann et al.
140. Major v. Sullivan et al.
141. Mullen et al. v. Gilbert et al.
142. Fensenthal et al. v. Durand et al.
143. Ludwig et al. v. Sager.
144. Baird v. The People, etc.
145. The Unknown Heirs of Hiram Thornton, dec'd, impl'd, etc., et al. v. Thornton.
146. Hawhe et al. v. Jennings.
147. Hawhe et al. v. Snydaker et al.
148. Bailey et al. v. White.
149. Cummings v. Burleson.
150. Stevens v. Downing.
151. Seymour et al. v. McConihe.
152. Peck et al. v. Immel.
153. Tomlinson et al. v. Osgood.
154. Seymour v. Belding.
155. Richardson v. Davis.
156. Reed et al. v. Boyd et al.
157. Davidson et al. v. Lighter.
158. Wadhams et al. v. Gay et al.
159. Sidway v. Marshall.
160. Town et al. v. Jones.
161. Ryan etc. v. Driscoll.
162. Taylor v. Adam.
163. Stone etc. v. Wilbern et al.
164. Boyer et al. v. Boyer.
165. Darst v. Gale et al.
166. Wilcox et al. v. Fairbanks et al.
167. Alden et al. v. Goldie et al.
168. Young v. Williams et al.
169. Huestis et al. v. Johnson et al.

(*To be continued.*)

We are under obligations to FREDERIC ULLMANN, of the Chicago bar, for the following opinion:

SUPREME COURT OF ILLINOIS.

OPINION FILED JUNE 30, 1876.

JESSE M. HOAGLAND *v.* GIDEON CREED et al.

Error to Morgan.

Where a case was tried by agreement before a member of the bar, and a judgment rendered by him as judge of the Circuit Court, the judgment was declared to be a nullity.

SCHOLFIELD, J.—The record brought before us by this writ shows a trial by agreement before Edward P. Kirby, Esq., a member of the bar, and what purports to be a judgment rendered by him as judge of the Circuit Court of Morgan county. The bill of exceptions, or rather what purports to be the bill of exceptions, is signed by him, and it is impossible for us to close our eyes to the fact, however strongly inclined we may be to do so, that the record sought to be reviewed, is one made by Edward P. Kirby, Esq., a member of the bar, and not by any one commissioned to act as Circuit Judge. What we might hold, did it appear that he was acting as Circuit Judge under color and claim of authority, we will not say. It is sufficient that all pretense that he was a judge *de facto* is without any foundation in the record. It expressly shows that he is a member of the bar, and that his authority for assuming to act as judge, was the agreement of the parties. Freeman on Judgment, sec. 148; Case *v.* State, 5 Ind., 1; State *v.* Anone, 2d Holt and McCord, 27; State *v.* Alling, 12 Ohio, 16; Blackburn *v.* State, 3 Head, 690, and Pepin *v.* Lachenmyer, 45 New York, 27, cited by the counsel for the defendant in error, are, therefore, not in point.

Under our Constitution, judges are elected by popular vote, except to fill vacancies not to exceed one year, which shall be filled by the appointment of the governor. Const. 1870, Art. 6, sec. 32—and all judges shall be commissioned by the governor. Same Art., sec. 29. And unlike the Constitution of some other States, it contains no authority for temporarily filling the office in any other way. With regard to the doctrine that consent cannot confer jurisdiction as to the subject-matter, and that judicial power cannot be delegated, we deem it unnecessary to enter into any extended discussion. All that need be said on these subjects is so well said by Judge Cooley in his work on Constitutional Limitations, 1st Ed. p. 399, that we shall content ourselves with transcribing it:

"But, the courts of a country cannot have these controversies referred to them by the parties which the law-making power has seen fit to exclude from their cognizance. If the judges should sit to hear such controversies, they could not sit as a court; at the most, they would be arbitrators only, and their action could not be sustained on that theory unless it appears that the parties had designed to make the judges their arbitrators, instead of expecting from them valid judicial action as an organized court. Even then the judgment could not be binding as a judgment, but only as an award, and a mere neglect, by either party to object to the want of jurisdiction, could not make the decision binding upon him, either as a judgment or as an award."

If the parties cannot confer jurisdiction upon a court by consent, neither can they by consent empower any individual other than the judge of the court to exercise its powers.

Judges are chosen in such manner as shall be provided by law, and a stipulation by parties that any other person than the judge shall exercise his functions in their case, would be nugatory even though the judge should vacate his seat for the purpose of the hearing.

That which in the present record purports to be a bill of exceptions and judgment, is therefore a nullity, and there is no case before us upon which we are authorized to render final judgment. It follows the writ of error must be dismissed.

Writ of error dismissed.

CHICAGO LEGAL NEWS.

CHICAGO, SEPTEMBER 16, 1876.

The Courts.

SUPREME COURT OF THE UNITED STATES.

No. 219.—OCTOBER TERM, 1875.

THE STEAM FERRYBOAT AMERICA, her Tackle, etc., THE UNION FERRY COMPANY, Claimants.

v.

THE CAMDEN AND AMBOY RAILROAD TRANSPORTATION COMPANY.

Appeal from the Circuit Court of the United States for the Southern District of New York.

The court states the rule as to what is required of vessels meeting or passing each other, so as to avoid a collision.

Mr. Justice CLIFFORD delivered the opinion of the court.

Sailing rules were ordained to prevent collisions between ships employed in navigation, and to preserve life and property embarked in that perilous pursuit, and not to enable those whose duty it is to adopt, if possible, the necessary precautions to avoid such a disaster, to determine how little they can do, in that direction, without becoming responsible for its consequences, in case it occurs.

Except in special cases the sailing-ship is required to keep her course where a steamship is approaching in such a direction as to involve risk of collision, but the rule is widely different if the two ships are under steam, and they are meeting end on, or nearly end on, so as to involve risk of collision, the requirement in that event being that the helms of both shall be put to port, *so that each may pass on the port side of the other.* 13 Stat. at Large, 60.

Steamships meeting end on, or nearly end on, should seasonably adopt the required precaution, and neither can be excused from responsibility, in case of omission, merely upon the ground that it was the duty of the other to have adopted the corresponding precaution at the same time, if it appears that the party setting up that excuse enjoyed equal facility to obey the requirement with the other party, and might have prevented the disaster. Imperative obligation is imposed upon each to comply with the rule of navigation, nor will the neglect of one excuse the other, in a case where each might have prevented the disaster, as the law requires both to adopt every necessary precaution, if practicable, to prevent the collision, and will not tolerate any attempt of either, in such an emergency, to apportion the required precaution to avoid the impending danger, in case where both or either might secure perfect safety to both ships and all entrusted with their control and management.

Two steamboats, to wit, the steamtug Fairfield and the ferryboat America, on the thirteenth of December, 1866, collided in East river, in the harbor of New York, and it appears by the transcript that the owners of the former instituted the present suit in the district court of the United States against the ferryboat, to recover damages for the injuries sustained by the steamtug on the occasion, whereby it is alleged that she was damaged to such an extent that she soon sunk and became a total loss. Service was made and the owners of the ferryboat appeared and filed an answer. Testimony was taken on both sides, and the district court having heard the parties, entered a decree dismissing the libel, and the libellants appealed to the Circuit Court. Hearing was again had in the Circuit Court, and the Circuit Court reversed the decree of the district court and entered a decretal order in favor of the libellants, and referred the cause to a master to estimate the damages. Subsequently the master made a report, to which the respondents filed exceptions, but the Circuit Court overruled the exceptions and entered a final decree in favor of the libellants for the sum of seventeen thousand seven hundred and twenty-three dollars and seventy-five cents, with the costs of both courts; from which decree the respondents appealed to this court.

Sufficient appears to show that the steamtug was proceeding down East river, having come from the navy-yard, and that she was bound on a trip round the Battery into the North river; that the other steamer was a ferryboat, belonging to the Fulton ferry, and was making one of her regular trips from her slip at the foot of Fulton street, New York, to her slip at the foot of Fulton street in the city of Brooklyn. Theories widely different, and irreconcilably inconsistent, are maintained by the respective parties, but it may afford some aid in reaching the true solution of the controversy to reproduce those theories before adverting to the evidence by which each of the parties attempts to show that the other is responsible for the disaster.

Both parties agree that the tide was ebb, and the libellants allege that the steamtug, in proceeding on her intended trip, was heading down the river nearly in the middle of the same when the ferryboat left her slip on the New York side, for the purpose of transporting her passengers to her slip on the Brooklyn side; that as the two vessels advanced towards each other she, the steamtug, blew one whistle to indicate that she intended to go to the right, and that she ported her helm at the same time as evidencing that intention; that the ferryboat paid no attention to the signal given by the steamtug, but continued her course up the river and towards the vessel of the libellants, and that the steamtug, finding that the ferryboat was rapidly approaching without changing her course, and that a collision would probably ensue if she, the steamtug, pursued her course, rung her bell to slow, stop, and back, and the libellants aver that the orders were promptly obeyed and that the headway of their vessel was nearly or quite stopped, and they charge that it was not until their vessel was in that condition that the ferryboat blew two whistles to indicate that it was her intention to go to the left, and they also aver to the effect that it was then too late to avoid a collision, for two reasons: first, because the vessels were too close together; and secondly, because the power of the steamtug to move forward was stopped; that the steamtug, under the circumstances, could not do anything except to continue to back her engine, and the allegation is that the ferryboat kept on at full speed, striking the steamtug on her port bow, crushing in her planks and timbers to such an extent that she sank in a few minutes.

Suppose those allegations were all founded in fact, the conclusion of the libellants that the collision happened through the carelessness, negligence, and want of skill and proper management in those navigating the ferryboat might perhaps be adopted as correct, but the whole theory of fact involved in those allegations is denied by the respondents, and they allege that when the pilot of the ferryboat discovered the steamtug, the former was not more than two hundren yards from the Brooklyn shore and about the same distance from her slip on that side of the river, and that she was heading up the river, against a strong ebb tide, for the purpose of getting room to swing into her slip, and that the ferryboat was under full speed, heading down the river and towards the Brooklyn shore, on a course which, if continued, would carry her in front of the steamtug on the Brooklyn side of the river; that the ferryboat thereupon kept steadily on her course up the river, in order that the steamtug might pass in front of her, as she easily might have done, without any danger of collision, and the respondents allege that the steamtug continued that course under full headway, until she was within a short distance of the ferryboat, when it was impossible for the two boats to prevent a collision, and the respondents aver that it was at that moment and under those circumstances that the steamtug blew one whistle, to indicate that she intended to go to the right, and that the ferryboat answered the signal with one whistle, and put her helm hard-a-port and reversed her engine and backed, which was all she could do in the emergency to avoid the impending peril. Hence they aver that the collision was caused by the carelessness, negligence, and want of skill and proper management of those in charge of the steamtug.

Evidence giving some support to each of the conflicting theories is exhibited in the record, and the District Court decided in favor of that assumed by the respondents, but the Circuit Court was of the opinion that the libellants ought to recover, and entered a final decree in their favor.

Mutual accusations are made, each against the other, that the respective steamers were without lookouts, but the court here does not find it necessary to give such accusations, in this case, much examination, as the proofs are clear and satisfactory that each vessel was seen by the other in ample season to have adopted every necessary precaution to have prevented the collision, and it also appears to the entire satisfaction of the court that the want of a lookout on the one side or the other did not contribute in any degree to the disaster, which is all that need be remarked in respect to those accusations. The Farragut, 10 Wall, 338; City of Washington, 91 U. S.

Viewed in the light of these suggestions, it is quite clear that the decision must turn upon the merits of the controversy. Inevitable accident is not set up by either party, nor could it be with any hope of success, as it appears beyond all doubt that each steamer was seasonably seen by the other, as they were approaching nearly end on, and that they collided, the ferryboat striking the steamtug on the port bow, just aft the stem, in the open channel of the river, where each might have passed the other on either side in perfect safety, if proper measures for that purpose had been seasonably adopted to carry such an intention into effect.

Decided support to the material facts of that proposition is found in the libel and in the answer, as well as in the statements of the principal witnesses on both sides. Nothing different could have been intended by the libellants, as they allege that the steam tug "headed down the East river and about the middle thereof," and the respondents allege that the ferryboat "was heading up the East river against a strong ebb tide, for the purpose of getting room to swing into her slip."

Confirmation of that view is also derived from the charts exhibited by the parties, which show that the two steamers were approaching each other nearly end on, without any substantial change of course, until they were so close together that no efforts of those in charge of their navigation could possibly have avoided the impending danger.

Argument to show that nothing could have been done at that moment to avoid the collision is quite unnecessary, as the proposition is self-evident, but the fault consists in getting the two vessels into that dangerous situation. Precautions, in such cases must be seasonable in order to be effectual, and if they are not so, and a collision ensues in consequence of such delay, it is no defense to allege and prove that nothing more could be done at the moment to prevent it, nor to allege and prove that the necessity for precautionary measures was not perceived until it was too late to render them availing.

Inability to do anything effectual to prevent a collision, at the moment it occurs, usually exists, but it seldom happens that there is much difficulty in tracing the cause which produced it to some antecedent neglect, carelessness or unskillfulness in those having the command of one or both of the vessels.

Two ships under steam, if they are meeting end on, or nearly end on, so as to involve risk of collision, are required to put their helms to port, so that each may pass on the port side of the other, but if they neglect to comply with that requirement until it is so late that the object to be accomplished cannot be effected, it is no defense to allege or prove that one or both ported their helms before the collision occurred, for unless a party seasonably complies with the requirement, the act of compliance is without substantial merit.

Both parties allege in this case that they ported their helms, and the court here is of the opinion that if either had put the helm hard-a-port in season the loss of property would not have taken place. Beyond all doubt it was the duty of each to have complied with that rule, but inasmuch as the circumstances convince the court that if either had properly complied with the rule the collision would have been avoided, the conclusion must be that both were in fault.

Seasonable compliance with the rule is not alleged by the respondents, nor is there any proof exhibited in the transcript to warrant such a conclusion. Instead of that the answer admits, in effect, that the collision was inevitable before the ferryboat put her helm to port. Nor have the respondents attempted to place their defense entirely upon that ground. Merit to some extent is claimed by the libellants because those in charge of the steamtug did at sometime blow one whistle, to indicate that the steamtug would go to the right, and that she ported her helm, but the evidence convinces the court that the signal was not seasonable, and that the porting of the helm was by no means sufficient to constitute a compliance with the rule of navigation.

Grant that, and still the libellants suggest that the ferryboat paid no attention to the signal, and it may be that the charge is correct, but if so it would not follow that the steamtug might run down the ferryboat, as rules of navigation are ordained to preserve life and property, and not to promote or authorize collision. Even flagrant fault committed by one of two vessels approaching each other from opposite directions will not excuse the other from adopting every proper precaution to prevent a collision. The Maria Martin, 12 Wall., 47.

Admit that proposition, and still the libellants suggest that they also rung to slow, stop, and back, and they aver that the signals to that effect were properly obeyed, but the court is convinced from the evidence that these last mentioned signals immediately followed the whistle to go to the right, and that the signals, one and all, were too late to be effectual.

Indefinite as the allegations of the libel are, it may well be urged that the libel contains nothing inconsistent with that conclusion, and the answer expressly alleges that as soon as the steamtug blew her whistle it was obvious that she would strike the ferryboat on the starboard side, unless the ferryboat changed her course "to ease the blow."

Tested by these several considerations, the court here is of the opinion that both vessels were in fault and that the damages and the costs in both of the courts below should be equally apportioned between the two vessels, as prescribed by the decisions of this court. The Catharine, 17 How., 173. The St. Charles, 19 How., 109. The Maria Martin, 12 Wall., 43. The Morning Light, 2 Id., 557.

Decree reversed, with costs in this court, and the cause remanded with directions to apportion the damages and the costs in both courts below equally between the respective vessels, in conformity with the opinion of the court.

U. S. DISTRICT COURT, W. DIST. MICHIGAN.

OPINION MAY 8, 1876.

In re WILLIAM W. PHILLIPS.

In the matter of the proof of debt of Chase, Isherwood & Co.

The requisites of a notarial seal are determined by the law of the locality from which the official derives his authority.

An official seal is an impression on the paper directly, or on wax or wafer attached thereto, made by the official, as and for his seal.

In the absence of express legislation, an official seal need not contain the name of the official.

It is the seal, and not its composition or character of words and devices which raises the presumption of official character of which the courts take judicial notice.

The presumption is, that a seal is the official seal of the person it purports to be, and who subscribed the jurat.

Any impression made upon sealing-wax or wafer adhering to the paper, without any device or words indicative of the particular official, is entitled to judicial sanction as evidence of the official character of the individual who signs the jurat.

WITHEY, J.—Chase, Isherwood & Co., of Ohio, proved their claim against the bankrupt estate before a notary public of Lucas county, Ohio, who subscribed the jurat "A. E. Scott, Notary Public, Lucas Co., Ohio." On the paper containing his certificate is impressed a seal containing the words "Notarial Seal, Lucas Co., Ohio," in the center of which seal is distinctly seen a device of some kind impressed upon the paper.

We are referred to, but cannot follow the judgment, *in re* Henry Nebe, 11 N. B. R., 289, where it was decided by Mr. Register Clark, of the Eastern District, and approved by Judge Longyear, that a proof of debt before a notary public of Wayne county, Michigan, authenticated by his signature and a seal impressed on

the paper, containing the wards "Notary Public, Wayne Co., Michigan," was defective and insufficient, because the name of the notary was not on the seal, and impressed upon the paper. Reference was made in that case to Gay *v.* Railroad Co., 11 Iowa, 310, 314, in support of the conclusions reached.

The certificate and seal in the Iowa case were those of a commissioner for the State of Iowa, residing in New York. He certified to an affidavit made before him, and authenticated it by his signature and a seal, in the body of which the name of the State, "Iowa," was written with a pen, and not impressed.

The authenticated seal in the Iowa case was partly impressed and partly in writing, which fact alone would render the seal not entitled to credit as evidence, for the Iowa code requires the commissioner's seal to be *impressed* on the paper, or on wax or wafer thereon. It also requires the seal of a notary public to have *his name* and the words "Notarial Seal, Iowa," thereon, so as to impress the same upon his certificates. That case, therefore, while undoubtedly rightly decided, comes far short of authority for the rejection of the seal as evidence in the case of Chase, Isherwood & Co.'s claim.

The generally received doctrine is that a notarial seal proves itself. Starting out with this fundamental rule, the question is presented, What is it that determines the character or make-up of a notary's or other official's seal? We answer, It is determined by the law of the locality from which the official derives his authority; or, if there is no law prescribing what the seal shall be, resort must be had to the common law to ascertain. So far as we can learn, the laws of Onio do not prescribe what the seal shall be, or, at least, do not require that the name of the notary shall be thereon, as the laws of Michigan do not.

At an early date, a seal was an impression on wax, according to Lord Coke. 3 Inst., 169. Signets and rings were used from very ancient times to make impressions in wax, as seals. Afterwards an impression upon wax, wafer, or other tenacious substance capable of being impressed, was held sufficient as a seal 5 John. R., 230.

A plate of metal, on which is engraved the arms or device of a public official, has long been used. More recently, machines which stamp the paper and impress the seal thereon, without wax, wafer, or other substance to receive the stamp, are held sufficient as to public official seals. Pillow *v.* Roberts, 13 How., 472. Where has it ever been held in common law courts that an official's seal must contain his name? We fail to find one in the absence of express legislation. An official seal, then, is the impression on the paper directly, or on wax or wafer attached thereto, made by the official as and for his seal. But how are courts to know that it is his seal unless it contains his name, not written, but impressed on the document? The seal of a notary public is taken judicial notice of, the world over. We venture to affirm that the presumption in favor of an official seal does not arise from the name impressed on the paper; on the contrary, it is the seal which authenticates, not the particular name, word, or device on it. This is in harmony with the common law idea of a seal, viz., the impression, and had its origin in those days when the great men and official dignitaries of earth could not write their names, and so had to sign by the signet, ring, cross, etc. Hence the seal impression placed upon a document by a notary public, signifies authentication of his official character. It is the seal and not its composition or characters of words and devices which raises the presumption of official character, of which courts take judicial notice. Accordingly, it has been held sufficient, when the words and devices have been so far obliterated and defaced from a seal that nothing certain could be made out as to its particular character, if enough remained to show satisfactorily that the document had been sealed. Again, where, owing to defacement or obliteration, the question is raised as to a seal having been impressed, the fact has been referred to a jury for a verdict. 3 McLean, 332; 4 McLean, 247.

Suppose, then, this was the case of a partially obscured or defaced seal, or one whose impression was so imperfect that the words and character upon it could not be made out; the only question would be, was it sealed, and not whether the name of the notary appeared.

Our opinion is, that the seal in this case, of which we take judicial notice, is evidence of the notarial character of Scott; the presumption being that it is the official seal of the person it purports to be, and who subscribed the jurat. We even think any impression made upon sealing-wax or wafer adhering to the paper, without any device or words indicative of the particular official, would be equally entitled to judicial sanction as evidence of the notarial or official character of the individual signing his name as "Notary Public, Lucas Co., Ohio."

The register is directed to allow the proof of claim. The clerk will certify this opinion to the register.

UNITED STATES DISTRICT COURT, MARYLAND,

MARCH 10, 1876.

In re KIRKLAND, CHASE AND CO.

A party who purchased an imported article duty free, and was compelled to pay the duty in order to get possession thereof, is entitled to priority, although he has proved his claim as unsecured.

At various times during the year 1872 William Bayne & Co. purchased sugar in bond from the bankrupts, amounting in the aggregate to one hundred and eighty hogsheads, duty free. In payment for this they gave notes to the bankrupts to the amount of fifty thousand dollars, which were indorsed by the bankrupts and passed for value to *bona fide* holders. The bankrupts paid duty on the sugar from time to time until their failure, when a balance still remained unpaid. On the 5th day of October, 1872, the purchasers paid four thousand eight hundred and nineteen dollars and forty-six cents, to purchase four thousand two hundred and twenty-seven dollars and sixty cents in gold in order to pay duties, and on the second day of December, 1872, their trustees paid one thousand and sixty-seven dollars and nineteen cents, to purchase nine hundred and forty-four dollars and forty-two cents in gold in order to pay duties. The proceedings in bankruptcy in this case were commenced on the 7th day of October, 1872. William Bayne & Co. also failed, and on the 15th day of October, 1872, made an assignment for the benefit of creditors to Andrew Reid, James Hooper, Jr., and P. S. Chappel. Including the claim for duties, there was due from the bankrupts to William Bayne & Co. the sum of twenty-three thousand five hundred and eighteen dollars and twenty-three cents. On the 25th day of October, 1872, the trustees proved this claim. The holders of the notes given for this sugar, having received a dividend from the estate of William Bayne & Co. of fifty-five per cent., also proved for the balance against the bankrupts, who were the indorsers. The assignees contested the claim of the trustees of William Bayne & Co., on the ground that they had a right to set off such dividends as they might be compelled to pay to the holders of the notes. This controversy was referred to an arbitrator, who, on the 6th day of August, 1873, awarded "that the trustees of William Bayne & Co. are entitled to a dividend from the estate of Kirkland, Chase & Co., upon the claim of twenty-three thousand five hundred and eighteen dollars and twenty-three cents, equally with the other creditors of that estate, and that Kirkland, Chase & Co. cannot set up the matter of the dividends they may have to pay the holders of the notes as any bar to the present allowance." After this the trustees received dividends on the claim from time to time, the amount received on the money paid out for duties being eight hundred and seventy-eight dollars and sixty-seven cents. When the trustees proved their claim they were not aware of their right to a priority, but soon afterwards they were aware that D. J. Foley, Bro. & Co. had filed a petition claiming such a right on their claim. In June, 1875, after the decision of the Circuit Court on that petition, the trustees notified the assignees of their claim to priority. It was conceded that the assignees had funds sufficient to pay the claim, if it were allowed. When the sugar was entered at the warehouse, the bankrupts gave a bond, with John C. Bridges and Wm. D. Shurtz as sureties. The sureties also failed, but their estates at the time of the payment of the duties were amply sufficient to pay the claims of the United States.

Andrew Reid, sole surviving trustee, on the 20th day of October, 1875, filed a petition claiming priority for the sum of five thousand and seven dollars and ninety-eight cents, being the balance of the money paid for duty. The assignee filed an answer, setting up the award, the proof of the claim, the laches of the petitioner, and the statute of limitations of two years.

GILES, J.—Let an order be entered that the assignees pay to Andrew Reid, out of the money now in their hands, the sum of five thousand and seven dollars and ninety-eight cents, with interest from October 20th, 1872, and the costs of this proceeding.

We are under obligations to F. W. S. BRAWLEY, for the following opinion:

SUPREME COURT OF ILLINOIS.

OPINION FILED JANUARY 21, 1876.

LOVIRA TAYLOR *v.* GEORGE W. RENN et al.

Appeal from Superior Court of Cook.

SPECIAL CONTRACT—ARCHITECT'S CERTIFICATE — DAMAGES FOR DELAY IN FINDING—POSSESSION.

1. ARCHITECT'S CERTIFICATE.—The work was done under the direction of the architect, and was done in substantial compliance as to the quality of the work, and from his decision there can be no appeal, unless he can be charged with fraud or mistake, his action is conclusive upon the parties.

2. PROOF REQUIRED.—It being the contract of these parties that the certificate of the architect should be conclusive, appellees made out their case by producing and proving such certificate.

3. WAIVING THE RIGHT TO OBJECT ON ACCOUNT OF DELAY.—Appellant knowing of the delay in finishing the building, and permitting appellees to go on with the work after the day specified, making no complaint, waived performance at the day, and continued the contract as in full force after the day specified for its completion.

4. POSSESSION.—That possession of the keys was full possession of the house.

5. RIGHT OF ACTION.—The court states the rule as to the right of a party to bring an action where he has done work under a special contract, but not within the time or in the precise manner as named in the contract.—[ED. LEGAL NEWS.

BREESE, J.—This was *indebitatus assumpsit* in the Superior Court of Cook county, by George W. Renn and William G. Waddell, plaintiff, against Lovira Taylor, defendant, to recover a balance alleged to be due for their work as carpenters and joiners, and materials furnished to complete a brick building belonging to the defendant, situate on West Randolph street, in the city of Chicago.

The cause was tried by the court, without a jury on the general issue.

The court found for the plaintiff, assessing the damages at five hundred dollars, rendering judgment therefor.

To reverse this judgment the defendant appeals and claims plaintiffs were not entitled to recover anything, insisting as a proposition of law that when contractors are shown to be willfully in default and where there is no voluntary acceptance of the work done, the parties in default cannot recover anything for what they have done in their own wrong, and in support of it, refers to a large number of authorities of this and other courts.

We are not disposed to take any exception to this proposition, the *onus* being upon appellant to establish the terms of the proposition, the wilful default and that the acceptance of the work done was compulsory, not voluntary on her part.

What are the proofs?

The agreement to do the carpenter's and joiner's work on this house, and furnish material, was made September third, 1873, plaintiffs agreeing to do the work according to the plans, specifications and drawings of Theo Karls, architect, in a good, substantial and workmanlike manner, "to the satisfaction of and under the direction of the said architect." They agreed to complete the job by the fifteenth of November of the same year and in case of failure to pay twenty dollars per day, for each day later. For which work and material, and their completely and faithfully executing it and furnishing the materials therefor, so as to carry out the contract and the design according to its true spirit, meaning and intent, and at the time mentioned and to the full and complete satisfaction of said Theo Karls, the architect and superintendent, defendant agreed to pay plaintiffs the sum of two thousand and forty-five dollars upon the estimates of said Karls. It was further agreed that before plaintiffs should be entitled to demand payment for the work or any part of it they should produce to the defendant a writing or certificate under the hand of the architect and superintendent Karls, stating the amount due for materials furnished and work done by the plaintiff as per contract.

It was further agreed, in case any difference of opinion should arise between the parties in relation to the contract, the work to be performed under it, or in relation to the plans, drawings and specifications, the decision of Theo. Karls, the architect, should be final and binding on all the parties.

We have examined the testimony in the cause, and fail to find any willful or other default on the part of appellees.

Whilst the work progressed, the required certificates of the architect were presented and paid. So, that, up to November 17, 1873, one thousand dollars had been paid on the contract. On that day, another certificate was presented by appellees to appellant, for four hundred dollars, on which she paid the sum of one hundred dollars only. The final certificate was issued by the architect on the 16th of January, 1874, which, after deducting one hundred dollars on account of lumber furnished of an inferior quality, *leaving* a balance due of five hundred and sixty-nine dollars. This, added to the balance due on November 17, 1873, of three hundred dollars, shows a balance due appellees, of eight hundred and sixty-nine dollars.

The architect and superintendent, Karls, testified that the work was done by appellees under his superinterndence and direction; that it was performed substantialy as required by the contract; that they did as he directed; that he was at the building every other day, or every third day while the work was progressing, in October and November, and probably three or four days in December, and was there in January.

It is sufficient, in disposing of this appeal, to advert only to the contract and this testimony of the architect. The work was done under his superintendence and direction, and was done in substantial compliance as to quality of work and materials used, and from his decision there can be no appeal, unless he can be charged with fraud or mistake. The architect knew what the contract required, and his testimony is with direct reference to its terms. His action is conclusive upon the parties. Canal Trustees *v.* Lynch, 5 Gilm., 521; McAvoy *v.* Long, 13 Ill., 147; McAuley *v.* Carter, 22 Ib., 52, and Korp *v.* Lill, decided at September Term, 1874, where all the cases are reviewed.

It being the contract of these parties that the certificate of the architect should be conclusive, appellees made out their case by producing and proving such certificate. He was made the judge of all matters pertaining to the contract. He drew the plans and specifications, and superintended the work, and when he certifies the money was due under the contract and testifies the work was done in substantial compliance with its terms, what should prevent a recovery?

Appellants say there were defects in the material. That may be so, but the architect allowed one hundred dollars for that, and another architect, Bauman, testified that sum would have completed the work substantially, according to the contract. There is then no evidence of default, wilful or otherwise, so that one of the terms of appellant's proposition drops out.

But it is said the contract was not completed at the time specified. There was no claim set up for the stipulated damages on that account. But was there any delay for which appellees are justly chargeable? The contract was to do the joiner and carpenter work on a brick building. It needs no argument to show, even if the contract for such work does not provide, that it is always made with the understanding that the owner of the building shall keep the mason's work so advanced as to enable the carpenters to do their work. Cold, freezing weather arrived whilst this work was in progress; appellant was requested by the architect on three or four occasions to heat the building so that the plastering might dry, which she promised to do, but did not do. Had it been heated, the carpenter's work, he testifies, could have

been completed by the 15th December, and by the time specified in the contract, had the plastering been dry. By the specifications the base and casings were not to be put on until the plastering was thoroughly dry, and appellees were delayed on this account. Heating was necessary to dry the plastering—it was not dry enough for the carpenter's work to go on until the first of January. The delay, then, is not chargeable to appellees. Appellant prevented the work from proceeding by reason of failing to heat the building. It was her act or omission. Marsh *v.* Kauff, decided Sept. Term, 1874, and such is the acknowledged doctrine everywhere.

Appellant, knowing of this delay, and permitting appellees to go on with the work after the day specified, making no complaint, waived performance at the day, and continued the contract as in full force after the day specified for its full completion, and this she had a clear right to do. If this was a condition precedent, it ceased to be so by the subsequent conduct of appellant.

The other term of appellant's proposition is, there was no voluntary acceptance of the work. Being sworn as a witness, she testifies she was at the building very often, as much as once or twice a week; that the keys were delivered to her sometime in January, 1874; had demanded them before. There was no compulsory acceptance here. Possession of the keys was full possession of the house, and they were delivered to her on her own demand, and which she freely accepted. So that there is nothing left of the two terms of appellant's proposition. The case cited by appellant, from 5 Gilm., 91, Eldredge *v.* Row, holds, if a person contracts to build a house upon the land of another, and proceeds to perform the work in part, and afterwards refuses or neglects to complete it according to the terms of the agreement, it would be impracticable for the employer to abandon, and he may properly appropriate the work so far as it has progressed, without being subject to an action upon a *quantum meruit* unless he should render himself liable by an acceptance.

All the cases cited by appellant on his first point containing the main propositions, are like this case in 5 Gilman, and were executory contracts or contracts only in part performed. If the rule was as contended for, in relation to executed contracts, though not strictly according to their terms, every employer who furnishes the land on which the house is built, if not built in the time specified, and in the precise manner stipulated, and of good materials, but is in fact completed and accepted, and which has added value to the land, could free himself from his obligation to pay for it by alleging the work was not done at the time stipulated, nor such materials furnished as promised, nor that the work was done in the manner agreed.

The true rule, as found in all books of authority, is this: if a party plaintiff prove a special agreement, and the work done, but not pursuant to such agreement, he may recover upon the *quantum meruit*, for otherwise he would not be able to recover at all. Whenever there has been an entire performance of the precedent condition, but not exactly according to the contract, the plaintiff may recover on a *quantum meruit*, Sindingdale *v.* Livingston, 10 Johns, 36. The same in principle is the case of Eggleston *v.* Buck, 24 Ill., 262, and is the doctrine of all common law courts, and by text writers of authority. Chitty on Contracts, 826; Addison on Contracts, 409; Greenleaf on Ev., § 104.

The evidence in this record shows a substantial compliance with the contract though not in all its terms, and on every principle of law and justice, appellant having accepted the work and materials, is liable in this action.

Appellees have filed cross-errors, having excepted to the finding of the court, as less than their proofs warranted. They clearly show that on November 17, 1873, there was the sum of four hundred dollars due them on the architect's certificates and estimates of that date. Of this sum, one hundred dollars only was paid. On the certificates of January 17, 1874, there was due appellees, five hundred and sixty-nine dollars. The amount of appellees' recovery should have been three hundred dollars, with interest from November 17, 1873, *plus* five hundred sixty-nine dollars, with interest from January 17, 1874.

The judgment is reversed and the cause remanded, with directions to the Superior Court to render a judgment accordingly.

The cause is remanded for that purpose.

DENT & BLACK, for appellants.
F. W. S. BRAWLEY, for appellee.

Through the kindness of WM. M. HOWLAND, of the Chicago bar, we have received the following opinion:

SUPREME COURT OF ILLINOIS.

OPINION, JANUARY, 1876.

EMIL HORNER *v.* JESSE B. SPELMAN et al.

Appeal from Superior Court of Cook.

CERTIFICATES — TRANSCRIPT — EVIDENCE — DISCHARGE IN BANKRUPTCY.

A transcript of record of court of foreign State, certified by the clerk under the seal of court, together with a certificate of the presiding judge that the attestation is in due form, is a proper authentication.

The plea of payment in this case is not sustained by the evidence.

It is not error to refuse to admit in evidence a discharge in bankruptcy, when such discharge was not pleaded.

A judgment for fraud is not released by a discharge in bankruptcy.

BREESE, J.—This was debt in the Superior Court of Cook county on a judgment rendered by the Superior Court of Hartford county, in the State of Connecticut, in an action for damages sustained "by reason of sundry covins, frauds, wrongs and injuries by the defendant committed against the plaintiffs."

The defendant pleaded *nul tiel record* payment and accord and satisfaction of the judgment, on all which issues were made up and submitted to the court for trial without a jury.

The court found for the plaintiff the amount of the judgment as debt, and assessed the damages by computing interest thereon, and rendered judgment accordingly. The defendant appeals.

Appellant makes objection that the record of the Superior Court of Hartford county is not well authenticated.

We are of opinion it is in substantial compliance with the act of Congress May 26, 1790. Rev. Stat. 1845, appendix 624, and was properly admitted in evidence.

The clerk has certified a transcript of the proceedings under the seal of the court, and the presiding judge of the court has certified that the attestation is in due form. This is all the act of Congress requires. Ducomun et al *v.* Hysinger, 14 Ill., 249.

Under the plea of payment it was attempted to be shown that through an arrangement made with Tobias Kohn, who was on defendant's bail bond in the suit in Connecticut, the judgment had been paid, but the evidence fails to show it. On the contrary, it is shown these plaintiffs have never raised any part of it. They have Kohn's note for a part of it not due at the time of this trial. This arrangement with Kohn was made, as we infer from the testimony, while an action was pending against him on the bail bond. Nothing has been realized from it, and the plea of payment is not sustained. Nor could a release of Kohn from his bail bond be a payment of this judgment. This will not be denied.

It is not like the payment of a debt by a surety, where he can claim in equity, at least, to be subrogated to all the remedies of his principal. Nothing of the kind.

All that is necessary to be said on the refusal of the court to admit in evidence appellant's discharge in bankruptcy is, that such discharge was not pleaded, and had it been it could not avail as the judgment obtained in the Superior Court of Hartford county was for "the covins, frauds, wrongs and injuries" committed by appellant.

Section 33 of the Bankrupt Act provides that no debt created by the fraud of the bankrupt shall be discharged under that act. Bump's Law and Practice in Bankruptcy, 518.

There being no error in the record the judgment must be affirmed.

Judgment affirmed.

WOODBRIDGE & BLANKE, attorneys for appellant.

WALTER M. HOWLAND, attorney for appellees.

SUPREME COURT OF TENNESSEE.

KNOXVILLE, MAY 15, 1876.

J. W. COLBURN et al. MAYOR AND ALDERMEN OF CHATTANOOGA.

JURISDICTION IN CHANCERY. — The Chancery Court has jurisdiction to prohibit the issue of illegal evidences of debt, upon a bill filed by a tax-payer.

CITY SCRIP.—Officers of a municipal corporation may not issue scrip in anticipation of the taxes of another year.

CORPORATE POWERS.—Corporate powers are to be strictly construed.—[ED. *Commercial and Legal Reporter.*

LEA, Special J.

This bill was filed by complainants in behalf of themselves and other tax-payers of the city of Chattanooga, to enjoin the mayor and aldermen from issuing any scrip, treasury warrants, currency, note, bill or other evidence of debt, until legal authority is first obtained for so doing.

The bill alleges that by an act of the General Assembly of the State, approved on the 20th day of March, 1873, entitled "an act to provide for the issuance of bonds by the cities," it is provided that in no case shall the authorities of cities having more than 8,000 and less than 20,000 inhabitants, issue bonds or other evidences of debts until authorized by a two-third vote of the qualified voters of such city, at an election held for that purpose; and when duly authorized so to do, by an election held as aforesaid, such authorities are empowered to issue bonds or evidences of debt not exceeding $100,000 in addition to the debts outstanding at the time of the passage of said act; that Chattanooga contains less than 20,000 inhabitants; that authority has been given by the requisite number of votes, at an election, to issue $100.000 to the Cincinnati Southern R. R. Co.; that without any authority by a vote of the qualified voters of said city, said board of mayor and aldermen have, since the passage of said act of the General Assembly, issued evidences of debt amounting to more than $90,000, and that such evidences of debt consist of warrants on the treasurer, drawn by the mayor and countersigned by the recorder, currency warrants, which are due in one and three years, which are promissory notes, having the form and general appearance of bank bills; that the treasury warrants are payable in city scrip; that by this creation of debts the defendant has greatly depreciated the credit of the city—so much so that said scrip is now bought and sold at from forty to fifty cents on the dollar; that notwithstanding said depreciation, defendants were still issuing large sums of said scrip; that contracts are made payable in cash, but are paid in issues of the city at their cash value, and thus two dollars or more of scrip will be paid for one dollar of indebtedness; that by this means bankruptcy and ruin is being brought upon the tax-payers; that defendants be required to answer and state the amount of evidences of indebtedness issued since the passage of the act of the 20th of March, 1873, in what it consists and the character of the same, and by what authority issued.

The defendant answers, after a motion to dismiss for want of jurisdiction of subject matter and parties, which was overruled by the court, that the entire funded and floating debt of the city is between one hundred and fifty-four and one hundred and fifty-eight thousand dollars, besides some $5.000 or more not audited; that since March 20. 1873, about seventy or eighty thousand dollars of indebtedness has been issued; that they issued the warrants and scrip under the authority of and for the purpose specified in the municipal charter, and to accomplish the objects of their incorporation, and for providing for the payments of the debts and expenses of the city; that upon the coming into office of the present board, they found no money in the treasury and a large outstanding indebtedness, and being deprived by the action of the General Assembly of the State, at its last session, of the power to enforce the collection of taxes for the years 1874-75, they issued warrants and scrips, believing such a course to be necessary to the maintenance of the city government, and for the best interests of the people; that they have the right to issue warrants upon their treasury, whether they have money therein or not, and the right to issue scrip. That the credit of the city is depreciated, but not by any illegal creation of debt, but by the action of the last legislature suspending the collection of taxes; that in one transaction they paid $3,364.83 in scrip, ranging at the rate of from 50 to 75 cents on the dollar; at another time they paid $529.96 in scrip, at from 60 to 75 cents; at another time $2,500 at 60 cents, at another $1,143.20 at 50 cents on the dollar, and $1,300 was paid at 62 or 63 cents, and some few other payments at from 45 to 60 cents were made; that warrants on the treasury were paid in city scrip, bearing ten per cent. interest, if the holder so desires it; that warrants were issued payable in city scrip; that the scrip was not issued to circulate as currency; that the form of the scrip is:

STATE OF TENNESSEE. [1.]

One year after date the Board of Mayor and Aldermen of the city of Chattanooga will pay one dollar to bearer.

THOMAS TAYLOR, Mayor.
———, Auditor.

And endorsed: "This note is receivable for all taxes and other dues of the city on presentation;" that these are now outstanding:

Warrants on Treasurer	$41,183.23
Ten per cent. scrip	26,278.89
One year scrip	8,381.00
Three years scrip	21,771.00
Three years interest on 10 per cent. script	7,458.42

That $100,000 in bonds has been voted to the Cincinnati Southern Railroad Company, but the same is not yet issued; that they have been governed by a conscientious desire to discharge their duty, and that no expense has been incurred or evidence of indebtedness issued but that which they believed to be necessary for the good order, government and improvement of the city, and such as is contemplated in the charter under which they acted. It is admitted that Chattanooga contains a population less than twenty thousand. The cause was heard upon the bill, answer and exhibits, and an injunction granted, and defendants have appealed to this court.

The first question presented by the case for our determination is, had the chancery court jurisdiction of the subject and of the municipal conduct of the defendant by bill filed by a tax-payer? It is insisted for the defendants that illegal acts, such as defendants are charged with, effect the whole public, and the public must, by its authorized officers institute the proceeding to prevent or redress the illegal act, and that therefore the Attorney-General was the proper person to file this bill; and we are referred to the reports of several States thus holding. The better and more universal doctrine is that any tax-payer may bring his bill in equity to prevent the corporate authorities from acting *ultra vires*, where the effect will be to impose on him an unlawful tax, or to increase his burden of taxation. 2 Dillon on Municipal Corporations, sec. 731, says: "In this country the right of *property holders* or *taxable inhabitants* to resort to equity to restrain municipal corporations and their officers from transcending their lawful powers, or violating their legal dates in any mode which will injuriously affect the tax-payers, such as making an unauthorized appropriation of the corporate funds, or of an illegal disposition of the corporate property, or levying and collecting void and illegal taxes and assessments upon real property * * * has been affirmed or recognized in numerous cases in many of the States. It can, perhaps, be vindicated upon principle, in view of the nature of the powers exercised by municipal corporations and the necessity of affording easy, direct and adequate preventive relief against their abuse.

It is better that those immediately affected by corporate abuses should be armed with the power to interfere directly in their own names, than to compel them to rely upon the actions of a distant State officer."

The action of the Chancellor, therefore, in overruling the motion to dismiss the bill for want of jurisdiction, was proper. The charter of the city of Chattanooga provides that the corporation "shall have full power to borrow money on its bonds for any object that its authorities may determine to be important to the promotion of its wellfare, and is not made improper by existing law, provided that the sum borrowed under the provisions of this section, shall not exceed the sum of fifty thousand dollars, with-

out being specially authorized to do so, by a majority of the qualified votes of said city."

The unconstitutionality of the act of March 20, 1873, has been argued with great earnestness, because the caption of the act does not state the subject of the act, and because it repeats the section just quoted from the charter of incorporation of the city of Chattanooga. In the view we have taken of this case, it is immaterial whether said act is constitutional or unconstitutional, or whether it repeats any part of the charter or not. Neither by the act of March 20, 1873, nor by the charter, has the corporation any power to issue warrants on the treasurer, or city scrip, for the purpose of raising money for the ordinary expenses of the corporation. Warrants on the treasurer may be given by an authorized officer to pay money, but only as evidences to him that the debts had been audited by the properly authorized officers of the body, and serve as vouchers to him for his disbursements. Mayor and Council of Nashville *v.* J. G. Fisher et al., Nashville, 1875. If there be not money in the treasury, then the corporation should borrow as provided in the charter or by existing law, or they should levy and collect such tax as to raise whatever sum is needed, and if they can neither borrow, nor raise the money by taxation, to meet their expenditures, then they should cease their expenditures until they can thus realize according to law.

But for no purpose had the corporate authorities the right to issue warrants on the treasury payable in city scrip, or to issue the city scrip. Their action was illegal and contrary to law and public policy. This city scrip is about the size, and upon the same kind of paper, and in every respect very much like national bank notes, and was doubtless designed to circulate as currency.

The court will strictly construe municipal charters, and require clear authority for the powers assumed to be exercised under them. While these defendants aver that they have acted in the utmost good faith, yet so much abuse of power, not to say corruption, has been found in some municipalities, and such onerous burdens placed upon the tax payers, that to use the language of a distinguished author, "it is the part of true wisdom to keep the corporate wings clipped down to the lawful standard."

Let the decree be modified as indicated in this opinion, and the injunction be made perpetual.

SUPREME COURT OF LOUISIANA.

HORTER, PETERSON & FENNER, Appellants,
v.
MERCHANTS MUTUAL INS. CO.

Appeal from Fifth District Court, Parish of Orleans

A company is liable for a risk taken by one of its employees, before business hours, on a vessel past due.

GIBSON & AUSTIN, for plaintiffs.
A. & W. VOORHIES, for defendant.

LUDELING, Ch. J.—The plaintiffs sue defendant for $745, the value of certain goods or merchandise, insured by defendant, which were lost while on board the steamer Victor, from the perils insured against.

The defendant alleges that there was no contract of insurance in regard to the said goods; that the Victor was past due, and news of her loss had reached the city when the plaintiff sent his clerk to effect the insurance, before business hours, and in the absence of the officers having charge of the business department, who procured an employee of defendant to make the indorsement, etc.; that afterward the president notified plaintiffs that the risk could not be taken.

The evidence shows that plaintiffs had a general policy with the defendant; that on Saturday evening plaintiffs received bills of lading for the goods on the Victor, and early Monday morning their clerk went to the insurance office, and presented the said policy at the marine clerk's desk, and that a clerk or employee of the company "wrote up the indorsement in their policy book;" that sometime during that day the president of the company wrote to notify the plaintiff that the company declined the said risk, etc.

It is urged that because the vessel was past due, and the insurance was effected at about 8½ o'clock, a. m., and the indorsement was made by the book-keeper instead of the marine clerk of the company, the contract was no contract.

To this we cannot assent. The plaintiffs had a right to present themselves at the company's office whenever it was open, and to presume that the employees in said office were authorized to transact the business which they undertook to perform; and whether the company would take risks on vessels past due or not was a question within the discretion of the company.

There is no proof that plaintiffs had knowledge that any accident had befallen the steamer when they applied to have the insurance effected.

It is therefore ordered that the judgment of the lower court be reversed, and that there be judgment in favor of the plaintiffs, and against defendant, for $745, with legal interest from judicial demand and costs.

SUPREME COURT OF PENNSYLVANIA.

RESERVE MUTUAL INS. CO. *v.* KANE.

Error to District Court of Philadelphia.

A son has an insurable interest in his father's life.

Under the poor-laws of Pennsylvania, he may be obliged to support his father.

Per Curiam.—By the 28th section of the poor-law of June 13th, 1778, the father and grandfather, and the mother and grandmother, and the children and grandchildren of every poor person not able to work shall, at their own charge, being of sufficient ability, relieve and maintain such poor person, at such rate as the Court of Quarter Sessions of the proper county shall order and direct. Maintenance of a father or mother unable to work is therefore a legal liability. When we add to this the feelings of natural affection, and the desire produced by these feelings to provide for the comforts of parents, the right to effect an insurance on the life of the parent to carry out these purposes ought not to be denied. It would be technical in the extreme to say that a son has no insurable interest in his father's life. Poverty may overtake the father in his lifetime, and thus both father and mother be cast upon the son; or if the father die before her, the necessity may fall at once upon the son. Why then should he not be permitted to make a provision, by insurance, to reimburse himself for his outlays, past or future? What injury is done to the insurance company? They receive the full premium, and they know, in such case, from the very relationship of the parties, that the contract is not a mere gambling adventure, but is founded in the best feelings of our nature, and on a legal duty, which may arise at any time. We are of opinion that the policy is not void.

Judgment affirmed.

We are indebted to ARNOLD TRIPP, of the law firm of Haines & Tripp, for the following opinion:

SUPREME COURT OF ILLINOIS.

OPINION FILED JUNE 30, 1876.

MURPHY *v.* MCGRATH, Adm'r, etc.

ASSAULT AND BATTERY—ABATEMENT OF ACTION—THREATS—EVIDENCE——NEWLY-DISCOVERED EVIDENCE.

Opinion by BREESE, J.

This was trespass, assault and battery, in the Cook Circuit Court, by Dennis Gleason, plaintiff, against Thomas Murphy, defendant, resulting in a verdict for the plaintiff, on which the court rendered judgment, having denied a motion for a new trial. It appears, after verdict found, and whilst a motion was pending to set it aside and to arrest the judgment, the plaintiff died, and the same was suggested to the court, and that letters of administration had been granted to Terrence and Mary McGrath, and the suit therefore progressed in the name of the administrators, their names appearing thereafter as plaintiffs on the record. Appellant's abstract is entitled Thomas Murphy, appellant, against Terrance McGrath and Mary McGrath, administrators of Dennis Gleason, deceased, etc. appellees.

At common law, doubtless the action would have abated on the death of the plaintiff, before final judgment; but by the act of the General Assembly of this State, in force July 1, 1872, it survived to the personal representatives. Laws of 1872, p. 108, § 123.

There is nothing in the way of executing the judgment by the administrators.

Complaint is made that the court refused the following instruction, asked by the defendant:

"If the jury believe from the evidence that on the 4th day of July, 1873, the plaintiff threatened to kill the defendant with a cleaver, and if they should further believe from the evidence that in his testimony with reference to said threat, the said plaintiff knowingly and wilfully swore to what he knew to be false in a matter material to the issue, then the jury may disregard the whole of his testimony, except so far as the same is corroborated by other credible evidence given to the jury by other credible witnesses in the trial of this cause."

As to the first branch of the instruction, it has been held that acts done or words spoken by the plaintiff some time previous to the assault, which were part of a series of provocatives often reiterated, and continued up to the time of the assault, are admissible in evidence in mitigation of damages. But evidence with respect to the conduct of the plaintiff at other times and upon other occasions, the assault and battery having been committed without any provocation given at the time, cannot be given in evidence to mitigate the damages, 1 Waterman on Trespass, 238-239. The assault by the plaintiff against the defendant, as occurring twenty-one days prior to the assault and battery complained of, was not a subject for the consideration of the jury. As to the second clause of the instruction, the substance of it was given in defendant's first instruction, and the court did not err in refusing to repeat it.

It is claimed a new trial should have been granted on the newly discovered evidence brought to the notice of the court. That testimony is cumulative upon the testimony of other witnesses of defendant, heard on the trial, of which he was one. It is by no means of a character to determine the verdict in his favor, or to lessen the damages. The affidavit of appellant setting out this new evidence, does not come up to the requirements of the law in such cases as held in Ritchey *v.* West, 23 M., 385, where it was said the affidavit must state positively the new evidence is true. The affidavit is faulty in this particular. Seeing no error in the record, the judgment must be affirmed.

THOMAS SHIRLEY, for appellant.
HAINES & TRIPP, for appellee.

SUPREME COURT OF INDIANA.

SEPTEMBER TERM, 1876.

BILL OF EXCEPTIONS—WHAT IT MUST SHOW AS TO THE EVIDENCE—PRACTICE.

5,367. Ward *v.* The State. Decatur C. C. Affirmed. PETTIT, J.

The bill of exceptions does not show that all of the evidence is in the record by words, nor are there any equivalent words from which the court can draw the conclusion that all the evidence is in. Therefore, the court cannot consider any question as to the evidence. Nor can the judgment be reversed upon the instructions, as they may have been correct under evidence which may have been given in.

EVIDENCE—PRACTICE—DEPOSITIONS.

Baber *v.* Rickart et al.; Warren C. C. Reversed. BUSKIRK, J.

Suit on promissory note; the answer alleges that the notes were given in consideration of the right to make and vend a certain ditching machine, and that said machine failed to do the work warranted, etc.

The warranty declared that the machine would do certain work in a certain county. The evidence to show the working of the machine outside of the limits described in the warranty, was admissible, as tending to prove the capacity of the machine for work.

Motion was made to suppress certain depositions, on the ground that they were not authenticated. Under our statute, a justice of the peace of another State is empowered, within his jurisdiction, to take and certify depositions. But the justice cannot come into this State and certify depositions taken before him out of it.

MOTION IN ARREST OF JUDGMENT.

Laydon *v.* The State. Fountain, C. C. Affirmed. Pettit, J.

In a criminal case, a motion to arrest of judgment only raises two questions: 1st. That the grand jury which found the indictment had no legal authority to inquire into the offense charged, by reason of it not being within the jurisdiction of the court. 2d. That the facts stated do not constitute a public offense. In this case the offense was clearly and properly charged, and the court had jurisdiction.

MINORS PLAYING BILLARDS—EVIDENCE.

Bond *v.* The State, Jackson C. C. Affirmed. Downey, C. J. Under an indictment for permitting a minor to play billiards it is not necessary that anything was wagered on the game.—*From the Indianapolis Sentinel.*

LOW RATES OF INTEREST.—In the "Report" by Mr. Stephen H. Rhodes, of Massachusetts, on life insurance in that State, he makes the following sensible remarks on the effect of the prevailing rates of interest on the business of insurance.

"Money can now be obtained upon first class securities at a very low rate of interest. This fact has an important bearing upon the business of life insurance. Should the present rates prevail for any considerable length of time, the (so-called) profits of the companies from this source will be very much diminished, if not annihilated. That the decline in the rate of interest did not seriously affect the companies during 1875 is apparent from the statement rendered. Upon gross assets of $405,288,388, the companies doing business in this State received during the year for interest and rents $23,915,562, or five and nine-tenths per cent. The reserve, upon which the companies are required to earn four per cent., was $359,502,956. The rate received, computed upon this sum, was 6.65 per cent. First class loans maturing at the present time, can be replaced at a great reduction in the rate of interest. Large sums are lying idle in the banks at a merely nominel rate, and such loans as insurance companies should invest in will not yield, at present rates, over four or four and one-half per cent., net. Agents should bear this fact in mind when soliciting, and policy holders must expect that their dividends will diminish from this cause. From present appearances, the standard of valuation adopted by this State (four per cent.) is none too high for safety.

MEMBERS OF BAR AS JUDGES.—With pleasure we give place to the following note from Mr. Ullmann:

CHICAGO, Sept. 14th, 1876.

MRS. MYRA BRADWELL:

Dear Madam—In July last you published an abstract of a Supreme Court opinion then just filed at Springfield, relating to the validity of judgments entered by members of the bar acting as judges by stipulation.

Being desirous of knowing what effect this decision would have on the practice which prevails to a considerable extent in this city, of trying cases by agreement before members of the bar, but having the verdict and judgment entered in open court, I procured a copy of the opinion, and at the request of several lawyers, last week sent it to you for publication.

It did not occur to me that your acknowledgment of having received the opinion from me might give the impression that I had been engaged in the case and had made the point decided by the court, until a legal friend expressed considerable surprise that I should have violated such a stipulation.

Lest such an impression might be shared by others, I write to say that I never heard of the case until I saw your abstract of the opinion.

Yours truly, FREDERIC ULLMANN.

THE SUPREME COURT DOCKET.—Mr. Trimble, with his usual enterprise, had the SUPREME COURT DOCKET printed and distributed on yesterday, although the time for filing records did not expire till Thursday morning.

CHICAGO LEGAL NEWS.

Lex vincit.

MYRA BRADWELL, Editor.

CHICAGO, SEPTEMBER 16, 1876.

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This issue closes the eighth volume of the LEGAL NEWS. We have given to the readers of the LEGAL NEWS, for the small sum of two dollars and twenty cents per annum, which includes postage, the most important opinions of the Supreme Court of the United States, as well as those of many of the Circuit and District Courts, and head-notes to the opinions of the various State Supreme Courts, months and often years in advance of their appearance in the regular series of reports. In our abstracts of Illinois opinions we have kept our readers fully posted upon the questions decided by the Supreme Court of this State. The LEGAL NEWS is the only legal journal that has, through the year, given a report of every motion made in the Supreme Court of the United States. This feature alone is worth many times the subscription price. We have prepared and sent out with this number a table of all the cases reported at length in Volume VIII., giving the name of the Judge who delivered the opinion and the point of law involved in the case, and a thorough index. We will furnish bound copies of Volume VIII., at the office, for $3.00 per volume, and of volumes IV., V., VI. and VII. at the same rate. The money must in all cases accompany the order.

We hope all our subscribers, who have not already done so, will immediately, upon receiving this number, send us the required two dollars to renew their subscriptions, and twenty cents to pay the postage, which, under the present law, must be paid in advance by the publisher.

We call attention to the following opinions, reported at length in this issue.

COLLISION.—The opinion of the Supreme Court of the United States, by CLIFFORD, J., stating what is required of vessels meeting or passing each other so as to avoid collisions.

DUTIES—PRIORITY OF PAYMENT.—The opinion of the United States District Court of Maryland, by GILES. J., holding that a party who purchased an imported article, duty free, and was compelled to pay the duty in order to get possession thereof, is entitled to priority, although he has proved his claim as unsecured.

SPECIAL CONTRACT—ARCHITECT'S CERTIFICATE—DELAY—DAMAGES.—The opinion of the Supreme Court of Illinois, by BREESE, J., holding under the building contract in this case that the certificate of the architect was conclusive, and that from his decision there could be no appeal unless he could be charged with fraud or mistake—that it being the contract of the parties, the certificate of the architect should be conclusive. The appellees made out their case by producing and proving such certificate; that appellant, knowing of the delay in finishing the building and permitting appellees to go on with the work after the day specified for its completion, making no complaint, waived performance at the day, and continued the contract as in full force after the day specified for its completion.

TRANSCRIPT—DISCHARGE IN BANKRUPTCY.—The opinion of the Supreme Court of this State, by BREESE, J., as to the proper manner of certifying a record, and holding that it was not error not to admit in evidence a discharge in bankruptcy, when such discharge was not pleaded, and that a judgment for fraud is not released by a discharge in bankruptcy.

INJUNCTION—CITY SCRIP—CORPORATE POWERS—ANTICIPATING TAX LEVY.—The opinion of the Supreme Court of Tennessee by LEA, Special J., holding that a court of chancery has jurisdiction to prohibit the issue of illegal evidences of debt, upon a bill filed by a tax-payer; that officers of a municipal corporation cannot issue scrip in anticipation of the taxes of another year; that corporate powers are to be strictly construed.

PROOF OF DEBT BY NOTARY.—The opinion of the United States District Court for the western district of Michigan, by WITHEY, J., holding a proof of debt in bankruptcy, taken before a notary public to be good, and that the requisites of a notarial seal are determined by the law of the locality from which the officer derives his authority. The Federal courts as a general rule have been too strict in limiting the authority of notaries public in taking these proofs, and requiring unusual evidence of their official character. We are glad to see that Judge Withey disregards some of the former opinions on this subject.

INSURABLE INTEREST.—The opinion of the Supreme Court of Pennsylvania, holding that a son has an insurable interest in his father's life. This opinion is not in accord with the opinion of the Supreme Court of this State, in 8 CHICAGO LEGAL NEWS, 382.

ASSAULT AND BATTERY.—The opinion of the Supreme Court of this State, by BREESE, J., in an action brought to recover damages for an assault and battery.

THE SUPREME COURT OF ILLINOIS—The September Term of this Court commenced at Ottawa on Tuesday last. All the judges were in attendance, ready to enter upon another year of legal labor. Theirs is at best a hopeless task. They may deprive themselves of society—devote the whole twelve months in the year to the examination of records, the reading of abstracts and briefs, and the writing of opinions—and it will be utterly impossible, under our present system, for them to properly dispose of more than one-half the business which comes before the court. The question arises, what is best to be done to relieve the court from this press of business? Some say, increase the number of judges; others, create appellate courts; and quite a number say, make litigation expensive. We must confess that we are not among those who wish to make litigation expensive. We believe that justice should be administered with as little expense to the citizen as possible consistent with the interest of the State. To make litigation expensive, is to place the poor man's rights at the mercy of the rich. To increase the number of judges would have a tendency to give us one man's opinions, and deprive us of the united judgment of the judges in important cases. To create appellate courts, and make them a kind of half-way legal station between the circuit courts and the Supreme Court, would promote litigation, and, instead of being an aid to the Supreme Court, would greatly increase its business. If appellate courts were created, and the cases which could be taken from such courts by appeal or writ of error to the Supreme Court were limited as much as the present Constitution will allow, we have no doubt the Supreme Court would be relieved of its press of business, and able properly to dispose of all the business that would come before it in a reasonable time. At the commencement of this term there were seventy cases on the docket for a re-hearing. Judging by the way the court has already disposed of many of these cases it does not intend to waste much time in disposing of the re-hearing docket.

The Judges of the Supreme Court are all men of experience and distinguished ability, and, without a single exception, possess the confidence of the people of the State. It is not just that they should be so over worked, when a little wise legislation would relieve them. Shall we have it the coming winter?

GOVERNOR BRAYMAN. — Gen. Mason Brayman, recently appointed Governor of the Territory of Idaho, passed through our city this week, on his way to take charge of the gubernatorial affairs of that territory. Governor Brayman is a gentleman of culture, and extensive and varied experience. He was the author of the Revised Statutes of 1845, of this State, which have not only been the model, but the acknowledged superior of all subsequent Revisions. He was at an early day attorney of the Illinois Central Railroad Company, and took an active part in securing the location and completion of that road. He served with distinction as a general in the army, during the rebellion, and was in some of the severest battles of the war. We have no doubt the Governor will take a pride in seeing that the laws of the territory are properly revised. He goes with the intention of making his permanent abode in the territory. The people of the territory are to be congratulated upon his appointment.

GROWING CROPS AND PERSONAL CHATTELS.

A question of more than ordinary importance under the Bills of Sale Act was recently raised in the Common Pleas Division in the case of Brantom *v.* Griffiths, 34 L. T. Rep. N. S., 871. Its importance was due to the terms of the 7th section of that Act, according to which the expression "bill of sale" includes bills of sale, assignments, transfers, declarations of trust without transfer, and other assurances of persons as well as power of attorney, authority or licenses to take possession of personal chattels as security for any debt. It also provides that the expression "personal chattels" shall mean goods, furniture, fixtures and other articles capable of complete transfer by delivery, and shall not include * * any stock or produce upon any farm or lands which by virtue of any covenant or agreement, or of the custom of the country, ought not to be removed from any farm where the same shall be at the time of the making or giving of such bill of sale." The only facts of the case which it will be necessary to notice here are few in number. The plaintiff made a claim to certain growing crops, under two instruments by which these crops had been assigned to him. The documents were not registered under the Bills of Sale Act, 1854. The defendant accordingly contended that his claim as execution creditor was good.

In the long series of decisions upon the 4th section of the Statute of Frauds, there will be found a variety of cases in which the question raised was the converse one, namely, whether a sale of growing crops conferred an interest in land within the meaning of the statute. The opinion of Lord Tenterden appears to have been that if the thing would at the time of delivery be a personal chattel, then no interest in the land was conferred. Thus in Watts *v.* Friend, 10 B. & C., 446, an agreement to sell the crop produced from certain seed at a price named, was held to be a contract for the sale of goods within the 17th section, and not a contract conferring an interest in land within the 4th section of the Statute of Frauds. Mr. Justice Littledale has also expressed an opinion to the effect that a sale of any produce of the earth reared by labor and expense, whether it was in a state of maturity or not, provided it was in actual existence at the time of the contract, was not a sale of an interest in or concerning land: Evans *v.* Roberts, 5 B. & C., 829. In another case, however, when a plaintiff had bought timber whilst standing, and was to cut it down, the contract of sale was held to be within the 4th section, although it did not appear when it was to be cut, or what state it was in as to growth at the time of the contract, Scorell *v.* Boxall, 1 Y. & J., 396, and in the same case Baron Hullock distinguished between crops and other articles which are raised by the industry of man; and things, such as trees, which give no annual profit. Although there has been some uncertainty in the law relating to the subject, the principles laid down by Mr. Benjamin in his treatise on the sale of personal property, (pp. 88-90) based as they are, on the remarks of Mr. Justice Blackburn (Blackb. on Sales, 9, 10), are substantially correct of these principles; the first is that an agreement to transfer the property in anything attached to the soil at the time of the agreement, but which is to be severed from the soil and converted into goods, before the property is transferred by the purchaser, is an agreement for the sale of goods, an executory agreement within the 17th section. The second principle enunciated is, that when there is a perfect bargain and sale vesting the property at once in the buyer before severance, a distinction is made between the natural growth of the soil and *fructus industriale*. The former is an interest in land, the latter are chattels. These distinctions have been dwelt upon by Chitty likewise in his work on contracts. He gives at p. 280 the general rule in somewhat similar terms.

We shall now be better able to appreciate the difficulty in Brantom *v.* Griffiths. So far as relates to the provisions of the Statute of Frauds, we have seen that the sale of anything attached to the soil may or may not be a sale of an interest in land according to the time when it is intended that the property should

vest in the vendor, and to the nature of the thing sold. We are thus enabled to get to one conclusion, namely, that growing crops are not goods and chattels in point of law for all purposes and under all circumstances. When dwelling upon this point, Mr. Justice Brett quoted with approbation a passage from Williams on Executors (7th edit. p. 709), in which the law is thus stated: "There are certain vegetable products of the earth which, although they are annexed to and growing upon the land at the time of the occupier's death, yet as between the executor or administrator of the person seized of the inheritance, and the heir in some cases, and between the executor or administrator of the person seized of the inheritance, and the heir in some cases, and between the executor or administrator of the tenant for life, and the remainderman or reversioner, in others, are considered by the law as chattels, and will pass as such. These are usually called emblements. The vegetable chattels so named are the corn and other growth of the earth, which are produced annually, not spontaneously, not by labor and industry, and thus are called *fructus industriales*." In the present case the growing crops had belonged to the occupiers of a farm. The plaintiff, after the assignment, allowed the growing crops to remain on the land. Now, if we proceed upon the analogy of the cases upon the Statute of Frauds, the crops in question were chattels within the 17th section. Besides, at common law a growing crop, produced by the labor and expense of the occupier of lands, was as the representation of that labor and expense, considered an independent chattel: per Justice Bazley in Evans *v.* Roberts (sup.) quoted in Benjamin on Sales, p. 90. Hence arises the question, should this analogy be applied to cases under the Bills of Sale Act.

In the judgment of Mr. Justice Brett was cited a number of instances where it is stated that growing crops are considered as mere chattels, but his Lordship nevertheless came to the conclusion that "although they are chattels for some purposes they are not so for all, and therefore they cannot be said to be within the Bills of Sale Act, because they are chattels for all purposes, nor without the Act because they are chattels for no purposes." He then proceeds to consider whether they are goods. The argument against the contention that they are goods was, that the Act only includes goods which are capable of complete transfer by delivery, and that the statute only applies to things which at the time when the statute is to be applied to them might be delivered and are not, which is not the case with growing crops; these, therefore, are not within the Bills of Sale Act. This view was adopted by Mr. Justice Brett. A decision of the court of Common Pleas in Ireland (Sheridan *v.* M'Cartney, 5 L. T. Rep. N. S., 27) in which the contrary was held, was adduced as an authority, but overruled on the ground that Chief Justice Monahan overlooked the real meaning of the provision as to stock or produce which ought not to be removed; "For it seems to me," said Mr. Justice Brett, "to apply to farm stock or produce, which is severed from the land, and which could be delivered, but by agreement or custom is prevented from being delivered, such as straw, and other things of a similar nature." Speaking of the quotation at Westminster of authorities from the Irish and Scotch courts generally, his Lordship remarked that "Irish and Scotch decisions, although they ought to be treated with deference, are not binding upon us in the same way as decisions of the courts in this country." The authority of the Irish case quoted had already been questioned by the Court of Exchequer in Gough *v.* Everard, 8 L. T. Rep. N. S., 363, where Chief Baron Pollock said in effect that the decision could be supported only by a liberal interpretation of the statute, and that such an interpretation would be quite inappropriate when the parties were acting honestly. We do not think that the reasoning of the judgments in Brantom *v.* Griffiths altogether satisfactory, although we think the equity of the case has been met. The weak point in the reasoning of the judgment of Mr. Justice Brett appears to be that there is no sequence between his conclusion that growing crops are not chattels for all purposes, and his instances of cases where growing crops are treated as chattels. Perhaps, too, it is unfortunate that nothing, so far at least as can be gathered from the report of the case, was said of the numerous cases upon the construction of the Statute of Frauds. As we have already said, we think the result of the case does no wrong; but we should have been better pleased had the reasoning been more strictly logical.—The London *Law Times*.

SUPREME COURT OF ILLINOIS.

ABSTRACT OF OPINIONS FILED AT OTTAWA, JUNE 30, 1876.

308.—Peter Abt *v.* Minnie Burgheim.—Appeal from Superior Court of Cook.—Opinion by SCHOLFIELD, J., affirming.

SELF DEFENSE DEFINED AND LIMITED.

Held, That where one forcibly enters the premises of another, and uses indecent and abusive language, or while therein, commits an assault and battery upon him, he is only justified in using such force as is reasonably necessary, under the circumstances, to defend himself and expel the intruder; and if, in so doing, he employs more force than was reasonably necessary, under the circumstances, he will be liable in damages.

324.—R. W. Hyman *v.* William Bayne.—Appeal from Superior Court of Cook.—Opinion by WALKER, J., reversing and remanding.

LIMITATION OF 1849—SAVINGS UNDER THAT AND LATER STATUTES—CONSTRUCTION—PLEADING.

Held, 1. That the savings of the limitation act of 1849, apply as well to a non-resident debtor, who has never been in the State until the cause of action accrued, as to a resident who leaves the State.

2. Our late statutes of limitation, which provide that "where a cause of action has arisen in a State or Territory, out of this State, or in a foreign country, and by the laws thereof, an action cannot be maintained by reason of the lapse of time, an action thereon shall not be maintained in this State," relates as well to actions already barred by foreign law at the time of the passage of the act, as to those which should afterward become so barred.

3. In regard to pleading it is a settled rule that one pleading a statute having an exception in the enacting clause must, by averment, exclude himself from the exception. But where the exception is contained in a proviso, or other part of the statute, the exception must be set up and relied upon by the other party, and he must show that his adversary's claim falls within the exception.

315.—Julius White, et al *v.* Board of Trustees.—Appeal from Superior Court of Cook.—Opinion by SCHOLFIELD, J., affirming.

CONSTRUCTION OF OFFICIAL BOND.

STATEMENT.—Appellants were sued as sureties on the bond of a township treasurer. The breaches claimed were the failure of the treasurer to pay over to his successor (Gage) certain money in his hands.

The first point made on appeal was that in 1870, Greene was appointed for two years, and gave bond; which bond was destroyed in the great fire of 1871. He was required to replace the bond, which he did with the one in suit; and it was claimed that as this bond was executed for that purpose only, these sureties were only bound for the acts of Greene until the expiration of the two years for which he was appointed in 1870.

1. But the court *held* that the appointment of 1870 must have been for the unexpired term of some one, for a year; since the regular term would, under the statute, commence in 1869, and 1871; and so, when Greene was appointed again on the 2nd of October, 1871, this must have been for the full term of two years, or until 1873; and the new bond given after the fire was then for the term closing in 1873; and, therefore, the position was not tenable—and more especially as the bond in question does not profess to be executed merely as a substitute, or to have any retroactive effect.

2. Also *held*, that no matter what were Greene's own representations as to the purpose of the bond, if appellants were content to take his word, rather than go to the trustees to inquire, they cannot be allowed to complain that they trusted unwisely therein.

3. Nor did the consolidated school law of 1872 terminate the official term of Greene as treasurer—the act continuing elections, etc., as they were under the prior law.

4. And where the superintendent received the bond and filed it, and paid money afterwards to Greene, as treasurer, this was equivalent to an express approval, and so fulfilled the requirements of the statute in this respect.

327.—Asahel Emigh *v.* The People ex rel.—Appeal from County Court of Cook.—Opinion by WALKER, J., affirming.

OBJECTION TO ASSESSMENT ROLL HAPPILY DISPOSED OF.

STATEMENT.—Tax case. The objection was that the assessment rolls were not returned in the time prescribed by law. The court *held*,

That, inasmuch as the statute expressly declares that such a delayed return shall not vitiate, and as there is no express provision of the constitution relating to the manner of such returns, it is quite novel to apply to the case the constitutional provision that no person can be deprived of his life, liberty, or property, except by due process of law.

341.—Henretta Foster *v.* Henry Clark.—Appeal from Iroquois.—Opinion by CRAIG, J., affirming.

COURT CORRECTING MISTAKES OF ITS MINISTERIAL OFFICER—WHEN ON MOTION AND WHEN NOT.

STATEMENT.—Suit in equity brought to correct the mistake of a master in a certificate of sale and deed. It was claimed that the court had no jurisdiction to correct the mistake of a ministerial officer, if one was made; that appellee had a remedy in a court of law, to correct the mistake by motion. But the court *held*, that the mistake existed not only in the certificate, but also in the deed; and even if the former might be corrected, on motion, the latter could not be corrected in any way but by application to a court of equity. And a court of equity has competent jurisdiction in such cases.

374.—Alfonso Yates et al. *v.* Village of Batavia.—Appeal from Kane.—Opinion by SCOTT, Ch. J., affirming.

EQUITY JURISDICTION.

STATEMENT.—Prosecution under liquor ordinance—bill to enjoin further proceeding, and to settle the validity of the ordinance. *Held*,

That a court of chancery has no jurisdiction of the subject of such litigation; nor is it in the power of parties to waive the question of jurisdiction of the court, and compel it to try the cause. Whatever defense may have existed to the actions was complete in the court of law where they were pending.

471.—Morris David *v.* Timothy M. Bradley.—Appeal from Cook.—Opinion by SHELDON, J., reversing and remanding.

WHO MUST SIGN BILL OF EXCEPTIONS—MEASURE OF DAMAGES IN REPLEVIN.

Held, 1. That a bill of exceptions must be signed by the judge who tries the cause or before whom the proceedings take place.

2. Where property is replevied, and the plaintiff fails to prosecute his replevin suit, the measure of damages is not the value of the property, but only the value of the interest of the special owner in the property, as for example, where the property was taken by a distress warrant, for rent due, the measure of damages is the amount of rent due.

470.—J. W. Spellman *v.* Stephen Dowse.—Appeal from Will.—Opinion by WALKER, J., reversing and remanding.

QUESTION OF JURISDICTION—VENUE OF PROCEEDINGS TO SELL LANDS OF NON-RESIDENT MINORS.

Held, That, where the question of jurisdiction in a court rendering a decree ordering the sale of a lot, arises, an appeal from an order confirming the sale, will be regarded as a direct proceeding on the original order of sale; although the report of the sale and order of confirmation were seven or eight years after the sale. For, nevertheless, it is a continuation of the original case. And the want of jurisdiction of the subject-matter may be shown at any stage of the proceedings; and until every order or step required by the statute has been taken and completed.

2. The wards living in Ohio, in this case the statute was imperative that the proceedings should be had in Cook county, Illinois, where the land lay to be affected by the order. And there could be no jurisdiction in a Will county court

326.—George L. Thatcher *v.* The People ex rel.—Appeal from County Court of Cook.—Opinion by WALKER, J. affirming.

VARIOUS TAX OBJECTIONS DISPOSED OF.

STATEMENT.—Tax case. The first objection made was that appellant had made a tender of all taxes and costs, except printer's fees, of ten cents on each tract; which tender the collector refused to receive, as the types were set, and the paper struck off, though not distributed among the patrons. *Held*,

The collector properly refused the tender, not including the statutory printer's fees; except that he might have accepted and receipted for the money offerred, specifying, in the receipt, the non-payment of, the printer's fee; and then asked the court for a judgment for the printer's fee. [Probably the taxpayer would not allow this, but demanded a full receipt.]

It was objected that the assessment was void, because the county clerk refused, on proper request, made in due time, to include, in the books returned to the assessor, a portion of the lots in blocks, and not in lots, under the provision of the revenue act: "When all lots in one block belong to one owner, they shall, at the request of the owner, or his agent, be listed as one block." *Held*,

1. That appellant failed to show that he was the owner.

2. Another section of the act provides that "No assessment of property, or charge for any of said taxes, shall be considered illegal on account of any irregularity in the tax lists, or assessment rolls, or on account of the assessment rolls or tax lists not having been made, certified to, or returned within the time required by law, or on account of the property having been charged, or listed, in the assessment roll, or tax list, without name, or in any other name than that of the rightful owner, and no error or informality in the proceedings of any of the officers connected with the assessment, levying, or collecting of the taxes, not affecting the substantial justice of the tax itself, shall vitiate, or in any manner, affect the tax, or the assessment thereof."

3. By this statute nearly all previous rules laid down as determining causes in decisions of the Supreme Court have been abrogated.

It was objected that the court below refused to allow an objection that the certificate returned by the town clerk showed the assessment of taxes to have been in excess of the amount authorized by law. *Held*,

1. That this nowhere appears; and appellant has not shown in what manner, or to what extent, the excess was produced or existed.

2. The presumption is that any difference in amounts, was produced by extending the tax over one, or a few tracts, rather than that the clerk would intentionally incur the penalties of the law by deliberately raising the amount levied on all the property assessed.

3. It was the business of appellant to show that the tax was void in its levy, or that the law had been violated in such a manner as to affect the substantial justice of the tax levied on his property.

It was objected that the law was violated by the county clerk in failing to extend the road tax in a separate column on the collectors' books. *Held*,

That this, though an irregularity, does not affect the substantial justice of the tax.

It was objected that the town clerk of South Chicago failed to certify the levy of the tax to the county clerk within the time required. *Held*,

That Mix *v.* People (June T., 1874) was annulled by the subsequent adoption of the 191st section of the revenue act curing such defects as suggested by the objection. (Buck *v.* People, of the Sept. T. 1875.)

[In conclusion, the court passes a severe censure on clerks for sending up such shapeless and confused records in

tax cases; and declares they are generally much larger than fairness to litigants warrants.]

350.—Catharine Paris *v.* Thomas Lewis. —Appeal from Superior Court of Cook. —Opinion by SCHOLFIELD, J., affirming.

COLOR OF TITLE AND PAYMENT OF TAXES THEREUNDER — INITIALS IN DESCRIBING LANDS—GOOD FAITH.

STATEMENT.—Petition to establish title under burnt record act. Answer, and petition in the nature of a cross-bill, setting up title in defendant (appellant). A question arose, under the limitation law of 1839, as to color of title, and payment of taxes under it. Appellant had the better title because of appellee's inability to connect himself with the patent title from the United States. It was by stipulation admitted that neither appellant nor any of those under whom she claims, ever had been in possession, and that the property was entirely vacant until 1862. April 7, 1863, appellee's immediate grantor took possession by a tenant, and possession has continued until now. *Held*,

1. That the payment of taxes, under the act, may be made by an agent appointed by parol. A request by letter, or orally, would be sufficient authority. And this authority, moreover, may vest without any express request; and be inferred from circumstances, as, for instance, from the fact that one without interest in the land pays the taxes, and is afterwards compensated for it by the owner. In this, the presumption is that the taxes were paid for the owner, and that the person paying was his agent in making the payment. It is not requisite, in this respect, more than in other respects, in civil actions, that the proof shall be positive, or that the circumstances shall be strong and convincing in their character. It is enough that the evidence sufficiently preponderates to reasonably establish belief.

2. Receipts for taxes are sufficiently definite in describing lands by customary initials, etc., and the court will take judicial notice of the meaning of such initials.

3. Where it is objected that a grantor did not act in good faith in acquiring title under the act, it must be shown that the grantee had notice of the grantor's bad faith. And especially, where the grantor was an intermediate grantor only, the grantee has a right to rely upon previous title in good faith, and seven years' payment of taxes. The bad faith of the intermediate grantor cannot relate back to, and affect, previous titles acquired in good faith, with which the grantee is connected.

375.—Samuel McCarty *v.* Gideon Marlette.—Appeal from Kane.—Opinion by BREESE, J., affirming.

RESCISION—LACHES—ESTOPPEL.

Held, 1. That an unreasonable delay in commencing proceedings to rescind a contract on the ground of fraud, will prevent relief in a court of equity. This delay, however, depends on circumstances of excuse. [In this case, the delay was six years, and held inexcusable.]

2. Where one discovers fraud in passing notes upon him, and then sues upon the notes afterwards, this act of suing is a confirmation of the contract on which the notes were based; and he is thereby estopped from setting up the fraud to procure a rescision.

384.—Village of Kewanee v. James P. DePew.—Appeal from Henry.—Opinion by SCHOLFIELD, J., reversing, SCOTT, Ch. J., dissenting.

COMPARATIVE NEGLIGENCE AS TO DEFECTIVE SIDEWALKS EXPLAINED.

STATEMENT.—Suit for injuries by means of a defective sidewalk. *Held*,

That a plaintiff cannot recover for injuries received through the defendant's negligence, when his own negligence has contributed to such injuries, unless his negligence was slight and the defendant's gross, when compared together.

2. And so where one was aware of a defect in a sidewalk, and yet, in passing, paid no heed to its vicinity, but was engaged in looking at a passing carriage in the street, and is thus injured, he has no claim to damages for an injury thus received.

3. If one does not know of a defect, he may be justified in assuming that the sidewalk is safe, and acting on that hypothesis. Or, knowing of a defect, yet, if some present necessity distracts his attention, he may be excusable in not recollecting. But one in the full exercise of his faculties, passing over a sidewalk in daylight, without any crowd to jostle or disturb, and no intervening obstacles to obscure approaching danger, and no suddenly occurring cause to distract his attention, is under obligation to use his eyes to direct his steps, and if he fails to do so, it is at his own risk.

4. And especially, where the character or extent of the defect is not such as to arouse, necessarily, any serious apprehension of imminent peril to the public, although there may be passive negligence in the city officers, yet it is not then to be regarded as gross.

385.—George A. Wilkins *v.* Noah Marshall.—Appeal from County Court of Peoria.—Opinion by BREESE, J., reversing.

DOMICIL—CHANGE THEREIN—REQUISITES—TEMPORARY ABSENCE.

STATEMENT.—Contested election to the office of collector, the contest being based on the ground of the ineligibility of the claimant, in that, at the time of the election, he was not a resident of the State, and was not a legal voter and elector. Decree that appellant was not eligible, on a trial by jury.

He was an unmarried man, and had resided with his brother, in this State, from 1838 to 1873. He had but little personal property, and no land; and no home but his brother's. In 1872 he was registered as a voter, and was one of the judges of election in the township, in 1873, and was, in 1871 or 1872, elected township collector.

In June, 1873, he packed up what little effects he had, and set out in quest of a new home, visiting Iowa, Nebraska and Kansas. In the latter State, he took a contract for building a bridge, in part. He went to Fort Scott, however, and was very sick there. On his recovery, he left his team at Fort Scott, and came back to his brother's, by rail—having been absent about seven months. He did not, during that time, remain long enough in any one State to gain more than a temporary residence. When he started, he had no definite point in view, thinking, at one time, he would go to California; at another, Texas, or south somewhere, etc, to seek a different climate, and perhaps settle and locate a soldier's claim. Not finding what he sought, he returned, and, in April after his return, he was elected.

The theory of the contestant was, that, leaving his home in Illinois, without making any provision for a return to it at a future time, was *ipso facto* such an abandonment as to deprive him of the right of claiming it as his home, even should he return to it afterwards. *Held*,

That he acquired no new residence; for, even if he had the *animus*, the *factum* was still wanting. His intention to resume his old home on failing to find a new one, was manifested by his return; and he had not, therefore, forfeited his residence here, by a temporary absence not resulting in a settlement elsewhere. He did not leave the State with a fixed intention, but only a conditional intention, to become a resident elsewhere.

398.—John H. Henick *v.* Jude P. Gary. —Appeal from DeKalb.—Opinion by SCOTT, Ch. J., affirming. (Breese, Schofield and Dickey, JJ., dissenting.)

DISEASED SHEEP—DAMAGES — LIABILITIES.

STATEMENT.—Suit for damages, by reason of sheep becoming diseased through contact with the sheep of defendant, afflicted with scab, on account of the neglect of defendant to take care of them. Verdict, not guilty. *Held*,

1. That a multiplicity of instructions is a fruitful source of error, and ought to be abandoned.

2. Plaintiff, in such a case, was bound to use and exercise ordinary care and diligence, in taking care of and properly treating his diseased sheep, and endeavor to heal and cure them, in order to recover. If unacquainted with the disease, and he treated it as a person of ordinary prudence and skill might do, it was sufficient, as he is not held to the exercise of any peculiar skill.

3. If plaintiff's sheep caught the disease elsewhere than from defendant's sheep, or his father's sheep that had been previously afflicted by contact with defendant's, no responsibility attached to defendant.

428.—William L. Greenleaf, imp. etc. *v* Henry T. Beebe.—Appeal from Superior Court of Cook.—Opinion by CRAIG, J., affirming in part.

MARRIED WOMAN'S RESPONSIBILITY AS TO MECHANIC'S LIEN—HUSBAND AS AGENT, ETC.—PARTIES—DECREE.

STATEMENT.—Suit to enforce mechanic's lien; demurrer to first petition sustained; to amended petition, overruled; joint decree rendered; and this was assigned also as error.

The question was raised whether there was a cause of action against the owner of the premises, Fannie Greenleaf, for furnishing materials and performing labor under a parol contract made with her husband after the written contract —that is, extra materials and extra labor. *Held*,

1. Mrs. Greenleaf, though a married woman, had a right to bind herself for labor and materials furnished in the erection of buildings on her separate property.

2. And if she could, in person, contract, she had power to authorize her husband to contract in her behalf, and such authority will be conclusively inferred from his acting with her knowledge in the matter.

3. And there is nothing, in such case to shield her separate property from liability for payment.

4. The husband is a necessary party, in proceedings in mechanis's lien, because of his interest in the separate property. But the decree cannot be rendered against him personally for the debt.

440.—David Coey *v.* George Lehman.— Appeal from Superior Court of Cook. —Opinion by CRAIG, J., reversing.

MECHANIC'S LIEN—PAYMENT CONTINGENT ON ACCEPTANCE.

STATEMENT. — Petition in mechanic's lien for extra materials and labor under a contract with a guardian. Judgment for $1,132.22. The error assigned, of which the appellate court took notice, was: "The court erred in rendering judgment in favor of the plaintiffs below, because they had not complied with the terms of their contract, in ascertaining the amount, if anything, due them, before the commencement of the suit." The work was to be estimated and accepted, etc., and payment was to be made on an architect's certificate. *Held*,

That, as the parties had seen proper to incorporate these provisions in the contract, and to provide that particular mode of payment, they must be content therewith; for courts are powerless to disregard the terms of a contract, plainly expressed; but contrariwise must enforce them according to the apparent intention of the parties. And so, failing to secure the arhitect's certificate, the plaintiffs could not enforce payment, for the contract made his decision final.

446.—Nancy Suver *v.* William O'Riley.— Appeal from Warren.— Opinion by BREESE, J., affirming.

SUIT FOR PROCEEDS IN POSSESSION OF A THIRD PARTY—GENERAL RULE.

Held, That where one is entitled to the proceeds of a sale from another, it is no defense that those proceeds have not come to hand, but are in the hands of another for the seller. The buyer can sue, nevertheless, since, technically, they are in the hands of the seller, when held by a third party to be handed over to the seller. And the buyer cannot bring suit against the holder, because there is no privity between them, and no contest; but must bring the action against the seller of the proceeds, the same as if they had been actually delivered by the holder to the seller.

449.—A. M. Niles *v.* Jacob Harmon.—Error to Iroquois.—Opinion by SHELDON, J., affirming.

HOW MORTGAGE FORECLOSED AS TO SUCCESSIVE GRANTEES—GENERAL RULE—QUIT-CLAIM DEED AS TO FAILURE OF TITLE.

Held, 1. That in the case of successive grantees of different portions of an entire tract of land, upon which is a mortgage before given by the grantor, upon foreclosure of the prior mortgage, such granted portions are to be sold in the inverse order in which they were granted, so that the lands of the last grantee shall be subject to be first sold.

2. Where the owner of mortgaged land conveys a portion of it, with warranty, it is his duty to protect the grantee against the mortgage, and in foreclosing the mortgage, it is just and right that it should be satisfied, if it may be, out of the portion of the land remaining in the mortgagor, and that it should be first charged with the debt. This protects the interest of the purchaser of the portion sold, and but makes the mortgagor pay his own debt out of his own land.

3. And should the mortgagor convey the portion remaining to him to a second purchaser, this purchaser takes the land as it was in the hands of the mortgagor, subject to the equity of being first charged with the payment of the mortgage debt; and so, it is equitable, that the land of the second purchaser should first be sold for the satisfaction of the debt before resort is had to the land of the first purchaser.

4. But where the first purchaser has not paid the purchase money, and has given back a mortgage to secure its payment, this land may equitably be first sold—unless the notes he had given for the purchase money had been transferred, before maturity, to a *bona fide* purchaser. This places him in the same condition, in this respect, as to personal liability, as if he had paid for his land at the time of the purchase; and there exists the same necessity that, in order to protect him from injury, the lands should be sold in the inverse order of their alienation.

5. Under a quit-claim deed, no fraud appearing, there is no responsibility for a failure of title.

501.—John C. Steward *v.* Cincinnatus C. Mumford.—Appeal from Knox.—Opinion by SCOTT, Ch. J., reversing and remanding.

EQUITY JURISDICTION AND COMMON LAW IN CONTRACTS.

Held, That where a claim arises out of a contract, equity has no jurisdiction to measure the damages. Exclusive jurisdiction in that class of cases, belongs to the common law courts.

450.—Oglesby Coal Co. *v.* Henry Pasco. —Appeal from LaSalle.—Opinion by SCHOLFIELD, J., affirming.

INHERITANCE — HALF-BLOOD — ESTOPPEL— MARRIED WOMAN—EQUITY JURISDICTION —NUISANCE—STATUTE OF LIMITATIONS.

STATEMENT.—Bill in equity by appellant, against appellees, praying that a deed from Abagail Pepson, and her husband, for 12½ acres of land, to appellee, Elizabeth Pasco, be set aside; that appellees be restrained from interfering with appellant's possession; and from keeping a saloon on the premises; and that they be required to remove a building therefrom, used as a saloon.

Appellant claims under John Corrigan, by virtue of a contract between him and Barbara Shelton, of which it is assignee; an equitable title, conditioned upon a certain payment; and by deeds from certain other persons, as heirs at law, of Mary Fell, the legal title to the undivided six-eights of the whole property.

Patrick Fell was seized in fee of the property, and died intestate, leaving Thomas Fell, his only heir at law, who subsequently died intestate, while seized in fee of the property, leaving no child or children, nor descendant of any child, surviving; but leaving his mother, and certain half-brothers and sisters, on her side.

The question was, whether she took as sole heir to their exclusion. *Held*,

That our statute does not follow the common law rule, in this respect; but forbids distinction between kindred of the whole and of the half-blood. Nor does it require that the half-blood shall be of the blood of the ancestor from whom the estate descended.

It was alleged that during the last illness of Mary Fell (the mother of Thomas Fell and of the half-brothers and sisters, among whom were John Corrigan and Abigail Pepson), a family consultation was held, between her and them, as to the disposition of the lands of which Thomas Fell died seized, including particularly, the 12½ acres, and also a certain lot in LaSalle, the title to which, it was then believed by them, was vested in her as sole heir of Thomas Fell. On such consultation it was mutually arranged, that she should convey the 12½ acres to John Corrigan for his portion of the supposed estate, on the condition that he would care for an infirm brother during his life, which condition was afterwards fulfilled. Abigail Pepson, for

her share, was to have the LaSalle lot, and a deed was accordingly executed to her by Mary Fell for it, and she took possession; in which all acquiesced. Corrigan also took possession of the 12½ acres under Mary Fell's deed, until he sold and agreed to convey it to Barbara Shelton, who took possession under the contract, claiming to own the whole, until her subsequent assignment of the contract to appellant.

The question, under these facts, was, whether Abigail Pepson was estopped from claiming any interest, as heir at law of Thomas Fell, in the 12½ acres. *Held*,

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173. Johnson et al. v. Berlizheimer.
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180. Carpenter et al v. Calvert.
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187. Mason, impl'ed v. Abbott.
188. Kipp, impl'd v. Martin et al.
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190. Nasson v. Cone.
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192. Thomas v. Darst et al., adm'rs, etc.
193. Lamping et al v. Payne.
194. Crain, adm'r et al v. McGoon.
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196. Van Wyck v. Colvin.
197. Bell v. Senneff.
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200. Richardson et al. v. Akin.
201. Smith, impl'd, v. Stevens et al.
202. Foster v. The C. & A. R. R. Co.
203. Harvey et al. v. Harvey, exec'x.
204. Evans v. Bouton.
205. Carr v. James et al.
206. Dow v. McKenzie.
207. The Village of Hyde Park v. Dunham et al.
208. Hahn, adm'x, v. Huber.
209. Jones v. Kennicott.
210. Strawn et al. v. O'Hara et al.
211. The Lycoming Fire Ins. Co. v. Jackson.
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213. In the matter of the est. of Morgan, dec'd, Morgan, adm'r, etc., v. Morgan.
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216. Lewis et al. v. Rose.
217. The Mineral Point R. R. Co. v. Barron, for use.
218. Custer v. Kimball et al.
219. Pardridge, impleaded, v. Laprise.
220. Webster et al. v. The City of Chicago.
221. Dimick v. Downs.
222. The City of Freeport v. Isbell.
223. Taylor et al. v. Frahock.
224. Baldwin v. Murphy.
225. Hamm v. Culvey.
226. Gottschalk v. Hughes.
227. Turnan et al. v. Timke, executrix, etc.
228. The Union Steamboat Co., impleaded, etc., v. Knapp.
229. Gross v. Weary.
230. Wolf v. Fletemeyer.
231. Garrity v. Lozano et al.
232. Wilson et al. v. King.
233. Morrison v. Osterman.
234. Swartz v. Wehle.
235. M. Crandall et al. v. Emack.
236. The City of Rockford v. Tripp.
237. Bishop, impleaded, v. Nelson et al.
238. Hayes v. Loomis et al.
239. Heaton v. Prather et al.
240. Simpson v. Leech.
241. Byrd v. Hughes.
242. In the matter of the estate of Orrin Miller, dec'd, Miller v. Miller.
243. Kerr et al. v. Sharp.
244. Welch v. B. C. Tayler Manufacturing Co.

OFFICIAL CALENDAR.

We are under obligations to C. D. TRIMBLE, Clerk of the Supreme Court at Ottawa, for the following Official Calendar:

No. of Case.	When Appellants' Abstracts and Briefs must be filed.	When to be Called.	When Appellees' Briefs must be filed.	When Appellants' Replies must be filed.
1 to 20	September 16	September 18	September 27	October 7
21 to 40	September 18	September 19	September 28	October 7
41 to 60	September 19	September 20	September 29	October 9
61 to 80	September 20	September 21	September 30	October 10
81 to 100	September 21	September 22	September 30	October 10
101 to 120	September 22	September 23	October 2	October 12
121 to 140	September 23	September 25	October 3	October 13
141 to 160	September 25	September 26	October 5	October 14
161 to 180	September 26	September 27	October 6	October 16
181 to 200	September 27	September 28	October 7	October 17
201 to 220	September 28	September 29	October 7	October 17
221 to 240	September 29	September 30	October 9	October 19
241 to 260	September 30	October 2	October 10	October 20
261 to 280	October 2	October 3	October 12	October 21
281 to 300	October 3	October 4	October 13	October 23
301 to 320	October 4	October 5	October 14	October 24
321 to 340	October 5	October 6	October 14	October 24
341 to 360	October 6	October 7	October 16	October 26
361 to 380	October 7	October 9	October 17	October 27
381 to 400	October 9	October 10	October 19	October 28
401 to 420	October 10	October 11	October 20	October 30
421 to 440	October 11	October 12	October 21	October 31
441 to 460	October 12	October 13	October 21	October 31
461 to 480	October 13	October 14	October 23	November 2
481 to 500	October 14	October 16	October 24	November 3
501 to 520	October 16	October 17	October 26	November 4
521 to 540	October 17	October 18	October 27	November 6
541 to 560	October 18	October 19	October 28	November 7
561 to 580	October 19	October 20	October 28	November 7
581 to 600	October 20	October 21	October 30	November 9
601 to 620	October 21	October 23	October 31	November 10
621 to 640	October 23	October 24	November 2	November 11
641 to 660	October 24	October 25	November 3	November 13
661 to 680	October 25	October 26	November 4	November 14
681 to 700	October 26	October 27	November 4	November 14
701 to 720	October 27	October 28	November 6	November 16
721 to 740	October 28	October 30	November 7	November 17
741 to 760	October 30	October 31	November 9	November 18

245. Wallace et al. v. Goold.
246. Chandler, Receiver, etc., v. Dow.
247. Cossman, impleaded, etc., v. Wohlleben.
248. The People ex rel. Huck, County Treasurer, etc., v. Gage et al.
249. Corwith and Corwith v. Coulter.
250. McCormick et al. v. Wells.
251. Voss, impleaded, v. The German American Bank of Chicago.
252. Hancock v. John Yunker et al.
253. Henry v. Merriam & Morgan Paraffine Co.
254. The Joliet Iron and Steel Co. v. The Scioto Fire-Brick Co.
255. Meeker v. The Chicago Cast Steel Co.
256. The School Directors of Union District No. 2, etc., v. Boomhour.
257. Keyer v. Mead.
258. Mudge v. Bullock.
259. Fitzgerald v. Kimball.
260. Fowler et al. v. Deakman.
261. Wilhelm, impleaded, etc., v. Schmidt et al.
262. Lull v. Korf.
263. Clark v. Busse, et al.
264. Hitt, administrator, etc., v. Scammon et al.
265. Nelson v. Danielson.
266. Eyster v. Parrott.
267. Barker, for use of, etc., v. Garvey.
268. Mayberry v. VanHorn.
269. In matter of estate of Cagney, deceased.
270. Boyd v. Martin, for use, etc.
271. Reitz et al. v. Coyer, et al.
272. Ward, impleaded, etc., v. Bracken.
273. Law, guardian, etc., v. Fletcher.
274. Culver v. Graham.
275. Morrison, impleaded, etc., v. Brown.
276. Ressor v. Ressor.
277. Blacklaws v. Milne et al.
278. Town of Partridge v. Snyder.
279. Jefferson v. Alexander.
280. Harker v. Barton et al.
281. Davies et al. v. Brace et al.
282. Robinson, partners, etc., v. Randall.
283. Russell et al. v. Mintier.
284. Hohmann v. Eiterman.
285. Home v. Sullivan.
286. Bast v. Bast.
287. McNab v. Young et al.
288. Town of Belmont v. Treasurer of Iroquois Co.
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290. Town of Middleport v. Treasurer of Iroquois Co.
291. Strong et al. v. Shea et al.
292. Zeigler v. Anderson.
293. Darst, Rebecca Goldsborough and Nicholas Goldsborough, by Dodge, his guardian, v. Thomas.
294. Smith et al. v. Shinkle et al.
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298. Reid et al. v. Degener et al.
299. Quagle et al. v. Guild, Jr., adm'r, etc.
300. Burchard, impl'd, etc., v. Dunbar.
301. Constantine v. Wells.
302. Camp v. Bryan et al.
303. Cleaver v. Lauer.
304. Smith v. The People, etc., ex rel. etc.
305. Smith v. The People, etc., ex rel., etc.
306. Cronkite et al. v. The People, etc., ex rel., etc.
307. Smith v. The People, etc. ex rel., etc.
308. Smith v. The People, etc., ex rel., etc.
309. Wells v. The People, etc., ex rel., etc.
310. Wheeler et al. v. The People, etc., ex rel., etc.
311. Dunham et al. v. The People, etc., ex rel., etc.
312. Maher et al. v. Lanfrow, surviving partner, etc.
313. Smith v. Schampfer.
314. Schnell v. Schlernitzauer.
315. Roberts et al. v. Cleland.
316. Thayer v. Peck.
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318. House v. The Board of Trustees of T. 35, R. 10, E.
319. Wadsworth v. Ætna National Bank.
320. The Rock Valley Paper Co. v. Nixon.
321. Baird, trustee, etc., v. Bowen et al.
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323. Hough v. The Cook County Land Company et al.
324. Garrity v. Wilcox et al.
325. Garrity v. Bash.
326. Oldham et al. v. Pflieger.
327. Wallace et al. v. Wallace.
328. Morrison v. Woodley.
329. Robertson v. Deatherage.
330. Jarnajan v. Gaines.
331. Trude, adm'r, etc., v. Meyer.
332. Wells et al., partners, etc., v. Lilly.
333. Coursen, impl'd, etc., v. Browning et al.
334. Village of Hyde Park v. Hill et al.
335. The Chicago & Iowa Railroad Co. v. Davis.
336. The Batavia Paper Manufacturing Co. v. The Newton Wagon Co.
337. The People, etc., ex rel. Stenger v. Allen.
338. Stickle v. Otto.
339. United States Mortgage Company v. Gross et al.
340. Northwestern University v. The People, etc., ex rel. Huck.
341. Morton et al. v. Smith, Jr., et al.
342. Morton et al. v. Smith et al.
343. Krefting v. Dewerth.
344. Spear, impleaded, etc., et al. v. Griffiths, Jr.
345. Sparling v. Marks.
346. McAllister et al v. Clark.
347. Bowen v. Wilcox & Gibbs Sewing Machine Company.
348. Hearson et al. v. Turner et al.
349. Hearson et al. v. Traudine.
350. Dunphy v. Riddle et al.
351. The Keithsburg & Eastern R. R. Co. v. Nichol et al.
352. Lawrence et al. v. McIntire, sheriff, etc.
353. D'Arcy v. Miller.
354. Osborn v. Farwell.
355. Condon v. Besse.
356. The Town of Jefferson et al. v. The People, etc., ex rel., etc.
357. Coffman et al. v. Campbell et al.
358. Moore v. Hopkins.
359. The Chicago and Northwestern Railway Co. v. The People of the State of Illinois.
360. Ballinger v. Bourland et al.
361. The Mechanics' National Bank of Peoria v. Frazer.
362. Rosenthal v. Rosenthal.
363. Morrow v. Cooper.
364. Kolb v. O'Brien.
365. Hyman, impleaded, etc., v. McVeigh et al.
366. Hyman, impleaded, etc., v. Harper et al.
367. Grundeis et al. v. Bliss et al.
368. Trentler v. Hallagan.
369. Wehrli v. Zenieschek.
370. Marshall v. Thompson.
371. Wicke v. Hasbrouck.
372. Union School District No. 6, T. 41, v. Sterricker.
373. Wilton v. Tazewell.

(*To be continued.*)